SUPREME COURT OF QUEENSLAND

CITATION:	*Watts v Legal Services Commissioner* [2016] QCA 224
PARTIES:	**PETER JOHN WATTS** (appellant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	Appeal No 1294 of 2016 QCAT No 77 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2016] QCAT 4
DELIVERED ON:	6 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2016
JUDGES:	Margaret McMurdo P and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Appeal allowed.**
2. **Set aside Order 1 made by the Tribunal on 8 January 2016.**
3. **Order in substitution therefor:**

“1. (a) The respondent, Peter John Watts, is publicly reprimanded for his professional misconduct the subject of the application to the Tribunal;

(b) In the event that the respondent applies for a practising certificate, his application be accompanied by a contemporaneous report of a psychiatrist or a psychologist which expresses an opinion as to the risk of the respondent’s engaging in conduct of the kind for which he is publicly reprimanded; and

(c) In the further event that such an application is granted, any practising certificate be issued subject to a condition that the respondent

practise under the supervision of another certified legal practitioner and that he not have responsibility for operating a trust account."

4. **Otherwise, confirm the orders of the Tribunal made on that date.**
5. **The respondent to this appeal is to pay the appellant's costs of the appeal on the standard basis.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the appellant admitted to six charges of disbursing trust money without authority – where the appellant admitted the conduct amounted to professional misconduct – where the Tribunal concluded that the appellant was not a fit and proper person to remain in legal practice, removing his name from the roll of practitioners – where the appellant appeals the order made on the basis that: (1) the Tribunal did not consider the treating clinical psychologist's opinion as to his risk of re-offending; and (2) the Tribunal did not properly apply the test to determine whether the appellant's name should be struck from the roll of practitioners – where the treating clinical psychologist's opinion was that the risk of re-offending was very low – where an order removing a practitioner's name from the roll of practitioners should only be made when the probability is that the practitioner is permanently unfit to practice – whether the Tribunal did not have regard to a material consideration – whether, if so, in the re-exercise of the discretion under s 456 of the *Legal Profession Act* 2007 (Qld), a different order should be imposed against the appellant in substitution of the removal order

Legal Profession Act 2007 (Qld), s 456

Burgess v McGarvie (Legal Services Commissioner) [2013] VSCA 142, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Legal Services Commissioner v Quinn [2012] QCAT 618, considered
Prothonotary of the Supreme Court of NSW v P [2003] NSWCA 320, considered

COUNSEL: P J McCafferty for the appellant
M D Nicolson for the respondent

SOLICITORS: Bartley Cohen for the appellant
Legal Services Commission for the respondent

[1] **MARAGARET McMURDO P:** I agree with Gotterson JA's reasons for allowing this appeal and with the orders he proposes.

[2] **GOTTERSON JA:** The appellant, Peter John Watts, was admitted as a solicitor of the Supreme Court of Queensland on 14 March 1983. He worked first as an employed solicitor at various firms in South East Queensland. From 15 May 1989 until 22 October 2010, he carried on practice as a sole practitioner in Brisbane. Since 23 October 2010, he has worked in property management.

[3] The appellant's cessation of practice arose in circumstances where a routine audit of his trust account in 2010 prompted a more detailed audit which detected irregularities. These irregularities were investigated by the Legal Services Commissioner ("LSC"). As a consequence of the investigation, the appellant's practice was wound up. He surrendered his practising certificate on 1 December 2010 after service of a "show cause" notice on him on 26 October 2010.

[4] The appellant had been the subject of a previous disciplinary finding by the Legal Practice Committee of Queensland. On 15 October 2007, he was found guilty by the Committee of unsatisfactory professional conduct in that he had neglected or unduly delayed, and had thereby failed to maintain reasonable standards of competence and diligence, in relation to execution upon a judgment debt on behalf of a client. He was publicly reprimanded, fined $1,500, and ordered to pay the LSC's costs of $2,000.[1] He paid both the fine and the costs.

