SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v CBD* [2012] QCA 69
PARTIES:	**LEGAL SERVICES COMMISSIONER** (appellant) **v** **CBD** (respondent)
FILE NO/S:	Appeal No 9140 of 2011 QCAT No 255 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	27 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2012
JUDGES:	Muir JA and Margaret Wilson AJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the respondent pleaded guilty to possession of child exploitation material – where the respondent was sentenced to 12 months imprisonment wholly suspended with an operational period of two years – where the respondent was a solicitor with no previous criminal history – where the respondent had been deprived of his practising certificate as a result of the offence – where the appellant made application to QCAT seeking disciplinary orders against the respondent – where the Tribunal declined to impose further sanctions – whether the respondents conduct constituted unsatisfactory professional conduct and/or professional misconduct – whether the respondent was a fit and proper person to practice law – whether the Tribunal should have imposed further sanction on the respondent *Legal Profession Act* 2007 (Qld), s 9, s 68, s 419, s 420, s 452, s 456 *A Solicitor v Council of Law Society (NSW)* (2004) 216 CLR 253; [2004] HCA 1, cited

Barristers' Board v Darveniza (2000) 112 A Crim R 438; [2000] QCA 253, cited
Legal Services Board v McGrath [2010] VSC 266, cited
Legal Services Board v McGrath (No 2) [2010] VSC 332, cited
Legal Services Commissioner v Hewlett [2008] 2 Qd R 292; [2000] LPT 3, distinguished
Legal Services Commissioner v Madden [2009] 1 Qd R 149; [2008] QCA 301, cited
Legal Services Commissioner v Quinn [2008] LPT 19, cited
Ziems v Prothonotary of Supreme Court (NSW) (1957) 97 CLR 279; [1957] HCA 46, distinguished

COUNSEL: P T Davis, with B McMillan, for the appellant
T Pincus for the respondent

SOLICITORS: Legal Services Commission for the appellant
Brian Bartley & Associates for the respondent

[1] **MUIR JA: Introduction** The respondent, a solicitor, pleaded guilty to possession of child exploitation material and was sentenced to 12 months imprisonment wholly suspended with an operational period of two years. He is a middle aged male with no criminal history and a previously unblemished professional record. The offending occurred when the respondent, to use the words of the sentencing judge, "stumbled upon" the offending material when looking for legal adult pornography. His mistake, according to the sentencing judge, was that he failed to deal with the material that had inadvertently come before him and continued to look at it. The offending material was stored with a greater mass of material which was not unlawful and the sentencing remarks recorded that the vast majority of the offending material fell at the lower end of the spectrum of offensiveness for the type of material under consideration.

[2] A psychiatric report before the judge expressed the opinion, in effect, that the respondent had no abnormal sexual urges or conditions and that he was now cognizant of the importance of being careful not to access offending material and presented a low risk of reoffending. The psychiatrist's opinion was that the respondent had an "avoidant personality disorder" which meant that his relationships with others were marred by "nervousness, anxiety and apprehension" and resulted in his avoiding social interactions. The condition did not pose a threat to others.

[3] In early 2010, shortly after his conviction, he gave notice to the Queensland Law Society of a "show cause event" under s 68(1) of the *Legal Profession Act* 2007 (Qld) (the Act) and was deprived of a practising certificate by resolution of the Queensland Law Society. The appellant made application under s 452 of the Act to the Queensland Civil and Administrative Tribunal (QCAT) seeking disciplinary orders pursuant to s 456 of the Act. The appellant alleged that the respondent's offending conduct constituted unsatisfactory professional conduct and/or professional misconduct. The Tribunal declined to find that the respondent was not a fit and proper person to resume practice. It declined also to impose further sanctions on the respondent apart from ordering that he pay the appellant's costs of the proceeding fixed at $1,500. The appellant appeals against the Tribunal's decision.

[4] I now propose to address the grounds of appeal in the order in which they were addressed in the appellant's Outline of Argument.

The proceedings miscarried

[5] The argument advanced in support of this ground was to the following effect. A central question for the Tribunal was whether the respondent was unfit to practise. If he was unfit, then there was "professional misconduct" as defined in s 419(1)(b) of the Act. The Tribunal refused to make such a finding, but nevertheless considered the question of "penalty". Because there had been no finding of "professional misconduct" based on unfitness to practise, there was no basis upon which a penalty could have been imposed. Moreover, it was unclear whether a finding of "professional misconduct" had actually been made and, if it had been made, the basis on which it was made. As the basis upon which the Tribunal had decided the application was undisclosed, the proceedings miscarried.

