HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

A SOLICITOR APPELLANT

AND

THE COUNCIL OF THE LAW SOCIETY OF NEW SOUTH WALES RESPONDENT

A Solicitor v The Council of the Law Society of New South Wales
[2004] HCA 1
4 February 2004
S406/2002

ORDER

1. *Appeal allowed in part.*

2. *Set aside declarations 1(a) and 2, and the order that the name of the appellant be removed from the Roll of Practitioners, made on 12 March 2002 by the Court of Appeal of the Supreme Court of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation:

P L G Brereton SC for the appellant (instructed by the appellant)

J E Griffiths SC with N J Beaumont for the respondent (instructed by R J Collins, Law Society of New South Wales)

CATCHWORDS

A Solicitor v The Council of the Law Society of New South Wales

Legal practitioners – Solicitors – Jurisdiction of the Supreme Court with respect to the discipline of legal practitioners – Declaration of professional misconduct in circumstances where person convicted of sexual offences – Declaration of professional misconduct in circumstances where person failed to disclose fact of conviction of offence but where conviction ultimately set aside on appeal – Duty of candour to professional association – Distinction between professional misconduct and purely personal misconduct – Removal from Roll of Practitioners on basis that person not a fit and proper person to be a legal practitioner – Relevance of rehabilitation and character – Relevance of findings of professional misconduct to question of whether fit and proper person.

Words and phrases – "inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners", "professional misconduct", "fit and proper person to be a legal practitioner".

Legal Profession Act 1987 (NSW), ss 127, 171M.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ. This is an appeal by a solicitor against a decision of the Court of Appeal of New South Wales[1] making declarations that he was guilty of professional misconduct in two respects, and that he is not a fit and proper person to be a legal practitioner of the Supreme Court of New South Wales, and ordering that his name be removed from the Roll of Legal Practitioners. The appellant's name, and the names of members of his family, were not stated in the reasons for judgment of the Court of Appeal to ensure compliance with s 11 of the *Children (Criminal Proceedings) Act* 1987 (NSW). This requirement arises from the nature of the offences referred to in the declarations, and the ages of the victims. It is appropriate for this Court to follow the same course and no party suggested otherwise.

Disciplinary jurisdiction of the Supreme Court

2 The appellant was born in 1962 and admitted as a solicitor of the Supreme Court in 1987. This was before the commencement of the *Legal Profession Act* 1987 (NSW) ("the Act"), which in turn was amended by the *Legal Profession Reform Act* 1993 (NSW) ("the 1993 Act"). The 1993 Act introduced the term "legal practitioner" and the provision in the Act (s 17) stating that "[p]ersons cannot be admitted or enrolled as barristers or solicitors", that "[a]ny inherent power or jurisdiction of the Supreme Court to admit barristers and solicitors (or legal practitioners) is revoked", and that the Charter of Justice[2] "remains revoked ... in so far as it relates to the admission of barristers, advocates, proctors, solicitors and attorneys". However those changes did not affect what in s 171M was identified as "[t]he inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners".

3 It is that "inherent power or jurisdiction" which was exercised in the present case. The expression "inherent jurisdiction" usually is used with reference to the authority of the common law courts at Westminster which was conferred on the Supreme Court by s 2 of 4 Geo IV c 96[3]. However, detailed and specific provision with respect to the legal profession in New South Wales was

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1 *The Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62.

2 Issued under 4 Geo IV c 96 (1823).

3 *Grassby v The Queen* (1989) 168 CLR 1 at 16-17.

made by cl X of the Charter of Justice. Among other things, cl X authorised the Supreme Court to admit "fit and proper Persons to appear and act as Barristers, Advocates, Proctors, Attorneys and Solicitors". A power of removal or suspension was incidental to that of admission[4].

4 The declarations made by the Court of Appeal were in the following terms:

> "1. [The appellant] is guilty of professional misconduct in that:
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> (a) the [appellant] engaged in conduct for which he was, on 20 February 1998, convicted by the Sutherland Local Court of four counts of aggravated indecent assault on [a] person under the age of 16 years contrary to s 61M of the *Crimes Act* 1900 (NSW);
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> (b) prior to serving his affidavit sworn on 31 August 2001 in these proceedings the [appellant] failed to disclose to the [respondent] that he had been convicted on 7 November 2000 of further charges of aggravated indecent assault on a person under the age of 16 years contrary to s 61M of the *Crimes Act* 1900 (NSW) notwithstanding that at the time of that conviction the [appellant] was aware that the [respondent] was actively considering whether disciplinary action should be taken against the [appellant] in respect of previous similar convictions as set out in the [respondent's] letter dated 9 October 2000.
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> 2. in the light of the matters in Paragraph 1 above the [appellant] is not a fit and proper person to be a Legal Practitioner of the Supreme Court of New South Wales."