The subject of the current disciplinary proceeding

[5] On 15 March 2012, the LSC, the respondent to this appeal, applied to the Queensland Civil and Administrative Tribunal ("the Tribunal") under s 452 of the *Legal Profession Act* 2007 (Qld) ("the Act") for a finding that the appellant was "guilty of professional misconduct and/or unprofessional conduct" on the basis of conduct on his part alleged in some six charges. On the footing that such a finding was made, disciplinary orders pursuant to s 456 of the Act and a costs order were sought against the appellant.[2]

[6] The six charges arose out of the 2010 investigation to which I have referred. Each charge alleged that the appellant had breached s 249(1)(b) of the Act. One charge related to conduct in March 2006. The other five charges related to conduct between May 2009 and May 2010.

[7] Four of the charges concerned circumstances where a disbursement was made by payment from the appellant's trust account to his general account before an account for professional costs had been issued to the client. In one instance, the appellant became entitled by way of payment for professional costs to an amount equal to the moneys disbursed, once the account for professional costs had been issued. In the other three instances, however, the moneys disbursed were refunded to the client by the appellant.

[8] The other two charges involved the creation by the appellant of false trust account receipts which, in each instance, purported to record the receipt of an amount of funds from a particular client when no amount had been received. The appellant then paid an almost equivalent amount from the trust account into his general account. The payments took place on 10 December 2009 and 27 January 2010 respectively. Each of them was, in effect, funded proportionately by the individuals on whose behalf moneys were held in the trust account at the time of the payment. The moneys were restored to the trust account by the appellant after several weeks in one instance, and after about six months in the other.

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[1] AB56-57.
[2] AB1-14.

[9] The six charges covered a total of $191,930.85 in payments from the trust account by the appellant without authority. For the two instances where false receipts were involved, the payments totalled $49,945.82. For the three instances where moneys paid for professional costs were refunded, the payments totalled $134,400.

The progress of the disciplinary proceeding

[10] The six charges were each particularised in the respondent's filed application. On 16 April 2012, the appellant filed a response in the Tribunal in which he admitted the particulars for each charge.[3]

[11] The appellant filed two reports for the purpose of explaining his medical condition at the time when the charged conduct occurred, progress with treatment for it, and his prognosis. One was a report of his treating forensic and clinical psychologist, Dr L Madsen, dated 19 December 2012.[4] The other was of Professor H Whiteford, consultant psychiatrist, dated 30 January 2013.[5]

[12] The parties filed a Statement of Agreed Facts including annexures in the Tribunal on 20 June 2013.[6] The appellant thereby accepted the truth of the particulars as amended of each charge.[7]

[13] Both of the medical reports were referred to in written submissions filed by the LSC with the Tribunal on 1 August 2013.[8] Significant reliance was placed upon them by the appellant in his written submissions filed with the Tribunal on 28 October 2013.[9]

[14] On 1 April 2015, the Tribunal ordered that the appellant file and serve an updated report by Dr Madsen. His further report dated 4 May 2015 was duly filed with the Tribunal.[10] Short supplementary written submissions to accommodate this report were filed by the LSC and the appellant on 18 and 26 May 2015 respectively.[11]

[15] In its principal submissions, the LSC submitted that the appellant's conduct particularised in the charges was properly characterised as professional misconduct.[12] The appellant accepted that characterisation in his principal submissions.[13]

[16] The application was heard on the papers. On 8 January 2016, the Tribunal ordered that the appellant's name be removed from the roll of practitioners kept by the Supreme Court of Queensland (Order 1). It also ordered that the appellant pay the LSC's costs fixed in the sum of $2,000 within 30 days of the order (Order 2).[14]

[17] By a notice of appeal filed on 5 February 2016, the appellant appealed to this Court pursuant to s 468 of the Act.[15] The appeal is against the order that the appellant's

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3 AB15-19. The admission was subject to an exception for one particular which was wrong.

4 AB26-33.

5 AB36-43.

6 AB44-101.

7 On 1 August 2013, the LSC filed a miscellaneous application in QCAT by which directions were sought amending two particulars to correct an error as to amount in one instance and as to year in another: AB20-25. The admitted facts anticipated that these amendments would be made.