Consideration

[6] The criticisms of the Tribunal's approach failed to have regard to the issues litigated before the Tribunal. Counsel for the appellant at first instance informed the Tribunal that it was "accepted that the conduct in question constitutes professional misconduct" and the only matter in contention between the parties was the order which the Tribunal should make. Counsel for the respondent candidly acknowledged to the Tribunal that the subject offence was "very serious". He then set out to establish that at the time of the hearing, the respondent was a "fit and proper person".

[7] Having regard to the way in which the parties approached the matter before the Tribunal, there was no need for the Tribunal to make an express finding that the subject offending constituted professional misconduct. It is, however, implicit in the Tribunal's reasons that it made such a finding. It said:

> "On any view the offence here was a serious one. The circumstances do not fall within the definition of *unsatisfactory professional conduct* because they did not occur in connection with [the respondent's] practice of the law, and have no apparent connection with his standards of competence and diligence in that respect. His conviction for a serious offence, happening otherwise than in connection with the practice of the law, places the matter more obviously within the definition of *professional misconduct*."[1]

[8] The Tribunal then went on to observe that:

> "The more pressing issue for the Tribunal, squarely raised in the submissions from the parties, is whether he is not, therefore, a fit and proper person to engage in legal practice."[2]

[9] The Tribunal and the parties, rightly, were concerned with the position in this respect at the time of hearing.

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1 Record at 166 [10].
2 Record at 167 [11].

[10] It is implicit also in the discussion of penalty that the Tribunal was of the view that its power to impose a penalty had been enlivened because the respondent had been guilty of "professional misconduct".[3]

[11] This ground was not made out.

Ground 2 – The Tribunal erred by failing to find that the respondent's conduct amounted to "professional misconduct"

[12] The discipline application filed by the appellant alleged that the respondent was "guilty of unsatisfactory professional conduct and/or professional misconduct". It was submitted that by failing to make a positive determination in relation to that allegation, the Tribunal failed to "hear and decide each allegation stated in the discipline application".[4]

Consideration

[13] For the reasons given in relation to ground 1, there is no substance in this ground.

Ground 5 – The Tribunal ought to have found that the respondent was not a fit and proper person to engage in legal practice

[14] It was contended that the Tribunal erred by applying principles established by courts in relation to the exercise of the original jurisdiction of Supreme Courts to regulate the conduct of their officers rather than following and applying the statutory scheme. It was submitted that the Tribunal should have determined whether the conduct alleged in the discipline application fell within the second limb of "professional misconduct" in s 419 of the Act and, if so satisfied, proceed to address the question whether the unfitness was continuing at the time of the hearing of the discipline application.[5]

Consideration

[15] Again, it was unnecessary for the Tribunal to establish what was common ground between the parties and, as has been pointed out already, there was, at least implicitly, a finding of "professional misconduct".

Ground 3 – The Tribunal failed to take into account the suitability matters

[16] The appellant argued that in considering making a finding of "professional misconduct" pursuant to the second limb of s 419, the Tribunal "ought to have had regard to the suitability matters set out in s 9" of the Act. The relevant suitability matters were whether "the person is currently of good fame and character"[6] and "whether the person has been convicted of an offence… and if so… the nature of the offence".[7]

[17] In having regard to these matters, the Tribunal was required to consider that, at the time of the hearing, the operational period of the respondent's suspended sentence

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3 See *Legal Profession Act* 2007, s 456.
4 *Legal Profession Act* 2007 (Qld), s 453.
5 See *Legal Services Commissioner v Cousins* [2009] LPT 2 per Wilson J; and *Legal Services Commissioner v Dempsey* [2009] LPT 20 per Atkinson J.
6 Section 9(1)(a).
7 Section 9 (1)(c)(i).

had not expired. If it had done so the Tribunal could not have been satisfied that the respondent was "currently of good fame and character". It is inconceivable that a court would, upon consideration of an application for admission, find that an applicant who was still serving a suspended sentence of imprisonment was of "current good fame and character".

