IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 41/2019
[2020] NZSC Trans 9

BETWEEN **NEW ZEALAND LAW SOCIETY**
Appellant

AND **JOHN LLEWELLYN STANLEY**
Respondent

Hearing: 23 April 2020

Coram: Winkelmann CJ (via VMR)
William Young J (via VMR)
Glazebrook J (via VMR)
O'Regan J (via VMR)
Ellen France J (via VMR)

Appearances: P N Collins for the Appellant (via VMR)
J C Gwilliam and H Joubert for the Respondent (via VMR)

CIVIL APPEAL (REMOTE PARTICIPATION)

WINKELMANN CJ:

Mōrena counsel. Now, Mr Collins for the appellant?

MR COLLINS:

Yes, may it please the Court, Collins here for the appellant, and Ms Inder is joining us by telephone as a representative of the appellant.

WINKELMANN CJ:

Thank you. For the respondent?

MR GWILLIAM:

Yes Ma'am, Gwilliam for the respondent and I have a junior Ms Joubert who is attending by telephone.

WINKELMANN CJ:

Ms Joubert?

MR GWILLIAM:

Yes.

WINKELMANN CJ:

Thank you Mr Gwilliam. I should start off by saying that we thank counsel for their preparedness to make arrangements so that we can hold this hearing in this remote way. It's the first time the Supreme Court has sat entirely remotely and all members of the Court are remote from each other, and remote from counsel, and that's been made necessary to respond to the present COVID-19 emergency and we will see how it goes. Mr Collins, have you got an estimate of how long you will be with your submissions?

MR COLLINS:

Perhaps 40 minutes.

WINKELMANN CJ:

And as we have indicated, we will wait until you have finished each heading before we ask questions. So we asked counsel to provide a list of topics, thank you for providing those, and we have those to hand, so if you could just

indicate when you are about to move on to the next topic and that will give the Court an opportunity to ask questions.

MR COLLINS:

Thank you. Well may it please the Court. These submissions will address the separate subject matter items notified in my memorandum yesterday, the first of which was the fit and proper person standard and it's application in this case, and as part of that a response to the submissions made on behalf of the respondent that he meets that standard. The fit and proper standard is, of course, the central issue in this appeal. The appellant in the High Court found that the combination of the respondent history of his convictions and his lack of insight into the offending, meant that he was unfit. The Court of Appeal disagreed. While it acknowledged that the convictions disclosed a flaw in his character, and that he had not discharged the burden of satisfying the Court of his lasting form, the Court was nevertheless willing to approve him for admission as a person of good character. The correctness of that finding is at the centre of this appeal.

The fit and proper person standard has statutory expression in section 55 of the Lawyers and Conveyancers Act 2006, which lists the matters that the decision-maker, the appellant or the High Court, may take into account in forming a view about the person's status as a fit and proper person, but the concept of fit and proper person has a long history in the regulation of this country's legal profession. The elements of that standard were helpfully summarised under six separate heads in the 2018 High Court judgment in the case of *Brown v New Zealand Law Society* [2018] NZHC 1263, [2018] NZAR 1192, which is at tab 7 in the bundle. The appellant's case emphasises four of those six elements of the concept of fit and proper person, but I will just briefly go through each of them.

The firstly is that, "The Court should not lightly limit the ability of a person to engage in an occupation for which they are qualified." The second, which is one that is emphasised in the appeal is that the refusal of – the decision to refuse admission or, in the case of the appellant, to refuse to issue a

certificate of character, is not punitive but is wholly protective in its purpose, and the judgment referred there to refusal being based on the risk of the candidate's future misconduct, or likely potential harm to the profession's reputation. The third characteristic of the fit and proper person standard which is emphasised in the appeal is that the Court must be satisfied that the person character is such that he or she can be safely accredited to the authorities, to the Courts, the institution to justice, to the clients, to responsibly discharge his or her professional duties. The fit and proper person standard includes standards of integrity, and the next item which is central to this appeal is that where there is evidence of past indiscretions, the Court must be satisfied that the frailty or defect of character evidenced by those indiscretions is entirely spent and/or can be safely ignored. Finally, the Court, and this is also important in the context of this appeal because it was the, certainly the determinative element in the judgment of the Court of Appeal in allowing the appeal and proving Mr Stanley for admission that the Court must look at the facts in the round and not pay undue regard to the earlier wrongdoing.

So the appellant's position in this appeal, consistently with the findings of the High Court, is that the standard is not satisfied in this case for two key reasons. First, the frailty in the respondent's character evidence by the convictions, and importantly by his lack of insight into the underlying offending, and his relationship with alcohol, meant his character flaws could not be safely ignored or said to be spent. The second key point in the appeal, and the reasons the appellant says that the respondent is not a fit and proper person, is that he posed a risk of future offending which, if it occurred, would likely engage professional discipline and cause damage to the reputation of the legal profession.

Now there are two further points to be made concerning the respondent's obligation to establish themselves as a fit and proper. The first is the absence of any independent qualified evidence about his relationship with alcohol, and there is a lack of any such evidence in his dealings with the appellant, and when he applied to the High Court. This meant that the decision-makers, including the appellant and the High Court and the Court of Appeal were

required to rely on the respondent's own assurances of reform, which might likely be seen as unreliable, conceivably in the nature of wishful thinking. Also, of course, the decision-makers were entitled to rely on the references, although it is submitted that the references were relatively superficial on the key issue of the respondent's insight into his offending and his relationship with alcohol. It is a criticism of the Court of Appeal judgment that it too readily accepted the respondent's assertions of self-reform. Now I expect that the respondent would say in response to that point that as counsel enquired with the Law Society about the need for drug and alcohol assessment, and there's a letter in the case on appeal dated the 13th of September, and there's a letter in the case on appeal dated the 13th of September 2017, it's document 201.0096, in which that issue was raised, and that no assistance was given, he would say. But the suggestion came when the Law Society inquiry was well advanced, indeed its decision had already been made, and the question was being asked whether it could be reconsidered at that time and long after the respondent himself had repeatedly said in correspondence that he had no issue with alcohol – and the letters of 11th of May and 6th of July 2017 are in the case on appeal. So it's submitted that his failure to produce qualified independent evidence to support his assertion that he had put alcohol issues behind him meant that the decision-maker was being asked to take his word about that.

The second point that I want to emphasise about the unsatisfactory nature of the finding that the respondent was a fit and proper person was that the possibility of reputational harm to the legal profession in the circumstances of this case comes in two forms. The first is the obvious one, where there is a risk of future offending and the harm that that would do to the reputation of the profession in its own right. If, let's say, the respondent was convicted of a fifth drink-drive then that would self-evidently in my submission bring the profession into disrepute and would be regarded as such by the Disciplinary Tribunal. And an example of one of the cases that is in the authorities is a case called *Canterbury Westland Standards Committee v Taffs* [2013] NZLCDT 13 where the lawyer was convicted with a third or subsequent EBA and also with obstruction when he tried to flee from the police or meddle with

the breath testing apparatus. But the Tribunal nevertheless found that the third or subsequent EBA conviction was itself a matter which brought the profession into disrepute and, with respect, that must be correct.

But the second aspect of reputational harm which arises in this case is the disrepute that would be caused the by the admission itself where, A, a four-time convicted drink-driver has been admitted to the profession; B, the decision-makers all accepted that he lacked insight into his offending, and that is the case here; and, C, he did not offer any qualified evidence concerning his reform. So it's reasonable to see that an informed member of the public, and that is the measure, an informed member of the public, would think that his admission would reflect poorly on the standing of the legal profession.

Now in his counsel's submissions the respondent points to his clean record since the last conviction, which occurred on the 9th of May 2014, relating to offending on the 5th of June 2030. It's submitted on his behalf that it's relevant that in May 2021 the respondent will be entitled to benefit of the Criminal Records (Clean Slate) Act 2004, and therefore had he been applying for a certificate of character from that time he would be entitled to the suppression of criminal record. That submission is understood to be intended to establish that the convictions should not be regarded as an adverse indicator of the respondent's character now. That is not accepted for the following reasons.

First, the convictions are not suppressed by the Criminal Records (Clean Slate) Act and they are available and directly relevant both in relation to the good character dimension of a fit and proper person status and the past criminal convictions aspect, both of which are specifically matters of statute in which the decision-maker is entitled to take those into account under section 55(1)(a) and (c) of the Lawyers and Conveyancers Act.

The second point in response to the remoteness of the last conviction and the possibility of the clean slating of the conviction a year from now is the point that the convictions cover the span of the respondent's adult lifetime but include a pattern of three EBA convictions in a period of about 12 years from

2002 to 2014. So the submission is that a clean record since the conviction in May 2014 is not on its own evidence of true and lasting reform of character.

The next point is that the conviction in 2014 reinforces the concern that the respondent has not learned the lessons from previous convictions. If the convictions in 2002 and 2007 were mitigated because they involved, in the first instance, consumption of "Hospital Linctus", in other words apparently drinking cough medicine which put him over the limit, and the second of those in 2007 involved special circumstances, then a chastened person in that position would have thought themselves fortunate to have been treated with leniency and been careful not to re-offend, but that did not happen and the respondent went on to re-offend six to seven years later, and it's significant that that occurred after he had completed his law degree and one of the reasons he gave in correspondence with the Law Society to establish himself as a reformed character was the lessons he had learned and the impression that had been made on him from his law course and the ethics course which he referred to. But the problem with that was that he went on to offend subsequently.

Now I just need to comment on the special circumstances vouched for the 2007 conviction. That appears to have related not to the offending but to the circumstances of Mr Stanley's occupation or employment and in his letter of 11 May 2017 to the Law Society he referred to it relating to his work, and I will just go to that for one moment. That's document 201.0030 and it's a letter addressed to the Wellington District Law Society although for the Wellington Branch of the New Zealand Law Society and at the end of the first page of that letter he refers to the Lower Hutt 12 September 2007 conviction, "Breath test failed. I think Des Deacon was acting. The Judge found special circumstances. I had a good job which required a vehicle. He fined me and convicted and discharged the matter."

So I mention that only because of the impression that special circumstances might have related to the offending itself and so far as we are aware it does not, but also because of my point that a person convicted in those

circumstances and a few years before the “Hospital Linctus” consumption would have been expected to have learned the lesson and to have been chastened and not to have re-offended, but instead he did re-offend in 2013. In fact, there were two convictions, one relating to failing to stop for a police car and the other for excess blood alcohol, I think, and they came, as I said, after the convictions which would have had a chastening effect on an insightful person and after the law degree had been completed, including the ethics course which was said to have made an impression him.

