SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v O'Reilly* [2019] QCA 251
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant) **v** **MARK JOSEPH O'REILLY** (respondent)
FILE NO/S:	Appeal No 2790 of 2019 QCAT No 107 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2019] QCAT 28 (Judicial Member Lyons QC)
DELIVERED ON:	15 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2019
JUDGES:	Gotterson and Philippides and McMurdo JJA
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – FIT AND PROPER PERSONS – where the respondent was found guilty of professional misconduct concerning defalcations of $268,455 – where the Tribunal held that the respondent was not permanently unfit to practise law and, as such, did not remove his name from the Roll – where the Tribunal instead made orders that the respondent be publicly reprimanded, suspended from practising for three years and that his next application for a practising certificate be made subject to specified conditions – where the Legal Services Commissioner appealed and seeks that the respondent should be removed from the Roll – where the respondent suffered from a major depressive order and physiological dependency on alcohol at the time of offending – where, upon the defalcations being discovered, the respondent cooperated with the investigation and audit and promptly repaid the money – whether the respondent should be removed from the Roll *Legal Profession Act* 2007 (Qld), s 452, s 456 *Attorney-General of the State of Queensland v Legal Services Commissioner; Legal Services Commissioner v Shand* [2018]

QCA 66, considered
Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320, considered
Watts v Legal Services Commissioner [2016] QCA 224, considered
Ziems v Prothonotary of Supreme Court (NSW) (1957) 97 CLR 279; [1957] HCA 46, considered

COUNSEL: J M Horton QC for the appellant
G R Rice QC for the respondent

SOLICITORS: Legal Services Commission for the appellant
Gilshenan & Luton for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

[2] **PHILIPPIDES JA:** On 28 February 2019, the Queensland Civil and Administrative Tribunal (the Tribunal) determined an application referred by the Legal Services Commissioner (the LSC) under s 452 of the *Legal Profession Act* 2007 (Qld) (the Act) in relation to Mark O'Reilly, the respondent, who practiced as an Australian legal practitioner practising as a partner of a law practice in Brisbane. The LSC alleged that the respondent was guilty of professional misconduct and, or, unsatisfactory professional conduct and sought disciplinary orders pursuant to s 456 of the Act.

[3] The Tribunal found the respondent guilty of professional misconduct in relation to the two charges brought concerning defalcations amounting to $268,445. That was not in dispute before the Tribunal. The Tribunal found that no order pursuant to s 456(2)(a) of the Act recommending the removal of the respondent's name from the Roll was warranted. In declining to make an order removing the respondent's name from the Roll, the Tribunal held that that it could not be said that the respondent was permanently unfit to practise law.[1] Instead, the Tribunal made orders pursuant to s 456(2)(b) and (c) of the Act that the respondent be publicly reprimanded and that he be suspended from practising as a legal practitioner for three years. The Tribunal also ordered that the next application by the respondent for a practising certificate be made subject to specified conditions, including the provision of reports of two psychiatrists about his mental condition and its effect on his ability to engage in legal practice obtained within six months of the application.

[4] The LSC appealed against the Tribunal's orders on the basis that it erred in ordering a period of suspension rather than the removal of the respondent's name from the Roll. It is contended that the Tribunal erred in failing to properly have regard to all the relevant purposes for the making of orders under s 456 of the Act and did not have regard to the wider purposes of preservation of the good standing of the legal profession and of the Roll through the Court's endorsement of the fitness of those enrolled.

The wrongdoing

---

1 *Legal Services Commissioner v O'Reilly* [2019] QCAT 28 (Reasons) at [61].

[5] The conduct in question took place between August 2013 and March 2015. The respondent had been appointed as an attorney of a client, Mr Saba, by a power of attorney executed in 2007. That power of attorney was activated in December 2012 upon the client's incapacity.

