

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV.2006-404-7227**

IN THE MATTER OF      the Law Practitioners Act 1982 section 118

BETWEEN                EDWARD POULTER LEARY  
                                  Appellant

AND                        NEW ZEALAND LAW  
                                  PRACTITIONERS DISCIPLINARY  
                                  TRIBUNAL  
                                  Respondent

Hearing:                16 August 2007

Court:                    Williams J  
                                  Venning J  
                                  Andrews J

Counsel:                Alan R Galbraith QC and Ian F Williams for Appellant  
                                  Grant M Illingworth QC for Auckland District Law Society  
                                  Paul N Collins for New Zealand Law Society

Judgment:              21 August 2007

---

**JUDGMENT OF THE FULL COURT**

---

*This judgment was delivered by the Full Court*

*on*

***21 August 2007 at 3:00pm***

*Pursuant to Rule 540(4) of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

*Date:.....*

- A. **The appeal is allowed. The appellant's name is restored to the roll of barristers and solicitors of the High Court of New Zealand but on condition that he does not practise as a solicitor in the future.**
- B. **If costs are in issue, they are to be dealt with in accordance with paragraph [57] of this judgment**
- 

## TABLE OF CONTENTS

	<i>Paragraph</i>
<i>Issue</i>	[1]
<i>Law</i>	[2]
Mr Leary's application:	
(1) <i>Summary</i>	[10]
(2) <i>Mr Leary's application</i>	[11]
(3) <i>Matters Preliminary to Tribunal Hearing</i>	[17]
(4) <i>Tribunal Hearing</i>	[21]
(5) <i>Reasons for Tribunal's decision</i>	[29]
Submissions	[33]
Discussion and Decision	[41]
Result	[56]

---

## REASONS OF THE COURT [Given by Williams J]

### Issue

[1] The appellant, Mr Leary, was admitted as a barrister and solicitor of this Court in 1972. He was struck off the roll of barristers and solicitors by order of the Court of Appeal on 15 April 1987 (*Auckland District Law Society v Leary* CA200/86). On 23 June 2006 he applied under the Law Practitioners Act 1982 s 116 for restoration of his name to the roll of barristers and solicitors (giving an

undertaking that, if successful, he would only apply to hold a practising certificate as a barrister). His application was dismissed by the Tribunal on 31 October 2006 (with reasons for that decision being given on 6 December 2006). He has appealed to this Court under s 118 of the Act against the refusal of his application. This judgment deals with that appeal.

## Law

[2] Other than in matters of emphasis, there was no difference between counsel as to the tests to be applied on the appeal.

[3] The appeal is to be by way of rehearing and the Court has power to “confirm, reverse, or modify” the Tribunal’s order (s 118(2)(3)).

[4] There is a variety of approaches to the manner in which an appeal by way of rehearing can be conducted, ranging from a full rehearing of all the evidence, through appeals – as this one is – on fact and law relating to the exercise of a discretion and without statutory guidelines, to appeals limited to points of law. In all such appeals, however, the onus is on the appellant to demonstrate the decision appealed from was wrong as lacking evidential foundation, wrong in law, demonstrating error in the exercise of discretion or on procedural grounds (*Herewini v Ministry of Transport* [1992] 3 NZLR 482, 489-490).

[5] Judicial expressions vary, too, as to the weight to be given on appeal to the Tribunal’s findings, particularly one, as here, with particular expertise in the field of determination. In *Sidney v Auckland District Law Society* [1996] 1 NZLR 431, 434 this Court held:

The Court must have regard to the views of an experienced tribunal and one which has considerable experience in dealing with matters of discipline within the legal profession. As was stated by Lord Widgery CJ in *Re a Solicitor* [1974] 3 All ER 853, 859:

“It has been laid down over and over again that the decision as to what is professional misconduct is primarily a matter for the profession expressed through its own channels, including the disciplinary committee.”

Similarly it is submitted that the professional body with lay assistance included is a body well fitted to assess the nature of the offending and the appropriate penalty.

and in *L v Canterbury District Law Society* [1999] 1 NZLR 467, 472-473 the proper approach was put in the following terms:

*Appeal principles*

The appeal is brought pursuant to s 118 of the Act. Mr Templeton pointed out that s 118(2) requires the appeal to be “by way of rehearing”. On the authority of *Wellington District Law Society v Cummins* [1998] 3 NZLR 363 he submitted that this Court is well placed to determine the appropriate legal tests and has the same expertise as the tribunal in deciding who is entitled to practise law on their own account.

