IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 10

LCDT 014/10

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **AUCKLAND STANDARDS COMMITTEE 2**

Applicant

AND **HANS TIMOTHY SORENSEN** of Auckland, Lawyer

Respondent

CHAIR

Mr D J Mackenzie

MEMBERS OF THE TRIBUNAL

Mr W Chapman
Mr M Gough
Mr A Lamont
Mr C Rickit

REPRESENTATION

Ms J McCartney SC and Mr M Treleaven for Auckland Standards Committee 2
Mr J Katz QC for Mr Sorensen

HEARING at Auckland on 4 April 2011

RESERVED DECISION OF THE TRIBUNAL ON CHARGES

Introduction

1. The Tribunal convened in Auckland on 4 April 2011, to hear three charges that had been laid against Mr Sorensen by Auckland Standards Committee 2.

2. The charges arose from the manner in which Mr Sorensen had acted regarding the administration of a will in the estate of a deceased client, Ms D.

3. Mr Sorensen denied the charges, and at the conclusion of the hearing the Tribunal reserved its decision.

Charges

4. Mr Sorensen faced three charges; misconduct; negligence or incompetence reflecting on fitness to practise or as to bring the profession into disrepute; and, unsatisfactory conduct. The charges were laid in the alternative.

5. The relevant facts were detailed in the particulars supporting the charges filed with the Tribunal.

6. In effect, the allegations against Mr Sorensen were that he had;

   (a) accepted instructions to make distributions from the estate knowing that the distributions were contrary to the late Ms D's will; and/or,

   (b) made those distributions without taking any steps to bring to the attention of beneficiaries their entitlements under the will; and/or,

   (c) made those distributions within 6 months from grant of probate without taking any steps to bring to the attention of beneficiaries and/or other possible claimants the intention to distribute; and/or,

   (d) made those distributions without seeking advice as to his duties or seeking directions from court; and/or,

   (e) made those distributions without seeking agreement of beneficiaries or directions from the court; and,

   (f) by so acting, knowingly facilitated the dishonest scheme of the executors and trustees of the estate.

7. In his formal response denying all of the charges, Mr Sorensen admitted the various acts and omissions described in (a) – (e) above, but denied the particulars noted in (f).

8. He said in his response, in respect of matters covered by (a), (b), (d) and (e), that he had acted as he did on the express instructions of the executors, and that he did not

knowingly act with intent to breach the terms of the will, defraud legatees under the will, or to aid or assist the executors in any dishonest purpose.

9. In respect of the matters particularised in (c), he stated in his response that as the estate assets were wholly in cash and available for immediate distribution, there was no reason not to make any distribution within 6 months.

10. The task for the Tribunal is to examine the facts, most of which are admitted by Mr Sorensen, consider Mr Sorensen's conduct in the context of those facts, and decide which, if any, of the alternative charges is made out against him. Mr Sorensen's knowledge and belief at the relevant time will be an important matter in assessing his conduct.

Background

11. The evidence showed that the background to this disciplinary proceeding was that the testator, Ms D, had made a number of bequests in her will to some friends and family members.

12. Those bequests were;
    (a) $20,000 to her friend S
    (b) $50,000 to her niece D
    (c) $20,000 to her sister S
    (d) $20,000 to her sister V
    (e) $50,000 to her nephew F
    (f) $30,000 to her friends A & M S
    (g) $20,000 to her friend F

13. The will providing these bequests, which totalled $210,000, was signed by Ms D on 28 February 2008. It had been prepared by Mr Sorensen after he took instructions from her, and he witnessed her signature on the will, together with his wife.

14. Ms D died approximately 17 months later, in July 2009. Mr Sorensen confirmed that he considered she had testamentary capacity at the time the will was signed.

15. Probate of the will was granted by the High Court at Auckland on 7 August 2009. The will appointed two of Ms D's brothers, F and D, the executors and trustees. It provided that after payment of all her debts, expenses, and bequests, the residue of her estate was to be divided between those two brothers and a third brother, O, in equal one third shares.

16. The estate had a value of approximately $278,000, and after debts and expenses were paid approximately $265,500 was available for distribution. After payment of the bequests totalling $210,000 noted above, the residue available to be divided between Ms D's three brothers was approximately $55,500. On that basis the residual share for each brother was to be approximately $18,500.

