

# SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Law Society Inc v Smith* [2000] QCA 109

PARTIES: **QUEENSLAND LAW SOCIETY INCORPORATED**  
(applicant)  
v  
**ANDREW JOHN SMITH**  
(respondent)

FILE NO/S: Appeal No 1052 of 2000

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: Court of Appeal at Brisbane

DELIVERED ON: 4 April 2000

DELIVERED AT: Brisbane

HEARING DATE: 28 March 2000

JUDGES: McPherson and Thomas JJA, Atkinson J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Respondent to be struck off the roll of solicitors; respondent to pay the applicant's costs of and incidental to the application to be assessed; direction that the costs not include the costs of counsel**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – REMOVAL OF NAME FROM ROLL

PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – CRIMINAL OFFENCE

PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – STRIKING OFF AND ANCILLARY ORDERS

PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – INHERENT JURISDICTION OF COURT – QUEENSLAND

PROFESSIONS AND TRADES – LAWYERS –

MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – STATUTORY PROCEEDINGS – QUEENSLAND – jurisdiction of the Supreme Court to order that a solicitor be struck off the roll – where conduct of practitioner not related to professional practice – whether Solicitors' Complaints Tribunal had jurisdiction to hear the complaint – "unprofessional conduct" as defined in s 3B *Queensland Law Society Act 1952* includes conduct of practitioner not related to professional practice

*Supreme Court Act 1995 (Qld) s 200*

*Supreme Court of Queensland Act 1991 (Qld) s 29*

*Queensland Law Society Act 1952 (Qld) s 3B, s 6AA*

*Ex parte Attorney-General (Cth); re A Barrister and Solicitor (1972) 20 FLR 234* considered

*Re Hope* [1996] 2 Qd R 25 considered

*Myers v Elman* (1940) AC 282 considered

*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 considered

COUNSEL: Mr DA Clothier for the applicant  
The respondent appeared on his own behalf

SOLICITORS: Corrs Chambers Westgarth for the applicant  
The respondent appeared on his own behalf

- [1] **McPHERSON JA:** I agree with the orders proposed and with the reasons of Thomas JA.
- [2] **THOMAS JA:** This is an originating application to the Court of Appeal that the respondent be struck off the roll of solicitors. The application is based upon criminal activity on the part of the respondent subsequent to a period of suspension imposed by the Statutory Committee in 1994.

### **Jurisdiction**

- [3] The jurisdiction to make such an order is that of the Supreme Court, and it expressly remains unaffected by the *Queensland Law Society Act 1952*<sup>1</sup>. Under s 29(1) of the *Supreme Court of Queensland Act 1991* the Court of Appeal has jurisdiction to hear and determine all matters that the Full Court had jurisdiction to hear and determine immediately before the date of commencement of the section, that is 14 December 1991. For the reasons hereunder there is no doubt that the Full Court had the power both to admit and to strike off legal practitioners.
- [4] The power of the Supreme Court to admit legal practitioners, and in particular solicitors, was considered by this court in *Re Hope*<sup>2</sup>. McPherson JA concluded that one of the limited areas of original jurisdiction which remained exclusive to the full

<sup>1</sup> See s 6AA(1) and s 6 AA(2).

<sup>2</sup> [1996] 2 Qd R 25, 28.

court at the material time in 1991 was admission to practice as a barrister or solicitor. His Honour concluded that formerly the Full Court and now this court "remains the ultimate admitting authority and the disciplinary authority for practitioners in this state"<sup>3</sup>. It is not necessary in the present matter to determine the question of limitations upon the power of members of the trial division on the admission and discipline of legal practitioners. It should be remembered however that trial division judges have various disciplinary powers which may be exercised against practitioners including the power to protect parties (usually by orders for costs personally against the solicitor) when they would otherwise be disadvantaged by misconduct, default or negligence of the solicitor in the course of the proceedings. There are also Rules of Court (including former Order 12 Rule 10 and Order 64 Rule 7) which expressly render solicitors liable to certain duties that may be enforced by the court or a judge. The distinction between what might be termed ordinary daily discipline and the extreme remedy of striking off the roll for disgraceful conduct was adverted to in *Myers v Elman*<sup>4</sup> and *ex parte Attorney-General (Cth); Re A Barrister and Solicitor*<sup>5</sup>. In the latter case Fox, Blackburn and Woodward JJ identified disciplinary action by judges against solicitors in respect of professional misconduct in litigation proceeding in the court as "the court's summary jurisdiction".

- [5] It is I think consistent with McPherson JA's view of the matter in *re Hope* that what has been referred to above as the summary jurisdiction on the part of a trial judge is ancillary to the jurisdiction which he or she is exercising in the particular trial or matter in question and that such powers are not the sole province of the court in banc. Irrespective of the limits upon the powers of trial judges over admission and removal of legal practitioners, there is no doubt that the Full Court had and the Court of Appeal now has the power to admit practitioners and to strike them off. The power to strike off is regarded as ancillary to the right to admit.