So those are my submissions concerning the fit and proper person standard as it applies to the respondent and the fact that it has not been met. My four key dimensions of that standard are that the refusal is not punitive. That the Court must be satisfied that the person can be safely accredited to responsibly discharge his or her duties. That the evidence of past discretions means that the Court must be satisfied that the frailty of character is spent or can be safely ignored, and that the Court must look at the facts in the round. Now I should say further on that last point my friend says that that is the, that was the telling point in the Court of Appeal judgment, that the Court thought that the High Court had overemphasised the past offending and failed to look at the case in the round. I will come back to that point in a few moments, but the submission there is that a consistent pattern of offending of the sort that occurred, accompanied by lack of insight and lack of supporting evidence about, or lack of supporting evidence that could give confidence about reform, cannot be brushed aside, so to speak, on the basis of viewing the matter in the round. That concept is more frequently, it seems, applied in the realm of youthful offending where the applicant is a mature person with a period of settled and responsible living after a difficult youth. How that was not the case here. So those are my submissions about the fit and proper person standard and the respondent’s failure to meet that standard. I will next move on to the Court of Appeal errors.

WINKELMANN CJ:

Just pause there thank you, Mr Collins, and just take an opportunity for the Judges to ask you questions.

MR COLLINS:

Thank you.

WINKELMANN CJ:

Justice Young?

WILLIAM YOUNG J:

How does the standard for admission compare in practice with the standard for striking off?

MR COLLINS:

The statutory requirement for striking off in section 244 of the Act is the person by their conduct – sorry, the Disciplinary Tribunal may not make an order striking a person off unless in its opinion a practitioner is, by reason of his or her conduct, not a fit and proper person to be a practitioner. So –

WILLIAM YOUNG J:

So it's the same?

MR COLLINS:

Yes, it is the same, and it is the case, for example, that the Tribunal would look at section 55 in that analysis, although the higher standard for striking off is that were not a fit and proper person and that is, I think, materially the same as a fit and proper person standard –

WILLIAM YOUNG J:

Are there any cases where people have been struck off only for EBA convictions?

MR COLLINS:

I pause only because I recognise that this sort of issue arose in the Court of Appeal. I believe not.

WILLIAM YOUNG J:

There are many cases, or a number of cases where there have been suspensions which I guess in their nature imply an underlying assessment that the practitioner, despite convictions, remains a fit and proper person to retain a practicing certificate – to remain on the Roll.

MR COLLINS:

The concept of suspension is recognised and I think the case *Daniels v Wellington District Law Society* where a full Bench in the High Court referred to the purpose of suspension being recognition that the person is not, for a period of time, a fit and proper person to be in practice, but has not wholly disqualified themselves.

WILLIAM YOUNG J:

Right. But if satisfied that the practitioner appearing on disciplinary charges is not a fit and proper person to practice, the Tribunal or the Court would presumably strike them off?

MR COLLINS:

Yes. I mean, the distinction frequently in cases of suspension or striking off is where, well, A, the offending is not so grave as to irretrievably disqualify the person. So, for example, if it's theft of money from a trust account it would be in the irredeemable category but –

WILLIAM YOUNG J:

Of course, I know. But just keeping on the point, isn't it open to the conclusion that the unwillingness of the Courts and the Tribunal to strike off practitioners for EBA offending probably as serious, if not more serious, than Mr Stanley's suggests that that standard of fit and proper person may have been applied in rather too exacting a way by Justice Clarke? I mean, if you're right he's the first person to be disqualified from practice because of EBA convictions.

MR COLLINS:

But that does not address the reputational aspect –

WILLIAM YOUNG J:

Why doesn't the reputational aspect apply equally in disciplinary proceedings? It's all a subset of fit and proper person isn't it?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So why doesn't it engage with the reputational issue?

MR COLLINS:

Sorry? Why doesn't the…

WILLIAM YOUNG J:

Well, I mean, in the case of Mr Taffs, for instance, who I know, who had a range of convictions including one for attempting to pervert the course of justice and then these rather florid incidents that resulted in the disciplinary charges, now the issue of reputational damage to the legal profession must have been on the table in that case.

MR COLLINS:

Yes, and –

WILLIAM YOUNG J:

And not enough to result in him being held to be not a fit and proper person.

MR COLLINS:

Well, I suppose, Sir, the issue is whether a person should be admitted as a fit and proper person with the knowledge that their conduct puts them in serious peril of being suspended. It does seem rather perverse that a person could be admitted into the profession where that was a real possibility.

WILLIAM YOUNG J:

Because although not bad enough to be not a fit and proper person they might in the future become not a fit and proper person, is that the line of thinking?

MR COLLINS:

Well, they presumed a genuine peril of that happening.

WILLIAM YOUNG J:

But so did all the people who were facing disciplinary charges.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

And can you tell me why we should apply a different standard to Mr Stanley to the standard that appears to have been applied in the other cases?

MR COLLINS:

Well, really because of the reputational aspect –

WILLIAM YOUNG J:

Yes, but reputational aspect applied in the other cases, you've conceded that.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

All right, thank you.

WINKELMANN CJ:

Justice Glazebrook?

GLAZEBROOK J:

My question was very similar to Justice Young's. The only issue, I suppose, in respect of that is whether in fact, given the issue of drink-driving in particular that has two aspects: one, that it might show an alcohol problem; the other that it might show a disregard for the law; and also the nature of a drink-driving conviction which there might be further offending but because somebody's driving when impaired it might also be offending that causes major danger to other people and maybe even danger to lives, whether in fact the sort of thing that's been done to those other practitioners than just a suspension is actually the proper response and whether otherwise without them addressing the underlying alcohol offending, which I know is the submission in respect of the, I think it's the *Evans v The Solicitors Regulatory Authority* EWCA (CIV 01 of 2007) case, wasn't it, because that was what was put in place there. So it's just a question that's possibly more for your friend than for you, because certainly I don't see that there can be any distinction between being, continuing in practice, and as Justice Young says it might even be worse for the reputational issue of the profession that somebody who has been trusted all that time, and been deemed a fit and proper person, has shown themselves not to be.

MR COLLINS:

Yes. I'm sorry, the question?

GLAZEBROOK J:

I was really just asking you for a comment on that, rather than specifically questioning, but also just to indicate to your friend that it might be something that needs to be addressed.

MR COLLINS:

The standard for suspension is that the person has shown themselves, for a time, not to be a fit and proper person, and the penal function, I suppose, is to give a person time out of the profession to reflect and repair their ways and come back an improved person. That is a recognition that for a time they are not a fit and proper person and that's what has happened in the drink-drive

cases which I've put in the material, but they are nearly all, I think they are all accompanied by other offending as well, but there is an issue about disrespect for the law, or an addictive or impulsive aspect of behaviour which leads to unlawfulness, which is incompatible with the status of a person as being fit and proper to practice law. Does that respond to the question?

GLAZEBROOK J:
Well you have provided your comment, which is what I asked for.

MR COLLINS:
Thank you.

WINKELMANN CJ:
Justice O'Regan?

O'REGAN J:
Can I just ask you, what evidence you would have expected Mr Stanley to provide to the Court to show that he has turned the corner on any drinking problem he may have, or on the possibility of future drink-driving incidents?

MR COLLINS:
Yes. There's two aspects to that Sir. One is that there would be some acknowledgement that there was a problem, because the position Mr Stanley took was that he had no alcohol problem, and indeed if a psychologist or appropriately qualified person was able to probe that and find that it was indeed true, that he did not have a problem, then that evidence should have been brought and some other explanation given for the poor record of the adult lifetime. The second aspect of it would of course be assuming that there was indeed a tendency to consume excessive quantities of alcohol, that there was a reliable basis for showing that some reason he had turned a corner and one would expect that to be supported by some independent therapy or something more than willpower or just self-will, and the time that had passed and situations that had arisen to challenge that possibility of falling back into habits which had not happened. So that sort of evidence would be expected,

and my submission is that it should have been self-evident to a person in Mr Stanley's position that he was coming to make this application, it had clearly arisen early on in the enquiry into his application for a certificate of character that there was concern about his record, and that he should have put something forward that would be capable of being relied on to show A, insight, that he had a problem or B, that he had addressed it.

O'REGAN J:
Thank you.

WINKELMANN CJ:
Justice France?

ELLEN FRANCE J:
Mr Collins, what do you say is the significance of the fact that under section 55(1) whether the person is, of the character test, whether they are a fit and proper person is a factor that may be taken into account? I'm thinking about the point made by Justice Wylie in *Brown* at paragraph 35, so this sort of splitting of the test.

MR COLLINS:
Yes. Well, it does seem – although the question whether the person is of good character is but one of multiple factors, it must be significant in any case where the fitness and propriety is being challenged on what might be called moral grounds because some of the factors are not, don't engage moral issues and, for example, whether because of a mental or physical condition the person is unable to perform the functions required in the practice of the law. So I admit that I find it hard to contemplate a situation where a person was found not to be of good character in any material way but was nevertheless found to be a fit and proper person. It seems to be an overarching concept that the person, whether the person is of good character, and that other matters may be evidence of that person's character, for example, criminal records or discipline in another occupation or overseas.

So the inquiry of good character is one which is prompted by the presence of other factors.

ELLEN FRANCE J:

Thank you, and my only other question related to the point that you were making about how the informed member of the public would view the circumstances, and my question was to what extent in looking at that is it relevant that the first of the four drink-driving offences is very dated and that for both the 1991 and 2002 offending, one of which is a drink-driving, they are subject to a fine only. I'm just trying to understand how you say this informed member of the public test works when you're looking at offending of this nature.

MR COLLINS:

Yes, well, it may have been a very different position if it was only those convictions, of course, both as to timing and seemingly the circumstances of the conviction itself. But the response really is that it puts the 2014 conviction into a more severe light because this is a person who has had the chastening experience of past convictions, albeit with some apparently mitigating factors or remoteness in time, but yet has offended again in mature life. He was 59 years old at the time of the last one. So the relevance is the establishment of a pattern and the point that the reasonable conclusion indeed that an informed member of the public might conclude fairly, that he had not learned his lesson from past experience and he presented as a peril in future.

WILLIAM YOUNG J:

Can I just add a question, two related questions? Good character is a subset of the fit and proper person test, isn't it?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

And it would be available in any of the disciplinary cases?

MR COLLINS:

Yes, while in the analysis of penalty in a disciplinary case. Is that, I mean the…

WILLIAM YOUNG J:

Yes.

MR COLLINS:

The person's poor character, if that's what was found, because of the conduct and the enduring influence of the poor character on that person's fitness, would be a factor in a disciplinary context.

WILLIAM YOUNG J:

This is a case where the last conviction is now nearly six years ago.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

All the disciplinary cases would have dealt with far more recent offending.

MR COLLINS:

Yes. I mean a comparable case was the *Brown* case, which is not a disciplinary case but an admission case, where the Roll had occurred, or the conduct which occurred seven years earlier, although there was an additional issue of non-disclosure in more recent times, and again the remoteness in time has to be seen in the context of the pattern over the adult lifetime, the fact that it is indeed the conduct of a mature fully-formed personality, and in a person who's had the chastening influence of past convictions and, so he said, the instructive experience of the law degree, and yet he still offended.

WILLIAM YOUNG J:

Thank you.