17. The brothers were not happy with the provisions contained in the will. In particular they expressed dissatisfaction with the bequests provided by the will to non-

immediate family members and friends. They thought there had been some opportunism and inappropriate dissipation, and that in the circumstances of this estate the late Ms D's siblings should have been better provided for. Mr Sorensen recorded in his evidence that he was empathetic to their concerns.

18. Those provisions of the will causing dissatisfaction were made by Ms D after consultation with and advice from Mr Sorensen about her will during the previous year. As part of the exercise to draft Ms D's will, Mr Sorensen no doubt would have enquired into her circumstances and intentions regarding allocation of the estate. He gave no evidence that he had counselled Ms D against the provisions in her will now causing consternation in the family, so he appears to have had a change of heart about the appropriateness of the provisions when confronted with those concerns by members of her family.

19. Once the value of the estate was established, the executors and trustees sought to have the estate distributed on what they considered to be a more equitable basis. They decided that all of Ms D's siblings should share equally in the estate residue established after paying costs and expenses, and after paying one of the bequests, an amount of $50,000 due to a niece, D.

20. That scheme of distribution required that specific bequests Ms D had made in her will should be ignored, disentitling legatees affected by not paying any of the bequests provided for them under the will. The legatees due amounts under the will, who were thereby disentitled, were: S (entitled to $20,000); F (entitled to $50,000); A & M (entitled to $30,000); and, F (entitled to $20,000).

Discussion

21. The redistribution scheme proposed by the executors and trustees was intended to deprive the legatees of their entitlement, and increase the shares of immediate family members (including the two brothers who were the executors and trustees giving the instructions that implemented the scheme). The evidence showed that a key feature of the scheme was to keep the legatees uninformed of their entitlements, to reduce the risk of any claims by those legatees in respect of their entitlements under the will.

22. Mr Sorensen, who held the estate funds in his trust account, was instructed by the executors and trustees to pay out the estate funds in a way that enabled payments to be made in accordance with their scheme and which reflected their view of what was equitable. He did that, as shown by his statement of distribution to the executors and trustees.[1] Those instructions and the distribution were contrary to the provisions of the will, and as the evidence showed, both the executors and trustees, and Mr Sorensen, were aware of that at the time.

23. Mr Sorensen said he told the executors and trustees that what they proposed regarding payments did not comply with the provisions of Ms D's will. He stated that he had made it clear to the executors and trustees that the redistribution of the estate they proposed would leave legatees out of pocket and the executors and trustees potentially

[1] Affidavit of Garreth Heyns dated 6 August 2010, Exhibit K (at P45)

liable to legal claims by those legatees. Mr Sorensen said he had asked them if they were prepared to take that risk, and they had confirmed that they were prepared to do so.

24. When he had these discussions with the executors and trustees Mr Sorensen said he had assumed that he should act as instructed by them, as he considered them his clients. That was his position notwithstanding his knowledge of unlawfulness of the scheme the subject of their instructions. His view was that he was obliged to accept the instructions, even though he was aware that meant that the provisions of the will would not be observed, and legatees would not receive amounts left to them under the will.[2]

25. The payment of estate funds Mr Sorensen made pursuant to those instructions resulted in bequests Ms D had provided in her will totalling $120,000, as noted in paragraph 20 above, not being paid to the legatees concerned. That $120,000 was then shared between the D siblings, including the two brothers who used their position as executors and trustees to instruct Mr Sorensen regarding this change to payments due under the will which improperly benefited them and their siblings.

26. For Mr Sorensen it was submitted that while he had failed to recognise his duty to uphold the terms of the will, he had at all times acted in good faith and in accordance with what he genuinely believed were instructions he was obliged to follow.

27. In summary, the evidence established that Mr Sorensen engaged with the executors and trustees in discussions about perceived unfairness of entitlements under the will. The executors and trustees formulated a plan that would increase their respective shares of the estate, and that of other immediate family, at the cost of the legatees noted above. Mr Sorensen knew the scheme was unlawful, and was aware the executors and trustees were breaching their fiduciary duties in changing the distribution arrangements under the will and excluding some beneficiaries from their respective entitlements. The fact that Mr Sorensen warned the executors and trustees of the risk they took should the beneficiaries become aware of the fact that bequests due to them had been unlawfully taken by others, confirms he was well aware of the impropriety of the arrangements.