"The power of suspending from practice must be incidental to that of admitting to practice ... The court that confers ... may for just cause take away"<sup>6</sup>.

- [6] The Supreme Court's powers include those given by the Charter of Justice of 1823<sup>7</sup>. The Court also was given the same jurisdiction power and authority as the superior courts of common law and of chancery in England<sup>8</sup>. That jurisdiction included an inherent disciplinary jurisdiction over solicitors as being officers of the court<sup>9</sup>. In both the United Kingdom and in Queensland legislation has progressively entrusted the hearing and determination of disciplinary applications to bodies such as the Solicitors' Disciplinary Tribunal (UK) or the Solicitors' Complaints Tribunal (Queensland). In each instance the legislation preserves the power of the court in

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<sup>3</sup> Ibid p 30.

<sup>4</sup> (1940) AC 282, 288-289.

<sup>5</sup> (1972) 20 FLR 234, 240.

<sup>6</sup> Per the Privy Council in *Re The Justices of the Court of Common Pleas at Antigua* (1830) 1 Knapp 267 12 ER 231; cf *Starke J in Re Davis* (1947) 75 CLR 409, 419 – "the power of removal or suspension is incidental to that of admitting to the roll of barristers."

<sup>7</sup> See Harrison's *Law and Conduct of the Legal Profession in Queensland* (2nd Edn GN Williams) pp 11-12; *Re Hope* above pp 26-28.

<sup>8</sup> *Supreme Court Act* 1995 s 200, formerly *Supreme Court Act of 1867* s 21.

<sup>9</sup> Halsbury's *Laws of England* (4th Edn) pars 252 and 290; McPherson JA – *Structure and Government of Australian Courts* (1992) IJJA 166, 177.

relation to applications to strike the name of a solicitor off the roll<sup>10</sup>. In the United Kingdom it has been noted that the exercise of this jurisdiction "will be rare"<sup>11</sup> and recent experience suggests that a similar comment is appropriate in Queensland.

### "Unprofessional Conduct"

- [7] We were told that the present application was brought before this court because of concern on the part of the Society that the definition of "unprofessional conduct" in s 3B of the *Queensland Law Society Act* may not be wide enough to cover conduct engaged in by the practitioner not related to his professional practice. It is desirable that this concern be dispelled. The functions of the Solicitors' Complaints Tribunal are "to hear and decide charges of malpractice, professional misconduct or unprofessional conduct or practice brought against a practitioner"<sup>12</sup>. Section 3B provides a definition of "unprofessional conduct or practice" as follows:

"3B(1) A practitioner commits "unprofessional conduct or practice" if the practitioner, in relation to the practitioner's practice, is guilty of-

- (a) serious neglect or undue delay; or
  - (b) the charging of excessive fees or costs; or
  - (c) failure to maintain reasonable standards of competence or diligence.
- (2) Subsection (1) does not, by implication, limit the type of conduct or practice that may be regarded as unprofessional for this Act."

- [8] Whilst subsection (1) is surprisingly limited, subsection (2) leaves open the proper limits of "unprofessional conduct". Whilst section 3B deals at the one time with what are obviously alternative allegations under s 6A, the two concepts of "unprofessional conduct" and "unprofessional practice" are disjunctive and therefore separate.

- [9] It has long been established that criminal conduct having nothing to do with the legal practice of the practitioner may well reveal a lack of fitness to remain on the roll<sup>13</sup>. In the sixth edition of his work on solicitors, Cordery stated<sup>14</sup> that:

"Misconduct which makes a solicitor unfit to continue in practice may be divided into three kinds: criminal conduct, professional misconduct and unprofessional conduct".

Of this classification, in the important case of *Ex parte Attorney General for the Commonwealth; re A Barrister & Solicitor*<sup>15</sup> Fox, Blackburn and Woodward JJ stated:

"This is a convenient classification and to some extent different considerations apply as between the three categories mentioned. The ultimate test is however the same in all cases. What the

<sup>10</sup> *Solicitors Act* 1974 s 47(1) (UK); *Queensland Law Society Act* 1952 s 6AA.

<sup>11</sup> Halsbury above par 290.

<sup>12</sup> Section 6A(a).

<sup>13</sup> In *re Weare*; in *re The Solicitor's Act* 1888 (1893) 2 QB 439, 442 (per Lord Esher MR), 446, 447 (per Lindley LJ), 449 (per Lopes LJ); in *re Davis* (1947) 75 CLR 409.

<sup>14</sup> At p 512.

<sup>15</sup> (1972) 20 FLR 234, 241.

classification does emphasize is that conduct which justifies removal from the rolls, or suspension, is not confined to the professional activities of a practitioner. The courts are not concerned with conduct which does not bear on the fitness of the practitioner to remain on the rolls, but they are concerned with all conduct which does have such a bearing".