We do not think that in *Cummins* the Court was intending to depart from the conventional principle that in a matter of discretion an appellate Court will not interfere without positive grounds for doing so. It does not substitute its own discretion de novo. The word “rehearing” in s 118 is to be interpreted in the same way as its more familiar counterparts in s 76 of the District Courts Act 1947 and R 18 of the Court of Appeal (Civil) Rules 1997. In a matter of discretion the appellate Court will normally intervene only if the decision at first instance is shown to have been plainly wrong or if there has been an error of principle, reliance upon irrelevant considerations, disregard of relevant considerations, or significant fresh material: *Pay v Pay* [1968] NZLR 140 (CA) at p 147; *May v May* (1982) 1 NZFLR 165 (CA) at p 170; *Gill v Wellington District Law Society* (High Court, Wellington, AP 120/93, 7 December 1993, Barker, Ellis and Doogue JJ) at p 9. Notwithstanding Judges’ familiarity with legal practice, these principles continue to apply when sitting on appeal from the decision of a legal professional disciplinary tribunal: see *Re a Solicitor* [1974] 3 All ER 853 at p 859; *H (a law practitioner) v Auckland District Law Society* [1985] 1 NZLR 8 at p 24 and *Sidney v Auckland District Law Society* [1996] 1 NZLR 431 at p 434.

[6] In the United Kingdom context the Privy Council observed in *Ghosh v General Medical Council* [2001] 1 WLR 1915, 1923 para 34 that an appellate Tribunal should “accord an appropriate measure of respect to the judgment” but would not “defer to the committee’s judgment more than is warranted by the circumstances”. That decision was followed in *Preiss v General Dental Council* [2001] 1 WLR 1926, 1935 para 27 and in both decisions the Privy Council emphasised the necessity for appellants to demonstrate that the decision on appeal is wrong.

[7] An applicant for admission, or readmission, to the legal profession must persuade this Court that he or she “is of good character and a fit and proper person to

be admitted” (s 46(2)(a)(ii)) and, in the case of a restoration application, we accept the observation in *L* (at 473) that “the greater the fall from grace the more the ground to recover before reinstatement”. The gist of the Court of Appeal’s observations in *Re Landon* [1923] NZLR 236, 242-243, remains apposite:

It is well settled by authority that a solicitor is not so dealt with by way of punishment. He is removed from the rolls because he is deemed unfit to be further trusted with the powers, rights, and duties attached to the responsible position of a solicitor of the Supreme Court. He is deprived of that position not by way of penal discipline in respect of offences committed by him, but for the purpose of protecting the public and the administration of justice from the danger involved in the continued authority of a solicitor who by his conduct has shown that he is not fit to be trusted with the possession of such an office. On an application for readmission, therefore, the question whether the period of his deprivation of office has been long enough to constitute an adequate punishment for his offence is wholly irrelevant. The true question is not whether he has been sufficiently punished, but whether his conduct since his removal has been such as to demonstrate to the satisfaction of the Court that he is now a fit and proper person to be admitted as a solicitor, and that he no longer possesses that disqualifying character which was formerly held to exist and to justify his removal from the rolls.

[8] The Court of Appeal in *Landon* cited from a decision of the Supreme Court of New South Wales in *Ex parte Meagher* (1919) 19 NSWSR 433, 437. An earlier reinstatement application by Mr Meagher was dismissed by the High Court of Australia (*Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 681) and the judgment of Isaacs J contains a passage which, though rather elevated in tone for contemporary taste, **nonetheless** expresses the principle which underpins restoration applications. The Judge said:

It may be that the error, though flagrant, has proved to be a solitary lapse. It may be that after sufficient time has passed the applicant can satisfy the tribunal that his purgation is complete, his repentance real, his determination to act uprightly and honorably [*sic.*] so secure that he may be fairly re-entrusted with the high duties and grave responsibilities of a minister of justice. But that obligation lies upon him, and it is no light one. The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors, or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot

satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future.

[9] Further, in *Lundon*, the Court of Appeal observed (at 244) that if a restoration applicant “relies on a subsequent career of honesty he must show long-continued honesty in circumstances of temptation and opportunity comparable with those which surround the practice of the law”.

