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

SC 41/2019
[2019] NZSC Trans 22

NEW ZEALAND LAW SOCIETY

Applicant

v

JOHN LLEWELLYN STANLEY

Respondent

Hearing: 25 September 2019

Coram: Winkelmann CJ
Glazebrook J
Williams J

Appearances: P N Collins for the Applicant
J C Gwilliam and H Joubert for the Respondent

ORAL LEAVE HEARING

MR COLLINS:

May it please the Court. Collins appearing for the applicant.

WINKELMANN CJ:

Tēnā koe Mr Collins.

MR GWILLIAM:

May it please the Court. Gwilliam for the respondent together with my junior Ms Joubert.

WINKELMANN CJ:

Tēnā korua. Mr Collins?

MR COLLINS:

Thank you.

WINKELMANN CJ:

What we're really keen to hear from you is why this case raises an issue of public or general importance beyond its own facts.

MR COLLINS:

Thank you and I won't go into the facts which have been set out in the submissions in support of the application. The application is brought under section 74(2)(a) of the Senior Courts Act 2016 that it is necessary in the interests of justice for this Court to hear and determine the proposed appeal because it involves a matter of general or public importance. These submissions will first address that matter and then the issues of principle raised by the proposed appeal and that latter topic is also relevant to the, what are an assessment of the merits of the appeal to the extent that it is necessary in assessing whether or not leave should be granted.

So I turn first to the matter of general or public importance. The regime for admission to the legal profession exists to ensure that the maintenance of standards in the legal profession of the protection of the public, and to ensure public confidence in the legal profession. The proper interpretation and application of the law governing admission to the legal profession is a matter of public importance. It is also a matter of great importance to the applicant

as the regulator of the profession and in the context of admissions the first tier gatekeeper on matters of –

GLAZEBROOK J:

You probably don't need to tell us how important it is at a general level. What we need to know is what issues of principle arise in this particular case, and why that means leave should be granted, which will be whether there's been a wrong application of a test, or whatever the submission is, but I'm not sure your friend would in the least bit be denying that it's a matter of general public importance at that general level.

WINKELMANN CJ:

Because it is accepted I think, Mr Collins, if it's important who the legal profession is because of the role it plays, which is I think expanded upon in the decision that you referred to us, the Privy Council decision of this year?

MR COLLINS:

Yes, *Layne v Attorney-General of Grenada* [2019] UKPC 11 (18 March 2019). All right, well I'll move to the issues of principle. First, by way of general statement on that point, the proposed appeal is concerned with the assessment of a candidate for admission as a fit and proper person, which is a discrete requirement from the educational qualifications under section 49 of the Lawyers and Conveyancers Act 2006, and the concept of fit and proper person is expressed in section 55 of that Act, which lists the matters that the High Court or, in the first instance, the New Zealand Law Society may take into account in assessing a candidate for admission. One matter of which the overarching requirement, whether the person is of good character, and under section 55(1)(c), "Whether the person has been convicted of an offence in New Zealand or a foreign country; and, if so, - (i) the nature of the offence; and (ii) the time that has elapsed since the offence was committed; and (iii) the person's age when the offence was committed."

So the submission underlying the points of principle I'm about to address is that in one way or another the Court of Appeal set the bar too low in the

matter of fitness and propriety and the related concept of good character in the circumstances of an applicant or candidate for admission with past criminal convictions, and in particular past convictions arising in the mature and fully formed personality. So the level at which the bar should be set in assessing those matters is a matter of great importance and the context where the person has offended in the past and where the Court is not wholly satisfied that the past frailty is spent. Is it correct in principle to admit the person on the basis that any risk of offending in the future, with the potential to bring the profession into disrepute, is manageable through the regime of complaints and discipline, and that is what happened in this case.

WINKELMANN CJ:

Not quite because the Court of Appeal actually said they were satisfied, they did not accept, they came to a different finding than the High Court Judge, having reviewed the evidence, as to the risk of offending. At paragraph 51 they say, "We do not consider the risk of Mr Stanley reoffending is high given his genuine commitment to not doing so." But then they made an alternative finding that if he did reoffend it could be managed through the disciplinary processes.

MR COLLINS:

I was referring there to the finding at paragraph 42, that the Court agreed with Clark J that, "The drink-driving convictions in 2002, 2007 and 2014 were sufficiently recent and numerous to raise a prima facie doubt as to whether Mr Stanley is reformed. The doubt is deepened by Mr Stanley's age." The Court appears to have linked the relative lack of seriousness and the indirect connection, as it saw it, between the offending and the applicant's respect for the law and for the rule of law as being sufficient to allow the application to proceed –

WINKELMANN CJ:

So your point is that actually there's an incoherence in relation to their factual findings, that what they purport to find at 51, and what they've actually found earlier.

GLAZEBROOK J:
It does say prima facie.

WINKELMANN CJ:
But it goes on at 43 to say, "The onus is on Mr Stanley to dispel that doubt. We agree – "

WILLIAMS J:
It's not rocket science if there's a doubt. I mean the man's got four drink-driving convictions and he's 65, of course there's a doubt. Why is that the issue?

MR COLLINS:
Well that goes to the issue of what evidence should a court require to satisfy itself properly, and in this case –

WILLIAMS J:
It wasn't enough?

MR COLLINS:
Well –

WILLIAMS J:
Your argument is on the evidence then?

MR COLLINS:
Well one of my points of principle, Sir, is that the Court too readily accepted the word of the applicant that he had indeed reformed himself and –

WILLIAMS J:
Perhaps, but why is that a question of principle? We might disagree with him but that's not our job, is it, just to replace our view with –

MR COLLINS:

The principle, Sir, is the evidence that a court should be entitled to receive, and one of the cases I put before the Court is a case called *Evans v The Solicitors Regulatory Authority* EWCA (CIV) 01 of 2007, where there was a person who had repeat convictions for alcohol related –

WILLIAMS J:

Drunken behaviour.

MR COLLINS:

Yes, but also in that case some material non-disclosure, but the Court said there that if she comes again we would expect to see evidence from a suitably qualified person who can reassure us that the person has, indeed, reformed and –

WILLIAMS J:

So is your point, I'm just getting to the point of principle here, is your point of principle that in the circumstances of your fully formed personality with four previous drink-driving offences, what is required in principle is independent drug and alcohol or other professional advice on the question of whether the problem is behind this person?

MR COLLINS:

Yes, or to use the language in this area, whether the frailty of character is completely spent. That is one of my points Sir, but the – that the Court, and I referred earlier to the setting of the bar too low. One aspect in which that occurred was the acceptance of the applicant's good intentions and own say-so that he had reformed unsupported by an independent and authoritative assessment.

WINKELMANN CJ:

Well is your focus more – it's not quite clear when you read the judgment from 43 through to 51 how the Court arrives at 51 because – but in any case, is your point more focused on 48, "We do not consider the risk that Mr Stanley

might again drink and drive as meaning he cannot be trusted to comply with the fundamental obligations of lawyers set out in s 4 of the Act." Is that the general point of principle?

MR COLLINS:
That is actually a separate point where the Court –

WINKELMANN CJ:
So what's your first point then?

MR COLLINS:
Well the first point is that where there is doubt about the frailty of character being completely spent, as evidently there was in this case as the Court itself said there was, should the Court require something more than the applicant's own expressions of good intent to allow the person to be admitted and placed with the acknowledged risk of re-offending and bringing the profession into disrepute.

WILLIAMS J:
That's potentially quite a tight test, perhaps not in this case, but that would apply every time you had multiple criminal convictions, for example.

WINKELMANN CJ:
It couldn't really apply at every time, could it, because it's really appropriate to drink-driving but perhaps not appropriate to other kind of offending. You can't get an expert to say whether or not you've become an honest person or a non-violent person.