WINKELMANN CJ:

Mr Collins, I just wanted to test with you the proposition that you seem to be accepting, which is that you can draw a straight line between the test of fit and proper person which applied once the person is admitted in this very context and the screening approach of the Law Society when they decide whether to issue the certificate. Because it seems to me if one carries to its logical conclusion the thought that the disciplinary case law, which says that we won't strike someone off because they have committed drink-driving offending, carry it through to its logical conclusion, then that would be simply something he could not take into account at the admissions stage, irrespective of the volume of the offending, I think was the *Taffs* case, and – well perhaps not that, but irrespective of attitude, it's simply that the profession doesn't strike people off for that, so the fact that you have this offending in your history is not about, is possibly the logical conclusion?

MR COLLINS:

Yes but then we do have to look at the established point that the frailty of character issue and whether it can said to be spent because when a person is disciplined, and struck off, that happens in the context of specific conduct, which is found to render the person unfit, whereas the person coming, wishing to enter the profession comes with conduct which has to be perceived in terms of risk of damage to the reputation of the profession, and the possibility of repeat offending.

WINKELMANN CJ:

So are you saying that there is inevitably a difference because one exercise you're undertaking an assessment of conduct that you can see, or is, which is when you're disciplining someone, whereas when you're undertaking the admission exercise you're simply using it as material to use in the case of a different exercise, or are they the same thing?

MR COLLINS:

Well it's coming at it from a different angle. In the admission case it's an attempt to predict behaviour based on past behaviour, and if there is a

reasonable body of evidence to suggest that the person is in peril of being seriously disciplined by something more than minor or trivial and in this case either rising to the level of suspension or striking off, then the exercise is trying to predict whether that possibility can be said to be disregarded or have been totally spent. So it is coming at it from a different angle.

WINKELMANN CJ:

All right. So I think you're moving on to your topic 1.3, is it, and applying those principles to particular facts to the respondent's case where the Court of Appeal heard it.

MR COLLINS:

Yes, thank you, Your Honour. The Court of Appeal agreed with the High Court that the respondent's convictions were sufficiently recent and numerous to raise a prima facie doubt about reform. The Court of Appeal also found that the onus that he had to dispel that doubt had not been discharged – and I'm referring to paragraphs 42 and 43 of the Court of Appeal judgment. But the Court nevertheless found him to be a man of good character, at paragraph 53, and the submission in this context is that that was an inconsistency in the judgment and an error. A person who is found to have a flawed character and to have failed to discharge the burden of establishing his or her lasting reform cannot at the same time be a person of good character eligible for admission. And the respondent says that that was not an inconsistency at all but that it was the case that the Court of Appeal was seeing the case in the round and found that the High Court had placed undue emphasis on the peril that the respondent posed to the reputation of the profession with the prospect of re-offending.

So my response to that is that the concept of seeing the case in the round is of course an appropriate one but it cannot be a justification for overlooking a pattern of conduct and, in the absence of qualified independent evidence about the behaviour, allowing the Court to be satisfied that the frailty is spent. So it does seem that the Court of Appeal was not satisfied about the frailty of character being spent but nevertheless found him to be of good character,

which was a finding that the pattern of repeat offending of the same type was not sufficiently concerning to justify refusal for admission, and the submission is that that was an error and it was an inconsistency that the person was at the same time found to have not discharged his responsibility to show that the frailty of character was spent but that he nevertheless was sufficiently of good character to be admitted.

The Court's second error in my submission was to accept that the respondent's evidence of reform and self-discipline was sufficient to establish himself as good character when that self-discipline and willpower had not served him well in the past during his adult lifetime, and I submit that this is an example of the Court of Appeal setting the bar too low. Any decision-maker in these circumstances could reasonably expect to see independent qualified evidence that is other than the person's own say-so of their reform and the relatively superficial references that were available in this case. So the next error is the acceptance of the respondent's self-improvement and his own evidence of having reformed his way should not have satisfied the Court about the frailty being spent.

Then the next point relates to the Court of Appeal substituting its judgments about the respondent's character for those of the High Court Judge who had the benefit of observing the respondent. Now Justice Clark had seen and questioned Mr Stanley and said in her judgment that she found his responses illuminating. The submission here is that the personal impressions of the Judge hearing the original application are a significant factor in the decision-making processes.

Now, two examples of that in the material before the Court. One is the dissenting judgment of Lord Kerr in Privy Council in *Layne v Attorney General of Grenada* [2019] UKPC 11, [2019] 3 LRC 459 where he emphasised the importance of the assessment of the presiding Judge in the matter of harm to the reputation of the profession but involving the Judge's own impression of the person's qualities of uprightness, honesty, integrity and probity, and similarly in the *Re Owen* [2005] 2 NZLR 536 (HC, Full Court) case we had

there, at paragraph 38, and I will refer to that, where the Court acknowledged that a person just looking at the record would say that the person was not a person of integrity, probity and trustworthiness as to be fit to be admitted, and the Court said, “With the benefits which we enjoy, in having before us the positive evidence of recent years and with the advantage of hearing Mr Owen being cross-examined by experienced counsel, we are satisfied that both the public and responsible members of the profession would, if similarly placed, share our view that Mr Owen is a suitable candidate for admission.” So the point here is that this is possibly unique in the role of the High Court Judge, a situation which has some of the qualities of an interview where the Court is required under section 52(2)(a) of the Lawyers and Conveyancers Act to be satisfied that the candidate is qualified for admission which includes the qualification of fitness and propriety, that there is a high degree of importance on the personal impressions of the Judge questioning and hearing from the applicant and, in my submission, the Court of Appeal should have given greater deference to Justice Clark’s assessment of Mr Stanley as lacking in insight into his offending, and that was the finding at the end of the High Court judgment, and I refer to paragraph 65 that Her Honour said, “Mr Stanley has not established he is a reformed person. I have found his assertions of reform to be unpersuasive.” He, “Proposes to rely on willpower and self-discipline when, manifestly, this has consistently failed him over a period of decades.” Those findings were the result of Her Honour having seen and heard personally from the applicant, the candidate for admission, and in my submission the Court of Appeal was too quick to substitute its own judgment on the papers for those of the High Court Judge.

The next error was the Court of Appeal was unduly lenient about the professional significance of drink-driving convictions and my submission is that the – the Court of Appeal found that the possibility of re-offending would not create an unmanageable risk of bringing the profession into disrepute and it’s submitted that this indicates a degree of permissiveness or setting the bar too low in which the possibility of re-offending which could not be ruled out is regarded as an acceptable risk for the profession to run and the question must be asked whether this puts the matter the wrong way round. The candidate

for admission should positively satisfy the decision-maker that he or she does not present a material risk to the standing and reputation of the profession rather than the decision-maker acknowledging the risk and categorising it in terms of manageability. So those were the errors I wished to refer to in the Court of Appeal judgment.

WINKELMANN CJ:
Right. Justice Young, did you have questions?

WILLIAM YOUNG J:
Taking the last point, I guess any case where there's a breath alcohol or blood alcohol conviction carries the risk of future offending, do you agree?

MR COLLINS:
Yes.

WILLIAM YOUNG J:
And such a risk would have been present in all of the disciplinary cases that have been cited?

MR COLLINS:
Yes.

WILLIAM YOUNG J:
And it can never ever, in the nature of things, be entirely excluded?

MR COLLINS:
No.

WILLIAM YOUNG J:
And the pattern of decisions shows that despite such a risk people in this situation have not been held to be unfit to practice?

MR COLLINS:

Yes. A distinguishing feature in this case was the lack of insight, Sir, and the denial –

WILLIAM YOUNG J:

Yes. Just answer my question, please. I'll come to that in a moment.

MR COLLINS:

Okay.

WILLIAM YOUNG J:

Just looking at the Judge's findings, she said – and I just want to ask you about this – para 61, that Mr Stanley had claimed to have been alcohol-free over the preceding four years. Now I understand that that's contended by your opponent to be a mistake, that he hadn't contended that. What he said is that he hadn't been drinking and driving.

MR COLLINS:

I understood him to be contending that he had been dry, alcohol-free, except for an occasion on which he claimed to be (inaudible 10:57:27).

WILLIAM YOUNG J:

Well, this is a point that is made, I think, and we might just go to it, because – are you able to take us to the transcript where he claims to have been alcohol-free for four years?

MR COLLINS:

Yes, just one moment.

WILLIAM YOUNG J:

I'm looking at para 25 of your friend's submissions, which is a bit ambiguous, but it refers to a statement of abstinence, being in relation to drinking and driving.

WINKELMANN CJ:

If it's of assistance, Mr Stanley comes in at paragraph 4.8 of his affidavit, which is at page 201.0004 of the case.

WILLIAM YOUNG J:

I don't think I've got that.

WINKELMANN CJ:

In the case on appeal.

WILLIAM YOUNG J:

Yes.

WINKELMANN CJ:

And it's about a third of the way in, and the large number at the top is 201.4, after the Court of Appeal judgment, paragraph 4.8.

WILLIAM YOUNG J:

Yes, okay. So he says, "I adopt a zero tolerance to any consumption of alcohol when I am driving and I hardly drink at all," is that right?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

That's the guts of it, isn't it?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So…

GLAZEBROOK J:

Yes, there's also at 201.0082, where he says something similar. He told us that he avoided alcohol except on special occasions.

WILLIAM YOUNG J:

So, just look at this…

ELLEN FRANCE J:

Sorry, just one other thing. In the transcript of the notes of evidence at 201.0112 he's asked about when did he last have a drink of alcohol and he said, "I had one glass May 2017 and nothing since then."

WINKELMANN CJ:

Although at the top of the page he says he gives up drinking, which might be –

ELLEN FRANCE J:

Yes, I was concentrating, I was thinking about the timing, the four year point.

WINKELMANN CJ:

Yes, the High Court Judge might have been picking up that, he said he'd given up drinking.

WILLIAM YOUNG J:

All right. So I'm just looking at what the Judge said at para 61, it's an overstatement, isn't it?

MR COLLINS:

That he declared himself to be completely alcohol free over the past four years. Sir, I would need to look at that…

WILLIAM YOUNG J:

Well, we've just looked at it.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

He says, as I read it he says, “I don’t drink and drive, absolute abstinence of drinking and driving, I drink on special occasions.”

GLAZEBROOK J:

I’m just looking at another one at 201.0090, this is where the four years comes in. So about halfway down the page it says he’s only had one – a file note of an interview – he’s only had one drink in the last four years when he presided at his son’s wedding. “He doesn’t drinking because it’s just not good for your health.” So there is a four year notice in the interview notes of 25 August 2017.

WILLIAM YOUNG J:

So as I see it, the Judge has picked up an inconsistency that wasn’t really there, do you agree with that?

MR COLLINS:

Well, so in the transcript I’m looking at page 201.0111 at that bottom of that page, which is page 14 of the transcript. He says at the beginning of the sentence, “And so I said that’s it. I can’t estimate, no one can I think estimate when you're in the limit or when you're not in the limit. I am going to, for me, set a policy of zero tolerance, which I have done.” I think that –

WILLIAM YOUNG J:

But isn’t that a zero tolerance to drinking and driving?

MR COLLINS:

Well, then he goes on to say –

WILLIAM YOUNG J:

And in any event that he hasn't been drinking for the last four years except at son's wedding. I mean, the impression I got from reading 61 is that he says one thing and does another.