5 The order removing the appellant's name from the roll followed those declarations.

6 By the time the matter came before the Court of Appeal, the convictions referred to in declaration 1(b) had been quashed as a result of a successful appeal,

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4 *In re Davis* (1947) 48 SR (NSW) 33 at 35-36; affd (1947) 75 CLR 409 at 414, 419, 423, 427.

but, as the form of the declaration indicates, the essence of that aspect of the complaint of professional misconduct was failure to disclose, rather than the conduct giving rise to the convictions.

7 There was a procedural complication, in that the respondent originally instituted a complaint against the appellant under Pt 10 Div 3 of the Act, but, because of a failure to comply with s 171J of the Act, the Administrative Decisions Tribunal, Legal Services Division, ("the Tribunal"), decided it had no jurisdiction. The respondent then invoked the inherent jurisdiction of the Supreme Court of New South Wales referred to in s 171M of the Act. It should also be mentioned that, in the Court of Appeal, the respondent alleged an additional matter of professional misconduct on the part of the appellant. The Court of Appeal decided that aspect of the case in favour of the appellant, and it has played no part in the proceedings in this Court.

History and background of professional discipline

8 Part 2 of the Act deals with "Admission of legal practitioners". It empowers the Supreme Court to admit and enrol, as a legal practitioner, a person approved by the Legal Practitioners Admission Board as a suitable candidate for admission (s 4). A candidate must not be admitted as a legal practitioner unless the Admission Board is satisfied that he or she is of good fame and character (s 11). A legal practitioner is, on and from admission, an officer of the Supreme Court (s 5). The Supreme Court Rules 1970 (NSW) require a person, upon admission, to sign the Roll of Legal Practitioners in the Court (Pt 65C, r 2(2)).

9 The Act stipulates that a legal practitioner must not practise without being the holder of a current practising certificate (s 25(1)). The Council of the Law Society of New South Wales ("the Council"), the present respondent, may grant a practising certificate to a legal practitioner authorising that person to practise as a solicitor and barrister (s 28(1)). The Administrative Decisions Tribunal[5], on complaint by bodies including the Council (s 167(1)), may make certain orders, including removal from the roll of legal practitioners, if the legal practitioner is guilty of "professional misconduct". That term (and the distinct expression "unsatisfactory professional conduct") are defined in s 127.

10 The *Legal Practitioners Act* 1898 (NSW) ("the 1898 Act") was repealed by the Act with effect from 1 January 1988. In its original form, the 1898 Act

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5 Established by the *Administrative Decisions Tribunal Act* 1997 (NSW).

conferred no such disciplinary powers as those now found in Pt 10 upon any professional or other body outside the Supreme Court. Such provision was first made by the changes effected by the *Legal Practitioners (Amendment) Act* 1935 (NSW). Thereafter, Pt X of the 1898 Act (ss 75-81) conferred such powers upon The Statutory Committee of the Incorporated Law Institute of New South Wales with respect to "charge[s] and question[s] as to the professional misconduct".

11 However, s 79 stated:

> "Nothing in this Act contained shall prejudice, diminish, or affect the jurisdiction, powers and authorities which are exercisable by the Court over solicitors."

This was described by Wallace P, with whom Jacobs and Asprey JJA agreed, in *Re an Application by a Solicitor*[6], as a provision "specially preserving the inherent jurisdiction of [the Supreme Court] as an overriding jurisdiction in connexion with the discipline and control of its officers in proper cases". The same jurisdiction is preserved in the current Act. Part 10 of the Act (which includes ss 127 and 167 to which reference has been made) deals with "Complaints and Discipline". It sets up a scheme with the objects of redressing consumer complaints of users of legal services, ensuring compliance by practitioners with the necessary standards of honesty, competence and diligence, and maintaining at a sufficiently high level the ethical and practice standards of the legal profession (s 123). The statutory procedures for making, and dealing with, complaints of professional misconduct and unsatisfactory professional conduct, which, as indicated above, are both defined expressions, were examined in *Barwick v Law Society of New South Wales*[7]. The definition of "professional misconduct" in s 127(1) states that for the purposes of Pt 10, it includes, among other matters:

> "(a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or

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6 [1966] 1 NSWR 42 at 42. See also *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 189; *Weaver v Law Society of New South Wales* (1979) 142 CLR 201 at 207 per Mason J.