- [10] The term "professional misconduct" has generally been understood as relating to misconduct in the course of professional work<sup>16</sup>, and it may be thought that the term "malpractice" connotes something done in the course of a practice. However I see no such necessary limitation in the term "unprofessional conduct". Such a term may comfortably include "personal misconduct" as Fullagar J termed criminal conduct by Mr Ziems which was unconnected with his professional practice<sup>17</sup>.

"Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister: see, e.g. *In re Davis* ((1947) 75 CLR 409). But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former."

- [11] In my view the case which is here brought against the practitioner could have been brought by the Society in the usual way upon complaint before the Solicitors' Complaints Tribunal. It may be expected that in general such matters will be brought before that Tribunal recognising that there is an appeal to this court from Tribunal decisions under s 6Z of the Act. The position is that there is concurrent jurisdiction in the Tribunal and in this court and that in the ordinary case proceedings before the Tribunal will be preferable, particularly where there may be disputed facts to be determined.

### **The facts**

- [12] The respondent was initially dealt with before the statutory committee of the Law Society on 17 November 1994 for two incidents of professional misconduct. The first incident involved representations by him to a client which might be described as extraordinary lies about how a hearing was progressing when in fact no proceeding had been instituted. The other incident involved his wrongfully mixing his own affairs with those of a client with the consequence that the client invested \$10,000 in a failed business run by the respondent. He was suspended from practice until 30 June 1997 and ordered to pay the Society's costs. The respondent gave an undertaking that he would satisfactorily complete a practice management course before recommencing practice as a solicitor. The respondent has not to date undertaken any practice management course and apparently paid only part of the Society's costs.

<sup>16</sup> *Ex parte Attorney-General (Cth) re A Barrister & Solicitor* above at 240.

<sup>17</sup> *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 290.

- [13] Unfortunately the respondent has been involved in further trouble since that time. On 1 December 1998 he pleaded guilty in the District Court to a charge of dishonestly applying to his own use an amount of \$12,000 which was the property of another. He was convicted and fined \$2,500 and allowed three months to pay, in default six months imprisonment. He had obtained \$12,000 from an acquaintance for the purpose of purchasing three amusement machines which were to be placed in the Sunshine Plaza Shopping Centre. He applied the funds to his own use and deceived the investor into thinking that the machines had been purchased and were in place. When the investor finally insisted on seeing the machines the respondent admitted that they had not been purchased. He claimed that the funds had been stolen. He purported to reimburse the investor, but his cheque was dishonoured. Eventually he did reimburse the investor and this was taken into account in the proceedings in the District Court.
- [14] Subsequently on 14 October 1999 the respondent pleaded guilty before another District Court judge to three charges of misappropriating amounts totalling \$156,000. He was convicted and sentenced to three years imprisonment to be suspended after 12 months for a period of three years. This related to conduct in December 1995 and January 1996. He persuaded various investors to invest in ostrich farming activities telling them that ostriches had been pre-sold to buyers in New Zealand and that the growers would be paid before the birds left Australia. Of 221 birds which the practitioner had at the time, only two had been sold. Other overly optimistic representations were made in relation to the scheme whereas in fact it was at material times in very real trouble with no real prospect of succeeding. Other charges are pending against him under s 408C of the Criminal Code, but this has no relevance other than the respondent faces the prospect of further trouble and difficulty.
- [15] The respondent appeared before this court indicating that he would abide by the order of the Court. Indeed when served with the material he promptly advised the Society that he did not intend to appear, and in order to avoid "looking down the barrel of another costs order" requested that counsel be dispensed with. He at no time made any attempt to recommence professional practice, but of course whilst his name remains on the roll he could recommence practice if he obtained a practising certificate and carried out his former undertaking. In these circumstances it was appropriate that the Society seek to have his name removed from the roll.
- [16] The conduct which has been revealed is sufficiently serious to require removal of his name from the roll in the interests and protection of the public<sup>18</sup>, and reveal him to be unfit to be held out to members of the public as an officer of the court<sup>19</sup>. It is not a case where the court could reasonably formulate an intermediate order, such as fixing a further period of suspension, in the belief that by that time it would be appropriate to reconsider an application<sup>20</sup>.

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<sup>18</sup> *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 202.

<sup>19</sup> Cf *Melifont v Queensland Law Society Inc* [1981] Qd R 17, 31; *Clyne* above at 188; *Attorney-General v Bax* [1999] 2 Qd R 9, 21.

<sup>20</sup> *Sedgwick v Law Society of New South Wales* 18 May 1994, BC 9404988 at 23 per Mahoney JA; in *re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.

**Orders**

- [17] It will be ordered that the respondent be struck off the roll of solicitors. The present case is one where there may have been some prospect of minimising the costs of preparation had the Society sought the respondent's consent to a striking off order at an earlier time. Even so, the application is one where the court exercises a discretion, and where some record needs to be kept of the basis upon which the striking off has occurred. In the circumstances the respondent will be ordered to pay the applicant's costs of and incidental to the application to be assessed, with a direction that the costs not include the costs of counsel.
- [18] **ATKINSON J:** I agree with the reasons of and orders proposed by Thomas JA.