MR COLLINS:

Well, the impression, the question is whether the Judge overstated what he was saying. I, it was a fair impression that –

WILLIAM YOUNG J:

I'm putting it to you that she did overstate.

MR COLLINS:

But the thrust of his evidence was that he was teetotal, except for a drink at his son's wedding.

WILLIAM YOUNG J:

All right. So you don't accept that that paragraph is an unfair or an inaccurate – I should put it that way – characterisation of the evidence?

MR COLLINS:

That he declared himself to be completed alcohol free over the past four years?

WILLIAM YOUNG J:

No, no, no. The proposition that she made is that he's made a resolution from which he has from time to time departed.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

And that, would you agree with me that that's not accurate, not an accurate account of his evidence?

MR COLLINS:

Well, she referred only to one occasion on which he had departed from it which she thought was telling.

WILLIAM YOUNG J:

Well, you name another.

MR COLLINS:

There isn't, Sir.

WILLIAM YOUNG J:

But he will find occasions. So what are the occasions?

MR COLLINS:

Special occasions such as a family wedding. That was the –

WILLIAM YOUNG J:

Didn't he mention one? You're focusing on her assessment of his oral evidence and I just want to look at how accurate that assessment was.

WINKELMANN CJ:

I think he does in fact in his own evidence say "special occasions" so he uses the plural.

WILLIAM YOUNG J:

Just the next paragraph, "Mr Stanley's answers to questions during the hearing provided me with very little confidence that he could be safely accredited by the High Court to the public to be entrusted with their business and private affairs." What's the basis for that conclusion which isn't really articulated?

MR COLLINS:

Sorry, which paragraph is that, Sir?

WILLIAM YOUNG J:

Para 63. And he's been an insurance broker.

MR COLLINS:

Yes. Well, I –

WILLIAM YOUNG J:

Why say that he can't be? What's the basis for it is what I'm asking for.

MR COLLINS:

It's likely to have been the lack of insight issue and the point that the Judge found him to be perhaps insincere about that and an example of that was that when he was asked about whether or not he'd shown remorse and he said that he didn't show remorse because he wasn't asked to.

WILLIAM YOUNG J:

She accepts he's sincere, para 60.

MR COLLINS:

Possibly sincerely deluded, Sir. That's the impression from the judgment.

WILLIAM YOUNG J:

So do you say that this passage is based on, this can't be trusted with business and affairs, is based on a lack of insight to and a tendency to minimise his breath alcohol, blood alcohol offending?

MR COLLINS:

It must have been that and general demeanour, I suppose, Sir, but…

WILLIAM YOUNG J:

Well, general demeanour, wouldn't you expect that to be articulated if it's going to be relied on?

MR COLLINS:

Yes, Sir. Yes. Well, that is –

WILLIAM YOUNG J:

So are we – at the moment this conclusion is not articulated in terms of reasons?

MR COLLINS:

No.

WILLIAM YOUNG J:

Thank you.

MR COLLINS:

Beyond the context of it, no.

GLAZEBROOK J:

I must say I just read that articulating the test based on her conclusion that he didn't have sufficient insight to be sure that he was of good character and a fit and proper person. I didn't see that as –

WINKELMANN CJ:

Which is what (inaudible 11:08:30) the case.

GLAZEBROOK J:

Yes, I didn't see it as being, as adding anything to the reason she'd said before, which is probably what Justice Young was saying in any event, that it wasn't based on anything other than articulating the test in that case.

MR COLLINS:

Yes, what I referred to as an aspect of the fit and proper person test that the person must be capably accredited to the Courts and to the institutions and clients, that that seems to be what that is addressing, but – and based on an impression of Mr Stanley as having been unreliable because he lacked insight.

WINKELMANN CJ:

Right. Justice Glazebrook?

GLAZEBROOK J:
I didn't have anything further, thanks.

WINKELMANN CJ:
Justice O'Regan?

O'REGAN J:
I don't have any questions, thank you.

WINKELMANN CJ:
Justice France?

ELLEN FRANCE J:
Nothing, thanks.

WINKELMANN CJ:
So Mr Collins, on to your next question, if I can find it.

MR COLLINS:
Thank you, that was concerned with the importance of maintaining public confidence in the legal profession and its relevance in this case.

WINKELMANN CJ:
Sorry, Mr Collins, I had one point, which is Justice France seems to focus quite a lot on Mr Stanley's approach to the law and his tendency to trivialise the JP's, the notion that somehow he was arrested because of a vendetta – not a vendetta, a blitz, and I think he, evidence included that the proprietors of the pubs should be prosecuted. Is that reflected in her judgment or do you say that that's part of her decision, it's part of her thinking, his relationship or attitude for law and law enforcement, and is that carried forward in the Court of Appeal judgment?

MR COLLINS:
It's part of the decision, the conclusion in the High Court that Her Honour accepted that he was a peril for the legal profession, and it was a peril that he

would re-offend and bring the profession into disrepute. It's not specifically addressed, I think, as a separate sort of category of frailties, so to speak, that he's got a disrespect for the law generally. But, and I'm going back in the judgment where there's discussion about him being, his evidence that he was impressed by the, having done, completed a law degree, and that that helped him in his reform, but that had not been sufficient to cause him to be reformed. So it was not an independent finding that he was disrespectful of the law.

WINKELMANN CJ:

Because that was part of the Law Society's thinking, was it not, was my recollection?

MR COLLINS:

Yes it was. Yes, that, well the general, the proposition that a lawyer who is a, or a person who is a candidate to become a lawyer is a fit and proper person ought to be capable of discharging their duty to uphold the rule of law and facilitate the administration of justice which requires the spectacle of the law, and that repeat offending of this sort indicated otherwise. But in my submission that can be explicable either as disrespectful of the law or being subject to addictive or impulsive behaviour which has the effect of, or tendency toward unlawfulness. And the Court of Appeal clearly did not think that it amounted to a disqualifying disrespect to the law, or that that was a significant issue in the analysis of his character.

WINKELMANN CJ:

Thank you.

MR COLLINS:

Should I continue with my –

WINKELMANN CJ:

Yes.

MR COLLINS:

I've finished with putting the profession into disrepute. The admission regime and the established principles must all be seen against the protective purposes of the Act in section 3, which include the protection of consumers of legal services and the maintenance of public confidence. As I mentioned earlier there are two dimensions to reputational damage, the harm that would be done in the event of future offending, the harm to the reputation in that context, and the harm by the admission itself in circumstances where an informed member of the public would think that the entry of a multiply convicted drink-driver lacking in insight, and lacking in evidence of the form, is damaging to the standards of the legal profession, and I refer only to paragraph 38 of the *Owen* judgment, which gives a helpful explanation of the concept of reputational harm being concerned with informed public opinion, which is a member of the public who had the same benefits of the Court hearing from the candidate, hearing the candidate be cross-examined and being satisfied that the person's insight meant that an informed, a person with that information would not think that the reputation of the profession was damaged, that's really all I wanted to say about that topic, and that in this case an informed member of the public knowing of the convictions, knowing of the lack of insight, knowing of the absence of any evidence of enduring soundly based reform, would think, would be justified in thinking that it would damage the reputation of the legal profession to allow that person. That is my submission under that head.

WINKELMANN CJ:

Justice Young? Justice Glazebrook?

GLAZEBROOK J:

No, I have no questions.

WINKELMANN CJ:

Justice O'Regan?

O'REGAN J:

I don't have any questions either.

WINKELMANN CJ:

Justice France?

ELLEN FRANCE J:

Nothing further, thanks.

WINKELMANN CJ:

Right. Thank you, Mr Collins, you can go on to your next heading.

MR COLLINS:

All right, thank you. The next heading is really concerned with the events since the Court of Appeal judgment and the questions that were included and the issues that were identified in the grant of leave to bring this appeal. Now subject to any questions I am satisfied that I have largely addressed this, taken it as far as I can in the written submissions, but I just did want to emphasise that the decision not to apply to this Court for a stay was a decision based on the language of the Court of Appeal in its judgment dismissing the application for a stay in that Court where it had specifically referred to its own jurisdiction to remove a person from the Roll being available if this appeal went ahead and is allowed. So what we would be faced with there, and we're told in the respondent's submissions that he is unlikely to consent to his voluntary, his removal from the role under section 60, therefore we would if this appeal is allowed be faced with the situation where an application needs to be made on reasonable cause under section 266 to the High Court and then it proceeds to the Court of Appeal, and the submission here is that it seems inconceivable that this country's superior Court had made a finding that Mr Stanley should not have been admitted, he was not a fit and proper person, and that the Court of Appeal itself, which has the jurisdiction to strike off, had said, "Well, your rights are preserved in that area and you can come to us and an application is necessary in that

category," it seems inconceivable that reasonable cause would not be made out in that situation.

Now the case of *Re Davis* (1947) 75 CLR 409, the Australian case, is an example of a case where a lawyer was admitted but subsequently removed from the role. The facts were different, that involved non-disclosure of past criminal convictions which emerged after the person was admitted. But the point is that nevertheless the impression of untidiness of a person being admitted and then being removed can be addressed, and in this case it seems, since we're told that he would not consent to his removal, that it would have to be done on the cause-based procedures under sections 266 and 267 and that there would be ample cause if this Court had found him to be unfit, which the Court of Appeal seemed to acknowledge, and that is the Court charged with the jurisdiction to be exercised in that area.

The only other issue under that heading is section 41, which related to the issuing to the respondent of practising certificate. The explanation for that is that is that there was an obligation, it was not a discretionary matter once he had been admitted, and under section 41 where the Law Society could not dredge up material that had been aired in the context of his admission application and used that as a ground of refusing a practicing certificate. So there was a mandatory element to that. Those were my submissions on that, on the post-Court of Appeal judgment issues, and I hope that I've addressed those responsibly in the written submissions, but I can, of course, answer any questions.

WINKELMANN CJ:
Justice Young?

WILLIAM YOUNG J:
If the case were to go to a High Court or Court of Appeal under sections 266 and 267 they would presumably have to deal with the situation as it was at the time the case was heard, wouldn't they?

MR COLLINS:

Yes.

WILLIAM YOUNG J:

So would be dealt with not as at 2018 but as at 2020 or 2021?

MR COLLINS:

Yes, but the event providing the reasonable cause is the finding of this Court, that he is not a fit and proper person.

WILLIAM YOUNG J:

Well it would be – wouldn't the finding of the Court be that he hadn't established himself as at 2018 to be a fit and proper person. I'm just trying to work my way through what I regard as quite an elusive point.

MR COLLINS:

Yes.

WILLIAM YOUNG J:

Say he produced evidence at that hearing to say, well in fact he doesn't have an alcohol problem anymore, would you say that's irrelevant?

MR COLLINS:

Yes, because the, I mean it has to be confronted that the application is based on the proposition that he should not have been admitted in the first place as determined by this Court.

WILLIAM YOUNG J:

But, yes, so I mean you accepted a moment or two ago, perhaps wrongly, that the application would have to be dealt with in light of the circumstances as they were at the time the application was heard.