MR COLLINS:
Well most of the cases rely on a significant passage of time and other evidence of reform.

GLAZEBROOK J:
Yes, I was going to say.

WINKELMANN CJ:

And age at the time of offending.

MR COLLINS:

Yes.

WINKELMANN CJ:

This is unusual. It's offending across a lifetime.

MR COLLINS:

And activity in the meantime of a blameless nature. So in a case where a person presents with convictions relating to substance abuse in the adult personality then a court should expect to see some reliable evidence independent of the applicant him or herself.

WINKELMANN CJ:

So it's a point of principle limited to alcohol and drug abuse with a mature applicant?

MR COLLINS:

Well the relevance of the mature applicant is twofold. One, it's likely there's not the length of time between the offending and the application and the period of blameless living. The other is the acknowledged point in the cases about activities of feckless youth where the unformed personality is the issue.

WINKELMANN CJ:

Would it be the case that with any person who's shown a persistence with alcohol or drug use in a problematic way, so as to actually be reflected in the criminal law, you would want to see some independent expert?

MR COLLINS:

Yes.

WINKELMANN CJ:

Is that more society's point. It doesn't matter he's mature, it's the persistence. So it's not an isolated action of drink-driving when you're an 18 year old, it's persistent. It's slightly suggestive of an issue with his use of alcohol.

MR COLLINS:

Yes.

WILLIAMS J:

Does the Law Society have some guidelines for this, for people fresh out of law school who might be applying for admission? Does it say if you're going to apply and you have this sort of background you'll need something independent?

MR COLLINS:

I don't know the existence of formal guidelines but if a person approaches the Law Society they'll be directed in that way and told what their application should include.

WILLIAMS J:

Is that what happened in this case?

MR COLLINS:

Well he –

WINKELMANN CJ:

He complained, didn't he?

MR COLLINS:

There was a significant period of consultation about his application. He went through the Wellington branch of the New Zealand Law Society and had meetings with them and then with the Practice Approval Committee which is the national –

WILLIAMS J:

Yes, I understand that. So was that advice given?

MR COLLINS:

I don't believe he was told to go away and get –

WILLIAMS J:

Get an AOD report?

MR COLLINS:

– an expert opinion on his status of his alcohol addiction, if he had one.

WINKELMANN CJ:

He actually complains, doesn't he, that he wasn't, in fact, told what he needed to do. He wasn't, in fact, told that they were looking to see what his remorse was.

MR COLLINS:

Yes.

WINKELMANN CJ:

And he complains that he wasn't given enough feedback.

MR COLLINS:

He complained that the matter of remorse, or the question of his remorse was not put to him, but the issue at that level was that he persistently minimised or made excuses about the convictions in terms of –

WINKELMANN CJ:

Well he was represented anyway, wasn't he, by the time he got to the High Court, so presumably counsel had advised him about this?

MR COLLINS:

Yes.

GLAZEBROOK J:

In any event that might be unfortunate but you would say it still doesn't mean that the Court could have been satisfied without that material, even if he had been badly advised?

MR COLLINS:

I'm sorry?

GLAZEBROOK J:

You would presumably say that's irrelevant because even if he had been badly advised the Court still couldn't be satisfied without that material from an independent source.

MR COLLINS:

On the facts of this case, yes.

WINKELMANN CJ:

And the Court certainly takes that attitude, doesn't it, that this isn't the kind of offending that you'd be so worried about. That you could say that a mere risk of offending is not enough. Is a bar, rather, that's at paragraph 48, isn't it.

GLAZEBROOK J:

Although one of the difficulties with that is it's obviously not a bar to a continuation of practice.

MR COLLINS:

So, for example, if it were a crime of dishonesty, the backgrounds were crimes of dishonesty, then that would be at a different level. It's accepted. But the risk of offending in the drink-driving category is still something that would bring the profession into disrepute, and the point of principle is whether it was enough to accept that the risk that that might occur because it could be managed by the complaints and disciplinary regime rather than through the admission process.

GLAZEBROOK J:

If it's not enough for an actual practitioner, is there a different test if you're wanting to be admitted?

MR COLLINS:

Well i address that in my written submissions and referred to a number of cases where drink-drive issues did arise in the disciplinary context, I think most of them anyway, accompanied by other criminal matters. But it must be the case that a person in this case coming up with a fifth drink-drive, if that is what happened, would be in peril of being at least suspended from practice.

GLAZEBROOK J:

That didn't seem to come through to me from the cases or from your concession in the Court of Appeal.

MR COLLINS:

That latter point may be a reflection of the fact that the emphasis was on the lack of insight into the offending but it remains the case that if a person, the position of Mr Stanley had what proved to be a fifth drink-drive, or in the context of his adult life fourth drink-drive, that it would put him seriously into contention of being suspended.

WILLIAMS J:

Most of those, I couldn't see a case referred to in which drink-drive and drink-drive alone without accompanying obstruction or whatever it might be, produced a suspension. I'm not saying it didn't happen but there was always some other problem I saw in the cases.

MR COLLINS:

The nearest, and this is in my written submissions responding to a minute of the 26th of July, the case is at paragraph 4 of that submission, paragraph 4(c), (d) and (e), the case of *Waikato Bay of Plenty Standards Committee 1 v Pou* [2014] NZLCDT 86. "Third drink drive conviction and one for driving while disqualified… censured and suspended for two months." Second drink drive –

GLAZEBROOK J:

Sorry, I just need to find where this is.

WINKELMANN CJ:

It's in the applicant's submissions of 15 August.

WILLIAMS J:

I see.

MR COLLINS:

And a case of *Auckland Standards Committee 1 v Chen* [2017] NZLCDT 7, which involved a range of driving offending and a failure to disclose convictions in the context of a practicing certificate application, which was a two year suspension.

WILLIAMS J:

Pou was on point from your point of view?

MR COLLINS:

Yes. But the point is if a person's past conduct makes him a risk of coming before the disciplinary processes again potentially and realistically at the level of suspension, and suspension reflecting a person's unfitness to practice for a limited period, whether that person should be considered to be a fit and proper person and a person of good character to be admitted at all, and it is…

WILLIAMS J:

You accept in your submissions that the standard isn't as tough to get in as it is to get out, don't you?

MR COLLINS:

That's right. The standard to be restored, after having been struck off, it's encapsulated in phrases about the further the fall from grace the more difficult the road to redemption.

WILLIAMS J:

My recollection of that *Pou* case is there was more to it than that. Hadn't he struggled to get admitted too for past indiscretions?

MR COLLINS:

Your Honour will be thinking of his admission problem where he had a minor conviction –

WILLIAMS J:

Internet use issue or something from memory.

MR COLLINS:

He'd used a university account to do some photocopying and accessed an adult website on a university computer. I think the answer to that is that he was admitted.

WILLIAMS J:

He was, yes.

MR COLLINS:

He was admitted against the background of those difficulties.

WILLIAMS J:

Was that background relevant in the decision at –

MR COLLINS:

No, no.

WILLIAMS J:

No, okay, thank you.

WINKELMANN CJ:

So the point of principle it seems to me that you are saying, the real point of principle, is that a Court shouldn't look down the lines and say, well, we can see there's a risk you're going to commit a disciplinary indiscretion in the

future, but that can be solved through our disciplinary processes, that that is to set the threshold too low?

MR COLLINS:
Yes and to treat the applicant as if he or she was a person coming before a standards committee as a lawyer having been convicted. That's a rather different situation from assessing the key assessment here, whether the person is fit and proper, and the issue of good character where there has been repeat offending.

