

**BEFORE THE NEW ZEALAND LAWYERS
AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2010] NZLCDT 21

LCDT 027/09

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND 356 COMPLAINTS
COMMITTEE and AUCKLAND
No.1 STANDARDS COMMITTEE**

AND

JOHN HARDWICK SANDERS
of Auckland, retired solicitor

CHAIR

Mr D J Mackenzie

MEMBERS OF THE TRIBUNAL

Ms S Gill
Mr C Rickit
Ms S Sage
Mr W Smith

HEARING: at AUCKLAND on 22 July 2010. Oral decisions on charges and penalty were given at the hearing

APPEARANCES

Mr R Earwaker and Mr M Treleven for the New Zealand Law Society
Mr H Fulton for the practitioner

FULL DECISION ON CHARGES AND PENALTY

Introduction

[1] This is the Tribunal's full decision, with reasons, following its earlier oral decisions on the charges and penalty.

[2] Mr Sanders faced five charges of professional misconduct;

- [a] That on or about 3 November 2006 he breached Rule 5.01 of the Rules of Professional Conduct for Barristers and Solicitors by failing to comply with Section 89 Law Practitioners Act 1982 and/or Rules 3 and/or 5(7)(b) of the Solicitors Trust Account Rules 1996. This charge was laid by the Auckland Section 356 Standards Committee of the New Zealand Law Society. ("the Section 356 Charge")
- [b] That on a date unknown but in approximately July 2007 he wrote false details on a form with the title "Authority to Disburse Funds" ("the Authority") which purported to authorise the payment of funds from his trust account in the name of Mr RV and Mrs SL P to Mrs R. ("the False Detail Charge")
- [c] That on or about 16 August 2007 he made a false representation to D, solicitors, expressly or by implication, that the Authority was signed by Mr P on 15 November 2006 with Mr P signing on behalf of himself and Mrs P. ("the D Representation Charge")
- [d] That on or about 11 December 2007 he made a false representation to Complaints Committee No.1 of the Auckland District Law Society, expressly or by implication, that the Authority was reduced to writing and/or signed by Mr P on 15 November 2006 with Mr P signing on behalf of himself and Mrs P. ("the Complaints Committee Representation Charge")
- [e] That from, on, and after 23 June 2008, in breach of Section 101(6) of the Law Practitioners Act 1982, without lawful justification or excuse he refused or failed, and continued to refuse or fail, to comply with the lawful requirement of Complaints Committee No.1 of the Auckland District Law Society made by resolution dated 26 May 2008 that pursuant to Section 101(3)(d) Law Practitioners Act he produce certain books, documents, papers, accounts and records in his possession. ("the Statutory Charge")
The charges noted at (b) – (e) above were laid by Auckland Standards Committee No.1 of the New Zealand Law Society.

[3] All five charges were set down for hearing in Auckland on 22 July 2010. At the hearing on that day the Standards Committee sought, and was granted, leave to withdraw the False Detail Charge and the Statutory Charge. That left the Section 356 Charge, the D Representation Charge, and the Complaints Committee

Representation Charge to be dealt with at the hearing. Mr Sanders admitted the latter two charges, but denied the Section 356 Charge.

[4] After hearing argument on the Section 356 Charge, and receiving representations on the D Representation Charge and the Complaints Committee Representation Charge, the Tribunal retired to consider its decision on these matters.

[5] The Tribunal found that Mr Sanders was guilty of misconduct in his professional capacity on the section 356 Charge.

[6] The Tribunal was satisfied that Mrs P had a joint interest in the money in the Ps' trust account with Mr Sanders. Mr P had instructed Mr Sanders to transfer \$174,000 of that money to Mr P's mother. Mr Sanders made the transfer without obtaining instructions from Mrs P. The Tribunal found that Mr Sanders had to have Mrs P's consent or authority to properly make the transfer. In making the transfer without Mrs P's consent or authority Mr Sanders breached both the Law Practitioners Act and the Solicitors Trust Account Rules.