MR COLLINS:

Well, but I acknowledged that was, that the circumstances were the finding of this Court rather than the (inaudible 11:22:46) character in 2017 or 2018.

WILLIAM YOUNG J:

So you say that if this Court allows the appeal, it would follow as night follows day that he would have to be struck off under sections 266 and 267? That there would be no answer he could make?

MR COLLINS:

Yes because the reasonable cause is the judgment of this Court.

WILLIAM YOUNG J:

Okay. I mean a possible view of the case is I guess that it's moot and that if you wanted him not to be admitted you should have applied to this Court for a stay and if you got it, if the Court of Appeal was wrong, and you were wrong, so be it. You say it's not because, by a sort of an indirect mechanism you can rely on it under sections 266 and 267?

MR COLLINS:

And because the Court made the decision the Court of Appeal specifically said that this was still available and it was reasonable for the Law Society to rely on that.

WILLIAM YOUNG J:

Did they say that, and this is an open-ended question, did they say the application wouldn't have to be considered in light of the circumstances as they were at the time it was dealt with? So, for instance, in light of any additional evidence?

MR COLLINS:

No, and I should go to that judgment…

WILLIAM YOUNG J:

It's somewhere, it is in the leave bundle I know.

MR COLLINS:

Page 50037.

WILLIAM YOUNG J:
Yes. It's paragraph 8(c) isn't it?

MR COLLINS:
And 13.

WILLIAM YOUNG J:
Okay.

MR COLLINS:
So 8(c), "Not granting a stay would not render the Society's appeal nugatory."

WILLIAM YOUNG J:
Okay.

WINKELMANN CJ:
We've lost Justice Young have we?

REGISTRAR:
It appears we've lost Justice Young in the courtroom Ma'am, yes.

WINKELMANN CJ:
Well what we might do is take the morning adjournment and then we can finish any questions for Mr Collins. Does anybody else have any questions for Mr Collins before we handover to Mr Gwilliam?

UNIDENTIFIED SPEAKER: (11:25:52)
I don't.

WINKELMANN CJ:
We'll resume with him I think when we come back after the morning adjournment. We'll take a 20 minute adjournment to allow for the complexity of it all and during that time hopefully Justice Young can be re-joined.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:
Justice Glazebrook, did you have questions for Mr Collins?

GLAZEBROOK J:
Yes. My question was you put great store on the fact that the Court of Appeal said that if this Court came to a different view that the avenue of 266 and 267 would be available. However, the Court of Appeal can't give itself jurisdiction if in fact it doesn't have jurisdiction and there isn't jurisdiction under those sections, would you agree?

MR COLLINS:
Yes, I agree that it could not give itself jurisdiction if none arose.

GLAZEBROOK J:
Well, my concern is that Mr Stanley has actually done nothing at all that would merit being struck off the Roll since he was put on the Roll. Do you agree with that too?

MR COLLINS:
In terms of conduct I agree with that.

GLAZEBROOK J:
So for myself I can't quite see – because in the case that we were discussing before, is it *Brown*, there had been non-disclosure and so effectively there'd been a fraudulent getting on the Roll whereas here Mr Stanley, perfectly reasonably, having been told by the Court of Appeal that he was a fit and proper person, applied for admission and was given admission to the Roll. Do you have a comment?

MR COLLINS:

Yes, thank you, Your Honour. Well, the relevant concept is, of course, what is reasonable cause, and I suppose the Court of Appeal expressed the view, well, was expressing the view that a successful appeal to the Court would amount to reasonable cause. That is why the Court said that the appeal wasn't rendered nugatory and that Mr Stanley was entering into his admission with his eyes open about the possibility of that. So I would be depending on establishing, initially in the High Court under 266 and subsequently to the Court of Appeal, unless the High Court dismissed, of course, under those two sections, that reasonable cause was constituted in the judgment of this Court that he should not have been admitted, not some independent conduct.

GLAZEBROOK J:

All right, I understand that argument. For myself I'd probably – I do have some concerns about that in being struck off as soon as one has done something to merit being struck off rather than something in the past, but I understand what your argument is on that. For myself I actually see possibly section 41 as having more purchase because that's an ongoing requirement to show good character before you can have a practising certificate, but then really following up on Justice Young's point, that would be assessed as at the time you were applying for a practising certificate and not retrospectively. Do you have a comment on that?

MR COLLINS:

Yes. I will first note that that comes into play, of course, only once the person is admitted. So that assumes he retains the status of an admitted lawyer which –

GLAZEBROOK J:

Well, I'm assuming that he does because you can't use 266 and 267. I'm not saying that's my final view but assuming that you can't use 266 and 267 I'm asking you about whether you can independently use 41 but at that stage you would have to assess it at the time the practising certificate was applied for.

MR COLLINS:

Yes, I accept –

GLAZEBROOK J:

And then take into account what he has or hasn't done since the date of admission.

MR COLLINS:

That is so because, among other reasons, because of the provision further on in subsection (4), so if a matter was disclosed in an application for admission then that matter cannot be taken into account as a ground for refusing to issue a practising certificate so it would not be open to the Law Society to, as it were, re-open the inquiry that existed at the time of the certificate of character application. So it would have to be present matters, that is correct, or it would have to be new matters since his admission, yes, since his admission, and there it would be in the realm of actual conduct rather than the status of a finding of this Court that he was not properly admitted, overruled the Court of Appeal and said that the High Court was correct in refusing his admission.

GLAZEBROOK J:

(inaudible – audio issue 11:54:22).

WINKELMANN CJ:

Are you on mute or is the sound breaking up?

GLAZEBROOK J:

(inaudible – audio issue 11:54:31).

WINKELMANN CJ:

We might just move on to Justice O'Regan to see if he's got any questions and if our tech person, Mr Ruth, could see if he can assist Justice Glazebrook with the sound, the issue that she has with her microphone. Justice O'Regan, have you got any questions?

O'REGAN J:

No, I don't have any questions.

WINKELMANN CJ:

Justice France?

ELLEN FRANCE J:

Could I just check, Mr Collins, section 267 does appear to envisage that the High Court may have affidavits before it. Is it your position that in this case they could only be the existing affidavits, in other words he couldn't file any new evidence, or is that not right, have I misunderstood?

MR COLLINS:

Well, the applicant would be the Law Society and under section 266, which would presumably, and I think would satisfy this, I would say that the judgment of this Court was the evidence it was bringing, it would not be as establishing reasonable cause and it would not be a re-run of the convictions and attitude to alcohol issues that arose in the first round in the present litigation because that would have all been determined by that time by the ruling of this Court. So the application would be made on the basis of this judgment, this Court's judgment.

ELLEN FRANCE J:

So would Mr Stanley be able to provide any evidence or not on your approach, any new evidence I mean?

MR COLLINS:

Well, he could try, but my submission is that the procedure, well, he could not impugn the judgment of this Court, which would be saying that he should not have been admitted and he's not a fit and proper person and it would not be a forum for arguing that issue. So he could only, well, he could only bring legal argument of the sort that's being teased out now that somehow the judgment of this Court, again assuming the appeal is allowed, does not amount to reasonable cause, and that would be the contest.

ELLEN FRANCE J:

Thank you.

WINKELMANN CJ:

Justice Glazebrook, have we got some progress on your sound?

GLAZEBROOK J:

Yes. I just don't seem to be able to mute it but I have managed to work out how I get it back. But I don't have anything further, thank you.

WINKELMANN CJ:

Right. I think those are our questions, thanks Mr Collins, and thank you for your submissions.

MR COLLINS:

Thank you.

WINKELMANN CJ:

Mr Gwilliam.

MR GWILLIAM:

Thank you, Your Honours. Just to address the matters in the memorandum filed yesterday, and then Your Honours indicated to taking question from the Bench. The first matter I refer to is a discussion of the relevant principles for determining whether a candidate is a fit and proper person to be admitted to the Bar, particularly within the context of section 55. I have to say firstly I don't think there is much disagreement between my friend and I as to what those principles are. We both set them out in our submissions, I set them out at paragraph 10 of my written submission. But the purpose of my oral submission is just to highlight some of matters of those principles which in my submission I consider particularly relevant to this appeal and to Mr Stanley's case.

The first feel real matter is, and it's this issue of good character, firstly it's clear that section 55 slightly amended or did amend the previous legislation in that it put good character as a subset of "fit and proper" and that in that respect clearly and also was certainly approached from the previous Courts, and I'm referring to the *Singh v Auckland District Law Society* [2002] 3 NZLR 392 (HC) case, which the Law Society have referred to, those concepts of fit and proper and good character were considered to be separate and discrete matters. But underlying the good character certainly is this question of whether a person is of unquestionable integrity, probity and trustworthiness, and that's a matter that I would like to come back to in terms of the evidence insofar as it relates to Mr Stanley.

The other matter, and this is one that's certainly come through in most of the cases where admission to the Bar has been challenged by the Law Society, is this lack of candour or failing to disclose, and those are often seen as quite important matters, for very good reason. They do go directly to a person's character in terms of their character or trustworthiness and probity. The other matter which, of course, has been referred to is the fact that simply – sorry, that simply because there are criminal convictions does not in itself mean that a person is of bad character. Indeed the way section 55 sets out of course that there's a separate category, but also more importantly is one where the Court and the Law Society for that matter is obliged to look at the nature of those convictions, not just the fact of the convictions. And as Justice Kitto in the *Ziems v Prothormotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 case, which I heard is in the bundle, made it quite clear there can be what are prima facie disqualifying convictions and clearly referring there to convictions where there are some clear dishonesty or where there has been some serious breach of the criminal law and again in my submission, and it's one I'll be coming back to, it's one that the Court of Appeal referred to, that in terms of these convictions they do not fall into that prima facie disqualifying category. That, of course, is not to say they aren't relevant and they are matters that need to be taken into account.

The other matter which is important, in my submission, is the principle that particularly was referred to in the *Owen* case to the effect that where there are previous convictions the question is whether the frailty or defect of character indicated by those convictions can now be entirely spent or safely ignored, and that “or” in my submission is important. It’s not an “and”. There are other words, there are two routes one can approach with previous convictions. Firstly, can they be safely ignored, in other words – sorry, have they now been entirely spent, which clearly addresses the reform of character. Youthful convictions, has the person since then shown themselves to be an otherwise fit and proper person such that the convictions can be seen to be no longer relevant, if I can put it that way. The second limb of that is, well can the convictions be safely ignored, and in my submission that then does address the nature of those convictions. Are they of such a character themselves where they can be safely ignored, and in my submission that is particularly relevant in this case when one looks at the particular convictions Mr Stanley has, and the way – and if I can put it this way, the doubts that both Her Honour Justice Clark in the High Court and the Court of Appeal had as to whether he was sufficiently reformed. Whether there was an acceptable risk that he would not re-offend in that way and that, in my submission, is an approach that the Court can take. Where the convictions themselves are not in that prima facie disqualifying category.