7 (2000) 74 ALJR 419; 169 ALR 236.

(b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners."

The expression "unsatisfactory professional conduct" is defined in s 127(2) for the purposes of Pt 10 as including:

> "conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner."

The Tribunal, if satisfied that a legal practitioner is guilty of professional misconduct, may order that the name of the practitioner be removed from the roll of legal practitioners (s 171C). Division 10 of Pt 10 contains the following provision:

> "171M (1) The inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners is not affected by anything in this Part or Part 2.
>
> (2) That inherent power or jurisdiction extends to interstate legal practitioners and locally registered foreign lawyers."

12 As Griffith CJ pointed out in *Southern Law Society v Westbrook*[8], the question that arises when the power of the Supreme Court is invoked in a case such as the present is not one of punishment, but "whether the Court is justified in holding out the [appellant] as a fit and proper person to be entrusted with the duties and responsibilities of a solicitor". The appellant is the Supreme Court's officer, his name is on the Supreme Court's roll of legal practitioners, and s 171M of the Act preserves the Supreme Court's jurisdiction in connexion with the discipline and control of its officers. A similar jurisdiction is preserved in other States[9]. The expression "professional misconduct" was not defined in Pt X of the 1898 Act but by the time of its inclusion in 1935 had a legislative pedigree in

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8 (1910) 10 CLR 609 at 612.

9 eg *Queensland Law Society Incorporated v Smith* [2001] 1 Qd R 649; *Law Society of South Australia v Rodda* (2002) 83 SASR 541.

England. This included s 13 of the *Solicitors Act* 1888 (UK). Of that statute, Lord Wright said in *Myers v Elman*[10]:

> "[T]here was established the Disciplinary Committee appointed by the Master of the Rolls from members or past members of the Council of the Law Society. This Committee was charged with the duty of investigating complaints against solicitors and reporting their decision to the Court, which could then, if so minded, strike the solicitor off the Roll or suspend him. It was not until 1919 that by the Solicitors Act of that year, the Disciplinary Committee was itself given power to strike off the Roll or to suspend or to order payment of costs by the solicitor subject to an appeal to the Court. But the jurisdiction of the Master of the Rolls and any judge of the High Court over solicitors was expressly preserved, as it now is by s 5, sub-s 1 of the Solicitors Act, 1932."

13 Section 13 of the 1888 statute used the term "misconduct" which was construed in *In re A Solicitor; Ex parte Law Society*[11] by adopting what had been said by the Court of Appeal in *Allinson v General Council of Medical Education and Registration*[12] concerning the phrase "infamous conduct in any professional respect" in the powers conferred upon the English medical professional body by s 29 of the *Medical Act* 1858 (UK). Questions of "professional misconduct" also arose somewhat indirectly. The dispute in *Myers v Elman*[13] arose from an application to a trial judge, after verdict, that the solicitor for the defendants pay the plaintiff's costs on the ground of his professional misconduct of the proceedings. This, as Dawson J pointed out in *Knight v F P Special Assets Ltd*[14], appears to be a summary jurisdiction which rests upon the duty of the court to supervise the conduct of its solicitors.

14 In New South Wales, the consideration of alleged "professional misconduct" entered the reasoning of the decisions of the Supreme Court not

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10 [1940] AC 282 at 317-318.

11 [1912] 1 KB 302 at 311-312.

12 [1894] 1 QB 750. See *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) (Pt 1) 136 at 142-143.

13 [1940] AC 282.

14 (1992) 174 CLR 178 at 199. See also per McHugh J at 213.

only where the statutory powers of professional bodies which used or referred to the expression were in issue, but where the Court was exercising its implied authority, stemming from cl X of the Charter of Justice, and the critical criterion was that of a "fit and proper person" to remain on the roll.