[6] In March 2013, pursuant to the power of attorney, the respondent appointed himself as sole director of a company of Mr Saba, Farah Saba Investments Pty Ltd (FSI), which operated a bank account with the Commonwealth Bank of Australia (CBA). The respondent cashed a cheque for $5,445 drawn on the CBA account of the company. The respondent had no legitimate reason to do so. That constituted the first defalcation.

[7] The remaining defalcations occurred after Mr Saba's death when the respondent became the sole executor of his estate.[2] On 9 February 2015, a cheque for $20,000 was drawn on the CBA account and paid into the respondent's personal account and then to a company associated with the respondent (Bluedice Pty Ltd) in satisfaction of a debt owed by the respondent which he was unable to meet. On 13 February 2015, the respondent opened an account with the Bank of Queensland (BOQ) in the name of FSI (which occurred in the ordinary course of the respondent's executorship). He subsequently caused all the funds in the CBA account to be transferred to the BOQ account. On 19 March 2015, the respondent caused payments of $128,000 and $15,000 to be made from the BOQ account to Bluedice to pay debts he could not meet. Neither the respondent nor Bluedice had any entitlement to the moneys. On 25 March 2015, the respondent caused two payments each in the amount of $50,000 to be transferred from the BOQ account, the first being to an entity described as "Normanddy Staffsuper" and the other to an entity described as "Taylor Super Fund". Neither entity nor the respondent were entitled to those moneys.

[8] The conduct came to light in May 2015, when an administrative employee of the law practice noticed various discrepancies in the bank accounts and statements of the estate and FSI and notified one of the partners in the firm.[3] On being queried, the respondent disclosed his conduct and made an appointment with the Queensland Law Society (the QLS). The following day, the respondent disclosed the conduct to the QLS. The respondent cooperated with the subsequent investigation and audit. He repaid the stolen money between 11 and 21 May 2015 with funds mostly borrowed from his mother and Bluedice Pty Ltd.

[9] The respondent ceased working at the law practice the following month and did not renew his practising certificate which lapsed on 30 June 2015. About that time, a niece of Mr Saba made a complaint to the Legal Services Commission.

Proceeding in the Tribunal

[10] In determining the orders to be made, the Tribunal had regard to the respondent's mental health and to the evidence of Dr Apel, a psychiatrist, who was of the opinion that in May 2015, the respondent was suffering from a depressive illness of marked severity which he also described as a major depressive order.[4] As a separate diagnosis, Dr Apel considered the respondent suffered from alcohol dependency to the point of physiological dependence with withdrawal symptoms on detoxification. It was Dr Apel's

---

2 AB at 133-135.
3 AB at 135.
4 Reasons at [26].

view that the respondent's judgment "would have been markedly affected by his psychiatric condition" over the year or so prior to May 2015 and there would have been a significant impairment of judgment over the period during which the conduct occurred.[5]

[11] Dr Apel stated that, with management of his depressive illness and alcohol use, the respondent now displayed the capacity for reflection and judgment that would make transgression of social rules highly unlikely. At the time of the hearing before the Tribunal, the respondent's depressive illness subsisted. While Dr Apel had considered that the respondent could return to work in October 2017, that did not occur, and Dr Apel revised that view as too optimistic. In giving evidence, Dr Apel stated that the respondent remained under intensive treatment, which was observed to be a reflection of the severity of his depression and the length of time it had persisted. Nevertheless, there was an "enormous distance" between the respondent's mental health in the 2013 to 2015 period and his current condition, which had plateaued but was likely to improve with time. Dr Apel expected to encourage the respondent to return to work at some (indeterminate) time in the future.[6]

[12] Counsel for the LSC did not cavil with Dr Apel's views and recognised that, at the time of the relevant conduct, the respondent was suffering from mental illness and that the risk of similar conduct in the future was low.