[18] Although the Tribunal in its reasons referred to observations of Warren CJ in *Legal Services Board v McGrath (No 2)*[8] to the effect that convictions for child pornography offences are not, by themselves, evidence that a person is not a fit and proper person to remain on the roll of solicitors, the Tribunal overlooked the following later observations of the Chief Justice in considering the "nature of the offence":

> "First, conviction for any serious breach of the law must call into question a practitioner's willingness and ability to obey the law which is integral to the civic office which they perform and the trust reposed in them to properly perform that function. As Spigelman CJ held in *New South Wales Bar Association*:
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> > 'The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or public in the performance of professional obligations by professional people.
> >
> > …
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> > Neither the relationship of trust between a legal practitioner on the one hand, and his or her clients, colleagues and the judiciary on the other hand, nor public confidence in the profession can be established or maintained, without professional regulation and enforcement.'
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> Secondly, the legal profession is one which demands both empathy and insight into the victims of criminal behaviour if it is to be performed to the standard expected by the courts, fellow practitioners and the general public. Any conviction which appears to show a disdain for such victims will raise a serious concern about a practitioner's professional and moral fitness to remain an officer of the court.
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> Finally, any suggestion that crimes committed at arm's length, such as those which involve child pornography, can be considered of lesser seriousness in deciding upon an individual's fitness to remain on the roll should be the subject of intense scrutiny. As Mason P observed in *New South Wales Bar Association v Hamman* in the context of tax fraud:
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> > 'I emphatically dispute the proposition that defrauding 'the Revenue' for personal gain is of lesser seriousness

[8] [2010] VSC 332 at [14]-[16].

> than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of 'victim' is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. 'The Revenue' may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud.'"

Consideration

[19] Section 419 and s 456 of the Act[9] relevantly provide:

> **"419 Meaning of *professional misconduct***
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> (1) *Professional misconduct* includes—
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> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
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> (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
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> (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.
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> **456 Decisions of tribunal about an Australian legal practitioner**
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> (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.
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> (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate —

[9] As in force at relevant times.

> (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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> …
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> (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;
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> …
>
> (7) The tribunal may find a person has engaged in unsatisfactory professional conduct even though the discipline application alleged professional misconduct."

[20] Section 419(2) does not require that regard be had to "suitability matters" in all circumstances in which it is being considered whether a legal practitioner is "a fit and proper person". Nevertheless, a consideration of "suitability matters" will normally be relevant to such a determination and they were relevant to the Tribunal's determination here. It is not the case that the Tribunal did not have regard to the suitability matters referred to by the appellant. The Tribunal was conscious of the existence of the suspended sentence. It was referred to early in the Tribunal's reasons and also in the last section of the reasons when the question of penalty was discussed. It was observed there that the respondent had "served his suspended sentence, without default". Counsel for the appellant tentatively submitted that this may have revealed an erroneous understanding by the Tribunal that the operational period of the suspended sentence had expired at the time of the hearing. I do not consider that this is the preferred construction of the Tribunal's observations which, to my mind, were directed to the respondent's behaviour whilst under sentence.

[21] The question of the respondent's current "good fame and character" was considered in detail by the Tribunal. Relevant authorities were discussed, including *Ziems v Prothonotary of Supreme (NSW)*;[10] *A Solicitor v Council of Law Society of (NSW)*;[11] *Barristers' Board v Darveniza*;[12] *Legal Services Board v McGrath (No 1)*;[13] *Legal Services Board v McGrath (No 2)*;[14] and *Legal Services Commissioner v Quinn*.[15] Careful consideration was given to the facts and circumstances of the offending conduct; the psychiatric evidence; the respondent's

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10 (1957) 97 CLR 279.
11 (2004) 216 CLR 253.
12 (2000) 112 A Crim R 438.
13 [2010] VSC 266.
14 [2010] VSC 332.
15 [2008] LPT 19.

conduct in relation to the criminal proceedings and, subsequently, in relation to his discontinuance of practice and cooperation with all relevant authorities; questions of remorse; insight into the offending conduct; and the prospects of the respondent's reoffending.

[22] In considering the nature and significance of the offending conduct, the Tribunal considered and distinguished *Legal Services Board v McGrath (No 2)*.[16]

[23] Counsel for the appellant accepted in the course of argument that there could be no inflexible principle that a person serving a suspended sentence was necessarily, by that fact alone, not "of good fame and character" and thus not a fit and proper person to engage in legal practice. He placed some reliance on *Ziems v Prothonotary of Supreme Court (NSW)*,[17] but it does not support the appellant's contentions. The first to thing to note about *Ziems* for present purposes is that it concerned the fitness to practise as a barrister. The particular role of counsel as an officer of the Court appearing before the Court was a relevant consideration.[18] The next matter to note is that the appellant barrister had been convicted of manslaughter in circumstances in which, as McTiernan J pointed out,[19] "…necessarily involves that the Crown made out its accusation that the appellant committed the offence by driving his motor car while he was drunk". McTiernan J observed that to "drive a motor car in this condition is evil conduct; because calculated to cause bodily injury or death".