28. There was also an element of deception in the plan, to ensure those adversely affected did not find out that they had entitlements in the estate which had been taken by others. This was demonstrated amply by the proposal to give small gifts of $200 each to the legatees (a total amount of $800) in place of the bequests they should have received, aggregating $120,000, "*…as if it came from the family rather than the estate*."[3]

29. Mr Sorensen understood this element of deception. He recorded it in the authority he prepared, and he facilitated it by adding an additional $800 to the share paid to D for that express purpose. That $800 was to be split into four payments of $200 each, and

[2] Mr Sorensen's affidavit of 21 January 2011, paragraphs 43, 45, and 57

[3] See paragraph 4 of an authority prepared by Mr Sorensen, signed by executors and trustees, exhibit HTS-10 in Mr Sorensen's affidavit of 21 January 2011.

was to be placed in envelopes for delivery by the brothers as a family gift to the four persons deprived of their entitlements under the will.[4]

30. In our view this is a planned and serious deception, aimed at furthering the ability of the executors and trustees to implement their scheme to take additional amounts from the estate, unquestioned by legatees who had no knowledge of, and were to be deliberately misled about, their entitlements. Mr Sorensen said he had discussions with the executors and trustees regarding this issue. The evidence confirmed that not only had he noted the arrangements in the authority referred to above, but also in his file notes.[5] He acted in pursuance of the arrangements, by paying estate funds as instructed, which facilitated the unlawful distribution and helped maintain the pretence with the legatees.

31. His role in the scheme is further compounded by Mr Sorensen agreeing not to communicate or send a copy of the will to the disenfranchised legatees, which ensured they would remain unaware of their respective entitlements. He said he did not contact those legatees because he was instructed not to, as would of course be expected if the deception was to be maintained by the executors and trustees. Mr Sorensen would have been well aware of the reason for that instruction in the circumstances of his discussions with the executors and trustees and also as demonstrated by his file notes, as referred to above.

32. Mr Sorensen summarised his position in his affidavit filed with the Tribunal. In that affidavit he said his understanding at the time of the relevant events was that he;

> *"…was acting properly and correctly because I was acting strictly in accordance with the instructions of my clients as executors. At no time however did I act dishonestly or with any intention to do anything other than act honourably and in accordance with what I then genuinely believed to be proper and correct procedures and conduct".*[6]

33. This was Mr Sorensen's position throughout the hearing; that he followed instructions in the belief that, having warned the executors and trustees that they were putting themselves at risk of a claim from disentitled legatees, he had met his obligations as a barrister and solicitor. It was only with the advantage of hindsight, he said, that he appreciated acting as he did was wrong, but at the time he had acted in good faith.

34. That explanation is not consistent with the established facts, which show Mr Sorensen was well aware the scheme proposed was not lawful and that he has, by his actions, deliberately assisted implementation of the scheme. In particular we note;

    (a) Mr Sorensen was aware at the time that the scheme for alternative distribution breached the terms of the will. He knew it was unlawful and advised the executors and trustees that the legatees who were disentitled in respect of their

---

[4] Mr Sorensen's affidavit of 21 January 2011, at paragraph 41.
[5] Ibid, exhibit HTS-4, where Mr Sorensen recorded "cash to D to give to 3rd parties", and see also HTS-5 where, in the second paragraph, he recorded his understanding of the deception, noting that the disentitled legatees "would get $200 cash as a gift from the family rather than as a bequeath (sic) from the estate."
[6] Ibid, paragraph 69

bequests under the scheme would have a right of action against the executors and trustees, and action could follow if the legatees found out.

(b) When Mr Sorensen demonstrated his knowledge that matters were unlawful by advising the executors and trustees of his concerns and the risk they ran, they confirmed to Mr Sorensen that they were prepared to take the risk of action against them. That concern about risk highlights the importance of another part of the scheme – keeping the matter from becoming known to the disentitled legatees, something with which Mr Sorensen assisted the executors and trustees. He did not communicate with the disentitled legatees to advise them regarding their respective interests under the late Ms D's will at the request of the executors and trustees, who would obviously have wished to keep the fact of their entitlements under the will from the legatees.