My next point of principle concerns the relationship between a candidate's past convictions, especially those occurring in a mature person, and the concept of respect for the law and the obligation of all lawyers to uphold the rule of law, and in that context the Court of Appeal found that Mr Stanley's convictions were only, in an indirect sense, indicative of a failure to uphold the rule of law. Now my submission about that is that while some convictions will be obviously more directly connected with the concept of respect for the law and for the rule of law, it must be certainly arguable that a repeat pattern of offending, as occurred in this case, is capable of being seen in terms of disrespect for the law and for the rule of law, not befitting an admitted lawyer and officer of the Court.

GLAZEBROOK J:
I suppose the issue there is it's either that or alternatively shows a major drinking problem, both of which in either alternative you would say means not fit and proper?

MR COLLINS:
Yes, and if it is the major drinking problem, an impulsive or compulsive behaviour, then respect for the law requires the person to address it responsibly.

WINKELMANN CJ:

Because the material that Justice Clark sets out at the beginning of her judgment tends to support your point about lack of respect for the law doesn't it, I think?

MR COLLINS:

Yes.

WINKELMANN CJ:

Because he seems to see the law as just a – well, the comments were made, set out at paragraph 10, he reduces it into paragraph 7, and the comments about Justices of the Peace. It tends to view the processes of the law as irritations.

MR COLLINS:

Yes and that connected back with the reasons why the Law Society was influenced in refusing a certificate of character because of what I described as excuse making or diminishing the significance of the offending, and Her Honour looked at that and went through it and was influenced by it. And the Court of Appeal, in my submission, set the bar too low by disconnecting the criminal convictions from the concept of respect for the law and respect for the rule of law required of an admitted lawyer.

My next point of principle relates to the issue of the importance in this context of the impressions formed by the Judge hearing the application in person as against the appellate court making an assessment about a key matter concerning the quality of the applicant's character from the papers. Now it's clear from the judgment of Justice Clark that Her Honour was significantly influenced in her decision to refuse the application by what she saw and heard of the applicant in person, and she spends quite some time in her judgment discussing the answers he gave to her questions, and aspects of his responses under cross-examination and all of which she referred to as finding Mr Stanley's oral evidence as illuminating and it's clear she was powerfully influenced by the first impression. Now –

WINKELMANN CJ:

So is your point that they actually strayed across the line drawn in, or the point made in *Austin Nichols* that in some cases you should show deference to the Judge who hears the evidence.

MR COLLINS:

Yes.

WINKELMANN CJ:

Not in all, but some cases.

MR COLLINS:

I acknowledge the conceptual difficulty here, that this was a general appeal, not an appeal against a discretion, and that was discussed early in the judgment of the Court of Appeal, and is not itself challenged. The issue is that in the special circumstances of a defended admission case the live impressions of the decision-maker are of considerable importance in the different judgment about the quality of the applicant's character and the risk of future offending.

GLAZEBROOK J:

You could also argue that it's related to the first point because in fact if you do accept that he is reformed and genuinely has remorse, then it is only on his say-so and in those circumstances, unless there's independent evidence, really the Court should have deferred to the decision-makers' who saw and heard him. Is that…

MR COLLINS:

Yes.

GLAZEBROOK J:

So it doesn't have to be quite as broad as you're saying. It can be just in the particular circumstances of this case where it was only his say-so.

MR COLLINS:

Yes.

GLAZEBROOK J:

Then hearing from his is vital in that circumstance in order to assess that properly.

MR COLLINS:

Because it gives confidence and credibility to the self-asserted reform.

WINKELMANN CJ:

So in terms of *Austin Nichols* it would be one of those cases where deference was due to the trial Judge.

MR COLLINS:

Yes.

WINKELMANN CJ:

It does seem to be, it seems to me to be the first point, as Justice Glazebrook says, I think this is the first point.

GLAZEBROOK J:

Well the first point's broader. It says, in these circumstances you can't just go and say-so.

MR COLLINS:

Yes.

GLAZEBROOK J:

In the particular circumstances of this case I think, so whether or not you heard or saw him and came to a view he was genuine, it was still not enough.

MR COLLINS:

Yes.

GLAZEBROOK J:
Is the first point I think, that you're making.

MR COLLINS:
That's –

GLAZEBROOK J:
I'm not saying we necessarily accept that, but that seemed to me to be…

MR COLLINS:
The same point arose in the case of *Re Owen* [2005] 2 NZLR 536 (HC), which together with *Re M* [2005] 2 NZLR 544 has been a source of leading authority in this area. In *Owen* the opposite conclusion was reached about the applicant's fitness to be admitted as a fit and proper person under the regime that applied at that time, and there at the end of that judgment the full Court of the High Court addresses the issue of the need for the Court to be satisfied, and distinguishing between the Court's informed view, and the less well-informed public opinion, going to the matter of harm to the reputation of the legal profession, and the Court there said that it was, it placed significance on having heard from the individual being cross-examined by experienced counsel to reassure itself that the past frailty had indeed been spent. So they're looking at it from the other side of the coin, that in admitting the person significant emphasis was placed on the personal impressions of the Court about the individual. So I submit that that is another point of principle warranting, going to justification for leave to appeal to this Court.

I refer in that context also to the dissenting judgment of Lord Kerr in the *Layne* case, admittedly on a different point, about harm to the reputation of the legal profession where he was saying that the key point is what the Court thinks, not what the Court thinks the public would think that matters, and that therefore it is of great importance that the Court form its own view of the applicant, and I submit that that reinforces the importance of the live and personal impressions of the Judge hearing the application, or in the case of at the level of the Practice Approval Committee that it generally has a personal

interview with the applicant in these circumstances for that reason, among others.

My next point of principle relates to the point that the Court of Appeal judgment tended to relegate in seriousness the drink-drive convictions to possible other criminal convictions, and I think I probably made this point already, but that it was insufficient to leave that matter to be resolved, leave any risk of re-offending to be resolved by the complaints and disciplinary regime.

On the matter of the risk of damage to public confidence in the legal profession, that issue arises through the statutory purpose of the Lawyers and Conveyancers Act in section 3 which includes the maintenance of public confidence in the provision of legal services and –

WINKELMANN CJ:
Section 4, fundamental duty of the lawyer to uphold the rule of law.

MR COLLINS:
Yes, and in my submission the Court of Appeal did not give sufficient prominence or ascribe sufficient importance to the harm likely to be done to the reputation of the legal profession if there was any future offending.

WINKELMANN CJ:
So how do you say that sort of Lord Kerr assessment, how does that fit in with his test, when you're looking at the character it's the Court's assessment of a fit and proper person, not what they think the public will think.

MR COLLINS:
Well, in that case the mature applicant who had been convicted of murder at age 25 I think Lord Kerr was saying that the public might be outraged about this but I'm – if the Court is satisfied, and it is essential that the Court itself be satisfied, then that addresses that problem, and I think that is reflected in *Re M* as well.

WILLIAMS J:

It does come down to the facts, doesn't it?

MR COLLINS:

Yes.

GLAZEBROOK J:

You're also –

WILLIAMS J:

Lord Kerr comes to that view because this is a great story of redemption and we shouldn't be too tough on him, and he may well be right about that, but you can formulate that as a differently focused test, but in the end the facts are driving these things.

MR COLLINS:

I'll put it this way, that the Court ought not to be swayed by the talkback radio factor.

WILLIAMS J:

Quite.

GLAZEBROOK J:

But I think you're also saying, aren't you, that there's a statutory background to public confidence. So it's not public opinion, it's public confidence, which might be the more subtle thing that Lord Kerr is talking about.

MR COLLINS:

And will the public confidence justly…

GLAZEBROOK J:

Yes.

MR COLLINS:

And in an informed way be damaged by this.

GLAZEBROOK J:

Yes, so same as the test for apparent bias in a way.