[24] Nevertheless, despite the nature of the conviction, all members of the Court other than McTiernan J considered it necessary to go behind the conviction and sentence in order to determine whether the appellant should have been disbarred. By this process, despite the gravity of the offending conduct, the decision of the Full Court of the Supreme Court of New South Wales ordering that the appellant's name be removed from the roll of barristers was overturned. In considering the matters to which a court should have regard in deciding whether to disbar a barrister, consequent upon his being convicted of a serious offence, Fullagar J observed:

> "In a case of this kind it is essential, in my opinion, to begin by defining the ground on which an order of disbarment is to be made. It is stated in general terms by saying that the person in question is not a fit and proper person to be permitted to practise at the Bar. The next question is — at what facts is it proper to look in order to see whether that conclusion is established? The answer must surely be that we must look at every fact which can throw any light on that question. But, descending to particularity, is it the conviction that is the vital thing, unchallengeable and conclusive of the ultimate issue? Or must we look beyond the conviction, and endeavour to ascertain, as best we can on the material before us, the facts and circumstances of the particular case? To my mind, there can be only one answer to these questions. The conviction is not irrelevant: it is admissible *prima facie* evidence bearing on the ultimate issue, and may be regarded as carrying a degree of disgrace itself. But, in the first place, its weight may be seriously affected by circumstances attending it, and it must be permissible to look at the conduct of the trial. And, in

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16 [2010] VSC 332.

17 (1957) 97 CLR 279.

18 See per Dixon CJ at 285-286; per Fullagar J at 287-288; and per Kitto J at 298.

19 At 287.

> the second place, it is on what the man did that the case must ultimately be decided, and we are bound to ascertain, so far as we can on the material available, the real facts of the case. It is only when we have done this that we can be in a position to characterise the conduct in question, and to see whether we are really justified in saying that a man is disqualified from practising his profession."[20]

[25] Fullagar J, although of the view that neither disbarment nor suspension should be ordered, was prepared to assent to an order of suspension during the appellant's term of imprisonment, "[h]aving regard, however, to the incongruity [of holding out the respondent to members of the public as a fit and proper person to act for them in legal matters while serving a gaol sentence] and to the views of the Council of the Bar".[21] Kitto J, although considering that suspension was inappropriate, was prepared to assent to such an order to permit it to be made as he thought that "it [could] do no harm". In his view, if the appellant's conviction and imprisonment were held not to disqualify the respondent "logically that should be the end of the case". He added, "[t]here can be no question of imposing a punishment additional to the imprisonment, and as far as I can see there is no purpose to be served by adding a *de jure* suspension to the *de facto* suspension which the appellant's incarceration produces while it lasts".[22] Taylor J agreed that it was incongruous "…if the appellant, whilst in prison, is to be entitled to hold himself out as a person entitled to practise as a barrister".[23]

[26] Counsel for the respondent made the point that although a sentence of imprisonment which is wholly suspended remains a sentence of imprisonment, the term of imprisonment is not actually served unless the prisoner offends during the operational period and an order is made under s 146 or s 147 of the *Penalties and Sentences Act* 1992 (Qld). Accordingly, there are fundamental differences between a term of imprisonment of 12 months and a term of imprisonment of 12 months wholly suspended with an operational period of two years.

[27] This ground was not made out.

Ground 4 – The Tribunal failed to take into account, or alternatively, failed to take proper account, of the fact of conviction of the offence and the effect of s 420 of *Legal Profession Act* 2007

[28] Section 420 of the Act provides that "conduct for which there is a conviction for a serious offence" is capable of constituting "professional misconduct". The subject offence was clearly a "serious offence", although under the common law it is not the fact of a conviction for a serious offence that constitutes "professional misconduct", but rather the offending behaviour itself. The position under the Act is different. Section 420 demonstrates a legislative intention "to recognise the significance of convictions for serious offences in determining whether certain conduct amounts to 'unsatisfactory professional conduct' or 'professional misconduct'". A legal practitioner's conviction for a "serious offence" may be taken by the Tribunal as an indication of the practitioner's unwillingness to abide by the law. Reference was made to the following observations of de Jersey CJ in *Legal Services Commissioner v Hewlett*:[24]

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20 At 288.
21 At 297.
22 At 300.
23 At 302.
24 [2008] 2 Qd R 292 at 297 [24].