### **Mr Leary’s application**

#### *(1) Summary*

[10] For context, it is pertinent to recount the Tribunal’s summary of the issues that led to Mr Leary being struck off (Reasons pp 3-4 paras [7]-[9]):

1. In or about the month of February or March 1975, he facilitated arrangements enabling clients (including Alexander James Sinclair alias Terry Clark) to locate and/or take possession of cannabis plant material;
2. On 22 July 1982, in evidence on oath before the Royal Commission into drug trafficking sitting in Australia, he knowingly gave false evidence concerning the affairs of his client Sinclair/Clark and thereby attempted to mislead the Royal Commission.
3. In or about the month of November 1979, he received a sum for his client Sinclair/Clark and paid the same to his personal account as costs when such monies should have been paid into his trust account, without complying with the provisions of the Law Practitioners Act and the audit requirements then in force.
4. On 4 December 1979, he deliberately attempted to deceive the Inland Revenue Department when answering a question as to the financial affairs of his client Sinclair/Clark, which question he was under a legal duty to answer.
5. On about 13 July 1979, having caused a sum to be paid in cash to Air New Zealand on behalf of his client Sinclair/Clark, he failed to record that transaction in his trust account books.
6. On about 1 November 1979, he caused his client Sinclair/Clark’s trust account to be debited with costs without having rendered a bill or obtaining a written authority.

[8] The Court of Appeal set out the reasons for its findings in respect of each of the six charges and for its order. It regarded the first charge as the most serious, and the second and fourth charges as serious.

[9] At p 80 of its judgment the Court of Appeal summarised the charges when considering the application to strike off. The Court of Appeal said

*“The drug matter in 1975 is very serious and the attempts to deceive the Inland Revenue Department in 1979 and the Royal Commissioner in 1982 are at least serious. The other three proved charges are instances of fairly minor misconduct in a professional capacity. Individually they are much less serious but together they would be enough to impair the Court’s confidence in the practitioner. The total effect of the six matters is to destroy that confidence.”*

(2) *Mr Leary’s evidence*

[11] Mr Leary supported his application with an affidavit covering his reactions to the striking-off and his life over the past two decades.

[12] He began by saying:

I feel that no amount of time will ever assuage my inner feeling of ignominy. Having damned myself by my own actions I had also damned the high expectations of my colleagues, the Judiciary, the public and family. This was compounded by failure of a good marriage. Having previously enjoyed respect at the Criminal Bar, the process of atonement and re-establishment of self would prove to be an arduous challenge.

[13] Salient features of the remainder of the affidavit include:

- a) That in about 1987 he terminated a contract with “Metro” magazine because it turned out the magazine wanted him to publish “tabloid style salacious detail” on those involved in the criminal courts.
- b) He researched and later became involved in the New Zealand smoked seafood industry, including obtaining the qualifications required by his company and himself to be permitted to be involved in that industry with continuing Police and MAF checks. His company won several New Zealand food awards. The company preferentially employed and trained local labour.
- c) His generosity to his staff and the setting up of a trust to assist children following a lottery win.

- d) He purchased Kingfish Lodge on Whangaroa Harbour in 1993 and managed the lengthy litigation endeavouring to obtain legal road access to the Lodge. Again, the Lodge preferentially employed and trained local labour and set up a local scholarship to that end.
- e) From 1999 Mr Leary was a board member of the Whangaroa Health Services Trust, a Government-sanctioned entity delivering free primary health care to the local community.
- f) Both he and his staff assisted MAF, Police and Customs in surveillance of illegal fishing and immigration.
- g) In December 2002 Mr Leary and his wife sold Kingfish Lodge and shifted to Mt Maunganui and then to Auckland where, unfortunately, Mrs Leary died in March 2006 after being nursed by the appellant.
- h) Mr Leary detailed his continuing involvement with legal matters over the years including efforts made in the run up to the Tribunal hearing to update himself on New Zealand criminal law. He concluded:

The years have brought home to me the absolute necessity of exemplary conduct when challenged or tested on any issue. The events that led to my downfall lead me to believe that at that time I lacked the ability to conduct myself in an exemplary way and accordingly paid a huge price. Reinforcement of exemplary conduct over the years has occurred through my expectation that all staff conduct themselves in the same way. As I have learned to my detriment, reputation earned can be quickly lost and the process of re-establishing that reputation is both difficult and complex.