MR COLLINS:

Yes.

GLAZEBROOK J:

You don't assume talkback radio, you assume somebody has informed and understands the background and the legislation and what needs to be happening.

MR COLLINS:

A person who's informed of the relevant facts will form the view in that case that the trier, the Tribunal would not bring an unbiased mind.

WINKELMANN CJ:

So the point, are there two aspects to it. There's the first thing which a court must form a view about the person's character, but could the Court also take the view that even though they accept they're reformed, their criminal record is so terrible that they could not countenance having him as a practitioner because it would undermine public confidence, which is not this case but…

MR COLLINS:

No, that seemed to be the emphasis of Lord Sumption's judgment in *Layne* that we congratulate Mr Layne on all the steps he's taken but murder is such a horrific crime that it's incompatible with membership of the Bar. So my submission on that one is that again the Court of Appeal set the bar too low on the matter of maintenance of public confidence in the legal profession.

WINKELMANN CJ:

Are you drawing to a close Mr Collins? Are you drawing to a close?

MR COLLINS:

Sorry, I think those are my points of principle which I can summarise, but they are my points of principle and which I submit justify leave to appeal and which, at least at the level of a grant of leave, disclose genuine issues to be considered on the merits of the appeal. So unless there are any further questions I should summarise briefly the points of principle. First, the overarching point, that the proposed appeal is concerned with standards and principles applicable to admission. It's therefore concerned with an important matter in the administration of justice in this country. Next, where a candidate for admission has past convictions, or where there are other adverse indicators of character, at what level should the bar be set, and is it sufficient to allow the risk of future offending to be managed by the professional disciplinary regime, and it was the case in this case that the Court of Appeal was not satisfied that there had been I think the term used was "wholesale reform" of character. There was no evidence of wholesale reform of character, but nevertheless the risk was one which was reasonable to run and any future offending could be addressed by the complaints regime within the regime and I submit that that set the bar too low.

The point about past offending happening in the context of substance abuse or apparent problems and failure to address, in this case, the relationship with alcohol and the extent to which the Court should be satisfied on the evidence before it, and in particular the need where the offending is relatively recent and is related to, in this case, alcohol and the Court is being asked only to rely on the good intentions of the applicant that there should be something more from an informed and independent source.

The relationship between the repeat convictions in a mature person and that person's respect for the rule of law, was not adequately addressed by the Court of Appeal in my submission, and it set the bar too low on that matter also.

The degree of deference to be given to the Judge hearing the person where an assessment of this sort has to be made is an important point of principle.

The seriousness of the drink-drive convictions and the possibility of future convictions, and the harm that that would do to the legal profession, is my other point.

WINKELMANN CJ:
Sorry, what was the last one?

MR COLLINS:
The, well, my point that the Court tended to characterise the drink-drive convictions of being of insufficient gravity to warrant exclusion from the profession and that instead any risk could be managed through the complaints regime and in my submission that was setting the bar too low.

WINKELMANN CJ:
That's the same as your second point isn't it?

MR COLLINS:
It's related, yes. So those are my submissions unless there are any questions?

WINKELMANN CJ:
No thank you Mr Collins. Mr Gwilliam?

MR GWILLIAM:
Thank you Your Honours. Just a first preliminary point. I think in my submissions I canvassed the issue of jurisdiction. I don't intend to address that.

WINKELMANN CJ:
No, we don't to hear from you on that.

MR GWILLIAM:
The other matter, Your Honours, well it's really a general matter to start with, is in some respects we are in unchartered territory procedurally in that this is the first time, as I understand it from talking to my friend, that an appeal has

been taken from a High Court against a refusal to issue a fit and proper person certificate which has been allowed by the Court of Appeal. However, the reason I'm pointing that out is while we may be in unchartered territory procedurally, that does not in itself create any points of principle. The point here, which I've stressed in my submissions, is this case is very much peculiar to its particular facts. We have, in this case, a person who has previous convictions, all of a driving nature. They are spanned over a period of 40 years. He, as I say, for that reason comes to the profession or applies to the profession as a mature person and it's, in my submission, Justice Clark placed too much emphasis on those convictions and the respondent's attitude to those convictions in arriving at whether he would be a fit and proper person to be admitted to the Bar, and in this respect the Court of Appeal accepted, to some degree, her findings having heard Mr Stanley and for that reason one of the points of principle that my friend raises is the deference to the High Court having heard the evidence, but my submission there is that the Court of Appeal did to that respect defer to Her Honour –

WINKELMANN CJ:
To what extent do you say it deferred?

MR GWILLIAM:
In that there was a prima facie doubt as to whether the frailty of character had been sufficiently met. I'm referring to paragraph 42 of the Court of Appeal's decision.

WINKELMANN CJ:
But they disagreed with her, didn't they?

MR GWILLIAM:
That's right, they –

WINKELMANN CJ:
They agreed with her and then they disagreed with her.

MR GWILLIAM:

What they said was look this is only part of the picture that you need to look at. You have to look at the evidence in the round, and that was a point they stressed, and in particular part of that assessment is not just looking at what might be termed the negative characteristics, which may suggest the person is not a fit and proper, but also to the positive aspects of his character, and it is that respect, if one looks at Justice Clark's decision I think she spends one brief paragraph about his so-called positive features, but only in the context where she says, I have some sympathy for Mr Stanley, but of course I have to put that to one side. So she hasn't really given any weight, if not ignored completely, the need to look at the significant contributions that Mr Stanley had made throughout his life to helping those in the community, his commercial background, as well as his involvement with the church. So my point here is that the approach of the Court of Appeal is nothing extraordinary about what they did. Rather than look again at the facts of this case as I say they are, I won't say they're unusual, but they seem to be unique in terms of any previous cases that we're aware of, where someone has been applying for admission to the Bar. I've stressed in there that none of these convictions are for dishonest nature. There's no suggestion that Mr Stanley hasn't been fully candid with the Law Society regarding those convictions and if one looks at all these other cases there is that evidence either of very serious offending or a lack of candour on the part of the applicant.

WINKELMANN CJ:

I found it difficult to actually understand what the Court of Appeal was saying between 42 – well I understood what they were saying. I found it hard to follow their train of logic or reasoning, because when I look at it more closely they effectively say they accept Justice Clark's assessment of the risk that Mr Stanley will re-offend, although appearing at 51 to disagree with Her Honour but not giving any reasons for doing so. But then they weigh as an unrelated matter Mr Stanley's good character. So they're not saying that bears upon whether or not he's going to re-offend, they're simply saying he is a good character and the Judge didn't take this into account. Is that how you read it?

MR GWILLIAM:

That's how I read it Your Honour and of course good character in section 55 is but one, although one would say probably a more important factor the Court has to consider, and in many respects it's unusually drafted, section 55, because everything else in section 5 is of a negative nature, but the actual good character is I guess a positive matter, although if they don't meet the good character test that doesn't help. So it's always been accepted there is a difference between good character and whether you're a fit and proper person to be admitted to the Bar, and section 55 has clarified those matters a court can look at. It's a very, there are a broad number of factors that can be done in that regard.

WINKELMANN CJ:

So they're effectively saying that Justice Clark has over weighted the risk of offending, that's really their reasoning?

MR GWILLIAM:

That's right. Her Honour in the High Court placed too much weight on the risk of re-offending and in my submission what they've really said is, and it's been referred to in number of High Court decisions, and also by Her Honour Justice Clark, that are the frailties of character sufficiently reformed that he should, in this case Mr Stanley, be admitted to the Bar. But it may well be that the frailties of character by their very nature, and taking into account other factors, that they aren't sufficiently detrimental that he doesn't still pass a good character test, and I think that's evident in a number of the other authorities when they say, look, simply because he's got a conviction doesn't mean you're not a good character or that you can't meet the –

WILLIAMS J:

Why doesn't he get an AOD report and reapply?