[13] The Tribunal made the following findings:[7]

> "There is no reason to doubt Dr Apel's evidence that the respondent at the time of the relevant conduct was suffering from a major depressive disorder, complicated by his extreme degree of alcohol dependence. The evidence demonstrates that the latter led to the respondent's very heavy consumption of alcohol on a daily basis. Nor is there any reason to doubt Dr Apel's view that the respondent's condition had the consequence that his judgment was markedly impaired. Much has been done to address both aspects of his condition. The respondent has been treated by Dr Apel for a long time now. He remains compliant with his medication regime. He has also undertaken regular group therapy at Damascus. Although his depressive illness has persisted, it seems to be adequately managed. He has remained substantially free of alcohol for a period of the order of three years.
>
> Dr Apel considers that the appellant does not have an antisocial personality, nor does he display antisocial traits. He is in a supportive family situation. Dr Apel considers that he shows a capacity for reflection and judgment, and that the risk of a recurrence of the misconduct is very low. This evidence was not challenged, and there is no reason not to accept it."

[14] The Tribunal noted a submission made on behalf of the LSC, relying on a comment by McMurdo JA in *Attorney-General of the State of Queensland v Legal Services Commissioner; Legal Services Commissioner v Shand*[8] that the "character" of the

---

5 Reasons at [26].
6 Reasons at [31]-[33].
7 Reasons at [39]-[40].
8 [2018] QCA 66.

respondent was so "indelibly marked by the misconduct that he cannot be regarded as a fit and proper person to be upon the Roll". The Tribunal rejected the submission that the reference to "character" in *Shand* was to be understood as a reference to reputation so that the matter for consideration was whether the respondent's reputation had been "indelibly marked" by his conduct. In that regard, the Tribunal referred to the definition of "character" in the *Australian Concise Oxford Dictionary*, which stated:[9]

> "**1** The collective qualities or characteristics, esp. mental and moral, that distinguish a person or thing. **2 a** moral strength (has a weak character). **b** reputation, esp. good reputation."

[15] The Tribunal observed the distinction made between "a person's characteristics" and "the public or community perception or opinion" as important in the present case:[10]

> "… because wrongful conduct committed at a time when a person is significantly affected by a mental condition may not reflect the person's characteristics and moral strength, when not so affected; although the conduct may have severely damaged the person's reputation. The former sense appears to have been what Kitto J was referring to in *Ziems v Prothonotary of the Supreme Court of New South Wales*, when he said, 'Conduct may show a defect of character incompatible with membership of a self-respecting profession'. The distinction is also apparent in the eighth proposition stated by Young CJ in Eq in *Prothonotary of the Supreme Court of New South Wales v P*, that 'The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community, character refers to the person's actual nature'." (citations omitted)

[16] The Tribunal found[11] that *Shand* did not provide a proper basis for the contention that the respondent's name should be removed from the Roll, because of the effect of his conduct on his reputation. It held that the conclusion reached by McMurdo JA in *Shand* that the practitioner's character was revealed by the offence, was to be understood as a reference to the practitioner's actual nature or personal characteristics, such an approach being supported by his Honour's earlier citation of *Prothonotary of the Supreme Court of New South Wales v P*[12] and the observation that the practitioner must have recognised the seriousness of the offence.

[17] The Tribunal turned to consider "whether the conduct the subject of this application demonstrated that the respondent's character is such that he is permanently unfit to practise as a solicitor".

[18] The Tribunal determined that the finding in *Shand*, that the practitioner's character was so indelibly marked by the offence which he committed that he could not be regarded as a fit and proper person to be on the Roll, did not mandate a similar finding in the present case. Acknowledging that the conduct of the respondent was serious, the Tribunal distinguished the present case from *Shand*, observing that there

---

9 Reasons at [42].
10 Reasons at [43].
11 Reasons at [44].
12 [2003] NSWCA 320.

were significant differences between the quality of the respondent's conduct and that of the practitioner in *Shand*, which concerned misconduct in the making of a corrupt payment to a Minister of the Crown described as "a very serious offence, the nature of which undermined the integrity of government at a Ministerial level".[13] Further, it was noted that, while serious misconduct may demonstrate a flawed character, that conclusion is not inevitable, particularly when factors other than character play a significant role in the conduct. In that respect, the fact that the practitioner in *Shand* (unlike the respondent) was not suffering from any psychiatric condition contributing to his conduct was of some importance in precluding an explanation for the conduct, other than in the practitioner's character.