[14] In addition, Mr Leary filed no fewer than 81 testimonials supporting his application. They included one from a retired Judge of this Court, six from District Court Judges, 15 from Queen's Counsel, five from the Auckland Crown solicitor's Office, 16 from barristers, 10 from barristers and solicitors and the remainder from industry and the community. As might be expected from the nature of such documents, all were uniformly laudatory of Mr Leary's legal acumen and his probity. However, there is a certain force in the observation made by Messrs

Illingworth QC and Collins, counsel for the Auckland District and New Zealand Law Societies respectively, that a number of the documents focused more on Mr Leary's period in practice than on his character and many references were solicited by the appellant. That slightly minimizes their impact. But there is a greater force in the submission by Mr Galbraith QC, senior counsel for the appellant, that the eminence and responsible nature of those who gave testimonials was such that they would be cautious before putting pen to paper, careful in their assessment of the appellant and at pains to ensure what they said was accurate and not inflated.

[15] Despite Mr Galbraith's criticism of what he submitted was the Tribunal's cursory treatment of the testimonial material, we do not find it necessary to conduct individual reviews of each of the references, principally because we accept that the task of the Tribunal and of this Court is to decide whether, if re-admitted to the profession, Mr Leary would conduct himself as a "fit and proper" barrister. In that assessment, what he has done over the past 20 years is relevant mainly as a pointer to the future.

[16] That said, many of the testimonials before the Tribunal did deal with the appellant's character and we have concentrated on references from persons who have known Mr Leary over the past 20 years in industry, commerce and in his community activities. They include testimonials from chartered accountants, a former Detective Superintendent who joined MAF in retirement, former employees who have done well in life with Mr Leary's assistance and encouragement and an ordained minister. They contained unanimous praise for the appellant's probity, honesty, intelligence and industry, sometimes in situations where others may have been tempted not to act honestly.

(3) *Matters Preliminary to Tribunal Hearing*

[17] The Tribunal gave national notice of Mr Leary's application in a form which, so we were told, was uniquely detailed. It sought expressions of support or objection.

[18] Objections were lodged by the Waikato-Bay of Plenty and Otago District Law Societies and by several individuals, one of them a solicitor. The Societies' objections took the view, that despite the passage of time and the appellant's subsequent exemplary behaviour, the actions which led to his being struck off were incompatible with the duties of an officer of the Court, the public would not be adequately protected should he be reinstated, and granting the application would not enhance the integrity of the legal profession.

[19] The advertisement also drew 10 notices of support, nearly all from lawyers.

[20] Two of the testimonials lodged as a result of the advertisement warrant particular notice. One was from a person with interests in the Whangaroa area who knew of the appellant but did not know him personally and who was highly supportive of Mr Leary's business actions in the area. The other was from Mr Corry, head of the Public Defender Service. He has known Mr Leary for over 35 years and maintained their acquaintance ever since he was struck off. Mr Corry expressed confidence that Mr Leary was "contrite about his conduct which led to his striking-off and displays now a commitment to the principles and values required of a barrister and solicitor of the High Court". Mr Corry described the appellant as a "person who truly regrets his earlier conduct and ... is fully rehabilitated and ... now able to conduct himself in the manner expected."

#### (4) *Tribunal Hearing*

[21] NZLS and ADLS both appeared at the hearing, taking the stance that they did not consent but did not actively oppose the application.

[22] The hearing proceeded by Mr Williams opening Mr Leary's case, Mr Leary confirming his affidavit and then being cross-examined by Messrs Illingworth and Collins and extensively by members of the Tribunal. An objection to the application had been lodged by a Mr Abbott, a former detective. He gave evidence, the Tribunal heard final submissions, considered its decision overnight and advised the parties the following morning that the application was refused.

[23] Since aspects of Mr Leary's evidence were a **significant** factor on which the Tribunal relied in reaching its decision, and since that reliance was criticized by Mr Galbraith, it is pertinent to consider some of the evidence in detail.