MR GWILLIAM:

Well –

WILLIAMS J:
That would save him a lot of money.

MR GWILLIAM:
Yes.

WINKELMANN CJ:
Or would have.

WILLIAMS J:
Assuming the outcome – yes, would have, well it could still, but assuming the outcome is good for him, and if it's not well that's probably good to know that.

MR GWILLIAM:
There are two points there. One is, I run afoul of giving some evidence from the Bar and then that very suggestion was raised –

WILLIAMS J:
Not the first to do that from that spot Mr Gwilliam.

MR GWILLIAM:
That very suggestion was raised with the Law Society. The implication was it would not make much difference to the decision because they were not so much concerned about the conviction but –

WINKELMANN CJ:
I must say this isn't really very helpful from the Bar so I don't want to hear it.

MR GWILLIAM:
So I won't tell you any more than that. The second factor here is that does Mr Stanley actually have a drinking problem, if I put it in quotation marks, when you stand back and look at, these convictions are over a period of 40 years. Two of those convictions there was some form of special circumstances, conviction, sorry, disqualifications were not imposed and then in the most recent one in 2014, the actual offending was 2013, it was simply

dealt with by way of a fine, there was no suggestion that he required some rehabilitative sentence as part of that and it's, as I say, easy to say this guy's got four convictions. My submission is it's really that 2013/2014 conviction which has led to the difficulties he had with the Law Society. One could easily see if he didn't have that conviction, because it occurred of course after he finished his academic qualifications, then that was of some concern. But when one looks at the others, in my submission they would not pass the threshold where they would be a concern to the Law Society.

WINKELMANN CJ:
So you're adopting the approach that Mr Stanley has taken which is to say they weren't really all that concerning, the other convictions?

MR GWILLIAM:
Well one was, I guess it would be the indiscretions of feckless youth, as one was right back in 1980 something. The ones in the early 2000s both of which, in one the Court did find special circumstances, that his alcohol level was over because of consumption of medication, and the other one in 2000, again no disqualification was imposed. So you can't just look at the convictions –

WINKELMANN CJ:
But most people don't get one conviction, Mr Gwilliam. It is quite unusual to have this many convictions.

MR GWILLIAM:
Well unusual – well, one can look at, you know, the *Owen* case and various other cases, were quite more serious and more multiple convictions have been imposed for people of a quite younger age than Mr Stanley.

WILLIAMS J:
That was dishonesty.

MR GWILLIAM:
That was dishonesty. I think arson was in one of the cases.

WILLIAMS J:

Or it was burglary anyway. This is different.

MR GWILLIAM:

And a suggestion of again lack of candour.

WINKELMANN CJ:

Well just to give some structure to what you're saying to us, did you want to respond to the particular points of principle that Mr Collins raised?

MR GWILLIAM:

Yes I do of course.

GLAZEBROOK J:

Sorry, if we're moving on to the points of principle, you've said this is on the facts and the Court of Appeal said there wasn't enough weighing of the good character. The slight difficulty I have with that submission is that I don't think good character can in the least bit be taken away from the convictions. We have these submissions in sentencing often, well I know that he's beaten up his wife really badly on multiple occasions, and abused his children, but otherwise he's a really good character and the church and the school think he's wonderful. Well he's not actually of good character in the sense you've got to look at the whole thing, and I just don't, this is sort of an assertion he's of good character, almost assuming that the convictions are irrelevant in that. Now I can see your argument on the other side which says, well, you can't assess good character without taking into account the positive as well as the negative, but I'm not sure you can assert someone's of good character saying, apart from the convictions.

MR GWILLIAM:

Well my submission is the way that section 55 is drafted it refers to good character separately from the fact of conviction.

GLAZEBROOK J:

Well it might do but I just don't think that that can possibly be the case. You can't say this man has murdered three people but otherwise he's of good character because he's done good work in the community.

MR GWILLIAM:

Well that would certainly affect whether he's a fit and proper person to be admitted to the Bar.

GLAZEBROOK J:

Well I just see how it can't affect his character.

WINKELMANN CJ:

There's nothing in the statutory scheme that suggests that they're two separate things and that convictions are not relevant to good character, that's just an absurdity, you couldn't read the statutory scheme that way, and I don't think the Court of Appeal was.

WILLIAMS J:

On the other hand, the flip side of that is any evidence of good character can leaven convictions.

WINKELMANN CJ:

Absolutely.

MR GWILLIAM:

Yes.

WILLIAMS J:

The Court of Appeal must have been right when it said you need to look at this in the round.

MR GWILLIAM:

Yes.

WILLIAMS J:

Whatever that round is and if the convictions dominate then they dominate. The question is in this case whether they do.

MR GWILLIAM:

Yes and that really I'm saying that the, in response to my friend's submission, that the Court of Appeal haven't set the bar too low, they're just confirming that you need to look at all of the evidence in front of you, the good, the bad, and make that assessment at the end of the day as to whether, given the principles of the Lawyers and Conveyancers Act, this person should be admitted to the Bar.

WINKELMANN CJ:

So taking Mr Collins' point about setting the bar too low, he said that they, they thought that it didn't, that it really, the fact that there was a risk, as Justice Clark had held which they minimised, I think they placed it at a lower level than her. Do you agree?

MR GWILLIAM:

The seriousness of the convictions themselves?

WINKELMANN CJ:

No. I mean when they say at 51, "We do not risk of Mr Stanley reoffending is high," are they taking a different view or the same view as Justice Clark?

MR GWILLIAM:

My view is that they are taking a different view in assessing the level of that risk. They're still saying there is a risk which Her Honour, you know, said in the, when she gave her decision, but that the Court of Appeal has said that this level of risk is not high enough such as to weigh on the other side of bad character, if I can put it that way, when a final in a round assessment is done as to whether he meets the fit and proper test. So what's the difference between the Court of Appeal and Justice Clark here was, yes, they both accepted there was a risk of his re-offending. It's the level of risk that the

Court of Appeal considered in this case was perhaps different to the level risk that Her Honour put.

GLAZEBROOK J:

And you say that's just a factual assessment that doesn't engage principle, that's your primary submission?

MR GWILLIAM:

That's my primary submission, yes. So the, some emphasis has again been made by my friend of course not only the convictions themselves but his attitude to those convictions and how this can impact on respect for the law that lawyers are supposed to have. The, without delving too much into facts, Mr Stanley has indicated why some statements he made may have been misinterpreted, he expresses remorse and so forth, but the point I wish to make here is he had four referees, all independent referees, aware of the convictions, aware of, of course, Mr Stanley's background, who were quite prepared to stand by those references and in my submission that's the independent evidence, if I can put it that way, that a court would be looking at in terms of deciding or determining whether any frailties of character or any negative aspects of someone's character may not be sufficiently serious to prevent a person being admitted to the Bar.

WILLIAMS J:

You'd accept though that none of these had any particular insight into substance abuse at all, did they, they were work colleagues, a lecturer, that sort of thing?

MR GWILLIAM:

Yes, I accept that they were not professionals in that sense. But I still come back to whether on these facts it shows a sufficiently serious drinking problem which triggered that independent evidence being perhaps required to make an assessment about that, and his likelihood of re-offending in that way with drink-driving.

WILLIAMS J:

Well the Court of Appeal said that that was an issue. They accepted that from that conclusion from Justice Clark, so that wasn't the issue. They thought there was a doubt about whether this guy had drink-driving behind him or not. It seemed to say two things. One, look at the good character stuff and take that into account and two, had bad is drink-driving anyway.

MR GWILLIAM:

Yes.

