SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Madden* [2008] QCA 52
PARTIES:	**LEGAL SERVICES COMMISSIONER** (respondent) **v** **JAMES XAVIER MADDEN** (applicant/appellant)
FILE NO/S:	Appeal No 1782 of 2008 BS No 1119 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for stay of execution
ORIGINATING COURT:	Legal Practice Tribunal
DELIVERED ON:	5 March 2008
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2008
JUDGES:	Fraser JA
ORDER:	**Upon the undertaking of the appellant:** **1. Not to undertake any legal work, including having contact with clients in his professional capacity** **2. To step aside from the day-to-day conduct of his practice and not play any active role in the practice but to remain as principal in name only pending the determination of this appeal** **3. To use his best endeavours to cause his existing staff and any additional staff engaged pending the determination of the appeal to take over the conduct of all files on a day-to-day basis under the supervision of John Marshall Davies pending determination of this appeal** **4. To use his best endeavours to cause John Marshall Davies to undertake the steps set out in paragraphs 11 to 14 of Mr Davies' affidavit filed 3 March 2008 and to cause his staff to cooperate in that** **The order of the Court is that:** **1. The enforcement of order 1 of the Legal Practice Tribunal made on 8th February 2008 be stayed until determination of this appeal** **2. The appellant be released from his undertaking given to the Legal Practice Tribunal on 8 February 2008** **3. The appellant cause notice of the order of the Legal Practice Tribunal and of this order, including the undertakings given and upon which it is conditioned,**

to all active clients of the practice pending determination of the appeal

4. **There be liberty to apply on two business days notice**
5. **The costs of and incidental to this application be costs in the appeal**

CATCHWORDS: PROFESSION AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – APPEALS

APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – STAY OF PROCEEDINGS – WHEN GRANTED – where the appellant was found to have committed professional misconduct – where the appellant's name was struck from the roll of practitioners – where the respondent conceded there were arguable grounds of appeal – where the appellant demonstrated that he would suffer severe prejudice if a stay were not granted – where the appellant offered extensive undertakings – where the appeal would be expedited within two months – whether in the circumstances the stay should be granted – examination of the relevant considerations to be taken into account in assessing whether a stay should be granted or refused

Cahill v The Law Society of New South Wales (1988) 13 NSWLR; [1987] 1 NSWCA 444, cited
Croney v Nand [1999] 2 Qd R 342; [1998] QCA 367, cited
Legal Services Commissioner v Baker No 1 [2006] 2 Qd R 107; [2005] QCA 482, followed
New South Wales Bar Association v Stevens [2003] NSWCA 95, followed
Robb & Rees v Law Society of the Australian Capital Territory, unreported, Finn J, No ACT G34 of 1996, 21 June 1996, followed

COUNSEL: J A Griffin QC and R P S Jackson for the applicant/appellant
B McMillan for the respondent

SOLICITORS: Brian Bartley and Associates for the applicant/appellant
Legal Services Commissioner for the respondent

FRASER JA: On the 8th February the Legal Practice Tribunal ordered that the name of the applicant, a solicitor, be removed from the local roll. The applicant now applies for an order that the enforcement of that order be stayed until the hearing and determination of his appeal against it. At first instance, the facts were agreed in writing. I will give a brief summary of them.

In relation to the applicants acting for his client, Mr Kampf, in his personal injuries damages claim, the applicant accepted the factual bases of four charges.

Firstly, he accepted that he was guilty of neglect and delay, exemplified by the fact that the settlement conference took place more than six years after Mr Kampf had retained the applicant, the delay largely being attributable to long periods in which the applicant did nothing to progress the claim.

Secondly, he compromised the defendant's application for an order for delivery of a statement of loss of damage without his client's authority or knowledge, part of the compromise requiring the client to pay the defendant applicant's costs which were later agreed to be fixed at $1,125.70. The defendant later made a second application for an order that Mr Kampf provide particulars of his loss and damage and a list of documents. The applicant appeared on that application, again without instructions. It was dismissed with no order as to costs.

Thirdly, the applicant subsequently withdrew the necessary money from his Trust Account, that is the $1,125.70, without the authority or knowledge of his client, and paid it to the defendant's solicitors in breach of the Trust Accounts Act 1973.

Fourthly, the applicant rendered an invoice for his professional fees which included his charges for the legal services performed by him relating to the two applications where he had not obtained instructions to provide those services. He knew or should have known that he was not entitled to receive payment for those services from his client and he did not obtain his client's authority to deduct his fees for those services from the settlement sum.

