QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Amitesh Kumar* [2018] QCAT 173
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **AMITESH KUMAR** (respondent)
APPLICATION NO/S:	OCR170-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	17 July 2018
HEARING DATE:	12 June 2018
HEARD AT:	Brisbane
DECISION OF:	**Justice Daubney, President** Assisted by: **Ms Megan Mahon, Legal Panel member** **Dr Margaret Steinberg, Lay Panel Member**
ORDERS:	**1. The respondent, Amitesh Kumar, is publicly reprimanded for professional misconduct.** **2. A local practising certificate is not to be granted to the respondent until 26 January 2021.** **3. The respondent shall pay the applicant's costs, to be assessed on a standard basis on the Supreme Court scale under the *Uniform Civil Procedure Rules*, such costs to be assessed as if the matter were proceeding before the Supreme Court of Queensland.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – TRUST MONEY – whether striking off roll or suspension is more appropriate – where respondent has shown evidence of being of fit and proper character – whether respondent can maintain exhibiting behaviour considered fit and proper *Legal Profession Act 2007* (Qld) ss 419, 456, 465, 462

Attorney-General and Minister for Justice Qld v Priddle [2002] QCA 297
Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand [2018] QCA 66
Attorney-General v Kehoe [2001] 2 Qd R 351
Jensen v Legal Services Commissioner [2017] QCA 189
Legal Services Commissioner v Fellows [2017] QCAT 337
Prothonotary of the Supreme Court of NSW v P [2003] NSWCA 320

APPEARANCES & REPRESENTATION:	
Applicant:	M R Lester of the Legal Services Commission
First respondent:	G M Cranny of Gilshenan & Luton

REASONS FOR DECISION

[1] The respondent was admitted as a solicitor on 8 September 2003. He has not practiced law since 10 August 2013 and no longer holds a practicing certificate. He is currently employed as the Group Compliance and Governance Manager for a not for profit organisation.

[2] The respondent commenced his legal career in September 2003 at McCarthy Durie Lawyers (then McCarthy Durie Ryan Neil Solicitors). He was made a Director of McCarthy Durie Lawyers on 1 July 2009, and he purchased an interest in the firm. His employment and directorship were terminated on 9 August 2013.

[3] In this disciplinary proceeding brought by the Legal Services Commissioner, the complaint is that between late February 2013 and 9 August 2013, the respondent misappropriated funds totally $12,672.50 from a deceased estate.

[4] The parties have filed a statement of agreed facts and the underlying factual matrix is not in issue.

Background

[5] Mr Peter Powell was a client of the respondent from 2005 until Mr Powell's death, in 2012. The respondent and Mr Powell developed a close relationship throughout the time the respondent acted for him. Their relationship was so close, indeed, that Mr Powell asked the respondent if he could bequeath his estate to the respondent. The respondent declined this offer, but was named and subsequently acted as executor of Mr Powell's estate.

[6] Following Mr Powell's death, the respondent organised for renovations to be done to Mr Powell's home in order to prepare the property for sale. During the time tradesman were working on Mr Powell's home, the respondent had the tradesman directed to his own home, where they completed works to the value of $12,672.50. This occurred between February and early August 2013. The works done on the respondent's own property were paid for out of the deceased estate.

[7] The respondent filed an affidavit in this proceeding in which he gave a comprehensive narrative and explanation for his actions. The contents of his affidavit were not challenged in any way by the applicant. The respondent said that at the time he rationalised his actions based on the offer Mr Powell had made to bequeath the whole of his estate to him. The respondent now accepts that his actions were inappropriate and that he has no excuse. At the time of the offending, the respondent was under considerable pressure in various aspects of his life, including financial pressure (some of which related to the interest he had been required to acquire in the law firm), cultural expectations, marital stress (which included the financial and emotional stress of the respondent and his wife participating in an IVF program), work pressures and family pressures, which included the need to renovate his own home.