[7] The D Representation Charge and the Complaints Committee Representation Charge were both admitted by Mr Sanders.

[8] After delivering its substantive decision on the Charges, the Tribunal requested submissions on penalty from the parties, who both indicated a willingness to provide them at that point with a view to finalising the disciplinary process.

[9] After a short adjournment submissions on penalty were made by the parties. After considering those submissions the Tribunal delivered its decision on penalty. The decision of the Tribunal provided that;

- [a] Pursuant to Section 112(2)(c) Law Practitioners Act 1982 and Section 242(1)(g) Lawyers and Conveyancers Act 2006, Mr Sanders was not to practise as a solicitor on his own account, whether in partnership or otherwise, until authorised by the Tribunal to do so;
- [b] On each charge Mr Sanders was censured;
- [c] Mr Sanders was to pay 50% of the New Zealand Law Society's total costs of \$14,361;
- [d] Mr Sanders was to reimburse 50% of the New Zealand Law Society's total costs of \$9,333 fixed under Section 257(3) Lawyers and Conveyancers Act 2006.

[10] The Tribunal confirmed at the hearing that it would issue a decision in writing, with its reasons, in due course. This written decision now sets out the reasons for the Tribunal's decisions on the charges and penalty.

The Section 356 Charge

[11] This matter arose as the result of a transfer of funds held on trust by Mr Sanders, a sole practitioner, in the names of Mr RV and Mrs SL P. The funds were transferred by Mr Sanders to Mr P's mother, Mrs R, to assist Mrs R to purchase a property at A Place, Auckland. The transfer was made on the instruction of Mr P. The Law Society position was that Mrs P's authority had not been obtained, and that no written record had been retained of Mr P's instruction. The first issue we considered was whether Mrs P's authority was necessary and obtained.

[12] The funds held by Mr Sanders on trust represented the proceeds of sale from three properties sold by Mr and Mrs P. Mr Sanders had acted for Mr and Mrs P on those sales. On or about 3 November, Mr Sanders, acting on the verbal instructions of Mr P, transferred approximately \$174,000 of the funds held on trust for Mr and Mrs P to Mrs R's account, to facilitate her purchase of the property at A Place. The sum transferred was said to represent funds held following sales by Mr and Mrs P of properties at P Road, E Street, and H Close.

[13] It was common ground that Mrs P did not personally give Mr Sanders instructions to make the transfer of the funds to Mr P's mother, Mr R. Mr Sanders acknowledged that he had relied on Mr P's veracity when he pressed him about Mrs P's agreement to the transfer, and he said he had accepted Mr P's statement that Mrs P approved the transfer.

[14] Mrs P's evidence was that she did not give her approval to the transfer, and that it was not correct for Mr P to advise Mr Sanders that she agreed to the transfer to Mrs R. As a consequence, Mr Sanders was in a position where he had acted on the instructions of Mr P in making the transfer, relying on his assurance that Mrs P also required the transfer to be made, without any authority (verbal or written) from Mrs P.

[15] For Mr Sanders, it was submitted that the central issue was the manner in which the Solicitors Trust Account Rules should be interpreted.

Rule 3(1) provides that;

"... a solicitor must deal with client assets only in accordance with the instructions of the client (and in particular may not pay, transfer, or charge any client assets except in accordance with such instructions)."

Rule 5(7) provides that;

"A solicitor may make transfers or payments from a client's trust money only if –

(a)

(b) the solicitor obtains the client's instructions or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it;"

[16] The Law Practitioners Act 1982 provides a similar provision to those contained in Rules 3(1) and 5(7)(b). Section 89(1) Law Practitioners Act 1982 provides that;

“All money received for or on behalf of any person by a solicitor shall be held ...exclusively for that person, to be paid to that person or as he directs...”