WILLIAMS J:

You defend those two conclusions do you?

MR GWILLIAM:

Well in terms of the second point, how serious is drink-driving anyway, what they said, they didn't quite say that, I'm looking at paragraph 48, they say his offending was not at the serious end of the range of drink-driving. So they weren't making a blanket assessment saying drink-driving in itself is not serious, and that is –

WINKELMANN CJ:

But they did at 52 say also, "The Judge did not consider the nature of the offending, which is not of the prima facie disqualifying type present in *Owen* and *Burgess*." So they did really say, in a number of places actually, it's not that bad because even if he does it, it can be dealt through the disciplinary processes.

MR GWILLIAM:

That's right. In my submission that is a factual finding that is available to them on the facts here. When one looks at the history, four drink-driving convictions, but as I said earlier, spanned over a long period, two of which did not lead to any disqualification, and the most recent a fine only and disqualification, that they were able to say, look, his offending anyway wasn't at the serious end of the range of drink-driving and therefore that's a matter in

looking at the nature of the offending, which they're required to do of course under section 55, it wasn't sufficient to negate other good character assessments that they had made.

GLAZEBROOK J:
I don't think we have in front of us – did the Court of Appeal have in front of it all of the summaries of fact for those convictions or…

MR GWILLIAM:
It had the summary of facts for the most recent one in 2013. Unfortunately attempts to try and find the earlier facts were unsuccessful.

GLAZEBROOK J:
That's why I asked. I suspected that there could be some difficulties in that regard.

MR GWILLIAM:
So, yes, they did have that information in front of them. So just coming back to his attitude to these convictions, in particular there's reference to the fact the most recent drink-driving conviction was actually defended initially, and he had every right to do that in terms of the way the law was at that stage, but there was a –

WINKELMANN CJ:
This was about the hypodermic syringe, was it?

MR GWILLIAM:
Yes, I think there was, the Court of Appeal decision finally came and resolved that issue, and upon that happening Mr Stanley readily accepted a guilty plea and the matter was dealt with accordingly, so he can't be criticised for exercising his legal rights when that was based on legal advice and that was in the evidence that he had received at the time to defend that particular charge.

GLAZEBROOK J:

Do you say that Justice Clark took that into account or not?

MR GWILLIAM:

I'm saying that she didn't take that into account and indeed in her decision took a negative view of the fact that he hadn't owned up to that particular –

WINKELMANN CJ:

Where does she say that?

MR GWILLIAM:

I'm just trying to find it. At paragraph 57 of her decision she says, "In respect of the 2014 conviction (involving a blood alcohol reading of 141 milligrams) Mr Stanley maintains his blood was taken illegally but accepts he was guilty 'because the Court has ruled that and I will accept the decision of that Court'." And later on –

GLAZEBROOK J:

Well I think she's not saying that's a wholehearted acceptance. She's not saying – because obviously you are entitled to defend – what I was asking you is whether she said you're not entitled to defend it and that shows that you're – I think she was just saying that even having been convicted he says, well the Court said so and that's why I'm guilty.

WINKELMANN CJ:

There is concerning material set out in the judgment of Justice Clark, for instance at 15 she narrates how the Law Society interview notes recorded Mr Stanley's concern that some of the prosecutions were unsafe or unwarranted and that's reflected in the material she sets out earlier. She also notes that he admitted that, "He had been diagnosed as having early signs of alcohol dependency but had responded to that by curtailing his drinking."

MR GWILLIAM:

That I believe was based on a self-report or comment that Mr Stanley had made that he had looked at whether he might have alcohol dependency but hadn't considered it was necessary to do anything about it, and again that's used –

WINKELMANN CJ:

So is that wrong in the interview notes that he'd been diagnosed as having early signs of an alcohol dependency?

MR GWILLIAM:

I believe it's based on a response that Mr Stanley gave in the High Court.

WINKELMANN CJ:

It says it's actually the notes of an interview.

MR GWILLIAM:

Yes, the note of the interview sorry, but my understanding is that in the sense of a formal diagnosis, no that hadn't been made, but that nevertheless Mr Stanley was taking his, the fact that he had now had –

WINKELMANN CJ:

This is evidence from you. You don't have anything, are you referring us to evidence or…

MR GWILLIAM:

Well I was referring you to some of the evidence that he'd given at the High Court but –

WINKELMANN CJ:

So did he refute that?

MR GWILLIAM:

What you recall, and Her Honour refers to this fact, that he'd given up drinking and driving and Her Honour then forms an adverse implication from that,

because he still drinks that he can't really, that can't be treated with much weight or sincerity. The point is though that his comment was, "I don't drink and drive," he didn't say I don't drink, so there are sort of adverse –

WINKELMANN CJ:
I think he did say he didn't drink, didn't he, because then he just said –

GLAZEBROOK J:
"He avoided alcohol except on special occasions."

WINKELMANN CJ:
Yes.

MR GWILLIAM:
On special occasions, yes, and also if he refers back then to a medical trial he was on which prevented him from consuming alcohol during that trial anyway. So –

WINKELMANN CJ:
So it's actually at paragraph 15,, "He stated he avoided alcohol except on special occasions and never when he anticipated driving." Which is what he said to the Law Society.

MR GWILLIAM:
Mmm. So the – my point here is that –

WINKELMANN CJ:
So you're addressing his attitude to his convictions and how Justice Clark saw those.

MR GWILLIAM:
Yes and, you know, statements he made to the Law Society at the time. He has subsequently explained why he made those statements. In particular he refers back in one of those statements about the fact that the owners of the liquor outlets should also be prosecuted for allowing him to drink, and he did

subsequently say that these were statements made when he was in hospital. There is evidence that he was –

WINKELMANN CJ:

Made when he was in hospital? He was communicating with the Law Society when he was in hospital?

MR GWILLIAM:

Yes, he was in hospital as a result of a health event, so he really hadn't turned his mind to perhaps responding in a more considered way so we are getting g-

WILLIAMS J:

There is a pattern of minimalisation though across all of these. It's hard to avoid seeing that.

MR GWILLIAM:

Well except of course he does express, in my submission, genuine remorse. I know that's a matter for the Court to evaluate, and I think Her Honour wasn't that satisfied as to whether it was. In terms of minimisation unfortunately as was stated I think in his evidence before the High Court that he may have adopted a, put his own lawyer's hat on in a sort of a plea in mitigation which isn't really the appropriate response when you're trying to convince the Law Society you're a fit and proper person. So there were, I guess, some errors of judgment in the way he dealt with these and my submission is that Her Honour really overstated to some degree his, whether his attitude to these convictions would be a main problem because his, and at the end of the day as my friend had to concede, even if he was to further offend, there hasn't been any cases, unless there is some other more serious offending involved, where this has led to disciplinary action such as suspension or strike-off, and for that reason I'm coming to –

WILLIAMS J:

Well there's been *Pou*. That seems to be on all fours with these facts.

MR GWILLIAM:

Well *Pou* was, I think, driving whilst disqualified wasn't it, in that one.

WILLIAMS J:

No, I think it was drink-driving.

WINKELMANN CJ:

It was drink-driving and driving while disqualified. But that doesn't add much.

MR GWILLIAM:

Well only in the sense it adds a deliberate flavour –

WILLIAMS J:

He's been disqualified for drink-driving and then was drink-driving again, that's rather worse than three drink-drivings. That shows a disregard for the rule of law, you might of thought, that perhaps isn't present in your case.

WINKELMANN CJ:

It is the case with *Pou* though.

MR GWILLIAM:

Yes and that's what I'm saying. Driving while disqualified, in my view, is a more serious conviction here. It's someone knowingly flouting a court order to drive.