15 In an appropriate case, where there is utility in so doing[15], the Supreme Court may make a declaration of professional misconduct either with or without an order removing the name of a practitioner from the roll. However, given the particular meaning now given that expression by the definition of "professional misconduct" in s 127(1) of the Act, some care may be necessary to indicate the sense in which the term is being used. A declaration that certain conduct constitutes professional misconduct may be of importance for the information of others[16]. Furthermore, it may be relevant to future proceedings for removal, or readmission, of the practitioner[17]. In *Myers v Elman*[18], Lord Wright distinguished conduct by a solicitor of litigation in a fashion amounting to professional misconduct which was not of so serious a character as to justify suspension or striking off from the Roll. Thus not all cases of professional misconduct justify or require a conclusion that the name of a practitioner should be removed from the roll[19]. Where an order for removal from the roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner of the Supreme Court upon whose roll the practitioner's name presently appears[20].

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15 See the remarks of Priestley JA in *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201 at 211.

16 eg *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) (Pt 1), 136; *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279.

17 *Bridges v Law Society of New South Wales* [1983] 2 NSWLR 361 at 362.

18 [1940] AC 282 at 318.

19 eg *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201.

20 *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 297-298.

The decision in *Ziems'* case

16 Where a practitioner appeals to this Court from an order of the Supreme Court removing him or her from the roll of practitioners, two potentially countervailing considerations arise. They were referred to by Fullagar J in *Ziems v The Prothonotary of the Supreme Court of NSW*[21], who said:

> "[T]he appellant challenges what is not merely an exercise of discretion by the Supreme Court, but an exercise of discretion in a matter which is in a special sense the province of the Supreme Court as the highest court of New South Wales. It relates to the right of a man to practise in that court and in other courts of New South Wales over which that court exercises a supervisory jurisdiction in certain ways. On the other hand, the possibly disastrous consequences of disbarment to the individual concerned [are such that] a court to which an appeal comes as of right is bound to examine the whole position with meticulous care."

17 The present appeal required special leave, but the appellant has already obtained that leave. As his counsel pointed out, the Court of Appeal was exercising its jurisdiction at first instance. This is the appellant's one opportunity for appellate review of an adverse decision.

18 The case of *Ziems* provides an example of the need to examine "the whole position". There, a barrister had been convicted of manslaughter, and sentenced to imprisonment for two years. The Supreme Court concluded that the conviction and sentence constituted grounds in themselves for disbarring the appellant[22]. This Court declined to adopt that view, and considered the facts and circumstances of the case. It was a case where the particularity with which the facts were approached was important to a conclusion as to the barrister's fitness. He had been found guilty of unlawful homicide (in the form of manslaughter) and sentenced to imprisonment. Even when his offence was described with a little more detail, his position was not improved. He had been responsible for the death of a person while driving under the influence of alcohol. Yet, when the circumstances of the case were exposed, the picture changed materially. The appellant, while drinking at a hotel, had been attacked and beaten. He was

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21 (1957) 97 CLR 279 at 287-288.

22 (1957) 97 CLR 279 at 283.

seriously injured. A sergeant of police advised him to go quickly to hospital. The appellant asked the sergeant to drive him, but the sergeant went away leaving the appellant without assistance. The appellant then set out to drive himself to hospital, and, in the course of the journey, was involved in a fatal collision. The appellant was still in prison when his case was before this Court[23]. The order of the Supreme Court disbarring the appellant was set aside, and an order was made that he be suspended from practice during the remainder of his term of imprisonment.

19 In *Ziems*, the conduct of the practitioner which resulted in his conviction and prison sentence had nothing to do with his practice as a barrister. Fullagar J said[24]:

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

20 The present case was conducted on the basis that the definition of "professional misconduct" in s 127 of the Act did not apply, because the proceedings were brought in the inherent, not the statutory, jurisdiction. The dividing line between personal misconduct and professional misconduct is often unclear. Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct[25]. Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper

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23 (1957) 97 CLR 279 at 290.

24 (1957) 97 CLR 279 at 290.

25 eg *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 291 [66].

person to practise[26]. And there may be an additional dimension to be considered. It was explained by Kitto J in *Ziems*[27]:

> "It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."