8 AB112-118.

9 AB119-123.

10 AB108-111.

11 AB124-126.

12 At para 21: AB116.

13 At para 1: AB119.

14 AB136.

15 AB137-139.

name be removed from the roll. An appeal of this nature is by way of a rehearing on the evidence given in the matter before the Tribunal.[16]

The Tribunal's findings and reasons

[18] The Tribunal noted, and agreed with, the appellant's acceptance that his conduct amounted to professional misconduct.[17] The Tribunal then observed that it was open to it to make any order it thought fit, including orders of the kind described in s 456(2) of the Act.[18]

[19] The LSC submitted that the appellant's conduct supported a finding by the Tribunal that he was not a fit and proper person to practise law and that the appropriate order to be made, taking into account the need to protect the public, was that the appellant's name be removed from the roll of practitioners.[19] The appellant submitted that the LSC had not demonstrated to the requisite standard of proof that he was not fit to remain on the roll. Reliance was placed on the evidence of Dr Madsen and Professor Whiteford and the circumstance that the LSC had not contradicted that evidence.[20] Several different orders, including an order suspending the appellant from working as an employed solicitor for a period of time, were submitted to be appropriate.[21]

[20] The Tribunal proceeded on the footing that the principal issue to be determined by it was whether the appellant was a fit and proper person to remain in legal practice. It acknowledged that the question was whether he was a fit and proper person at the time of the hearing[22] and that to answer that question, the Tribunal needed to consider what was necessary for the protection of the public and the maintenance of professional standards.[23] It recognised that, in this context, disciplinary penalties are not imposed to punish the practitioner.[24] The appellant does not challenge these aspects of the approach taken by the Tribunal to its task.

[21] The Tribunal found that the appellant was not a fit and proper person to remain in legal practice and, on that basis, made the order that his name be removed from the roll of practitioners.[25] It made this finding in the following way.

[22] The Tribunal first referred to Professor Whiteford's report. He had examined the appellant on 29 January 2013. The Tribunal made the following observations concerning the report:

> "[29] In relation to the conduct, Professor Harvey Whiteford, consultant psychiatrist, observes:
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> 'On a number of occasions between 2006 and 2010 he moved money from his legal practice's trust account 'without authority', 'to keep the business afloat'. He told me that he had repaid the money prior to any third party becoming aware that it had been taken. Mr Watts described these actions as a 'calculated risk', necessary given clients had not paid him monies owed at the time.'[26]

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16 *Legal Profession Act* 2007 (Qld) s 468(2).
17 Reasons [17]-[19].
18 Reasons [20].
19 LSC's written submissions paras 29, 31: AB117.
20 Appellant's Supplementary Submissions para 3: AB126.
21 Appellant's Written Submissions para 20: AB122-123.
22 Reasons [25].
23 Reasons [26].
24 Reasons [24].
25 Reasons [49].
26 Report by Professor Whiteford dated 30 January 2013 p2:AB37.

[30] When describing the disorder suffered by Mr Watts, Professor Whiteford observes that Mr Watts had episodes of anxiety sufficient to constitute an adjustment disorder but opines 'whilst they have acted to impair his judgment, I do not believe they removed his capacity to understand what he was doing or control his actions'.[27]

[31] Professor Whiteford refers (as at the date of his report of 30 January 2013) to Mr Watts' continuing to experience fluctuating psychological stress related to issues in the management of the company of which he was a part owner and also the disciplinary proceedings brought by the Legal Services Commissioner. He observes 'with removal of the stressors, either in whole or in part, his vulnerability to develop further clinically significant anxiety symptoms would be much less'.[28]

[32] At the time, Mr Watts told Professor Whiteford of actions he had initiated which should result in significant reduction of his work-related stresses. Mr Watts said he expected these actions to remove the stresses of the previous 6-9 months.[29]

[33] Professor Whiteford expressed the opinion that there was a low risk of misconduct similar to that for which Mr Watts had been charged, and attributed this to the identification of the misconduct as a significant deterrent, and also to the fact that Mr Watts had developed strategies to better control his anxiety."