The fifth and sixth charges concern the applicant's conduct whilst acting for a Mr Portch. The applicant accepted that, in breach of his duty as a solicitor, he failed to maintain a

reasonable standard of competence in the preparation of a financial agreement between Mr Portch and his future wife, for both of whom the applicant acted. He also accepted that, despite the conflict and notwithstanding objection, he acted in an application before the Family Court for financial orders against Mrs Portch in circumstances where he had previously acted for both Mr and Mrs Portch in preparing the financial agreement and for Mrs Portch in taking instructions for the revision of her will following their separation; during which he had obtained a detailed account from her of the separation.

In the proceedings in the Tribunal, the respondent, the Legal Services Commissioner, originally had sought the imposition of a penalty of $10,000, the public administration of a reprimand and costs. The applicant had indicated he would not oppose those orders.

The proceedings took an unusual course in the Tribunal. When the matter came on for hearing, the Tribunal raised with the parties the possible availability of an inference concerning charges two and three that the applicant had acted deceitfully. The Commissioner, the respondent here, declined to amend by making that or any similar allegation.

Thereafter, the Tribunal provided to the parties a document headed "Arguable inferences from agreed facts". It gave the applicant notice of possible inferences concerning charge two that, in summary, the applicant had acted deceitfully and preferred his own interests over his client's, in refraining from telling his client of the two applications; and that when he appeared in Court on the second application he implicitly represented that he had his client's instructions when he did not.

In relation to charge three, the document identified an arguable inference that the applicant knew that he should not have debited his client his costs of the first application because that was required by his own default. The document did not refer to charge four, which

itself complained that the applicant knew, or ought to have known, that the fees were not properly chargeable.

Thereafter, the applicant took advantage of the opportunity afforded to him to give evidence bearing upon the matters in issue, including what inferences should reasonably be drawn from the statement of agreed facts. After hearing the applicant's evidence and submissions on behalf of both parties the Tribunal rejected the applicant's contention that he acted innocently in his dealings with Mr Kampf. A critical finding is at paragraph 36 of the judgment.

> "The Tribunal, doubting the respondent's credibility, rejected his contention he acted innocently in all of this. We considered the more probable scenario was that, lacking the moral courage to front up to his client with the problem he had, through his own neglect, created, the respondent took the expedient course of hiding it from his client, and proceeded independently in the hope he could sail through the problem without his negligence being uncovered. That involved dishonesty. There are degrees of dishonesty in these situations. Here, it is noted, the respondent expediently preferred his own interests over those of his client."

The principles upon which the jurisdiction to grant a stay such as in the case here are those described in *Legal Services Commissioner v Baker No 1* [2005] QCA 482. In that case, Justice Chesterman, with whose reasons Justices McMurdo and Helman agreed, accepted as correct the statements of the principles by Justice Finn in *Robb v Law Society of the Australian Capital Territory*, unreported Federal Court No ACT 34 of 1996 21 June 1996, and by Chief Justice Spigeleman in *New South Wales Bar Association v Stevens* [2003] NSWCA 95. I will discuss the relevant factors in turn.

First, demonstration of an arguable appeal is a condition precedent to obtaining a stay. In this respect, the applicant's notice of appeal challenges the findings made by the Tribunal that he acted dishonestly, that he expediently preferred his own interests over those of his client, and that his conduct reflected an unfitness to practice. It also contends for error by the Tribunal in considering whether he acted dishonestly in respect of the charges against him where the discipline application did not allege dishonesty, where he was called upon

during the course of the hearing to justify his conduct with respect to what he would contend were inadequately particularised assertions of dishonesty, where the respondent declined the invitation to vary the discipline application to make such allegations, and where the discipline application was not amended to allege dishonesty.

The notice of appeal also contends that the order that the name of the applicant be removed from the local roll, was manifestly excessive. He contends that this is demonstrated by reference to decisions in matters where a less severe penalty was imposed for more serious transgressions.

Here, the respondent concedes that the applicant's appeal is arguable. I propose to act on that concession. It is not appropriate to speculate further about the prospects of success in the appeal, even if it were practical to do so, which it is not. See *Croney v Nand* [1999] 2 QdR 342 at 348.

The applicant contended in written submissions on his behalf that because the Legal Services Commissioner made no submissions before the Tribunal that the applicant was unfit to practice, the primacy to be given to the Commissioner's interest in upholding the public interest and protecting the reputation of the profession was not enlivened. I reject that submission.