(c) The risk of proceedings against the executors and trustees was affected by whether the legatees knew of their entitlements under the will. The real risk was that the legatees would find out. That touches on Mr Sorensen's claim he was not part of any deception to ensure the legatees did not find out. Such a claim cannot stand in light of his actions and the authority he wrote for the trustees and executors to sign, authorising his actions and summarising the scheme. In that authority Mr Sorensen wrote that token amounts of money ($200 each) were to be paid to the disentitled legatees *"as if it came from the family rather than the estate."* [7] He was well aware that deception was involved, and also referred at one point, in the context of the risk of legal action if the disentitled legatees discovered the will's provisions had not been followed, to the position if the "*beneficiaries under the will suspected anything…"* [8]

(d) Mr Sorensen provided the extra funds of $800 from the estate trust account to D to facilitate the payments of $200 to each of the four disentitled legatees,[9] knowing the misleading purpose of the funds.[10] His distribution statement to the executors and trustees, and trust account records, showed that he paid out the estate funds allowing implementation of the scheme.

(e) Accepting instructions not to communicate with the beneficiaries would have again confirmed to Mr Sorensen the fact that there was a scheme being put in place about which it was desired the legatees did not become aware. There is an element of subterfuge in the non communication with legatees, so that they had little opportunity of finding out about their entitlement, making the risk of a claim unlikely.[11]

(f) When instructed not to send copies of the will to the legatees, Mr Sorensen noted that the will was a matter of public record following grant of probate in any event, indicating there was a risk matters were discoverable.[12] Mr

---

[7] Mr Sorensen's affidavit of 21 January 2011, at paragraph 4 of Exhibit HTS-10.
[8] Ibid, at paragraph 3 of Exhibit HTS-5.
[9] Ibid, on Exhibits HTS-4 (his note to "give cash to D to give to (the) parties") and HTS-7 (his statement of distribution of estate funds).
[10] Ibid paragraph 2 of Exhibit HTS-5.
[11] Affidavit of Garreth Heyns dated 6th August 2010, Exhibit B, last paragraph at p 25 of bundle.
[12] See Exhibit "B" on the affidavit of Garreth Heyns, supra, last paragraph on p 25 of Bundle.

Sorensen's concern about risk, and the warnings he gave the executors and trustees about that matter, appeared to be more focussed on risk of the legatees' discovery of the scheme, rather than the fact of unlawfulness.

35. Mr Sorensen stated, in his formal response to the charges, regarding the allegation that he had by his acts and omissions knowingly facilitated the dishonest scheme of the executors and trustees of the estate;

"*I deny that I knowingly facilitated the dishonest scheme of the executors and trustees of the estate. At all times I acted in accordance with what I believed were my obligations to my clients, being the executors, and without any knowledge or belief that they had an improper or dishonest purpose. At all times I believed that what I was doing was correct."*[13]

36. In our view it is not open to Mr Sorensen to claim, now that this matter has come to light, that he did not appreciate the true nature of the scheme, and that he felt obliged to follow the instructions of the executors and trustees. He has lent his hand to a scheme that was clearly unlawful. He was of the view that the scheme was not something which should have been undertaken, but he co-operated and helped the proponents of the scheme maintain their deception and subterfuge regarding those entitled to the funds diverted to family members.

37. The actions the executors and trustees took constitute serious breaches of trust from which they benefited personally. There is calculation in the execution of the scheme, with concern about risk of discovery, a desire to ensure no indication of entitlement to the legatees concerned, and token payments ex the estate misleadingly being characterised as gifts from the family.

38. We consider it implausible, against the background in evidence before us, that Mr Sorensen did not understand the full implications of the proposal, and the need for him to co-operate in its implementation, which he agreed to do. Suggestions were made in submissions of a need for any assessment of Mr Sorensen's conduct to recognise cultural context, the fact that he succumbed to powerful personalities, and his attempt to avoid the undue cost to a small estate of seeking directions from court. In our view none of these matters mitigate Mr Sorensen's culpability.

39. We consider that Mr Sorensen's knowledge of and involvement in the scheme, with its elements of deception and serious issues of honesty involving a not insubstantial amount of money, must result in a finding of misconduct against Mr Sorensen.