[8] Shortly after the diversion of the funds, two of the respondent's fellow directors asked to meet with the respondent regarding the deceased estate file. A query had been raised by another staff member. The respondent was not aware of the reason for this meeting, but when he attended the meeting he immediately admitted his misconduct. He saw the meeting as an opportunity to confess to his actions. Soon after, the respondent went on to confess his conduct to the other directors of the firm and professed his regret and apology. As a result of his confession, his employment with, and directorship of, the firm were terminated.

[9] The respondent repaid the amount misappropriated from the estate, and did so prior to a Queensland Law Society audit of the file later in August 2013.

[10] In January 2016, the respondent pleaded guilty in the Magistrates Court to a charge of stealing property exceeding $5,000 in value. At the time of his conviction, the respondent volunteered an undertaking not apply for a practicing certificate for five years, i.e. until 26 January 2021. He was sentenced to 100 hours of community service.

Characterisation of the conduct

[11] The first question for present purposes is whether the Tribunal is satisfied that the respondent has engaged in unsatisfactory professional misconduct or professional misconduct.[1]

[12] The applicant contends that the respondent's conduct ought to properly be characterised as 'professional misconduct'. In that regard, s 419 of the *Legal Profession Act* 2007 ('LPA') provides:

> (1) Professional misconduct includes –
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> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
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> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

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1 *Legal Profession Act* 2007 (Qld), s 456.

> (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

[13] The respondent accepted that his conduct ought to be seen as 'professional misconduct'. That is clearly an appropriate concession, given the nature of the misconduct in question. Stealing from trust funds is misconduct which so obviously goes to the heart of a solicitor's professional obligations and standards as to impugn the person's fitness and propriety to engage in legal practice.

[14] It should be recalled that the question of the characterisation of the respondent's conduct for the purposes of s 419(1)(b) of the LPA calls for an assessment of whether, at the time at which the conduct occurred, it could have justified a finding that the practitioner was not a fit and proper person to engage in legal practice. Events after the impugned conduct, including any rehabilitation or reformation of character, may be relevant to determining the appropriate order to be made.[2]

[15] On any view, the respondent's conduct assessed as at the time it occurred, pointed ineluctably to a finding that the respondent was not a fit and proper person to engage in legal practice.

[16] Accordingly, the Tribunal is satisfied, for the purposes of s 465(1) of the LPA, that the respondent engaged in professional misconduct.

Appropriate orders

[17] Having made that finding, s 456(1) of the LPA confers a wide discretion on the Tribunal by providing that 'the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section'. Subsections 456(2), (3) and (4) then set out a non-exclusive array of orders which may be made by the Tribunal, including:

> (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate –
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> (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
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> (b) an order that the practitioner's local practising certificate be suspended for a stated period or cancelled;
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> (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
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> (d) an order that –
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> (i) imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and

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2 See *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor*; *Legal Services Commissioner v Shand* [2018] QCA 66 at [20], and the cases cited therein.

(ii) imposes the conditions for a stated period; and

(iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;

(e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;

(f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years –

(i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or

(ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.

[18] The applicant and the respondent jointly submitted that the appropriate primary order in this case would be for a period of suspension to coincide with the undertaking given by the respondent to the Magistrates Court.

[19] In *Attorney-General v Kehoe*,[3] Thomas JA, with whom the Chief Justice and Ambrose J agreed, said:

> Experience suggests that orders for striking off a practitioner are appropriate where the conduct reveals the practitioner to be a person unfit to exercise the powers and privileges afforded to solicitors. Suspension may be regarded as the next most serious level of punishment. It is appropriate in cases of relatively serious misconduct where the Tribunal or the court considers that suspension from practice for a designated period is called for and where it has reason to think that at the expiry of such period the practitioner will have learned his or her lesson and will be of appropriate character to resume practice. It is recognised that orders for striking off or for suspension carry with them a strong element of disgrace and a serious element of economic loss through deprivation of the capacity to practise the profession for which the practitioner has been trained.