> "One of the substantial obligations of a legal practitioner is to uphold the law, and to ensure the due application of the law in furthering his or her clients' affairs. The practitioner's capacity and commitment in those regards will be thrown into question where the practitioner is himself or herself guilty of a substantial contravention of the law, knowingly and deliberately, and for his or her own financial advancement."

[29] As "fitness" must be considered in its statutory context, failure to consider s 420 was a serious omission.

Consideration

[30] The passage from the reasons in *Hewlett* on which the appellant relied is not particularly on point. Here, unlike in *Hewlett*, there was no motive of "financial advancement". Nevertheless, it is beyond dispute that a practitioner's conviction for a serious offence is relevant as it goes to a practitioner's "willingness and ability to obey the law which is integral to the civic office which [practitioners] perform and the trust reposed in them to properly perform that function"[25] and to the maintenance of public trust and confidence in the legal profession.[26] Of course, s 420 makes a conviction for a serious offence a relevant consideration in the determination of the existence of "unsatisfactory professional conduct or professional misconduct". The Tribunal was cognizant of that. The reasons expressly state that under s 420 "unsatisfactory professional conduct" or "professional misconduct" may be found "if there is a conviction for a serious offence". That preceded the remark that "On any view the offence here was a serious one". There is thus no reason to conclude that the Tribunal failed to take into account these relevant considerations or that it otherwise failed to have due regard to the statutory scheme.

Ground 1 – The Tribunal's order was manifestly inadequate

[31] The appellant contended that although describing the respondent's offending as serious, the Tribunal must have failed to properly take the gravity of the offending into account because of its failure to impose any further sanction on the respondent. Counsel for the appellant quoted the above passage from Warren CJ's reasons in *McGrath (No 2)* in which the heinous nature of child pornography is explained and which emphasised that in imposing or deciding whether to impose disciplinary penalties "regard should primarily be had to the protection of the public and the maintenance of proper professional standards".[27] Protection of the public and the maintenance of proper professional standards, it was said, required the respondent's removal from the roll of legal practitioners or, at the least, his suspension from practice until the end of the operational period of the suspended sentence.

Consideration

[32] The circumstance of the respondent's offending and his own professional and personal circumstances were discussed in some detail at the commencement of these reasons. Those facts explain why the sentencing judge imposed a wholly suspended sentence and why the Tribunal declined to impose any further sanction on the respondent. Depriving the respondent of his ability to earn a living through the

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25 *Legal Services Board v McGrath (No 2)* [2010] VSC 332 [14].

26 *NSW Bar Association v Cummins* (2001) 52 NSWLR 279 at 284.

27 *Legal Services Commissioner v Madden* [2009] 1 Qd R 149 at 122.

practice of his chosen profession will harm him and do nothing to maintain public confidence in the legal profession or otherwise serve the good of the legal professional or the public. The appellant has been severely punished. In addition to the sentence imposed on him in the District Court, his ability to practise has been effectively curtailed initially by his being deprived of a practising certificate and then by the effect of his conviction and proceedings before the Tribunal and this Court.

[33] There are also good reasons for concluding that the imposition of further sanctions would impact more heavily on the physical and mental health of the respondent than would be the case with persons without the type of psychological difficulties under which the respondent labours. Indeed, the evidence suggests an increase in the already present risk of suicide. Although primary regard must be had to the protection of the public and the maintenance of proper professional standards, it does not follow that the impact of penalties on a practitioner, particularly insofar as they may affect the practitioner's health and ability to practise in future, are irrelevant. It should not be overlooked that the respondent practised with apparent competence and success without any blemish on his professional record. There is every expectation that he will continue to do so and the offending conduct, which is unlikely to reoccur, does not bear directly on the performance of the respondent's work as a solicitor or on his relationship with clients.

[34] This ground has not been made out.

Ground 6 – The Tribunal's finding that the respondent was a fit and proper person to engage in legal practice was unreasonable and against the weight of the evidence

[35] This ground was not made out for the reasons already given.

Conclusion

[36] For the above reasons I would order that the appeal be dismissed with costs.

[37] Because of the psychiatric evidence before it, the Tribunal ordered that publication of any information containing any details of the subject offence be prohibited. Similar psychiatric evidence was before this Court. After considering such evidence and having regard to the fact that the respondent would have had the full protection of the Tribunal's order were it not for the appellant's appeal, I would follow the unusual course of delivering reasons which delete all reference to the name of the respondent. I note that counsel for the appellant did not oppose such a course.

[38] **MARGARET WILSON AJA:** I agree with the order proposed by Muir JA and with his Honour's reasons for judgment.

[39] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the order proposed by his Honour.