

What price restitution?

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HURDLES TO BE OVERCOME: CO-OPERATION WITH THE AUTHORITIES MAY NOT BE ENOUGH WHEN SEEKING RE-ADMISSION.

A recent decision of the South Australian Supreme Court Full Court highlights the cumulative effect of a history of unprofessional conduct. Whilst the Court was not charged with determining an application for re-admission it indicated that an extensive prior history of unprofessional conduct including a Tribunal finding in 1993 and that it was unlikely full restitution would be made ought to be significant hurdles. In this matter the practitioner was 60 years of age when the matter came before the Court having been admitted in 1975.

The Supreme Court of South Australia on application by the Legal Practitioners Conduct Board proceeded to Order the removal of the name of Enzo Anthony Fardone to be struck from the roll of Legal Practitioners pursuant to Section 89(2)(d) of the *Legal Practitioners Act 1981*. The Court further Ordered that the Defendant pay the costs of the Plaintiff. [2011] SASCFC 138. The application was unopposed.

The striking off order arose from the conduct of the practitioner over many years in inappropriately dealing with trust monies. The monies applied by the Defendant in breach of trust were monies held in trust for an infant beneficiary of the estate.

It was found that the Defendant breached his fiduciary duties as executor and his duties as solicitor in that he applied \$50,000 from the estate of Margherita Di Salvo to the benefit of Empros Pty Ltd ("Empros") of which the Defendant was a director and substantial shareholder. Further breaches of the Defendants duties were found including his allowing Empros to be de-registered and not seeking its re-instatement as a company. The Defendant's conduct continued for a period of over nine years even though he was "on notice" of the allegations for some years. The Defendant failed to maintain adequate records of the transactions and the ultimate amount owing was not accurately quantified.

The Defendant did not oppose the making of the strike-off order. Despite submissions by the counsel for the Defendant as to the positive steps the Defendant had made including the co-operative attitude towards the authorities. The Full court noted that

"Whilst it is true that he has co-operated with the authorities, the fact is that the evidence against him was compelling."

The Court noted an

"unfortunate previous history of unprofessional

conduct".

These included a criminal conviction that involved unprofessional conduct and instances of ignorance or disregard of the obligations of a practitioner, including negligence and dishonesty. The court noted that he had been "dealt with by the Tribunal in 1993 for offences of dishonesty which included occasions where the practitioner had misled the court."

It was before the Court that despite making restitution in part the Defendant was unlikely to make full restitution due to his impecunious situation.

In conclusion the Court noted:

"Bearing in mind that this Court cannot bind any future courts in relation to any application by a practitioner for re-admission, it is my view that the combination of the serious offending in this matter, together with the unfortunate previous history of unprofessional conduct and the fact of a lack of full restitution, would make such an application a difficult one."

Counsel for the Defendant acknowledged that an application for re-admission could not even be considered until complete restitution was made. ●