[23] The Tribunal next referred to Dr Madsen's first report. The following observations were made by the Tribunal with respect to it:

"[35] Dr Madsen refers to the circumstances which contributed to Mr Watts becoming increasingly disillusioned with his life, prompting him to question and then doubt his own value system, leading to inner turmoil which triggered a further deterioration of his mental state and wellbeing and ultimately feelings of intense distress. Within these psychological circumstances, Mr Watts decided to use the trust funds to cover his costs and meet his obligations.[30]

[36] Dr Madsen concludes that Mr Watts' behaviour 'appears to have been the result of a confluence of interpersonal, intra-personal and contextual factors at a specific period of time'.[31]

[37] In the December 2012 report, Dr Madsen concluded that many factors pointed to a conclusion that future contraventions were unlikely. These included age, history of stable employment, not having been diagnosed with psychopathy or anti-social personality disorder, having no substance abuse or alcohol dependency problems, possessing pro-social support and having strong ties with pro-social activities.[32]

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27 *Ibid* pp6-7: AB41-42.
28 *Ibid* p7 para C: AB42.
29 *Ibid*.
30 Report Dr Madsen dated 19 December 2012 paras 24, 28: AB31, 32.
31 *Ibid* para 27: AB32.
32 *Ibid* para 31: AB33.

[38] In concluding, Dr Madsen notes it is important to recognise that Mr Watts' behaviour was a function of his inability to cope with his personal circumstances, and subsequent poor problem solving and decision making. He notes that if these psychological and contextual matters were improved or resolved (i.e. improved psychological state, less financial pressures), his opinion is that Mr Watts' risk of engaging in similar behaviour in the future is likely to be very low."[33]

[24] The Tribunal then noted that both Dr Madsen and Professor Whiteford recommended regular medical treatment for the appellant, preferably with a clinical psychologist.[34]

[25] Turning to Dr Madsen's second report, the Tribunal observed, firstly, that he referred to his earlier assessment that the appellant's "professional misconduct was a function of poor 'decision-making' in a context wherein he had suffered a deterioration of his mental health in highly stressful circumstances;"[35] and, secondly, that the appellant had undergone nine consultations with Dr Madsen since the first report was written.[36] At paragraph 43 of its reasons, the Tribunal recorded Dr Madsen as having made the following observations about the appellant in his second report:

"• 'It has been my judgment that Mr Watts has probably engaged as well as could be expected given his circumstances. He continues to run a property management business in Paddington. This has been difficult for him, due partly to the nature of the work, however, also to the problematic behaviour of his business partner… It is my assessment, therefore, that Mr Watts is exposed to exceptional interpersonal stresses, in addition to the stress associated with the current proceedings, in his 'day to day' activities.[37]

- Mr Watts' 'recent history shows persisting with running his business, managing his affairs and dealing with the uncertainty and stress of the current matters before the Tribunal'. Mr Watts has developed a number of strategies which are helpful to him and assist him with coping.[38]

- …when one considers Mr Watts' circumstances in completeness, one can only conclude that his situation is fairly exceptional. He … has remained working in a business that is both a financial burden upon him and psychologically harmful to him… All these issues remain a concern for him, and cannot either individually or collectively be easily resolved. Bearing all of these factors in mind, therefore, it would be unrealistic to expect that Mr Watts would not at this time be experiencing some stress and emotional upset.[39]

- Dr Madsen's evaluation is that Mr Watts has 'probably engaged in the process as well as could be expected, and gained from it

[33] *Ibid*.
[34] Reasons [39].
[35] Reasons [41].
[36] Reasons [42].
[37] Report by Dr Madsen dated 4 May 2015 para 14: AB109.
[38] *Ibid* para 15: AB109-110.
[39] *Ibid* para 17: AB110.