The authorities to which I have referred show that what is in issue is the interest of the public. That cannot be foreclosed by the approach taken by the respondent. The stay must be considered in light of the role of the Supreme Court in disciplinary proceedings, and the object of the sanction imposed, as Justice Finn observed in *Robb v Law Society of the Australian Capital Territory*.

The applicant also submits that, where a risk exists that the appeal will prove nugatory in the absence of a stay, the Courts will normally exercise their discretion in favour of a stay.

The authorities cited for that proposition are cases concerning private litigants: *Wilson v Church (No 2)* (1879) 12 ChD 454, *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 695 and *Croney v Nand*. No such prima facie rule can be posited in a case such as this, where the public interest intrudes.

Nevertheless, the seriousness of the prejudice that would be caused to the applicant if he succeeded in his appeal but has been denied a stay, is, of course, a very relevant consideration. On that hypothesis, in my opinion, the prejudice to the applicant here would be very substantial, and more so than in many other similar cases.

The applicant has been in practice as a sole practitioner in Toowoomba since 1991, and at Clifton, a small town some 50 kilometres south west of Toowoomba, since early 2002. He has no partners. His evidence is that if his appeal is successful, he would have no clients, and he would not be able to recover from the loss, his belief being that the clients would have associated with different firms. Although it may seem likely that the applicant might, in such situations, succeed in competing for at least some of his former clients, the respondent does not challenge his evidence.

The applicant refers, also, to his commendable pro bono work with elderly patients at the Clifton Nursing Home, and to his many elderly clients who visit the Clifton office. The uncontradicted evidence is to the effect that these elderly clients will be inconvenienced if a stay is not ordered because of the absence of a close legal practice other than the applicant's.

The applicant also deposes that, at his age, 53 years, and in his financial position in that event, he would never be in a position to recover from the loss of his clients and consequent inability to maintain his premises and staff. Of particular significance here, is that if a stay is not granted, the applicant will lose his practice, and, on the evidence which

the respondent does not seek to question, lose it permanently, even were he to succeed in his appeal.

The appeal would be not be rendered nugatory because, if it were to succeed, the applicant would be entitled again to practice, either on his own account, or as an employee. But on the evidence, success in the appeal would be a hollow victory indeed.

The significance of these matters is diminished by the serious findings against him in the Tribunal, which, subject to the appeal, might be said to demonstrate that it is very much in the public interest that the applicant suffer these inevitable consequences of striking off. Here, though, the applicant has the benefit of an affidavit by an experienced independent solicitor, Mr Davies, who is well regarded by the respondent, and, I was informed by the respondent's counsel, by the Queensland Law Society. Mr Davies deposes to having personally reviewed each of the applicant's files, and found that each of them is up to date and in order. This evidence, again not challenged by the respondent, is not determinative, but it suggests that the misconduct found against the applicant has not extended beyond the particular matters in issue in the appeal.

Other factors to be taken into account include those listed in Justice Finn's judgment in *Robb v Law Society of the Australian Capital Territory,* which was referred to with approval by Chief Justice Spigeleman, with whom Justices Meagher and Sheller agreed, in *New South Wales Bar Association v Stevens*, and, also by Justice Chesterman in *Legal Services Commissioner v Baker*, at paragraph 31.

They include:

I. The seriousness of the misconduct found.

II. The likely prejudice to public confidence both in the integrity of the discipline processes themselves and the reputation of the profession if the practitioner is granted a stay.

III. The means available to mitigate the prejudice alleged.

IV. The expedition with which the appeal can be heard.

As to the first of those factors there is no doubting the seriousness of the findings of misconduct. The findings are summarised in paragraph 50 of the judgment of the Chief Justice.

> "The Tribunal is of the view the aggregation of the respondent's professional misconduct involving expediency and his dishonestly preferring his own interests over those of his client committed over a period portraying various misconceptions about the basics of his professional role and involving 'repeat' offending in relation to his Trust Accounts, warrants the conclusion the respondent is not fit to practice."

The importance of the protection of the public interest and the reputation of the legal profession is a factor of particular significance in a case such as this, and one which distinguishes it from applications for a stay in private litigation.

In Legal Services Commissioner -v- Baker (No 1) this Court emphasised the significance of this factor. Justice Chesterman said, at paragraph 28,

> "In particular it should be accepted that an applicant for a stay of a recommendation that his name be removed from the role of legal practitioners should show a cogent reason for the stay and he will not do so merely by showing that he will be unable to practice his profession until his appeal is heard and allowed. Every practitioner who is suspended from practice or whose name is removed from the role suffers that prejudice but it is clearly not right that a stay is or should be granted as a matter of course; something more must be shown than prejudice of this kind. The additional factors which would justify a stay must be such as outweigh the public interest in having unfit practitioners debarred from practice. That interest is to be afforded particular significance."