[19] The Tribunal noted that a finding that a practitioner is, by reason of his character, permanently unfit to practise should not be lightly made and referred to Fullagar J's observation in *Ziems v Prothonotary of Supreme Court (NSW)*[14] as to the need to be "very sure of the facts before making so serious a finding". The Tribunal considered that the respondent's mental condition, as outlined by Dr Apel, provided a plausible basis for thinking that his conduct did not truly identify the respondent's character, which was supported by his prior and subsequent good conduct, his absence of anti-social personality and the assessment of a low probability of further similar conduct. The Tribunal also accepted Dr Apel's opinion of deep and genuine remorse which was confirmed by the respondent's "extraordinary" commitment to treatment to deal with his depressive illness and alcohol addiction, prompt repayment of the amounts misappropriated and prompt reporting to the QLS and cooperation with the investigation and these proceedings. Nor had there been any attempt to deny or minimise the misconduct. In those circumstances, the Tribunal found that the LSC had not demonstrated that the respondent's character was such that he was permanently unfit to practise.

[20] The Tribunal went on to consider other factors relevant to a removal recommendation and, in that regard, made some further observations about *Shand*, stating:[15]

> "McMurdo JA found that the Tribunal erred in not considering all of the *purposes served* by orders made under s 456 of the LP Act, and in particular, the *preservation of the good standing of the legal profession* and of the Roll as the *Court's endorsement of the fitness to engage in legal practice* of those enrolled.[16] Those considerations became relevant because the practitioner had no intention of returning to practise.[17] His Honour found, contrary to the Tribunal, that there was nothing to suggest any likelihood that the practitioner would become a fit and proper person to be on the Roll.[18] His character thus warranted an order that his name be removed from the Roll.[19]"

[21] The Tribunal continued:[20]

---

13 *Shand* at [60].
14 (1957) 97 CLR 279 at 296.
15 Reasons at [58].
16 *Shand* at [58].
17 *Shand* at [15], [56].
18 *Shand* at [59]; see also [42], [60], [61].
19 *Shand* at [61].
20 Reasons at [58]-[59].

> "In the present case it has not been established that the respondent's conduct, serious as it is, is a true reflection of his character. On Dr Apel's evidence, there has been a significant improvement in the respondent's mental state since the time of his misconduct, with the prospect of further improvement, no doubt relevant to the risk that the respondent's mental condition, would deteriorate, and he might engage in similar conduct in the future.
>
> Moreover, Dr Apel was of the opinion that the risk that the respondent would engage in similar conduct in the future was low. That opinion was not challenged. Dr Apel considered that the respondent's mental state had improved markedly since the time of the conduct. He anticipated further improvement with the passage of time. Given the respondent's slow progress under intensive treatment, there may be reason for some caution about the last-mentioned view. That caution does not provide a ground for finding that the respondent's character is such that he is unfit for practice; or that the probability is that he is permanently unfit."

[22] The Tribunal noted that its jurisdiction is protective of the public and stated:[21]

> "It is clear that the respondent's condition has not improved to the point where he is able to return to practice. *The [LSC] did not advance a case that the current state of the respondent's mental health warranted a recommendation for the removal of his name from the Roll*. Concerns about his condition can be addressed by an order requiring psychiatric evidence in support of a future application for a practising certificate.
>
> When these conditions are weighed up, they do not lead to the conclusion that the probability is that the respondent is permanently unfit to practise law."