[24] First, Mr Illingworth carefully took Mr Leary through all the factual aspects of the various actions summarized earlier which led to his being struck off. In each case he obtained Mr Leary's acknowledgement that he had acted as described and in each case obtained his express acceptance that what he had done was "disgraceful" or "wrong" or that, even though he may have made a mistake in the erroneous evidence he gave the Royal Commission, he accepted the Court of Appeal's findings "without reservation" and regretted what he had done. Asked if the profession could be assured he was now different, Mr Leary pointed to the contents of his affidavit and the numerous references, including from lay people, so that he could "draw what strength I can and point to it in the hope that it will be of sufficient weight to give confidence to not only the Tribunal today but the profession in general". He said his actions in helping Northland people were motivated by "decency". He expressed the belief that he was "far stronger in my character, in my resolve, in my ability to be tested and not found wanting" with the "necessary integrity and probity that is expected of me by this profession".

[25] To Mr Collins, Mr Leary described himself as having "deviated in the worst possible way that one can describe" but said that he believed that he had "redeemed myself to the point where I can hold my head up in the criminal courts and practise to the standard that is expected from the Judiciary, from this Tribunal, and from the legal profession in general".

[26] As had Mr Illingworth, Mr Hampton QC, a Tribunal member, questioned Mr Leary as to how Mr Sinclair/Clark had been able so to manipulate him as to cause him to breach his professional standards. Mr Leary said he had "searched through my own mind as to why I deviated in such a terrible way with one particular client", there being no motive. He had found no satisfactory answer. The "old Eb Leary" was one who "lacked the strength of character to resist anything like what we've been talking about" but his strength of character had improved through reassessment and time. He said that he had been "put to the test many times" in

areas where he might not have assisted law enforcement agencies and the like but “chose to do the right thing every time”.

[27] Of some importance, since, as will be seen, the Tribunal held it against him, in questioning Mr Leary about the cannabis matter, Mr Hampton said: I discern hesitation and I discern a lack of acceptance of that finding against you”. Mr Leary replied: “I accept it entirely ... I should never have done it”.

[28] Asked about the effect of his actions on the profession, Mr Leary replied that he had “damned myself by my own actions, I also damned the high expectations of my colleagues, the Judiciary, the public and family” but he thought the public would have held his actions against him, rather than the profession. His “atonement was towards the profession in general”.

(5) *Reasons for Decision*

[29] After reviewing the background facts, the Tribunal noted (at p 4 para 12) the application was supported by a “remarkable number of references and declarations” reviewing briefly the positions held by many of those providing them. The Tribunal reviewed relevant authority including *Lundon* and *Meagher* and cited (p 10 para [23]) the following passage from the judgment of Kirby P in *Law Society of New South Wales v Foreman* [1994] 34 NSWLR 408, 419:

The final consideration concerns an aspect of the public interest to which, as I believe, sufficient attention has often been paid in these cases. I expressed my views in this regard in *Kotowicz v Law Society of New South Wales* (Court of Appeal, 7 August 1987, unreported). I was there in dissent as to the result of the application. But, I hold to my opinion, as applicable to this case. It is an opinion which has enjoyed some favour in other Australian jurisdictions:

“Because the jurisdiction is for the protection of the public, regard also may be had to the public’s interests in the restoration to the Roll of such persons as have demonstrated, including by their work, activities and life, a fitness to be restored. For cultural and historical reasons, redemption and forgiveness are important attributes of the shared morality of our society. In part, this is because of the teachings of religious leaders who have profoundly influenced our community’s perception of justice and fairness, reflected from earliest times in the courts: see, e.g, *St Matthew’s Gospel* 18, 11ff; *The Acts*, 3, 19. In part it derives from the self-interest which any community has to encourage the rehabilitation of those who lapse

and to hold out to them the hope that, by diligent and honourable efforts over a period, their past may be forgiven and they may be restored to the good opinion of their family, friends, colleagues and society. The public's interest also includes the economic interest which is involved in utilising, to the full, the skills of talented people who have undergone years of rigorous training but who, having misconducted themselves, have had to be removed for a time from positions of responsibility and trust."

[30] The Tribunal then turned to the evidence, citing extensively from Mr Leary's cross-examination on the issues which led to the striking off before reaching a view that Mr Leary's answers were (at p 16 para [33]) "difficult to reconcile" with earlier evidence including that before the Court of Appeal. It analysed that judgment extensively and reached the view (p 18 paras [38]-[39]) that Mr Leary's answers "attempted to minimize his culpability". The Tribunal said (p 19 para [43]):

The CA judgment contained references to Mr Leary's prevarication and to his continuing to contest the nature and extent of his wrong-doing. We were therefore particularly interested in evidence relating to those matters. We were also looking for evidence that demonstrated from Mr Leary a detailed insight as to why he had been able to be so manipulated by Sinclair/Clark that he had completely put aside proper moral scruples and ethical standards. Knowledge of that insight was important to instil confidence that he would not succumb to such influences again, if an order was made restoring him to the roll. We were also endeavouring to assess his practical fitness to return to practice. There were many testimonials relating to his level of forensic skills prior to his being struck off, but there had now been a lengthy period when he was involved in other activities. We found that in certain respects there was not only a lack of full insight but also a lack of appreciation of the effect his wrong-doing had on the profession as a whole.