The only other – I referred to the lack of candour, of course, which came through clearly in all the cases, a matter of Mr Stanley I'll be addressing later is not present in this case. The other matter is this question which, about well if disciplinary action were to b e taken against a practitioner who had been convicted of a drink-driving charge, what the approach of the Law Society would be in that case, and I refer particularly to the principle there that the onus on a person who’s erred in a professional sense following admission to the legal profession is a heavier one than upon one who is a candidate for admission and, of course, the Court of Appeal accepted that proposition. It’s from a case *Ex-parte Leneham* (1949) 77 CLR. I’ve referred to it in a footnote. It’s one the Law Society also had earlier referred to, an Australian case of, I believe, the High Court in Australia.

So in terms of those principles in my submission they are relevant to this particular appeal. So I'm happy to take questions at this stage before I go on to the particular facts as I see in this case that are relevant when applying those principles.

WINKELMANN CJ:
Thank you. Justice France.

ELLEN FRANCE J:
Just in terms of the principles, Mr Gwilliam, how do you see those principles, how they interrelate with section 4 of the Act and in particular the reference to upholding the rule of law? So the notion, for example, of being able to ignore the previous convictions. Just how you see that fitting in then with that need to uphold the rule of law.

MR GWILLIAM:
Yes, look, it's certainly accepted if one goes to the purposes of the Act, particularly section 3, and 3(1)(a) is relevant in this case, that one of the purposes is to maintain public confidence in the provision of legal services and conveyancing services. So I accept that clear purpose of the Act, one of the relevant matters here is the upholding of the status of the profession and particularly if there is a risk of bringing the profession into disrepute is certainly a valid issue that can be looked in terms of that particular purpose.

In terms of the fundamental obligations of lawyers in section 4 of the Act it is my submission if one looks at all of those fundamental obligations, and I know I'm straying probably into my second point about how they apply in this case, but there is nothing to suggest that Mr Stanley would not fully comply with those fundamental obligations. As I see it the issue really in this case is whether his conduct, his attitude to those convictions, is sufficient that there is a real risk of bringing the profession into disrepute and therefore perhaps undermining one of the key purposes of the Act as set out in section 3.

ELLEN FRANCE J:

Thank you. I didn't have any other questions.

WINKELMANN CJ:

Justice O'Regan.

O'REGAN J:

Mr Gwilliam, do you see the question of insight into offending and the concern in this case was that Mr Stanley had minimised it, do you see that as bearing on the question you talked about whether they could be safely ignored?

MR GWILLIAM:

Well, in my submission, and it's certainly one I believe I made in the High Court and Court of Appeal, Mr Stanley is a person who has been quite forthright and candid in those convictions and who has in explaining them, of course, one could say perhaps made things slightly worse in trying to what appears to be a minimisation of those convictions which he saw as really an explanation, and if that's a criticism of Mr Stanley it's one that really goes to some extent to his advocacy role that perhaps he should have not adopted in terms of responding to those matters. But I still say that in terms of the attitude to those convictions, they are matters such that the convictions could still be safely ignored. So if you like, and I don't like posing hypothetical questions, but if one might recall in the evidence that 2013 or subsequent '14 conviction he did attempt to defend that charge based on that technical argument Your Honours are probably aware about, it was settled in *Tebbs*, as to the manner in which the blood was taken. I guess my comment here is if that appeal had been successful so he did not have a conviction would still his attitude to the offending rather than the conviction have been a matter of relevance in assessing good character? I would say no, it's not.

O'REGAN J:

Well, I guess that the – I think it's pretty clear that minimisation and lack of insight is relevant to whether the frailty is spent, to use that rather quaint phrase. But my question was really on ignoring it. Is it a concern that the

Court should be taking into account when deciding whether to ignore an offence that the person who committed the offence doesn't really seem to believe that it was a serious matter?

MR GWILLIAM:

I would have to agree that a person's attitude to the conviction is a relevant matter, I don't in any way disagree with that, and in fact does of course stray into the area, it runs, it strays into the area, but is relevant in the area of good character. And I guess my point really was would it be, if there was no conviction because of what might initially be termed a technicality that his, more or less his attitude to the offending, namely drinking and then driving, would have been a matter concerning the Law Society or to this Court.

O'REGAN J:

Thank you.

WINKELMANN CJ:

Can I just ask a question on that? Are you accepting that if there was evidence that Mr Stanley thought that it was an inconsequentiality, he didn't take it seriously that he'd previously offended, that could be a matter that the Law Society could take into account in deciding he wasn't a fit and proper person?

MR GWILLIAM:

Sorry, Your Honour, I could hardly hear what you said. Is that…

WINKELMANN CJ:

Really? Can you not hear me?

MR GWILLIAM:

I can just hear you. So the question was?

WINKELMANN CJ:

I'm just trying to test the tolerance on this point, because both Justice O'Regan and Justice France have raised it with you. I understand – can you hear me?

MR GWILLIAM:

Yes, I can.

WINKELMANN CJ:

I understand you to say that there are some offences of a character that they can be ignored by the Law Society, a character of some offences means that they can be ignored by the Law Society.

MR GWILLIAM:

That's correct, and that's based on Kitto's decision too where they don't in themselves –

WINKELMANN CJ:

Do you say that excess breath alcohol sits in that category because when the Law Society has come to discipline people for it they have not struck them off?

MR GWILLIAM:

No, I'm not saying that the Law Society can't take – sorry, when I say – I should go back a step. Obviously section 55 does require those convictions, they are relevant matters to be addressed. But the question is then if there is nothing else, and that means looking at the nature of the offending, they can in themselves be safely ignored. I'm going to take an obviously example, a very minor charge of this sort of behaviour, whatever, that one looks at the nature of that offence. It may be such, yes, it's considered, but then it's seen that it can be safely ignored in terms of assessing a fit and proper person.

WINKELMANN CJ:

And does that mean – so if the Law Society looks at a person and thinks, "Oh, well, I can see that they've committed these offences and I can see that they may well commit them in the future, but they are a category of offence that the Law Society can ignore," is that part of what you say the reasoning is?

MR GWILLIAM:

Yes, that they in themselves are of a nature where it's not considered that they would necessarily themselves bring the profession into disrepute.

WINKELMANN CJ:

And what does that say of the fundamental obligation of lawyers to uphold the rule of law?

MR GWILLIAM:

Well, this is the point I was going to address later in terms of Mr Stanley. Whilst I guess a human reaction, he in some respects expressed some dissatisfaction with having been convicted. He nevertheless fully accepted the decision of the Judge, the outcome, he didn't proceed to unnecessarily, if I can put it, defend the charge once the law had been settled, he followed the advice of his lawyer and, as he said somewhere in the, it's in his evidence, "I accept the decision of the Court." So in that respect he was carrying out that obligation to the rule of law, he's not seeking to say, "Well, I don't agree with the decision, I'm not going to comply," in fact he said, "I agree with the Judge's decision, I know that I've made a mistake," and certainly as the, I think the Court of Appeal did point out that drink-driving per se without any other aggravating matters such as driving whilst disqualified or some disorderly or eluding police, is in that category where there may not perhaps be an intentional non-compliance with the law, except of course, and I think the message was well out there, don't drink and drive at all, but in terms of assessing what your limit is, that's always a matter that in the sense is if I can call it strict liability.

WINKELMANN CJ:

So I'm just testing this direct line which seems to be accepted between the tests applied once a practitioner is – once a person is a practitioner to the test that' applied at admission, because it seems to me that when the Law Society is looking prospectively as to whether someone is admitted, they should be able to take into account their attitude to compliance with the law and irrespective of the category of offence, so if they are a repeated offender, or have a tendency to minimise the significance of offending, is that not relevant in that regard?

MR GWILLIAM:

Look I agree, it does become a matter of degree, and I didn't mean to indicate that drink-driving or EBA charges in themselves may, or can be safely ignored, particularly where there is a significant recidivist nature to that offending and there is also an indication of someone's attitude to that type of conduct. So I'm not saying that the matters that the Court, the Law Society and the Court took into account in this case were in any way irrelevant, clearly they are relevant to both the conviction but the attitude as I say is relevant to a good character assessment.

WINKELMANN CJ:

Thank you.

WILLIAM YOUNG J:

Two questions, or really propositions you may or may not agree with. When the word "ignore" is used, does it really mean "ignore" or does it mean "not treat as controlling"?

MR GWILLIAM:

My submission would be it's probably the latter. Ignored means we're not even going to look at it. What I'm saying is, as Your Honour has phrased it, it's not a controlling matter in terms of that assessment that we make that all other matters are also put in the pot so to speak.

WILLIAM YOUNG J:

And in terms of disciplinary hearings, would a scofflaw attitude on the part of a prosecuted practitioner be relevant to a strike off decision? Someone who doesn't have any respect for the law.

MR GWILLIAM:

Obviously again any disciplinary process of a similar assessment of whether someone is fit and proper. One point I was going to say here is that there was a suggestion that different exercise in terms of fit and proper for admission as opposed to fit and proper where a practitioner is being disciplined, but in my submission they are both the same in the sense you are forward-looking. You are looking, particularly if someone has got an EBA, as a practitioner what penalty would be imposed clearly would be looking at their attitude to that conviction and, you know, the risk that they may further offend in that way, in assessing what would be the outcome of that. The history shows that there are practitioners who have come before disciplinary processes with multiple drink-driving convictions where there seems only to at worse been suspension imposed.

WILLIAM YOUNG J:

Thank you.

WINKELMANN CJ:

Justice Glazebrook?

GLAZEBROOK J:

It's really more of a general question here. I have a great deal of difficulty in seeing that somebody who's been held to be not of good character could in any circumstance ever be a fit and proper person. Do you have a comment on that? Now what constitutes not of good character is not the question, it's just if you have come at the end of your assessment and found that they're not of good character, it seems inconceivable that you could nevertheless say that that person's who's not of good character can nevertheless be a fit and proper person.

MR GWILLIAM:

I certainly noticed that was my friend's position as well. If one looks at the way section 55 is drafted, there at least is technically a possibility that someone may not satisfy good character but still be deemed a fit and proper person. Whether that's inconceivable as I say the range of factual situations that might come before a court, you know, it is hard to envisage where that might happen. But I don't know if one could say it's inconceivable simply because section 55, I think it's subsection (2), says even if you don't fall within any of those, one of more of those categories, you could still, the Court could still find someone who's a fit and proper person to be admitted.

So I guess my response to your question is I can't say it's inconceivable, certainly from a legal point of view it is conceivable, that's the way the section is drafted. I would have to probably accept that it's probably highly unlikely, but one cannot preclude what, as I say, factual situations might present to a Court in the future with the Law Society.

WINKELMANN CJ:

Thank you, Mr Gwilliam. So on to your next point.