[17] For Mr Sanders, and relying on Rule 5(1)(c) of the Solicitors Trust Account Rules, it was suggested that a joint account of two clients was to be treated as a single client, and that accordingly the authority of just one joint owner in respect of funds held in a trust account would be a sufficient authority. We do not accept that submission. The Rule provides as follows;

(1) *“Every receipt, payment, transfer and balance of trust money must be recorded in a trust account ledger with a separate ledger account for each client and.....*

(c) for the purposes of this rule, clients having a joint account are a single client.”

The reference to treating a joint account of two clients as a single client in this Rule is for the specific administrative purpose of that Rule, and does not affect or relate to matters of consent or authority in respect of dealing with funds held in such an account.

[18] It was also submitted for Mr Sanders that he was entitled to rely on the *“implied ostensible authority”* of Mr P to give instructions for himself and his wife. This was an authority that was said to have existed and been practised over a period of years, during which time Mr Sanders had acted for Mr and Mrs P on numerous joint property transactions. Mr Sanders’ evidence was that Mrs P would attend at his office periodically to sign documents such as transfers, confirming transactions in respect of which Mr P had given Mr Sanders instructions.

[19] It was submitted that there was nothing that should have raised with Mr Sanders the possibility that matters had changed from the normal course, whereby Mr Sanders accepted instructions from Mr P in respect of the wishes of both Mr and Mrs P regarding their joint investments. For Mr Sanders it was said there were no circumstances which should have indicated to him that he was not entitled to consider that Mr P continued to have his wife’s authority to make arrangements regarding their joint affairs with Mr Sanders.

[20] In our view the issue is not one of ostensible authority. As has occurred in this case, joint interests can be at risk if a solicitor acts on the authority of only one joint owner, rather than both owners. The Solicitors Trust Account Rules in particular require a high standard of compliance and strict observance of the precise obligations imposed, which contribute to avoiding situations such as has arisen in respect of Mr and Mrs P’s money.

[21] Section 89 Law Practitioners Act and Rules 3(1) and 5(7)(b) are unequivocal. The transfer of Mr and Mrs P’s funds could only be properly made to Mrs R if both Mr and Mrs P gave that instruction. It is not sufficient for one owner of jointly owned funds to give the instruction, and to advise that it is on behalf of all owners. Both the Act and the Rules placed an obligation on Mr Sanders to obtain Mrs P’s instruction, and he could not properly rely on the assurance of Mr P alone.

[22] Under the Act and Rules ostensible authority has no place in authorising actions in respect of jointly owned assets. They require specific authority from those owners, not just one of them, otherwise the intended protections for jointly owned assets would not be able to operate effectively. A simple telephone call by Mr Sanders to Mrs P could have resolved the issue and avoided the situation in which he now finds himself.

[23] Even if ostensible authority did have a place in dealing with assets held on trust by a solicitor, we would have considered that the circumstances of Mr and Mrs P's marital relationship noted in evidence, and the fact that the transfer proposed was abnormal, would have made that argument difficult for Mr Sanders to sustain. We note also that the evidence of Mr Sanders and his secretary regarding Mr Sanders' questioning of Mr P about Mrs P's agreement to the transfer indicates an element of concern that should have resulted in nothing less than the required strict observance of the relevant regulatory requirement.

[24] We find that Mrs P's authority was not given or obtained for the transfer to Mrs R, and as a consequence Mr Sanders, in transferring \$174,000 to Mrs R from Mr and Mrs P's joint account, has breached the requirements of Section 89 Law Practitioners Act and Rules 3(1) and 5(7)(b) Solicitors Trust Account Rules. The Act and the Rules are intended to protect money held on trust, and for that reason require the money to be held and dealt with only as directed by those on whose behalf the money is held. There was no authority from Mrs P, and Mr P appears either to be mistaken about that or to have deliberately misled Mr Sanders about Mrs P's agreement to the funds being transferred to Mr P's mother. Observance by Mr Sanders of the requirements of the Act and Rules would have avoided this situation, which highlights the reason the regulatory requirements are in place.