> what has been helpful to him for coping with his circumstances at that time. His demonstrated ability to 'stick the course' with regards to the responsibilities (i.e. work, financial, and so forth), shows him to have developed resiliency and a capacity to cope under pressure…there is evidence that he has functioned effectively and been able to make good decisions. Or put another way, he has demonstrated a capacity to psychologically cope with his situation'."[40]

[26] Following this summation of the respective reports, the Tribunal noted that the appellant did not rely on his state of mind or psychiatric position between 2006 and 2010 as an excuse for his professional misconduct.[41] What was suggested by the appellant, the Tribunal said, was that his circumstances and psychiatric condition had changed to such an extent that he would no longer be involved in similar conduct, and hence, removal of his name from the roll was not necessary.[42]

[27] The Tribunal then embarked upon an examination of that suggestion before making its finding. It did so in the following way:

> "[46] The major stressors originally identified in the earlier reports as having contributed to Mr Watts' state of mind and which caused him to undertake the conduct related to financial and emotional stresses. For example, Professor Whiteford said that removal of these stressors would lessen his vulnerability to developing further clinically significant anxiety symptoms and also mentions actions which were being taken by Mr Watts which, according to Mr Watts, would result in a significant reduction in his then existing work related stress.
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> [47] It is evident from the most recent report of Dr Madsen that these stresses have not been removed. Dr Madsen refers to Mr Watts continuing to work in a business 'that is both a financial burden upon him and psychologically harmful to him'.
>
> [48] In those circumstances, it is impossible to conclude with adequate certainty that the stresses described in the medical reports which lead to the psychiatric condition which caused the conduct have changed significantly so as to eliminate any risk to the public.
>
> [49] In those circumstances, the Tribunal concludes that Mr Watts is not a fit and proper person to remain in legal practice and so orders that his name be removed from the roll of practitioners."

Appellant's submissions

[28] The appellant's submissions in support of the broadly-expressed grounds of appeal centred upon two aspects of the Tribunal's reasoning. The first is related to Dr Madsen's second opinion. The second concerns the correctness of the test applied by the Tribunal to determine whether the appellant's name should be struck from the roll of practitioners.

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40 *Ibid* para 18: AB110.

41 Reasons [44].

42 Reasons [45].

[29] As to the first aspect, in developing argument on it, counsel for the appellant referred to Professor Whiteford's report which had concluded with a recommendation that the appellant undergo treatment by a clinical psychologist to help ensure that a pattern of behaviour was established in which the appellant would use cognitive techniques he had learned to control his stress and anxiety.[43] That conclusion, it was submitted, underscored the significance of evidence concerning treatment that the appellant subsequently underwent and the opinion of the treating clinical psychologist as to the risk of re-offending. Dr Madsen's second report was directed to those matters.

[30] The appellant submitted that whilst the Tribunal had, at paragraph 43 of its reasons, referred to observations made by Dr Madsen in that report, no reference was made there or elsewhere in the reasons to the ultimate paragraph in the report. It states:

> "19. Finally, with regards to Mr Watts 'risk of re-offending', as highlighted within my earlier report, I would consider this to be **very low**. Mr Watts appears to possess many factors that are identified within the criminological literature as protective of future contraventions. These include, his age, having a history of stable employment, not having been diagnosed with psychopathy or antisocial personality disorder, having no substance abuse or alcohol dependency problems, appearing to possess pro-social support and strong ties to pro-social activities. In addition, the salutary consequences of the current disciplinary proceedings have been immense for Mr Watts, and not something that he would wish to replicate."[44]

[31] In summary, the appellant submits that the opinion held by Dr Madsen in May 2015 as to his risk of re-offending, and the reasons for it, was relevant to the Tribunal's consideration of what order or orders it ought make, and that it had failed to take that opinion and those reasons into account.

[32] An associated criticism is that in its reasoning at paragraph 46, the Tribunal incompletely stated the opinion of Professor Whiteford earlier set out at paragraph 31 of its reasons that with the removal of stressors, either in whole **or in part**, the appellant's vulnerability to develop further clinically significant anxiety symptoms would be much less.

[33] As to the second aspect, the appellant submitted that the Tribunal's reasons suggest that it failed to have regard for the proposition enunciated in a number of decision of the New South Wales Court of Appeal including *Prothonotary of the Supreme Court of NSW v P*,[45] that an order striking the name of a practitioner from the roll should only be made where the probability is that the practitioner is permanently unfit for practice.