[23] The Tribunal determined that an order suspending the respondent from practice was warranted in addition to a reprimand.[22] It also determined that an order for suspension would provide some recognition of the seriousness of the respondent's conduct and contribute to the general deterrence of other practitioners.[23] An order suspending the respondent for three years would allow the further improvements to the respondent's condition expected by Dr Apel and orders including imposing a condition requiring psychiatric reporting would provide a safeguard against the risk that the respondent's health did not sufficiently improve. Such orders provided adequate protection for the community.

Did the Tribunal fall into error in failing to have regard to the wider purposes of s 456 of the Act in choosing between suspension and removal

Submissions by the LSC

[24] The LSC contended that the Tribunal erred, as had the Tribunal in *Shand*, in failing to have regard to the wider purposes for the exercise of powers under s 456 of the

---

21 Reasons at [60]-[61].
22 Reasons at [63].
23 Reasons at [65].

Act, namely the preservation of the good standing of the legal profession and of the Roll as the Court's endorsement of the fitness of those enrolled.

[25] It was argued that the error stemmed from a misunderstanding of the decision in *Shand*. The Tribunal's error was said to be revealed by a comment made by the Tribunal in relation to *Shand*, and the wider considerations identified by McMurdo JA, that the Tribunal in that case had failed to consider. The relevant comment relied on was the Tribunal's comment that, "Those considerations [identified in *Shand*] became relevant because the practitioner had no intention of returning to practise." It was contended that the Tribunal was wrong to link the need for consideration of the wider purposes identified in *Shand* to the fact that the practitioner in that case had no intention of returning to practise. The point of *Shand* was to emphasise that, irrespective of whether a person intended to practise again, there were wider purposes for the making of an order under s 456 of the Act that ought be taken into account.

[26] As a result of the error made by the Tribunal, it failed to appreciate, as identified in *Shand*, the breadth of the purposes served by the orders. Those wider purposes being outlined by the objects of the Act as provided in s 3(a) to include:

> "… to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally …"

[27] Given the error in the exercise of the Tribunal's powers, it was submitted that it fell to this Court to re-exercise the discretion as to the orders that ought to be made under s 456 of the Act. Once the wider purposes of the Act were taken into account, it was appropriate to order the respondent's removal from the Roll. The LSC had argued before the Tribunal that there was a serious case of dishonesty[24] and that the sanction ought not to be limited to that contended for in written submissions below.[25] It was contended that, even if it be thought that the preference for removal from the Roll, as opposed to suspension, ought to have been expressed more clearly below, that ought not to stand in the way of this Court's intervention. The case involved a matter of public interest, such that, if there was error in the Tribunal's reasons, it ought to be corrected to avoid repetition.

Respondent's submissions

[28] The respondent submitted that the sentence of the Tribunal attacked by the LSC needed to be understood in the context of discussion by McMurdo JA of the "wider purposes" in *Shand*.[26] McMurdo JA referred[27] to the purpose of the broad discretion under s 456 of the Act to protect the public. *Shand* was a case in which there was no operative element of protection of the public since Shand did not intend ever to return to practise. In that type of case, if a practitioner's name was to be removed from the Roll, it was by reference to purposes other than the protective purpose. Hence, McMurdo JA gave some emphasis to the matters of the standing of the profession and the Court's endorsement of those who are enrolled. His Honour

---

24 AB at 128.
25 AB at 131.
26 *Shand* at [52]-[58].
27 *Shand* at [52]-[53].

did not disagree with the Tribunal's finding that there was no protective element[28] but held that it was necessary to have regard to the wider purpose of the powers.

[29] It was submitted that in the present case, the Tribunal's statement that "[t]hose considerations became relevant because the practitioner had no intention to return to practise", was no more than a comment on the type of case that *Shand* was, namely one where the basis for removal from the Roll was to be found not in any protective component but by reference to other considerations. The preceding sentence indicated a clear understanding by the Tribunal of the relevant passage from *Shand*. Accordingly, the LSC's contention that the Tribunal thought that the wider powers were only relevant when the practitioner had no intention of returning to practise, involved a misinterpretation of the Tribunal's statement.