WINKELMANN CJ:

Was he driving whilst disqualified for drink-driving?

GLAZEBROOK J:

Probably.

MR GWILLIAM:

I don't know apart from what my friend has put in his submission. Three drink-driving convictions, one for driving whilst disqualified. The assumption is that perhaps one of those was drink-driving when he was

disqualified but that, I don't know the particular facts of that case. So it is my submission that the Court of Appeal were able to say, well look whatever this risk is of him re-offending, and we agree to some degree with Justice Clark that the frailties of character haven't perhaps satisfied that they are, he is reformed. But that nevertheless, taking into account everything else, look if he does drink-drive again, this is a matter the Law Society can deal with in terms of their disciplinary processes –

WILLIAMS J:
What troubles me about this is that the Law Society is essentially saying, here is a man with the potential of an alcohol problem, actually admitted to some extent, with a tendency to minimise and an apparent sense of entitlement, without any evidence that he's got control of these things. Why would we let him in and buy the problem? You can see their point can't you?

MR GWILLIAM:
Again my, which is why I keep coming back to the central theme of my submissions, is that this is the evaluative judgment any court has to make –

WILLIAMS J:
Quite, so I guess my next point is, the Court of Appeal doesn't really deal with that take on what's going on here. It doesn't really address the character problems that Justice Clark focuses on. It says, well, the problem isn't as bad as that and anyway there are these other good character issues, it doesn't really address the tendency to minimise or the apparent sense of entitlement that might create a risk.

MR GWILLIAM:
Well I would say that the criticism we have of Justice Clark's decision is that it was all just a focus on those convictions, his attitude to those convictions, without looking at the other matters. The Court of Appeal said, no, we have to look at more of this. Yes, there is this risk of re-offending but when one looks at the nature of these convictions, they assess that risk as relatively low, and take into account, and it needs to be borne in mind that this last offending was

now more than six years ago, that they could, by doing that risk assessment, and taking into account everything else, the good character aspects of Mr Stanley, legitimately on these facts form the view that he did meet the fit and proper person test, and as –

WINKELMANN CJ:

I mean the threshold, the critical issue is whether it is valid to say, okay, there's a risk you're going to commit disciplinary offences and we don't know that that's addressed adequately on the evidence. Is the Law Society really expected to say, we see there's a risk you're going to commit disciplinary offences, you haven't provided anything to satisfy us that you're not, but we're still obliged to issue you with a practicing certificate. Is it really obliged – or issue with a certificate of good character. Is it really obliged to do that. Can that really be the case, and that's the fundamental question Mr Collins wants this Court to address.

MR GWILLIAM:

Well the risk that both the High Court and the Court of Appeal accepted of possible re-offending on this nature, that the Court of Appeal in its own assessment put that risk as low and then it did –

WINKELMANN CJ:

But with no actual – it doesn't seem to give a reasoned basis for disagreeing with Justice Clark if it didn't then disagree with Justice Clark. I don't know that she gives a proportion but, a quantum or magnitude of a risk.

MR GWILLIAM:

Well in assessing the risk was low it does, and I'm turning to paragraph 48 of the decision –

WILLIAMS J:

Of the CA decision?

MR GWILLIAM:

This is the Court of Appeal decision where they specifically address Mr Collins' submission that this risk of re-offending goes to the obligation to uphold the rule of law, and they go on to say, "In an indirect sense a failure to comply with the criminal law can be seen as a failure to uphold the rule of law. But Mr Stanley did not drive knowing he was over the legal limit for breath/blood alcohol. His offending was not at the serious end of the range of drink driving. He was not disqualified… 2002 and 2007." So in my submission they were quite entitled to asses that risk as low when they took into account the nature of these convictions. This is not someone who had four convictions for –

GLAZEBROOK J:

But that's a different point, isn't it, because they say it doesn't show that he doesn't want to uphold the risk of law. They're not saying that that means that the risk of re-offending is lower, which is the submission you were making, or actually possibly what the Chief Justice was asking you to address, whether they gave reasons for differing from Justice Clark's assessment.

WINKELMANN CJ:

Yes, that was what I was asking you to address.

MR GWILLIAM:

You're talking about his attitude to the convictions, whether the Court of Appeal sufficiently addressed those.

GLAZEBROOK J:

Yes, because that was one of the main issues that both I think the Law Society and Justice Clark had was the minimisation of the offending and therefore the relationship that had to the risk of re-offending. Now the Law Society make wider points about upholding the rule of law et cetera but just at that stage it doesn't seem to me that there's much from the Court of Appeal to say why they assessed the risk of re-offending as lower.

Apart from the genuine commitment to not doing so that they refer to in paragraph 51.

WINKELMANN CJ:

I mean one assumes he made, if he's a good person, one assumes he made that kind of commitment in the past and has breached it. Unless he is, in fact, someone who doesn't care about the law.

GLAZEBROOK J:

Or who has an alcohol problem which means that –

WINKELMANN CJ:

Yes, either is unattractive.

MR GWILLIAM:

Yes, you've referred to paragraph 51 of their decision.

WINKELMANN CJ:

I mean ultimately what is good character has to be coloured by the nature of the assessment that the Law Society is making, and it has to make an assessment in terms of section 3 and 4.

MR GWILLIAM:

Yes, except that those underlying, or overarching principles apply in terms of where we get to with an assessment as to fit and proper person. My submission is still that the Court of Appeal were justified in assessing his risk as a manageable one, which they say at page 51, for his bringing the profession into disrepute, and they refer of course to the disciplinary procedures. So in my submission they were entitled to make that assessment. There's no point of principle that would suggest a further appeal is necessary to consider that issue, and it really is a matter of assessing that risk. Both the two Courts assessed that differently. In my submission the Court of Appeal was justified in assessing it in a lower category than what Her Honour Justice Clark did in the High Court. That's an assessment of the

facts, the relative judgment they have to make, and it's not one that's appropriate in terms of principle for this Court to consider in terms of a further appeal. The, and of course the Court of Appeal does refer specifically to his referees in terms of pointing out the positive aspects to his character and how that needs to be included in the mix of making that final assessment.

WINKELMANN CJ:
Anything else Mr Gwilliam?

MR GWILLIAM:
No, the only final matter is that this Court should be aware that Mr Stanley was admitted to the Bar on Friday. The Court of Appeal refused the Law Society's application for a stay so that's the position at the moment.

WILLIAMS J:
Okay.

WINKELMANN CJ:
That's an unusual step, but anyway.

MR GWILLIAM:
Yes so again unchartered territory but it's depending on what this Court determines.

WILLIAMS J:
There was no application to this Court I take it Mr Collins?

MR COLLINS:
No.

WINKELMANN CJ:
We might just hear from Mr Collins in reply in a moment.

MR GWILLIAM:
Those are my submissions. Just again –

GLAZEBROOK J:

Well are you suggesting the appeal is moot then?

MR GWILLIAM:

Yes I am. He's admitted to the Bar. At the end of the day there aren't really points of principle sufficient for this Court to entertain it. It was unusual facts which two Courts took different views of but they were entitled to in terms of the relevant judgments they made. If I can't be of further help, thank you.

WINKELMANN CJ:

Mr Collins. I have a couple of questions on that last point, even if you have nothing in reply. Was the Court of Appeal aware that this was leave hearing?