Respondent's submissions

[34] For the respondent, it was submitted that the Tribunal had given "proper and adequate" weight to Dr Madsen's second report. Emphasis was placed on the observation in that report that, in his current "day to day" activities, the appellant is exposed to exceptional interpersonal stressors.[46]

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43 AB42-43.

44 AB111.

45 [2003] NSWCA 320 per Young CJ in Eq (Meagher and Tobias JJA agreeing), citing *Prothonotary v Richard* NSWCA 31 July 1987 per McHugh JA and *NSW Bar Association v Maddocks* NSWCA 23 August 1988.

46 At paragraph 14.

[35] It was further submitted that it was correct for the Tribunal to have concluded, in the circumstances, that the appellant was not a fit and proper person to remain in legal practice and that his name should be removed from the roll. Reliance was placed on an order of that kind made by the Tribunal in *Legal Services Commissioner v Quinn*[47] and on the proposition, for which the judgment of Street CJ in *Law Society of New South Wales v Jones*[48] was there cited, that "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 attaching to a solicitor".[49]

Discussion

[36] Section 456 of the Act contains comprehensive provisions concerning the orders that the Tribunal may make if, after it has completed its hearing in relation to a complaint, it is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct. The Tribunal may make any order it thinks fit, including any one, or more, of the orders stated in the section.[50]

[37] Putting to one side the orders referred to in sub-s (3) relating to interstate matters, the section contains two subsections listing orders that might be made. They provide as follows:

> "(2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate—
>
> (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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> (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;
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> (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

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47 [2012] QCAT 618.

48 [1978] CA 333 of 1997, 27 July 1978.

49 At [12].

50 Subsection (1).

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

…

(4) The tribunal may, under this subsection, make 1 or more of the following—

(a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than $100,000;

(b) a compensation order;

(c) an order that the practitioner undertake and complete a stated course of further legal education;

(d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;

(e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;

(f) an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;

(g) an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;

(h) an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;

(i) an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;

(j) an order that the practitioner must not apply for a local practising certificate for a stated period."

Any number of orders mentioned in sub-ss (2) and (4) may be made.[51] Ancillary orders may also be made.[52]

[38] Here, the Tribunal was satisfied, as the appellant had fairly conceded, that he had engaged in professional misconduct as alleged. Once the Tribunal was so satisfied, it fell to it to decide what order or orders it would make under s 456. As that provision makes abundantly clear, a decision of that kind is one of discretion.

[39] In written submissions to the Tribunal, the appellant submitted that his name should not be removed from the roll. A suspension from practice for a period from six to 12 months was proposed. A requirement that he undergo treatment was also suggested as an additional, or alternative order.[53] The LSC submitted that a removal order was the appropriate order for the Tribunal to make.[54]

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51 Subsection (5).
52 Subsection (6).
53 Paragraphs 4, 20: AB119, 122.
54 Paragraphs 6, 31: AB113, 117.

[40] In deciding the contested issue of whether an order removing the appellant's name from the roll ought to be made, it was incumbent upon the Tribunal to have regard to all material considerations. Consistently with the decision in *House v The King*,[55] a failure to take into account a material consideration would bespeak error in exercise of the discretion.

[41] In my view, the opinion expressed by Dr Madsen in paragraph 19 of his second report and the reasons there stated for it, were a material consideration for the Tribunal. That it had requested the report puts its materiality and the materiality of the reasons for it beyond question.

[42] It is clear that the Tribunal did not make express reference to the opinion in its reasons. Furthermore, the process of reasoning disclosed in paragraphs 44 to 48 of the reasons preclude an inference that the Tribunal, without acknowledgement, implicitly had regard for it. Only one conclusion can be drawn. It is that the Tribunal did not have regard for this material consideration when it determined that the appellant's name should be removed from the roll of practitioners.

[43] I accept the appellant's submission that the exercise of the discretion by the Tribunal in ordering his name to be removed from the roll was flawed on that account. A parallel may be drawn with the result in *Burgess v McGarvie (Legal Services Commissioner)*[56] where a decision of the Victorian Civil and Administrative Tribunal was impugned for failure to have regard to significant aspects of uncontradicted psychological evidence concerning the combined effects of the psychological and physiological disabilities of a solicitor who had been guilty of professional misconduct.