[30] Further, it was submitted that it was apparent from the Tribunal's reasons that it had close regard to *Shand* and expressly noted the reliance by counsel for the LSC on that decision.[29] The Tribunal noted that the passages in *Shand* "stress the importance of the community being confident that only fit and proper persons are able to practise as lawyers and the need to preserve the good standing of the legal profession". In those circumstances, it was highly unlikely that consideration of those matters was overlooked or misunderstood.

Consideration

[31] I do not consider that the statement in the Tribunal's reasons relied upon evidenced error as contended for on behalf of the LSC. The statement did not reflect a misapprehension as to the decision in *Shand*, nor did the Tribunal fail to have regard to the wider purposes of s 456 of the Act.

[32] As the respondent submitted, the Tribunal's observation to the effect that the wider considerations identified in *Shand* became relevant "because the practitioner had no intention to return to practise", was no more than a factual observation that, in *Shand*, the relevance of the wider considerations was brought into sharper focus because of the practitioner's disavowal of any intention to engage in legal practice. However, as McMurdo JA stated in *Shand*, that "was not the end of the matter".[30] The fact that there might be no operative element of protection of the public did not eliminate a consideration of the broader interests of the public that were served by the removal of the name of an unfit practitioner. Nothing said by the Tribunal in this case indicated a mistaken view of *Shand*.

[33] In *Shand*, the Tribunal's finding was one of current, but not permanent, unfitness. McMurdo JA observed that, if the practitioner was not a fit and proper person to engage in legal practice, the wider purposes required that his name be removed from the Roll, absent something which indicated that he was likely to become a person who was fit to be a legal practitioner".[31] It was in that context that his Honour articulated the test of probable permanent unfitness as 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".[32]

---

28 *Shand* at [58].
29 *Shand* at [56] and [58].
30 *Shand* at [56].
31 *Shand* at [56].
32 *Shand* at [57].

[34] In the present case, the Tribunal[33] distinguished *Shand* and, while it considered that neither that case nor the more analogous discussion of *Watts v Legal Services Commissioner*[34] was determinative of the outcome, it observed that the differences with *Watts* were not sufficiently significant to point to a different result.[35] In *Watts*, the practitioner misappropriated funds from his trust account to meet the needs of his practice and replaced the funds before his wrongdoing was discovered. He had also falsified documents in an attempt to avoid detection. In setting aside the order that Mr Watts' name be removed from the Roll, the error identified by the Court was the failure to have regard to the significant psychological evidence. In particular, no proper regard was had to unchallenged evidence that the practitioner had developed resilience, capacity to cope under pressure and that he was functioning effectively and making good decisions.[36]

[35] It is abundantly clear that the Tribunal was alive to the need, when considering the purposes served by s 456 of the Act, to bear in mind the protective aspect of an order and also the broader purpose of preservation of the good standing of the profession and of the Roll. In that respect, the Tribunal had careful regard to the nature of the conduct in question which, although serious, was not a category of seriousness (such as that of bribing an official) as to indelibly mark the character of the respondent as unfit, when the prism of mental illness in which the conduct occurred was considered and the steps taken to treat that mental illness and alcohol abuse were taken into account, together with the genuine remorse of the respondent. The Tribunal considered that it was a combination of all of those factors that told against a conclusion of probable permanent unfitness such that an order for removal from the Roll was warranted. The reasoning, conclusion and orders of the Tribunal were open to it in the exercise of its discretion under s 456 of the Act.

[36] I do not consider that the ground of appeal has been made out. I would dismiss the appeal with costs.

[37] **McMURDO JA:** I agree with Philippides JA.

---

33 Reasons at [57] and [58].
34 [2016] QCA 224.
35 Reasons at [57].
36 *Watts* at [48].