21 Professional misconduct may not necessarily require a conclusion of unfitness to practise, and removal from the roll. In that regard, it is to be remembered that fitness is to be decided at the time of the hearing. The misconduct, whether or not it amounts to professional misconduct, may have occurred years earlier. At the same time, personal misconduct, even if it does not amount to professional misconduct, may demonstrate unfitness, and require an order of removal. The statutory definition in s 127 involves both concepts, and, where it applies, must be given effect according to its terms. However, when the Supreme Court is exercising its inherent jurisdiction, it has the capacity to determine, and act on the basis of, unfitness, where appropriate, without any need to stretch the concept of professional misconduct beyond conduct having some real and substantial connexion with professional practice. In a statutory context where the power of removal depends upon a finding of professional misconduct, it may be appropriate to give the expression a wider meaning, similar to that in s 127[28]. There is no such necessity in the present case.

22 The facts of the conduct referred to in declaration 1(a) exemplify the difficulty of which Kitto J spoke in *Ziems*. They also exemplify the importance

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26 eg *In re Davis* (1947) 75 CLR 409.

27 (1957) 97 CLR 279 at 298.

28 cf *Roylance v General Medical Council (No 2)* [2000] 1 AC 311.

that may attach to a consideration of the detailed subjective and objective circumstances of offending behaviour.

The complaints against the appellant

23 In early 1997, the appellant had been involved for some years in a relationship with a woman, B, to whom he is now married. She had four children, including two daughters aged 12 and 10 respectively. As has been noted, the appellant was admitted as a solicitor in 1987. He also had a promising career with the Australian Army Reserve. In 1990, he was promoted to the rank of Captain. In 1992, he left his employment as a solicitor, and served with the Royal Marines Reserve in the United Kingdom. He returned to Australia in 1993, and took employment as a solicitor, while continuing his active involvement in the Reserve. In August 1993, he met B. He had regular contact with B's children and often stayed overnight at her home. In 1996, he was graded in the Reserve for promotion to Major. In February 1997, he suffered two major personal setbacks. He and a number of other employees were made redundant by the solicitors for whom they worked. His father was diagnosed with mesothelioma. The appellant suffered depression, and also physical exhaustion resulting from extended hours of work which he took on as an instructor in Army special forces training. This was when he committed the four offences of indecent assault on two of B's daughters. The circumstance of aggravation of the offences was the age of the children. The offences occurred in late April and early May 1997. They involved removing the children's clothing, rubbing on the back, buttocks and stomach, and on one occasion touching a victim on the outside of the vagina.

24 Complaint about two of the matters was made by the children. The appellant admitted the offences, and also told the police of two other offences involving the same children. He sought professional help from a psychiatrist. In February 1998, the four charges came before a Local Court. The appellant pleaded guilty and was sentenced to three months imprisonment. He appealed to the District Court against the severity of the sentence. In May 1998, Judge Luland allowed the appeal, quashed the sentence, and in lieu deferred passing sentence in each case on condition that the appellant entered into a recognizance to be of good behaviour for three years. The judge said:

> "The factual circumstances are that he had a relationship with the two victims' mother during the period of the offences and indeed continues to have a relationship with her.

At the time of the offences ... I accept that his life was greatly disturbed by factors of employment being taken from him, due to a redundancy, and perhaps more stressing a very difficult period where his father was dying from a very awful disease.

[The appellant] is 36 years of age and a solicitor by profession. In normal circumstances one would say a person whose character would [be] expected to be exceptionally high, and he would be well aware of the seriousness of conduct such as that which he has committed.

Now that is easily said of course but one does not know the frailty of human beings, particularly when they go through very stressful periods in their life. This conduct that he engaged in seems quite obviously totally out of character for the appellant.

The assaults upon the children were not in my view the most serious examples of indecent assaults that one unfortunately sees all too often in these courts. They were in the main incidences [sic] of him pulling the children's pants down when they were in their bedroom. With the exception of one offence where he placed his hand on the stomach area of one of the children and his finger touched her vagina.

To the police he recognised the seriousness of his conduct and readily accepted it. He also, perhaps understandably was unable to understand himself why he did what he did and that again is probably part and parcel of it being so out of character, because all of the evidence before me is that he is otherwise a very reputable person, and has always been considered so by the children's mother, her parents and also her children.

The effect of his offending was readily admitted by him and indeed he brought two offences to light himself with the police officers, two of those for which he is now before the Court. He had pleaded guilty, and pleaded guilty from the first opportunity. Those matters in themselves show true contrition but what I believe shows even greater contrition and understanding by him, is his conduct after the events themselves, that is his ready involvement with counselling and assistance from Professor McConaghy [Professor Neil McConaghy, a specialist psychiatrist].