[44] It follows that the Tribunal's removal order should be set aside on this account. It is unnecessary to consider, at this point, the second aspect to the appellant's submissions.

Re-exercise of the discretion

[45] Conformably with r 766(1) of the *Uniform Civil Procedure Rules* 1999, it falls to this Court to exercise the discretion under s 456(1). In doing so, all relevant matters need to be taken into account. Public protection is a guiding consideration.

[46] I accept, as correct, the proposition in *P* to which I have referred. That is to say, an order removing a practitioner's name from the roll should only be made when the probability is that the practitioner is permanently unfit to practice.

[47] I would also accept that, at the times when the offending conduct occurred, the appellant failed to exhibit the reliability and integrity in handling trust moneys required of him. That conduct would have rendered him unfit to practice at that point. However, that is not to determinative of whether he is now permanently unfit to practice.

[48] With the benefit of Dr Madsen's unchallenged opinion that a risk of re-offending is very low and having regard to the factors listed by him as justifying it, including the appellant's developed resiliency, his capacity to cope under pressure, and evidence of his functioning effectively and making good decisions, I am not prepared to conclude that the appellant is now permanently unfit to practice. I am fortified in this approach by his subsequent conduct in admitting his guilt, repaying moneys when it was appropriate to do so, and withdrawing from legal practice since 2010. These are all relevant matters for consideration.

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[55] (1936) 55 CLR 499 per Dixon, Evatt and McTiernan JJ at 505.
[56] [2013] VSCA 142.

[49] The circumstances of the appellant's fitness to practice may be contrasted with those of the offending solicitor in *Quinn*. There, in 2011, the solicitor, as managing partner of a legal practice, had, by numerous transactions, transferred about $826,000, in total, from trust moneys to the firm's general account to pay operational expenses. He had been found guilty of similar professional misconduct by the Solicitors Complaints Tribunal in 2001. That, together with the subject offending of a like nature some 10 years later, warranted a conclusion of permanent unfitness to practise.

[50] I would therefore not make an order removing the appellant's name from the roll. Given that the appellant is not now engaged in any way in legal practice and has not expressed an intention to be so, I do not see any utility in an order suspending him from practice.

[51] I am, however, of the view that aspects of his misconduct justify disapprobation by way of public reprimand. They include the subject matter of his conduct – misapplication of trust moneys, the repeated infringements, and the false entries involved in two of them.

[52] The important consideration of the public protection can, in my view, be achieved by orders, firstly, that in the event that the appellant applies for a practising certificate, his application be accompanied by a contemporaneous report of a psychiatrist or a psychologist which expresses an opinion as to the risk of the appellant's engaging in conduct of the kind for which he is publicly remanded and, secondly, that if his application is granted, any practising certificate issued to him be subject to a condition that he practise under the supervision of another certified legal practitioner and that he not have responsibility for operating a trust account.

[53] There is no appeal against Order 2. It should be confirmed. As the appellant has succeeded here, he should be awarded his costs of the appeal.

Orders

[54] I would propose the following orders:

1. Appeal allowed.
2. Set aside Order 1 made by the Tribunal on 8 January 2016.
3. Order in substitution therefor:

"1. (a) The respondent, Peter John Watts, is publicly reprimanded for his professional misconduct the subject of the application to the Tribunal;

(b) In the event that the respondent applies for a practising certificate, his application be accompanied by a contemporaneous report of a psychiatrist or a psychologist which expresses an opinion as to the risk of the respondent's engaging in conduct of the kind for which he is publicly reprimanded; and

(c) In the further event that such an application is granted, any practising certificate be issued subject to a condition that the respondent practise under the supervision of another certified legal practitioner and that he not have responsibility for operating a trust account."

4. Otherwise, confirm the orders of the Tribunal made on that date.

5. The respondent to this appeal is to pay the appellant's costs of the appeal on the standard basis.

[55] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.