MR COLLINS:

Yes. The application was made to stay the consequences of the judgment of the Court of Appeal to prevent Mr Stanley from being admitted on two grounds. One, that if this application is granted an appeal proceeds, and the appeal is allowed, then it's a significant matter to remove someone from the roll having been admitted and there are two ways that could happen. One is through a disciplinary process and the other is through a consent process and the other issue was that the form of practice that Mr Stanley had represented as intending to take up once he was admitted and issued with a practicing certificate, which he has not yet got, was a form of practice that he would not be entitled to practice in as a, he was wanting to work as an in-house lawyer in an immigration firm giving advice to the clients of that, in a non-lawyer immigration advisory practice. The Court of Appeal, and I will provide the judgment to this Court, the Court of Appeal being aware of this leave application said that those matters were not obstacles, that the primary point was that he was allowed the fruits of his judgment in that Court and that the reasons that had been put up by the Law Society were not substantial and it should the appeal proceed and be successful from the applicant's point of view in this Court then he could be expected to be removed from the roll. So that's what's happened there.

WILLIAMS J:

What's the process for removal if consent –

GLAZEBROOK J:

Well consent must be ruled out so how could it be a disciplinary matter. He hasn't done anything since he's been admitted to the Bar.

MR COLLINS:

So there's two ways of removing. One is through the Disciplinary Tribunal, which in the absence of a disciplinary issue that could not proceed. The other is an application to the High Court for the removal from the roll, an application directly, and that is what would have to happen if an appeal in this Court was successful and Mr –

GLAZEBROOK J:

What grounds do you have for removing?

MR COLLINS:

That he was not a fit and proper person as found by this Court would be the grounds.

GLAZEBROOK J:

Perhaps you can refer us to the legislation.

MR COLLINS:

Just one moment.

WINKELMANN CJ:

And we might have to be satisfied that he's not a fit and proper…

WILLIAMS J:

In any event the test rather changes, doesn't it, as you've conceded?

MR COLLINS:

Well –

WILLIAMS J:

The usual response to this sort of offending is suspension.

GLAZEBROOK J:

Well not as a lawyer so I think you've conceded it couldn't be the disciplinary. Why wasn't an application made to this Court? Or an appeal lodged against the refusal to stay the judgment?

MR COLLINS:

Well rightly or wrongly it was thought that the process could be managed. An effort had been made to prevent and the Court of Appeal had overruled and it was decided not to take that matter further but to pursue down this line.

GLAZEBROOK J:

I mean I can imagine an application to the High Court which says we thought he was a fit and proper person but it turns out he's got five convictions that he didn't disclose. But it's odd, I would have thought, to say we didn't think he was a fit and proper person, that was overruled by the Court of Appeal, he took the fruits of the judgment, we decided not to apply for a stay to the Supreme Court or to appeal against that judgment, but nevertheless we want him to go. That's why I asked you what the provision says.

MR COLLINS:

Yes, well the provision is section 266 of the Lawyers and Conveyancers Act that, "On application to the High Court in that behalf, the name of a person enrolled as a barrister and solicitor of the High Court… may be struck off… for reasonable cause." Now that is the provision relating to – that's the –

GLAZEBROOK J:

Well the reasonable cause would be where you didn't disclose something that you should have done, or it turns out that there were some other character flaws other than convictions you didn't disclose, but reasonable cause being that another Court took a different view of something when in fact there wasn't an appeal against the Court of Appeal decision not to grant the stay.

WINKELMANN CJ:

I suppose you could argue that the admission occurred on the basis of a mistake in fact or something like that.

GLAZEBROOK J:

Well it could be but it just seems a bit unfair to Mr Stanley I must say.

MR COLLINS:

Well it was put to him that was part of the reason that it would be unfair to him to put him through a removal process, but he elected to proceed. Sorry, I'm just looking for the consent –

GLAZEBROOK J:

Well naturally because he was wanting the fruit of the Court of Appeal judgment. That he maintains is a matter of fact and within the discretion, well discretion is the wrong word, but that was an outcome that was available to the Court of Appeal and no issue of principles involved.

MR COLLINS:

Well the Law Society had been criticised for not either appealing that judgment or applying to this Court. I think the reason lies in the assurances that were given in the Court of Appeal judgment that what was to be done could be undone if the appeal to this Court is A, granted, and B, successful.

WILLIAMS J:

This is in the refusal judgment?

MR COLLINS:

Yes, the refusal judgment.

GLAZEBROOK J:

Can you provide us a copy of that please?

WILLIAMS J:

It would have been good to have got this before the hearing.

GLAZEBROOK J:

Yes.

MR COLLINS:

Well, I'll get the judgment to the Court.

WINKELMANN CJ:

Was that accepting the submission from Mr Stanley's counsel?

MR COLLINS:

Sorry Your Honour?

WINKELMANN CJ:

Was the Court of Appeal accepting a submission from Mr Stanley's counsel that what could be done could be undone?

MR COLLINS:

Yes.

GLAZEBROOK J:

Well maybe we need to see the submissions that were made as well.

WILLIAMS J:

Yes.

GLAZEBROOK J:

And perhaps the transcript of hearing of that application.

MR COLLINS:

The stay application was determined on the papers.

GLAZEBROOK J:

Right, well I think we need to see all of the material that was put in.

MR COLLINS:

I will provide the written submissions and the judgment on that. The other provision is voluntary removal from the roll, which is section 60 of the Lawyers and Conveyancers Act, "Any person may, at any time, with the prior consent of the Council of the New Zealand Law Society, request the Registrar to remove his or her name from the roll." And I'm sorry I cannot recall what Mr Stanley's reaction was to that, my learned friend would, to that possibility in the context of the stay application.

Some other reply matters just briefly. The matter of Mr Stanley's referees was addressed by Justice Clark at paragraph 37 of her judgment and I think it's fair to characterise the referees or references as being rather superficial on the key issue of an alcohol problem. They didn't really take that issue any further.

On the matter of Mr Stanley's admission of having an alcohol problem, that is addressed at paragraph 52 of Justice Clark's judgment where Her Honour refers to Mr Stanley's official statement before the Court where he feels disgraced and at the end of that paragraph Mr Stanley said and quotes, "There may have been an alcohol problem at some stage by question early stages of maybe a dependency myself that was never confirmed." So that is the information that this Court has about the acceptance that Mr Stanley had an alcohol dependency issue.

GLAZEBROOK J:

Then there's what he said at paragraph 15 in interview.

MR COLLINS:

Yes, and my submission that the key criticism of the Court of Appeal judgment really is focused on paragraph 51 of that judgment where the Court indicated that it did not consider that Mr Stanley posed a risk of re-offending at a high level given his genuine commitment to not doing so. So the Court was content to rely on his own say-so, and then if he did re-offend that could be managed, so the inevitable impression from that is that it did not regard the earlier convictions as being sufficiently serious to put him in peril of being

taken out, or being curtailed from practicing law, and I've already addressed that issue and that it's quite conceivable that a person facing a fourth adult era conviction for excess breath or blood alcohol would be seen as being disqualified from practicing law.

Unless there are any questions those were my points and I will get the material to the Court on the refusal of stay issue. Another issue about the jurisprudence in this area, there was a judgment of the Court of Appeal last week in another matter, in a case called *Lincoln v New Zealand Law Society* [2019] NZCA 442 (19 September 2019).

WINKELMANN CJ:
L-I-N-C-O-L-N?

MR COLLINS:
Correct Your Honour. Where the applicant had been refused at first instance and his appeal was dismissed involving current adverse indicators of character not involving criminal convictions. Unless there's anything further?

GLAZEBROOK J:
What do you say that shows, that case?

MR COLLINS:
I mean I can provide it to the Court, but it's a quite different set of facts and the point that it does not involve criminal convictions makes it rather less relevant to the analysis of this case and also the point that the Court of Appeal was quite emphatic in its findings because there was a fresh evidence application which was allowed and it wasn't a close call, can I put it like that. But I can provide that to the Court also if that would be helpful.

WINKELMANN CJ:
Yes, that would be helpful. Thank you counsel. We will take a little while to consider the application for leave and let you have the judgment in due course.