[20] That passage was cited, with approval, by the Court of Appeal in *Attorney-General and Minister for Justice Qld v Priddle*.[4]

[21] The received propositions applicable in cases of personal misconduct by the commission of a crime were articulated by Young CJ, with whom Meagher and Tobias JJA agreed, in *Prothonotary of the Supreme Court of New South Wales v P*.[5] It is sufficient for present purposes if I respectfully adopt the following summary by Atkinson J, with whom Sofronoff P and Gotterson JA agreed, in *Jensen v Legal Services Commissioner*:[6]

> [183] P did not work as a solicitor after February 2000. She notified the Law Society of her guilty plea in March 2001. The Court of Appeal considered whether or not P's name should be struck from the roll of

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3 [2001] 2 Qd R 351.
4 [2002] QCA 297 at [9].
5 [2003] NSWCA 320.
6 [2017] QCA 189.

solicitors. In doing so, Young CJ, with whom Meagher and Tobias JJA agreed, summarised the relevant considerations arising from the case law when determining whether a practitioner should be struck from the roll. Young CJ listed 10 considerations, including:

1. The onus is on the claimant to show that the opponent is not a fit and proper person. This is a civil onus.

2. An order striking off the Roll should only be made when the probability is that the solicitor is permanently unfit to practise.

3. The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in a relevant community, character refers to the person's actual nature.

4. The attitude of the professional association is that the application is of considerable significance.

5. The question is present fitness, not fitness as at the time of the crime.

[184] Young CJ also listed 10 compelling mitigating circumstances, arising from American case law:

1. Absence of prior disciplinary record or criminal record;

2. Absence of motive for personal enrichment;

3. Honesty and cooperation with the authorities after detection;

4. The offences being unrelated to the practice of law;

5. The ignominy of having suffered a criminal conviction and the deterrent element;

6. The absence of premeditation with respect to the commission of the crime;

7. Evidence of good character;

8. Any voluntary self-imposed suspension or court imposed temporary suspension from practice;

9. Delay in commencing disciplinary proceedings; and

10. Most importantly, clear and convincing evidence of rehabilitation.

[22] In *Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand*,[7] McMurdo JA, with whom Morrison JA and Brown J agreed, said:

> [52] The discretion conferred by s 456 is a broad one and, as noted by the Tribunal, not subject to any express constraint. It is to be exercised for the purposes which are established by the authorities. It is well established that the purpose is not to punish the respondent, but to protect the public.

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7 [2018] QCA 66.

> [53] The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed.
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> [54] However the removal of the name of an unfit practitioner from the Roll serves the interests of the public in more extensive ways. In *Attorney-General v Bax*, Pincus JA said that the remedies of suspension or striking off are for the protection of the public and of the profession's standing and that further, there is also a deterrent element. And in *De Pardo v Legal Practitioners Complaints Committee*, French J (as he then was and with whom the other Members of the Full Federal Court agreed) said that:
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> > "[The protection of the public] extends beyond protection against further default by the particular practitioner to protection against similar defaults by other practitioners."
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> [55] The reference by Pincus JA in *Bax* to the protection of the profession's standing is important. The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced. The Court's Roll of practitioners is an endorsement of the fitness of those who are enrolled.

[23] McMurdo JA said further, at [57], that the test of probable permanent unfitness is, 'a way of identifying that the character of the practitioner is so indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the Roll.'.

[24] In the present case, there are a significant number of factors which militate against a finding that the respondent is probably permanently unfit to practice, and which should in any event be taken into account in mitigation:

(a) The respondent had no prior disciplinary or criminal record;

(b) The respondent has, from the outset, cooperated fully with the authorities. He was honest with his partners, and has maintained that frank cooperation throughout the criminal and disciplinary processes;

(c) The respondent made full reparation;

(d) Whilst not an excuse, the respondent's aberrant conduct can be explained by the manifest pressures under which he was labouring at the time (summarised above);

(e) The respondent consulted a psychologist in September 2013, and thereafter engaged in prolonged therapy. His psychologist has confirmed his opinion that, at the time of the misappropriation, the significant stressors in the respondent's life resulted in him suffering depression, anxiety and psychological distress. In his most recent report (1 December 2017), the psychologist outlines the significant improvement in the respondent's condition, the respondent's great remorse and guilt, the respondent's greater insight into the factors which contributed to his behaviour at the time, and the strategies he has developed to

ensure he is not placed in a similar situation again. The psychologist opines that the respondent's likelihood of reoffending is low.