[31] After further discussion on the topic and a review of counsel's submissions, the Tribunal reached the view (pp 22-23 para [50]):

1. Mr Leary had not reached the point of candid acceptance and acknowledgment of what he had done. There were still signs of the prevarication which the Court of Appeal had highlighted in its judgment. There was acceptance that charges had been found proved, without open recognition of all that the offending entailed. While appearing contrite, the difficult process of reassessment, redemption and atonement was not yet complete.
2. Mr Leary was either unable or unwilling to provide a detailed explanation of the relationship between him and Mr Sinclair/Clark. His evidence amounted to just going along with what Mr Sinclair/Clark wanted, rather than demonstrating a detailed insight into what had happened and how that had subverted his moral training and ethical standards. In the absence of such insight, it was difficult for the

Tribunal to have confidence that an analogous situation would not be handled in exactly the same way in the future.

3. When it reviewed the period of time over which the offending occurred, as set out in the chronology, the Tribunal found confirmation of a continuing failure to recognise fully the significance of his actions. For example, the explanation to the Tribunal in relation to the charge of giving false evidence to the Australian Royal Commission was that he had given the wrong month. This appears to gloss over entirely the detailed matters set out in the Court of Appeal's judgment (pp 37 to 60). Mr Leary appeared in some respects to be still arguing the case of the Court of Appeal. Without full acceptance and acknowledgment of wrongdoing there could be no contrition and full redemption. Without that, rehabilitation cannot come fully into effect.
4. There was no full and adequate realisation of the damage Mr Leary's offending had done to the reputation of the legal profession in general and the criminal bar in particular. To the Tribunal Mr Leary did not appear to have considered the matter much further than reflecting on his own involvement the "damning" of himself by his own actions and the "damning" of the "high expectations" held of him by others, despite the lengthy period of time that has elapsed.
5. This case is distinctly different from *Coughlan* [NZLSDT 15 October 2003] where there was full acceptance of what the practitioner had done. The Tribunal considered that, unless Mr Leary was able to recognise the true extent of the impact of his wrongdoing on the profession, atonement was not present and his many good works could not redeem him to the point where he was entitled to be fully restored.
6. There was also an impression that Mr Leary considered he could handle any future problems by himself. That was a critical part of his initial failing. While no doubt he is now much more mature, and has a depth of life experience, questions from the Tribunal relating to the practical steps he would take to avoid a reoccurrence of the major problems that brought him down, seemed to be answered in a somewhat formal way. This too is consistent with lack of detailed insight into the cause or causes of his downfall.

[32] The Tribunal concluded (p 23 para [51]) that "We have had regard to the references given in support of Mr Leary" and that "we have not re-tried Mr Leary" before dismissing the application.

### **Submissions**

[33] Mr Galbraith said the gist of the appeal was that the Tribunal gave undue emphasis to impressionistic, mistaken perceptions of Mr Leary's evidence, failed to give appropriate weight to the substantial body of supporting material and accordingly fell into error by looking at the application retrospectively instead of

prospectively. Authority required the latter. He submitted the Tribunal gave inadequate recognition to public interest in the appellant's redemption and the service he could provide.

[34] Mr Galbraith amplified those submissions by saying the Tribunal's perceptions were largely based on Mr Leary's answers in cross-examination. Mr Galbraith was especially critical of the almost complete lack of reference by the Tribunal to Mr Leary's affidavit and the significant body of supporting material, including eminence of the referees. He took the Court through a number of the testimonials emphasising their evidence of contrition, insight, redemption and creditable behaviour. He suggested the evidence demonstrated Mr Leary had acted with honesty and integrity in his business dealings, had responsibility and trust reposed in him, had fully complied with the law and assisted legal authorities, gone out of his way to participate in community service and expressed a genuine repentance for his misconduct and deep shame at having let down his colleagues and the profession. Mr Galbraith especially pointed to the passages in the evidence where Mr Leary unreservedly accepted the facts and the disgraceful nature of his earlier conduct. He submitted the Tribunal was wrong in its conclusions that Mr Leary lacked sufficient insight into his wrongdoing and failed to realise the extent of the damage his actions had brought on the reputation of the profession.