He has not denied the matters at any time. He has accepted the matters, and more so he has done all he can to place himself in a position where he ensures it does not happen again, that is to gain an understanding or attempt to gain an understanding of how and why this all happened.

He obviously is forgiven by the children's mother, she is here today in support of him, as is her father. There is material before me where the children themselves seem to have suffered no psychological harm, although one readily says that recognising that sometimes events such as this in children's lives does have a belated impact upon them in time to come. One never knows what is likely in that regard and one cannot overlook the possibility of it, but on present material before me, the children do not seem to be psychologically disadvantaged as a result of this. In fact they, I'm told and I accept, want the continuance of [the appellant] in their life as the father figure that he was before this all occurred.

Everybody seems to be supportive of him. The counsellors are supportive of him, the psychiatrists are supportive of him, and more importantly the family itself, who are after all the victims of this crime, continue to be supportive of him.

Those subjective elements of this offence weigh very heavily in my mind that it is an exceptional case. I do take account of what is said by the Court of Criminal Appeal of course, as I must, that normally offences such as these, would carry and should carry a custodial sentence, but my hands are not completely tied in that regard and I do consider this to be one of those exceptional cases.

It is not that [the appellant] is going unpunished. I accept that a punishment has already flowed in the sense that he's lost what was no doubt a very important part of his life, his involvement in the Army Reserve, that he no doubt put a lot of time and effort into to build up a career in that reserve. He has now lost that as a result of this matter.

He of course carries the shame of his conduct and he has to carry that shame with him in the eyes of those upon whom he committed the offence. He will have to overcome that as best he can but they want him in their lives, and he wants to be in their lives, but it will be in his mind at all times that he has had to appear before this Court in respect of these matters.

I do regard the offences as isolated, even though there were four offences. I regard them to be isolated offences, and I accept Professor McConaghy when he suggested there is a great likelihood that such behaviour would never occur again."

25 In April 2000, the appellant married B, who has supported him at all stages of the present proceedings.

26 Before the Court of Appeal, there was evidence of Professor McConaghy who treated the appellant, monthly, from June 1997. He said the appellant "has developed full awareness of the situations which led to his inappropriate behaviour and in view of his contrition and the stability of his personality I consider the risk of his re-offending to be minimal". There was also a report from the founder director of the Child Abuse Protection Centre who said that she regarded the appellant as a man of basically good character who was not a future risk. Three barristers and a solicitor gave character evidence in support of the appellant. One of the referees, who had distinguished service in the Army Reserve, and retired with the rank of Major-General, and who had also worked with the appellant in the legal profession, described him as a person who acted with probity, professionalism and honesty, and said that he would have no hesitation in working with him in the future. None of that evidence was challenged.

27 In July 1998, the Council of the Law Society resolved to institute disciplinary proceedings against the appellant under Pt 10 of the Act, based on his four convictions for indecent assault. Reference has already been made to the fact that, ultimately, those proceedings came to an end because, as a result of a procedural deficiency, the Tribunal found that its jurisdiction had not been properly invoked. That happened in October 2000. In the meantime, there occurred the succession of events giving rise to declaration 1(b).

28 In May 2000, one of the victims of the 1997 offences made further allegations of a similar nature against the appellant, who had recently married her mother. The appellant denied the allegations. The charges against him were heard in a Local Court on 23, 25 and 26 October 2000. On 7 November 2000, he was convicted and sentenced to imprisonment for two years. He appealed to the District Court. His appeal was heard in April 2001. Judge Tupman upheld the appeal. She quashed the convictions and sentences. The appellant has at all times maintained that the charges were false.

29 The Tribunal's decision that it had no jurisdiction to deal with the respondent's proceedings against the appellant was given on 9 October 2000. At the time, the new indecent assault charges were pending. On the same day, the respondent wrote to the appellant referring to the four convictions for the 1997 offences, indicating that it was considering further action and seeking any submissions he wanted to make. There was an exchange of correspondence. On 7 November, the appellant was convicted on the new charges, and sentenced. He

appealed. On 15 November 2000 the respondent wrote to the appellant again indicating that it was considering further action based on the 1997 conduct. On 17 and 21 November 2000, the appellant wrote to the respondent seeking to convince the respondent that it should not take such action. In that correspondence the appellant did not mention the new charges against him, or his convictions and sentence. On 3 April 2001, the convictions and sentences were quashed. On 24 May 2001, the respondent, still not aware of the new criminal proceedings, or the successful appeal, commenced proceedings in the Supreme Court under s 171M of the Act alleging that the 1997 conduct was professional misconduct, and seeking the removal of the appellant's name from the roll of legal practitioners. In August 2001, the appellant filed an affidavit in the Supreme Court proceedings in which he referred to the charges of 2000, and the successful appeal. The respondent then added a further charge of professional misconduct, being the failure of the appellant, in the correspondence of October-November 2000, to disclose the further charges and convictions. Although those convictions were ultimately set aside, the failure to disclose them was said to be a breach of the appellant's duty of candour to his professional association.