MR GWILLIAM:

Thank you, Your Honour. So the next point was an examination of the particular matters that the appellant argues in the case of Mr Stanley, and it's clear I think, don't again think there's any disagreement between counsel that there are the two matters and it's accepted it's not just the convictions for the excess breath alcohol but also the attitude that has claimed, suggests that Mr Stanley lacks insight to the offending and has minimised that offending. Now it's in this respect that I just want to point out to Your Honours the way the situation developed the application that Mr Stanley originally made to be admitted to the Bar, he had four referees, three of whom were well aware of this drink-driving conviction. He then of course, that was raised with him by the Law Society, "Please explain." I don't think I'm doing a disservice to Mr Stanley to say unfortunately he sent a letter of explanation, as he put it, which on the face of it certainly appeared to give the impression that he was

trying to make excuses, and that is the letter, it does appear throughout the case on appeal, I'm looking at the one in particular which is at 201.0080. But the reason the letter appears frequently is once the Law Society got that letter they referred it back to his referees for comment and in each case even though that letter, certainly from the Law Society's point of view, purported to show a lack of insight and minimisation of the offending, all of the referees still stood by their references, so that's to say there's a lack of insight.

The other matter which my friend refers to is that there was no independent evidence to support whether Mr Stanley had a drinking problem. My response to that submission is twofold. The first is, well, my submission is that the evidence is equivocal as to whether he had a drinking problem. It's all very well to look at four drink-driving convictions over a period of 40 years, but when one drills down one can see that in two of those instances there were no disqualifications imposed, and in the most recent and I'd say the most serious conviction, again a fine and disqualification when he was facing a third or subsequent, well, it was, a charge of third or subsequent offending, nowhere in there did the District Court or the sentencing Court consider that there was any rehabilitative type sentence required to address a drinking problem, it was dealt with purely by way of a fine. So obviously that was a matter of quite close cross-examination of Mr Stanley in the High Court where he himself said, "Well, I wondered at one stage if I had a drinking problem." My point is, my first point is, I don't know if the evidence goes so far, and of course a drinking problem is in itself a fairly euphemistic term as to what that means, and I guess in the case of this application is his drinking of such a nature that it would impair his ability to affect, to carry out his obligations as a lawyer.

The second point on this though is that Mr Collins, my friend refers to a letter that I sent back in September of 2017 requesting an independent report, and his response to that was, well, it was too late really because the Law Society had made its decision. But I would like to refer the Court to an earlier letter that Mr Stanley sent in which he asked the Law Society, "Look, do you want a report or some sort of therapy?" Now that's the letter I'm just trying to find, my notes, it's 201.0086. It's a very short letter addressed to the Law Society,

dated the 3rd of August 2017 and it's a covering letter. He says, "Attached is my letter of apology and request for reassessment." This is after the initial decision of the Law Society to refuse the certificate of good character. Then he says, "Should the committee require completion of specified courses I would be happy to consider them. Thank you for your help," and it seems that that was never really addressed by the Law Society in terms of guidance. So you'll see a reference made to him seeking some guidance from the Law Society as to how he should advance his application and really that wasn't forthcoming. My point of that is that he at the very start addressed the issue of whether there should be some independent evidence to satisfy the Law Society.

The remorse, which I know has always been an issue, even Her Honour in the High Court considered some of his statements were genuine but she simply didn't consider that what he had said himself was sufficient to allay concerns that she had regarding his risk of re-offending. But you'll see right throughout even that original letter back in August that I've just referred to of 2017 he sets out his remorse. He refers to it again in his affidavit in support of his application for admission and throughout the cross-examination of him by Mr Collins he refers to being disgraced, ashamed and so forth, and those in my submission are all matters relevant to – which even, as I say, Her Honour, Justice Clark, considered to be sincere, but there seemed to be the doubt Justice Clark had that that in itself, remorse, and the steps he says he's taken to stop any further drinking and driving, she didn't have confidence that was enough, that there wasn't a real risk of re-offending. And those are the matters as I see it.

So the risk that was assessed here, and it's a matter, and I think a question was asked of Mr Collins, the risk was not so much of him not upholding the law or being perhaps an undue arrogance towards law enforcement officers, but this risk that he might re-offend through drinking and driving and that from there the High Court considered that that risk is sufficiently grave or sufficiently high that it might run the risk of – there was a high risk of bringing

the profession into disrepute and therefore she wasn't satisfied that he met the fit and proper person test.

So my submission is that when one looks at the particular facts of this case, and I would certainly submit they are unusual when one looks at other cases that have come before the Court where admission has been contested, it would suggest that the only doubt here if it is that he may re-offend by drink-driving again the Law Society itself through its disciplinary process has indicated, well, that in itself wouldn't necessarily lead to a disbar, a removal from the Roll. I'm happy to answer any questions on that.

WINKELMANN CJ:
Justice Glazebrook.

GLAZEBROOK J:
Just looking at that, there are really two matters. One, what if in fact the type of offending that we've seen in those other cases actually should have led to somebody being struck off the Roll in circumstances where they couldn't show that they'd done something either to address their attitude, because if they don't have a drinking problem then it's their attitude to the law in terms of, "I'm able to drive nevertheless," or alternatively their drinking problem that had led to that.

MR GWILLIAM:
Well, just off the top of my head I can't recall but some – certainly there are cases where the Disciplinary Tribunal were satisfied that certain steps had been taken to address any perceived drinking problem and that obviously was reflected in penalty. But in my submission there are other cases there where perhaps there wasn't that significant evidence of a lack of risk of re-offending in that similar way where, as I say, the outcome has been a suspension rather than a strike-off.

GLAZEBROOK J:

What I'm suggesting to you is that they may be wrong because either they show a drinking problem which if you were going to give a suspension – well, I mean you might say you should be struck off until you can show that you've addressed that drinking problem, or they might show a disregard for the law, in which case you may have a situation where you should be struck off anyway, and this is against a background where disorderly behaviour is not going to, the next time it happens, possibly lead on to somebody being killed because someone is driving in an impaired fashion. So drink-driving in itself is important and serious because in other circumstances it can lead, because of the impaired driving, and being in charge of what can be said to be a dangerous offensive weapon in impaired hands, to very grave consequences.

MR GWILLIAM:

Look, I fully accept that Your Honours –

WINKELMANN CJ:

Hang on now, just pause. We've lost two members of our Court, I think.

MR GWILLIAM:

Yes.

WINKELMANN CJ:

So I think what we'll do is take a five-minute adjournment Madam Registrar.

COURT ADJOURNS: 12.31 PM

COURT RESUMES: 12.36 PM

WINKELMANN CJ:

So, Mr Gwilliam, I think Justice Glazebrook is just going to re-state her question for you.

MR GWILLIAM:

Thank you.

GLAZEBROOK J:

So the real question was are those cases in fact right and therefore would they be controlling on us in relation to this question? I can understand that there might be some fairness issues involved but if you could just answer that question in terms of a hypothetical?

MR GWILLIAM:

Look, I'd have to accept obviously decisions of the Disciplinary Tribunal are not anyway binding on this Court and, while I can't venture anyway the Law Society has taken this appeal, it may be that might be a matter they may want this Court to address, but it's really outside the scope of this appeal. But my real submission is if the Law Society itself didn't consider that a drink-driving conviction was sufficient. In the absence of anything more to remove a practitioner from the Bar then that must have also some bearing on how this Court or any Court should approach a contested application for admission where again matters are essentially being relied upon by the Law Society as the regulatory body.

GLAZEBROOK J:

Thank you. The follow-up question to that is do you want to comment on Mr Collins' indication that in fact a suspension says that at least for a period of time, as a finding, that at least for that period of time of the suspension that the person is not fit and proper?

MR GWILLIAM:

Well, my submission is that that's not necessarily the outcome of a decision to suspend a practitioner. Clearly to have a person removed from the Roll they have to fail the fit and proper test. The fact that they are still suspended says that they haven't got to that stage but that there's a recognition that they could again practice, and it may be part of that decision is that the detected practitioner undertake some therapy or some other steps as part of being able to resume practice.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

Justice O'Regan?

O'REGAN J:

I don't have any question, thank you.

WINKELMANN CJ:

Justice France?

ELLEN FRANCE J:

No, thanks.

WINKELMANN CJ:

Justice Young? Right. On to your next topic, Mr Gwilliam.

MR GWILLIAM:

Just perhaps one matter I should have covered, there was some suggest that the continue to drink and drive shows lack of respect for the law. I just want to make the point that Mr Stanley did in his evidence, and throughout, say that he'd imposed on himself the zero tolerance of drinking and driving, again showing in my submission that he does have respect for the law.

But moving on to the next topic, which is really addressing whether the Court of Appeal did air in the way it approached this matter and of course in allowing the appeal, and of course my submission is that the Law Society did not do that. One of the points relied up by my friend is that they should have given greater deference to the decision, or to the findings I should say, of Justice Clark as to her concerns regarding Mr Stanley's reform given that she had seen and heard him.

But, of course, one of the matters, and I know it hasn't been advanced further but was advanced by the Law Society in the Court of Appeal, was that this was an appeal against discretion. The Court of Appeal dealt with that argument fairly shortly by indicating this was an evaluative exercise, it was one where the *Austin, Nicholls* principles applied and that therefore the Court of Appeal, and indeed any Appellate Court, is free to revisit the facts and what weight to give to them and to undertake that evaluative exercise. And the important thing, as I've pointed out in my written submission here, is in fact the Court of Appeal…

Sorry, have we lost someone or – I seem to have lost Mr Collins but –

WINKELMANN CJ:
No, no.

MR GWILLIAM:
Carry on?

REGISTRAR:
We may have had Mr Collins drop out.

WINKELMANN CJ:
Has he been there at all?

REGISTRAR:
Yes, he was there. We have just lost him now.

WINKELMANN CJ:
And we've just lost Justice O'Regan. Perhaps we'll just take a two minute adjournment. Everybody can stay where they are. Can we just take a two minute adjournment while we rejoin people.

COURT ADJOURNS: 12.41 PM

COURT RESUMES: 12:42 PM

WINKELMANN CJ:

Carry on, Mr Gwilliam. You were just saying that the issue of whether this was a discretion decision hasn't been pursued on appeal.

MR GWILLIAM:

Yes, Your Honour. So as I say, this is an evaluative exercise which the Court of Appeal was quite justified to do and to revisit the facts. But as I was just saying before, it importantly in terms of some of the findings of Her Honour in the High Court accepted those findings particularly as to this concern about whether Mr Stanley had sufficiently reformed his character such that there was a not a negligible risk of him re-offending. But, of course, as the Court of Appeal rightly said, yes, that is a matter that was relevant and to be put into the mix. Her Honour in the High Court placed too undue weight on that without looking at various other matters, and as I said in my written submission one of those is also look at the positive aspects of good character, referring not only to his referees but his history of having had a successful career in insurance broking within the community of which some of his referees refer. So as I say good character is one of those elements where there may be some good, there may be some bad in it, but it's, as I say, there then has to be that final evaluative exercise of where that, where you come to, and the difficulty, in my submission, with a more mature applicant like Mr Stanley, and it's interesting, I don't recall whether there have been any cases I've seen where there has been a person of Mr Stanley's age who has applied unsuccessfully, he comes to life and he comes to the Court and to the profession with a long experience of, if I can use the expression, warts and all and sometimes those warts can be more than a younger person. But it is a matter of looking at all those matters throughout his life and while four drink-driving convictions, plus his other driving convictions, look bad, if one then looks at the span of 40 years and what else he has done in that career,

that isn't a proper way to approach that final assessment that a Court or initially the Law Society has to undertake.