(f) The respondent tendered a report dated 18 December 2017 by Dr Greg Apel, consultant psychiatrist, who had interviewed the respondent twice in October 2017. Dr Apel noted:

> [The respondent] describes a cluster of symptoms of loss of appetite, sleep disturbance, and social withdrawal consistent with a diagnosis of an Adjustment Disorder with Depressed Mood. This had arisen from around the time of the offences and persisted for 12 to 18 months. He received appropriate treatment support from the general practitioner and psychological input from the psychologist Mr Darryl Peries. The use of medication would not be appropriate in such a situation (this has occurred).

Dr Apel's conclusions included observations that the respondent is not of antisocial character, that the respondent committed 'a simple, egregious error of judgement for which he has paid dearly', and that the respondent's remorse is genuine and that the risks of reoffending in this man are negligible';

(g) The respondent has produced an array of personal references which speak to the respondent's good character. Notably, three of those references are from directors of McCarthy Durie Lawyers. His former partners consistently speak highly of the respondent's personal and professional attributes, acknowledge the respondent's regret and guilt, and uniformly express confidence in the respondent's future as a legal practitioner;

(h) The respondent has had to sell his home, rely on Centrelink, as a result of his struggle to find alternative employment, likely due to having disclosed the charges against him, and has lost his shareholding in the law firm. Before his current employment, he found some work in real-estate, but the field did not suit him. He now works for a not for profit registered charity, where he enjoys the positive impact his work can have on others. As a not for profit organisation, his employment is not overly secure, and he is fearful he will be made redundant at any point in time. He still has a passion for the law, and maintains his wish to return to the legal profession. He wishes to explore different avenues in the legal profession. If he has the opportunity to practice again, he wishes to use his skills to help people, rather than simply meeting billing targets;

(i) The respondent no longer suffers from depression, does not have the financial pressures of a mortgage and a business loan, and he and his wife are no longer undergoing the IVF process. He says that as a consequence of counselling with his wife and coming clean with his family in relation to the pressures he felt were being thrust upon him, he no longer feels the same heavy expectations. His family no longer relies on him financially, and his wife now also works in a full time capacity to supplement their financial position;

(j) The respondent volunteered to refrain from practicing for five years when he pleaded guilty in the Magistrates Court;

(k) There has been some considerable delay between the conduct in question and these disciplinary charges being brought and heard. Given the stress and burden

such charges can place on an individual, it is a positive sign that the respondent has behaved in the way he has since the conduct was committed. When there has been a delay between conduct and a disciplinary proceeding, 'the Tribunal is afforded an opportunity to see what the practitioner has done (or not done) to modify his or her professional behaviour or the intervening period';[8]

(l) The evidence presents a compelling picture of rehabilitation.

[25] Having regard to all of these matters, the Tribunal would not find that this respondent is probably permanently unfit to practice. Rather, as contended for by the parties, the appropriate and proportionate outcome is for a suspension to coincide with the undertaking volunteered to the Magistrates Court.

[26] Both parties submitted, and in the circumstances the Tribunal accepts, that given the financial hardship the respondent has already faced, it is not necessary to impose any further monetary penalty upon him.

[27] The respondent did not oppose the order for costs required by s 462(1) of the LPA.

[28] Accordingly, there will be the following orders:

1. The respondent, Amitesh Kumar, is publicly reprimanded for professional misconduct.

2. A local practising certificate is not to be granted to the respondent before 26 January 2021.

3. The respondent shall pay the applicant's costs, to be assessed on a standard basis on the Supreme Court scale under the *Uniform Civil Procedure Rules*, such costs to be assessed as if the matter were a proceeding before the Supreme Court of Queensland.

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8 *Legal Services Commissioner v Fellows* [2017] QCAT 337 at [27].