The findings of the Court of Appeal

30 The Court of Appeal found that this further allegation of professional misconduct was made out. That finding was correct, although the consequences that should follow will require further consideration. In October and November 2000, the appellant was engaged in correspondence with the respondent as to the course it should take in relation to his professional status. Although the specific focus of that correspondence was the conduct of the appellant in 1997, and although the respondent, being unaware of the new allegations, did not ask any questions about them, the appellant's professional obligations to the Law Society required him to disclose facts that were material to the respondent's decision as to what, if any, action to take against him. Giles JA was right to observe that the appellant "succumbed to the temptation of keeping from [the respondent] something clearly relevant to its decisions because he feared that disclosure would be against his interests." It is no excuse that he believed in his own innocence, and that his convictions were ultimately quashed. Frankness required the disclosure of the convictions and sentence, even if he regarded them as unjust, and hoped (or even expected) that they would be overturned on appeal. Furthermore, the appellant's duty of candour in his dealings with the Law Society was a professional duty, and its breach was

professional misconduct[29]. It was proper that it should be declared to be such. The appeal against declaration 1(b) must fail.

31 The finding of professional misconduct recorded in declaration 1(a) is, however, open to more serious challenge. In argument in this Court, and, apparently, in the Court of Appeal, it was common ground that the definition of professional misconduct in s 127 of the Act did not directly bear upon the proceedings because it was the inherent jurisdiction of the Supreme Court, not the special statutory scheme for dealing with complaints and discipline, that was invoked. The Court of Appeal did not base its reasoning on the application of s 127. As the Court of Appeal recognised, a finding that the appellant had been guilty of professional misconduct in 1997 did not necessarily require a conclusion that he was unfit to practise in 2002. Nor did a finding that he was unfit to practise, and that his name should be removed from the roll of legal practitioners, necessarily depend upon a characterisation of his conduct in 1997 as professional misconduct. These were related, but distinct, issues, and in considering the application of the respondent for an order that the appellant's name be removed from the roll, the ultimate issue for the Court of Appeal to consider was the appellant's fitness to remain a legal practitioner. Even so, the respondent pressed for a declaration that the appellant's 1997 conduct constituted professional misconduct, and the Court of Appeal addressed that issue.

32 The conduct of the appellant in committing the acts of indecency towards the two complainants in 1997 did not occur in the course of the practice of his profession, and it had no connexion with such practice. What it demonstrated as to his fitness to practise law, and to remain a member of the legal profession, was something to be considered in the context of the ultimate issue. However, the Court of Appeal found it to be professional misconduct, and not merely personal misconduct relevant to a decision as to his fitness.

33 Sheller JA, with whom Mason P and Giles JA agreed, said that professional misconduct "may extend beyond acts closely connected with actual practice, even though not occurring in the course of such practice, to conduct outside the course of practice which manifests the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice". He took this from some observations of Spigelman CJ in *New South Wales Bar*

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29 In *Weaver v Law Society of New South Wales* (1979) 142 CLR 201 this Court upheld a declaration that a solicitor who gave false evidence in the course of disciplinary proceedings was guilty of professional misconduct.

Association v Cummins[30], a case in which the Court of Appeal rightly held that the conduct in question was closely related to a barrister's professional activities, involving non-compliance with revenue laws affecting the earnings from those activities. The conclusion, in *Cummins*, that the conduct of the barrister amounted to professional misconduct involved no departure from the proper meaning of the expression. However, as was observed in *Ziems*, there is a real distinction between professional misconduct, and purely personal misconduct on the part of a professional, although there are cases in which the distinction may be difficult to apply.