For the reasons I mentioned earlier, I accept that the applicant has demonstrated more than merely the prejudice that any practitioner suffers from striking off or suspension.

There are here also means available to mitigate the prejudice to the public interest.

The Queensland Law Society has appointed a supervisor to the applicant's Trust Accounts pursuant to subsection 4.9.8(2) of the *Legal Profession Act* 2007. The Society effectively controls those Trust Accounts, the monies being paid in and out only with the approval of the supervisor to whom copies of the relevant documents must be provided.

Most significantly, the applicant undertakes to step aside from undertaking legal work personally until the appeal is determined and a reputable independent solicitor, Mr Davies, is willing to attend the applicant's office to supervise his staff and to monitor each file to ensure that each file is maintained and progressed in a proper and timely manner and if necessary to give directions to the applicant or his staff as to any particular matter he feels may need specific attention or action. The independent solicitor would also review the operation of the Trust Accounts - although that appears now not really necessary - and monitor dealings with documents held in safe custody. I accept that these conditions would provide significant protection to the public interest.

There remains the concern that to allow a practitioner against whom findings of unfitness have been made to continue in practice would constitute "a very distinct prejudice to the public interest", as was said by Justice Finn in *Robb*, approved by Chief Justice Spigelman in *New South Wales Bar Association -v- Stephens* and also referred to approvingly by Justice Chesterman in *Baker's* case. This consideration is ameliorated to some extent by the applicant's undertaking
not himself to undertake legal work, which can effectively be supervised by Mr Davies, who can be expected to notify the respondent of any breach of it.

Further by the third proposed order, the applicant's clients will be informed of the applicant's undertaking not to undertake legal work personally, so they will be aware that the striking off remains in effect to that significant extent pending determination of the appeal.

These conditions are, in my opinion, more effective to mitigate damage to the integrity of the disciplinary processes than were the conditions criticised by Justice Chesterman in *Baker's* case at paragraph 31. I note that a stay was granted by the New South Wales Court of Appeal in circumstances similarly protective of the public interest in a case where it was then recognised that the overriding consideration was the public interest, and where the findings were more serious than here: see *Cahill -v- The Law Society of New South Wales* [1987] NSWCA 444 (17 December 1987).

The Court has allocated 2 May 2008 for the hearing of the appeal, which is less than two months distant. In the context of this case, again unlike in Baker's case, this factor favours the application for a stay because on the applicant's evidence unless a stay is granted his practice will cease to exist permanently.

For the reasons I have given, I consider that the particular factors over and above the inevitable prejudice associated with the striking off which I have mentioned do here outweigh the strong public interest opposed to a stay, particularly as that opposition to the public interest is mitigated by the terms of the proposed order.

Finally I would note that whilst the Court exercises an independent discretion in matters such as these it is relevant that the respondent does not oppose the stay on the particular terms proposed.

The orders will be as follows. Upon the undertaking of the appellant:

1. Not to undertake any legal work, including having contact with clients in his professional capacity.

2. To step aside from the day-to-day conduct of his practice and not play any active role in the practice but to remain as principal in name only pending the determination of this appeal.

3. To use his best endeavours to cause his existing staff and any additional staff engaged pending the determination of the appeal to take over the conduct of all files on a day-to-day basis under the supervision of John Marshall Davies pending determination of this appeal.

4. To use his best endeavours to cause John Marshall Davies to undertake the steps set out in paragraphs 11 to 14 of Mr Davies' affidavit filed 3 March 2008 and to cause his staff to cooperate in that.

The order of the Court is that:

1. The enforcement of order 1 of the Legal Practice Tribunal made on 8th February 2008 be stayed until determination of this appeal.

2. The appellant be released from his undertaking given to the Legal Practice Tribunal on 8 February 2008.

3. The appellant cause notice of the order of the Legal Practice Tribunal and of this order, including the undertakings given and upon which it is conditioned, to all active clients of the practice pending determination of the appeal.

4. There be liberty to apply on two business days' notice.

5. The costs of and incidental to this application be costs in the appeal.

Mr Griffin, do you have instructions that your client gives those undertakings I have read out?

MR GRIFFIN: I do, your Honour.

FRASER JA: Yes, is there anything further?

MR GRIFFIN: No, your Honour.