[35] Mr Illingworth largely repeated the submissions he made before the Tribunal. After taking us carefully through relevant authority and the evidentiary details of matters leading the Court of Appeal to strike off Mr Leary, he made the point that the issue before the Tribunal remained as it was before the Court of Appeal 20 years ago, namely whether Mr Leary was a fit and proper person to be a member of the profession. Pursuant to ADLS's neutral stance, however, he accepted that perusal of the references necessarily led to the conclusion the appellant had done a great deal of good in the community during the past two decades and his ethical standards had changed dramatically for the better over that period. He also accepted Mr

Leary was repentant for his earlier acts of misconduct and shameful for the harm done to the profession.

[36] All of that said, however, Mr Illingworth submitted the Tribunal had a difficult task and was entitled to reach the views it did concerning Mr Leary as a result of his responses in the witness box. It could not be said it erred in placing weight on its assessment in that respect.

[37] In effect, he suggested, the Tribunal made a moral judgment on Mr Leary's capacity for integrity, probity and trustworthiness. It could not be said with confidence that its decision was wrong.

[38] Mr Collins' submissions, too, reflected those made to the Tribunal, though he additionally raised the question of the appropriate deference this Court should accord to a discretionary decision reached by experienced lawyers on a former lawyer. He submitted the testimonials and references were, with some limited exceptions, of little probative value in that they placed greater importance than was of assistance to the Tribunal on Mr Leary's abilities as an advocate. The inquiry into whether the appellant was a fit and proper person was therefore deflected.

[39] Mr Collins emphasized NZLS's concerns as to the prospect of an appeal being allowed on the basis that unsworn testimonial evidence might be given greater weight than sworn testimony.

[40] All of that notwithstanding, Mr Collins, too, submitted the Tribunal's decision was not shown to be wrong.

### **Discussion and Decision**

[41] Dealing first with the issue raised concerning testimonials as contrasted with sworn evidence, we note the Act contains no provisions as to the nature of the evidence which can be placed before the Tribunal. In our view, should

parties to disciplinary proceedings wish to challenge the admissibility of, or weight to be accorded to, unsworn evidence, they should seek an order under s 126(1) requiring the person who adduced that evidence to attend and give evidence on oath. Barring that, it would appear to be open for the Tribunal to accept such evidence as it thinks fit and give it the weight it considers it deserves.

[42] Turning to the significant issues raised by the appeal, it is to be recalled that the pivotal question in a restoration application is whether, in terms of s 116 (2), the applicant can satisfy the onus of persuading the Tribunal –or, on appeal, this Court – that he is a “fit and proper person” to be readmitted to the legal profession.

[43] Resolving that question necessarily, as the authorities show, requires the Tribunal to look forward in time and make a value judgment on that issue, drawing on evidence of an applicant’s past actions.

[44] That exercise, too, necessarily requires an inquiry into the actions which led to the striking-off, which, in its turn, involves acceptance by an applicant that those actions occurred and that they transgressed the legal and ethical standards of the profession. Without recognition that the actions breached applicable standards and the consequences of the breach - particularly to the public, the Courts and to all other practitioners - it would be difficult for the Tribunal to conclude the same actions would not be repeated should similar circumstances arise in the future.

[45] But, at least in the manner of their expression, the concepts of “atonement” and “purgation” might now be thought outmoded. Recognition of the wrongness of the earlier acts is necessary for the reasons mentioned. But requiring demonstration of “atonement” or “purgation” invites re-trying the earlier matters, even though all authorities agree that should be eschewed. Recognition of wrongness of the acts which led to the striking-off should be sufficient. In our view there is much to be commended in the approach of Kirby P in *Foreman*.

[46] Seen in that light, what did the Tribunal have as evidence in Mr Leary’s case?

[47] At the conclusion of cross-examination, it had repeated recognition by Mr Leary that the acts which he had committed and which led to his striking-off were wrong, disgraceful, contrary to his obligations and damaging to the trust and confidence the public, the profession and the Courts are entitled to have in all actions of all members of the legal profession.