34 The particular aspect of the appellant's conduct in 1997 which appeared to Sheller JA to manifest "qualities of character which were incompatible with the conduct of legal practice" was that "the conduct constituted a most serious breach of trust on the [appellant's] part given the paternal like role he had with the victims". It is true that the conduct involved a form of breach of trust, being the trust reposed in the appellant by the mother of the children (who later forgave, and married, him) and the children themselves. However, the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous. Declaration 1(a) should be set aside.

35 That conclusion, however, leaves open the principal question which the Court of Appeal had to consider, which was whether the 1997 misconduct, either alone or in combination with the professional misconduct the subject of declaration 1(b), demonstrated that, in March 2002 (the date of the Court of Appeal's decision) the appellant was not a fit and proper person to be a legal practitioner. It was declaration 2 that was the foundation of the order for the removal from the roll of the appellant's name. That declaration was expressed to be made "in the light of" declarations 1(a) and (b). A conclusion that declaration 1(a) was made in error requires this Court to reconsider the finding expressed in declaration 2. In that connexion, it is important to note that the Court of Appeal, correctly, had regard to the combined significance of the 1997 misconduct and the October-November 2000 breach of the appellant's duty of candour towards the Law Society. This Court should take the same approach.

36 The reasons for judgment of Sheller JA set out in full detail the objective and subjective circumstances of the appellant's conduct in 1997 and October-

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30 (2001) 52 NSWLR 279 at 289 [56].

November 2000, his evidence in chief and in cross-examination at the hearing before the Court of Appeal, the expert medical evidence, and the evidence of the character witnesses who supported the appellant. Most of this material was uncontested. While Sheller JA set out the reasons given by Judge Luland for imposing a non-custodial sentence in respect of the 1997 offences, in one important respect his appreciation of the situation differed from that of the sentencing judge. Judge Luland treated the four offences as "isolated". By that, he evidently meant that, although there were four offending acts, they represented one brief and uncharacteristic episode of behaviour, explained by the unusual pressures that bore upon the appellant at the time. Sheller JA said this "is not the case of an isolated offence followed by the taking of steps to ensure it would not be repeated".

37 Of course, the Court of Appeal was not bound by the views of the sentencing judge, but that description of the offences appears unduly severe. Furthermore, it related to a significant matter, that is to say, the appellant's rehabilitation. That rehabilitation was at the centre of the reasoning of Judge Luland, and was, in turn, important to the question of fitness to practise in 2002. The subjective evidence as to the appellant's character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed, and the appellant's efforts to obtain professional advice and assistance, formed part of the basis upon which counsel for the appellant sought to distinguish the case from *Law Society of South Australia v Rodda*[31], a case in which the Supreme Court of South Australia found unfitness on the part of a solicitor convicted of sexual offences. These cases turn upon a close consideration of their own facts, but the Court of Appeal in the present case appears to have given insufficient weight to the isolated nature of the 1997 offences, and the powerful subjective case made on behalf of the appellant.

38 The Court of Appeal was right to treat very seriously the breach of the duty of candour involved in the conduct the subject of declaration 1(b). Even so, the circumstances in which it occurred were extraordinary. Making full allowance for the need to consider the combined effect of the 1997 conduct and the conduct the subject of declaration 1(b), it should not be concluded that it had been shown that, at the time of the decision of the Court of Appeal in March 2002, the appellant was unfit to practise. Declaration 2 should be set aside.

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31 (2002) 83 SASR 541.

Conclusion and orders

39 In the result, that leaves standing the finding of professional misconduct in declaration 1(b), and the facts of the 1997 conduct. The parties joined in submitting that, if this Court were to disagree in a significant respect with the Court of Appeal, it should not remit the matter to the Court of Appeal, but should, as was done in *Ziems*[32], form, and give effect to, its own view as to the appellant's present fitness in considering what consequential orders to make.

40 By reason by the events of 1997, the appellant resigned from the Army Reserve, and has not renewed his practising certificate since the 1998-1999 year. In effect, he has been unable to practise for more than five years. It would have been appropriate for the Court of Appeal to make an order for his suspension, but an appropriate order would not have extended beyond the present time. The Court of Appeal made an order for costs against the appellant, and that should stand. In those circumstances, no further sanction is required.

41 The appeal should be allowed in part. Declarations 1(a) and 2 made by the Court of Appeal, and the order that the name of the appellant be removed from the Roll of Legal Practitioners should be set aside. There should be no order as to the costs of this appeal.

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32 (1957) 97 CLR 279 at 297, 300, 308-309.