40. We do not accept that he did not recognise what was occurring for what it was, a dishonest scheme depriving four individuals of their entitlements under the will. Mr Sorensen recognised the scheme was unlawful and went along with elements essential to the success of the scheme. He engaged in discussions with the executors and trustees about the scheme, recording that legatees could take action if they suspected anything, he paid out estate funds for distribution to the D siblings, he provided the extra $800 from estate funds to allow the D brothers to give that money to the disentitled legatees in a misleading way, and he refraining from taking any steps that

[13] Paragraph 7 of Mr Sorensen's formal response to amended charges, dated 8 November 2010

may have resulted in the disentitled legatees becoming aware of their position, at least until attempting a reconciliation and settlement once disciplinary action against him was underway.

41. Contrary to Mr Sorensen's claims, we believe the evidence clearly shows that he did have knowledge of the improper and dishonest purpose represented by the scheme. He was complicit, prepared to proceed with the instructions of the executors and trustees after he had identified the unlawfulness of the scheme, shown by his warnings and comments regarding risk of action by the legatees. We consider that his explanation of lack of knowledge or belief that there was an unlawful scheme is not sustainable in light of the evidence.

42. In this regard we also note that in Mr Sorensen's affidavit of 21 January 2011,[14] he referred to what he considered to be unwise and inappropriate payments by Ms D during her lifetime, which unduly dissipated assets of her relatively small estate. He recorded a specific gift of approximately $27,000 as an example of improvident gifting to *"distant relatives and friend"*.[15] In cross examination it emerged that this gift was in fact a gift to one of the brothers, D. The original evidence regarding this gift of $27,000, as set out in Mr Sorensen's affidavit, was misleading. Only in cross examination did its true nature emerge, and, quite apart from the evidence we have identified, this does not assist the credibility of Mr Sorensen's claimed position.

43. Giving a warning of risk to the executors and trustees does not vary Mr Sorensen's culpability, in fact it highlights that notwithstanding his knowledge that the scheme was unlawful, he chose to proceed and co-operate with the executors and trustees in their implementation of the scheme.

44. Mr Sorensen said he considered the redistribution of estate funds was the best course for the estate. He did not want to dissipate estate funds in legal claims, he said, and he considered the executors would probably undertake their scheme anyway, whether he was involved or not. These claims, together with his statement that he did not want to risk action from the executors and trustees if he did not follow their instructions, notwithstanding he fully understood the unlawful nature of the scheme and the steps necessary to keep those entitled uninformed of their bequests, are an unrealistic proposition to justify conduct we consider reflects poorly on Mr Sorensen.

Decision

45. We find Mr Sorensen guilty of the charge of professional misconduct. We consider his conduct to be a serious matter, and the charge of misconduct has been made out on the evidence. Mr Sorensen has engaged with the executors and trustees regarding a scheme he must have known was unlawful and his co-operation in its implementation, including its misleading and deceptive elements, involves an element of dishonesty. Mr Sorensen's claim that he was unaware of the unlawfulness and did not knowingly facilitate an unlawful scheme is not supported by the evidence.

---

[14] At paragraph 30
[15] Ibid, lines 4 - 6

46. Counsel for the Standards Committee is requested to lodge submissions on penalty and costs within 3 weeks of delivery of this decision, with service on counsel for Mr Sorensen at that time.

47. Counsel for Mr Sorensen is requested to lodge submissions in reply within 3 weeks after receipt of submissions from the Standards Committee, and to serve a copy of his submissions on the Standards Committee.

48. Once submissions are filed, counsel should liaise with each other and the Tribunal case manager with a view to establishing some prospective dates for the penalty and costs hearing.

49. Mr Sorensen was granted interim suppression regarding publication of his name and details of the charges brought. That suppression, which was granted on the basis that the public's right to know was outweighed by Mr Sorensen's right to privacy in circumstances where, if the charges were not substantiated, Mr Sorensen's reputation would suffer unduly, is now to lapse, effective 2pm on 6th May 2011.

50. Crown costs under S.257 Lawyers and Conveyancers Act 2006 are noted as $11,300 at the date of this decision. A final figure will be certified in the Tribunal's decision on penalty and costs.

Dated at Auckland this 2nd day of May 2011

_____

D J Mackenzie
Chair