So my submission also the appellant argues that finding that there is this still doubt about his reformation of character in terms of him, maybe a list of him continuing to drink and drive, that they still find him to be of good character, but my submission is no inconsistency in that. That matter, his doubts about his reformation in terms of drink-driving, is but one matter to look at in the overall assessment of his good character, particularly when that risk is confined to whether he might drink and drive again, not in terms of perhaps committing a more serious, engaging in more serious conduct that would impinge upon his suitability to practice, and so my submission really is that there is no errors in the way the Court of Appeal approached this matter, given that the particular facts it had before it. The principles that applied, which were fairly conventional and there was certainly no dispute about that. So I'm happy to take any questions on that.

WINKELMANN CJ:
Well I have a question so I'll start the chain. When you talk about "good character" do you accept that it's good character which is what one requires in good character is contextual and so in this case we're talking about a good character for a lawyer?

MR GWILLIAM:
That's correct in terms of obviously the principles and purposes of the Act and fundamental obligations –

WINKELMANN CJ:
Yes and therefore more weight can then be attached to some part of a person's character, in this assessment, in another assessment.

MR GWILLIAM:
Sorry, I didn't hear the question?

WINKELMANN CJ:

So the Law Society may attach more weight to one aspect of character than, say, might a church when considering someone to lead a committee.

MR GWILLIAM:

Yes, I fully accept that indeed. Of course, Mr Stanley refers to the fact he's a marriage celebrant which I think does require some fit and proper test but I fully accept what is required to be a marriage celebrant is a different exercise to being admitted to the Bar, but my point simply being, and we come back to the expression, one must look at the evidence in the round as to where one falls at the end of that, taking into account all those matters.

WINKELMANN CJ:

My point to you, I suppose, is that's a very post-modern approach to breaching the law because what Justice Clark was concerned with was that that there was a risk which was not adequately addressed that Mr Stanley would again breach the law and that that should be something which is of considerable concern to a Law Society.

MR GWILLIAM:

Look, I accept that that is a matter that is relevant, particularly in terms of the issue of bringing the profession into disrepute, but the reality is, as has been said before, that even practitioners who fall by the wayside in that way have not faced disbarment from the profession.

WINKELMANN CJ:

Thank you, Mr Gwilliam. Justice Glazebrook?

GLAZEBROOK J:

No, I have nothing, thank you.

WINKELMANN CJ:

Justice Young? Justice O'Regan?

O'REGAN J:

One aspect of the High Court decision which seemed to weigh very heavily on Justice Clark was the minimisation and lack of insight, and I'm just wondering whether that was something that the Court of Appeal gave sufficient weight to. I just wondered if you want to comment on that.

MR GWILLIAM:

Well, in my submission the Court of Appeal did take that into account in terms of agreeing with Her Honour in the High Court as to whether he was sufficiently reformed. Obviously, lack of insight into the offending is, I agree is a relevant matter in assessing is this person likely to re-offend in this way if he is minimising that offending? But as I have said, whether what he said to the Law Society, it is I guess an assessment or an inference to be drawn from those statements, he has at the same time expressed genuine, sincere remorse for his offending and they also are matters that the Court of Appeal, and to some extent the High Court, took into account in regard to that final assessment of good character and fit and proper person.

O'REGAN J:

Thank you.

WINKELMANN CJ:

Justice France.

ELLEN FRANCE J:

Nothing from me, thanks.

WINKELMANN CJ:

Right, so Mr Gwilliam, we're onto your second to last point?

MR GWILLIAM:

Yes, the fourth point and probably fifth point are related, and this is the issue of, well, even if this Court was of the view that as at 2018 it agreed with the decision in the High Court that there would be doubts that Mr Stanley was a

reformed character, my submission is whatever those doubts might have been back then are sufficiently ameliorated to a degree, given not only his lack of any further offending or conduct of an adverse nature but the fact he has also now been admitted to the Bar. He has given various undertakings to the Law Society regarding employment and so far as I'm aware, and I'm sure Mr Collins will tell me otherwise, there has been no indication he has in any way not complied with those undertakings.

And the point is this, that even if – well, my first point is that that is a matter that the Court, whether you call it fresh evidence, if you like, it's certainly lack of any aggravating matters, and I specifically refer to the case of *Lincoln v New Zealand Law Society* [2018] NZHC 3050 and [2019] NZCA 442, the very recent Court of Appeal decision of *Lincoln*, which is referred to by the Law Society, where in that case the Law Society were able to have further evidence admitted on appeal of subsequent conduct by Mr Lincoln which further showed his unsuitability to be admitted to the Bar. This case here, if I can say, it's not so much further evidence but it's lack of any such evidence, his now being admitted to the Bar, are matters this Court could take into account. While, of course, the principles say that fit and proper person test is to be assessed as at the date of hearing, ie, back in 2018, nevertheless it is my submission the Court can take into account matters that have transgressed, that have happened or not happened since then over a period of more, in excess of a further two years, where in terms of the offending, the excess breath, blood alcohol offending, come June, now I've said in my submission in principle he would have the benefit of the clean slate legislation. I fully accept that that legislation, of course, won't apply until seven years after conviction which won't be till the following year but certainly after his offending, he would come within that seven years or close to it, such that, and this is where I come onto the – I guess my fifth point here is that if the Law Society, if this appeal, if this Court found that he was not a fit and proper person as at 2018, if the Law Society then sought to have him removed under section 266, 267, in my submission Mr Stanley must have every right to bring before the High Court and the Court of Appeal in any such application updated evidence as to his position and to how he has complied, particularly

with any undertakings or other requirements of the Law Society and indeed the Lawyers and Conveyancers Act since his admission to the Bar.

So it's not just a matter of, and I think was suggested earlier, that as night follows day because this appeal has been upheld therefore that in itself is reasonable cause to have him struck off the Roll. In my submission, it is a completely separate exercise that the Court of Appeal, assuming it will need to go to the Court of Appeal, would look at in light of the additional information that Mr Stanley would be entitled to adduce and, indeed, for that matter so could the Law Society if they believed there were other matters that were relevant notwithstanding the decision of this Court. Of course, the decision of this Court is binding on the High Court or the Court of Appeal under sections 266, 267, but, of course, my submission is that the even if the appeal was upheld it would be an assessment of Mr Stanley's character as at 2018, not as at today or whenever the application is heard by the Court.

So it isn't a matter of yes, if this appeal is upheld he can be removed from the Roll. Yes, of course, the Law Society can apply. That will be an entirely separate exercise where additional evidence can, of course, be adduced.

I don't know whether you want me to briefly cover the final point. It's just more an update of Mr Stanley's position in terms of employment, or whether you wish to take questions – I'm happy to take questions now.

WINKELMANN CJ:
We'll just take questions and if anyone wants to have that information they can ask it. Well his current employment situation is subject to the undertakings he's given to the Law Society is it?

MR GWILLIAM:
That's correct Your Honour. He does not yet have employment, mainly because of this pending appeal, and he's fully disclosed that to prospective employers and I am aware, without going into details, that they are awaiting also the outcome of this appeal as to what might become of things.

WINKELMANN CJ:

He's employed and he's given undertakings only to do certain kinds of work, is that the case?

MR GWILLIAM:

Essentially he's first given an undertaking not to work unsupervised. You might recall earlier he was given a, offered a position for an immigration consultant. That's –

WINKELMANN CJ:

Yes and as a newly appointed solicitor, not qualified to practice on his own account, he wasn't entitled to do that?

MR GWILLIAM:

That's correct, and he's followed that advice, and therefore either he works as in-house counsel, which he will require to notify the Law Society that they are satisfied that he is in-house counsel, not providing legal services to the public, or he is offered a position with a law firm in which case he, of course, will disclose that or advise the Law Society of that.

WINKELMANN CJ:

So you're saying he's not working?

MR GWILLIAM:

At the moment he's not working. He's actively looking for work but, of course, this appeal is a matter that is putting that on hold. I am aware there have been offers subject to the outcome of this appeal.

WINKELMANN CJ:

Justice France?

ELLEN FRANCE J:

Nothing further thank you.

WINKELMANN CJ:

Justice Young? Justice Glazebrook? Justice O'Regan? Thank you. So Mr Collins, you have a brief opportunity for reply?

MR COLLINS:

Thank you Your Honour. Three matters. First, on the point about the frailty or defect of character to be entirely spent or safely ignored, and care needs to be taken, of course, in elevating judicial formulations into the words of the statute, but the point my friend was making I think was whether the conviction could be safely ignored. But the submission about that is, and the reference we have to this, is in the *Brown* judgment, it is the indication of the frailty of character by the candidate's earlier behaviour, is entirely spent or safely ignored. So it's not the convictions, it's the indicator of frailty or defect of character and the difference is significant because – and it must be what's intended there is that a frailty or defect of character indicated by earlier behaviour is not seen as material to the person's admission and therefore can be safely ignored. So it's the indicator of character which in this case was the convictions but also the attitude to the convictions and the dismissal of the seriousness of the convictions and the repetitive nature of the convictions and the excuse making, as I've put it in the past.

Now that moves to my second point, and I won't labour the Court with a walk through of all the correspondence earlier in the processes of the Law Society, but the point is, and it's in the material in the case on appeal, in the affidavit evidence, that Mr Stanley was consistently disavowing any alcohol problem. I just take, for example, his letter of the 11th of May 2017, which is document 201.0030, where he talks about the reasons why he was caught for drink-driving. The Lower Hutt area attracting police scrutiny and so on. So it is not the case that, well it is not accepted that the Law Society was remiss in any way in not insisting on Mr Stanley getting a psychologist report or a drug and alcohol report of some description. It was for him and his responsibility to produce that evidence and he didn't do so and he had the opportunity to do so not once, but twice, or indeed possibly three times including the Court of Appeal. So it is the case that the decision-makers were all, in

essence, invited to rely on his word and the references as showing him to A, not have an alcohol problem, or if he did, that it was resolved.

Now my third point relates to the undertakings and his current employment status, and I believe those undertakings are available, have been filed with the Court, although I think they were not included in the case on appeal, but the submission about this is that the undertakings are not relevant to the issue of his fit and proper status. The undertakings were required because in the context of Mr Stanley's admission following the Court of Appeal judgment, he persisted with a view of his entitlement to practice with which the Law Society disagreed, and that controversy was recorded in the submissions in the stay application in the Court of Appeal, and that material was given to this Court following the leave hearing, but it's not part of the case on appeal. But the point is that he had been intending, it seems, to work as an in-house lawyer to give advice to the clients of his employer, which was an immigration consultancy, and the Law Society took the view that that was not a legitimate mode of practice and that he appeared to be eager to practice, in effect, on his own account, and the undertakings were sought and received from him in those circumstances, not out of any cautionary aspect he might drink and drive, or some such thing, during any time pending the outcome of this appeal. So the undertakings are not relevant to the issue of his fitness and propriety. Those are my only points.

WINKELMANN CJ:

Thank you Mr Collins. We'll take some time to consider our position and let you have the decision in the usual manner and we will now retire.

COURT ADJOURNS: 1.03 PM