[48] In addition, it had significant evidence of the efforts made by Mr Leary over the 20 years since his striking-off, to reform himself and to act morally, ethically and uprightly in all facets of his life, including in circumstances where another may have been tempted to act otherwise. The evidence of that reform was not just in Mr Leary's affidavit and cross-examination but was buttressed by a very large number of laudatory testimonials from persons of eminence, both within the law and outside, persons who would not have expressed their confidence in Mr Leary continuing to act in that way had they not believed it. Their own reputations may have suffered had they not been sincere.

[49] Against that, the Tribunal had two bodies of evidence to consider.

[50] The first was the objections lodged by two responsible Law Societies and those lodged by members of the public. It would, however, be fair to say those objections focused rather more on the events which led to Mr Leary's striking-off than those since. For instance, the objection by Mr Abbott – who also appeared before us – and the other objections seemed to take the view that Mr Leary's transgressions were such that his reinstatement should never be contemplated. As the authorities show, that stance goes too far. Further, neither NZLS nor ADLS submitted that was the case here.

[51] The second was the Tribunal's own view of Mr Leary formed after seeing him under cross-examination. As every fact-finding Tribunal knows, seeing and hearing witnesses confers a decided advantage on a Tribunal having that opportunity by comparison with one which does not. That notwithstanding, it must be said that a fair reading of the transcript of Mr Leary's cross-examination suggests it focused significantly on the circumstances of the incidents which led to his striking-off and unfairly drew inferences from his inability, even now, to explain

why he undertook those actions. His inability to discern the wellsprings of his past inexplicable and wrongful behaviour should not be confused with an inability to know it occurred and now recognise it as wrong.

[52] There is, too, force in Mr Galbraith's submission as to the unfairness of drawing large conclusions from small indicia, such as a witness's hesitation in answering a cross-examiner. As every Court and Tribunal knows, there can be a multitude of reasons for that.

[53] There is further force in Mr Galbraith's submission that the Tribunal's focus on all the circumstances of the events leading up to the striking-off seems to have diverted its attention from the large body of evidence of reform, recognition and proper behaviour since that event. Its reasons for its decision have a much greater retrospective than a prospective focus.

[54] We accept that the views of an experienced Tribunal of knowledgeable practitioners reaching views as a matter of discretion on issues before them are deserving of certain deference. But, as the more modern authorities show, such deference needs to be displaced if a Court on appeal reaches the view the Tribunal's conclusions were wrong.

[55] We have, with respect to the Tribunal, reached that view. The focus of a restoration application is prospective. In our view, the evidence demonstrated Mr Leary's acceptance of his past wrongdoing. More importantly, it demonstrated his acceptance of his need for reform and his efforts in achieving that reform in difficult circumstances over 20 years. His evidence, and the very considerable body of support from persons of integrity should have given the Tribunal confidence that Mr Leary would not re-offend. It should have given the Tribunal confidence that he was a fit and proper person to practise as a barrister henceforth. It should have granted his application. In our view, it failed so to do by placing overmuch weight on the circumstances leading up to Mr Leary's striking-off and too little weight on the evidence of Mr Leary's reformatory efforts over the years since. As a result, the Tribunal's discretionary decision failed to give adequate recognition to the

required prospective view of Mr Leary's restoration application. The Tribunal was thereby led into error and reached a wrong decision.

## **Result**

[56] For all those reasons, Mr Leary's appeal is allowed and his name is ordered to be restored to the roll of barristers and solicitors on the condition he sought that he does not practise as a solicitor in the future.

[57] If costs are an issue and counsel are unable to agree, memoranda may be filed (maximum five pages) with that from the appellant being filed and served within 28 days of delivery of this judgment and that from the NZLS and ADLS within 42 days of delivery and with counsel certifying, if they consider it appropriate so to do, that all issues of costs can be determined by the Court without further hearing.

*Solicitors:*

*Chambers Craig Jarvis, PO Box 47-830 Ponsonby, Auckland, for appellant*

*Glaister Ennor (Paul N Collins) PO Box 63 Shortland Street Auckland, for NZLS*

*Copy for:*

*Alan R Galbraith QC / Ian Williams, PO Box 4338 Shortland Street Auckland, for appellant*

*Grant M Illingworth QC, PO Box 7205 Wellesley Street Auckland, for ADLS*

*David Slight, Case Officer, Auckland High Court*