[25] We have taken the view that we need not address the issue of Mr Sanders failing to make a written record of Mr P's authority, which was part of the Law Society's position on compliance with Rule 5(7)(b). It is arguable that Mr Sanders did reduce it to writing, although not for some eight months afterwards, and it may be that delay means there was no compliance. As we have found that Mr P's instruction was not valid as an authority to allow the proper transfer of jointly owned funds, and that an authority from Mrs P was required to comply with the regulatory requirements, then whether or not Mr P's instruction was reduced to writing in a timely way is not a matter of any consequence, and we do not consider it necessary to make a finding on that issue.

D Representation Charge

[26] This charge arose out of the Authority, which was signed by Mr P in or about July 2007. The Authority bore date 15 November 2006, and was stated to be signed by Mr P on his own behalf as well as on behalf of Mrs P.

[27] Following receipt of a letter from law firm D in June 2007, which firm was acting on behalf of Mrs P, Mr Sanders prepared the Authority, dated it 15 November 2006, and had it signed by Mr P. Mrs P did not sign the Authority, nor does it appear from the evidence that she was asked to sign it. Instead Mr Sanders relied on Mr P's

confirmation to him that Mrs P had authorised the transfer of \$174,000 to Mrs R referred to in the Authority.

[28] On 16 August 2007 Mr Sanders wrote to D advising that he had been instructed by Mr P to make a transfer from Mr and Mrs P to Mrs R of \$174,000 shortly before settlement of her acquisition of a property at A Place, Auckland. The money was an advance to assist Mrs R to purchase the property. Mr Sanders stated in that letter that Mr P's instructions to make this transfer were contained in several telephone calls which were "*subsequently reduced to writing, a copy of which authority is attached.*"

[29] For Mr Sanders it was submitted that the date he had inserted in the Authority, 15 November 2006, was in relation to the period the verbal authority was operative and material to the time the transactions the subject of the Authority occurred. It was not the date the Authority had been signed. Mr Sanders acknowledged that there had been no disclosure of this in his letter of 16 August 2007, nor of the fact that the Authority was not reduced to writing until July 2007, some eight months after the transactions the Authority was said to authorise. Mr Sanders has admitted this charge, and we will refer to his explanations as to what he intended under penalty.

Complaints Committee Representation Charge

[30] This charge arose out of the Authority involved in the D Representation Charge, and involved a further allegation of false representation of the date the Authority was executed, on this occasion made to the Complaints Committee No.1 of the Auckland District Law Society.

[31] There had been correspondence over a period between the Complaints Committee and Mr Sanders while Mrs P's complaint was investigated. When Mr Sanders responded to the Complaints Committee by letter on 11 December 2007, he provided his explanation regarding Mrs P's complaint about an unauthorised transfer of jointly owned funds. In that explanation he confirmed that he had completed the transfer to Mrs R on 3 November 2006, "*pursuant to the verbal authority of 1st November not on or about the 15 November, the date the verbal authority was reduced to writing.*" [The underlining in this quoted section is per Mr Sanders' letter]

[32] For Mr Sanders, the position traversed in paragraph 29 was again submitted. It was suggested that Mr Sanders was more concerned to address the issue of authority to make the transfer, rather than an accurate representation of the date the Authority was signed. He said that the Authority was only the written record of earlier verbal instructions that were said to be in existence at the time of the transfer complained of¹, not the authorising document itself, so its actual date was not relevant to the central issue of authority to transfer.

¹ For Mr Sanders it had been submitted at the hearing that Exhibit A on Mr Sanders' affidavit, filed with the Tribunal in his response to the charges, constituted a record of his instruction or authority to make the transfer. During the hearing counsel for Mr Sanders accepted that the file note concerned did not accurately reflect the transfers made, and abandoned the proposition that the file note was a written record of the instructions in question.

[33] Mr Sanders said that he intended to identify the Authority by the date it bore, which referenced earlier verbal instructions, not its date of execution. Mr Sanders also admitted this charge, and we will refer further to his submissions under penalty.

Decision on Penalty

[34] The penalty decision the Tribunal delivered at the conclusion of the hearing on 22 July 2010 is noted at paragraph 9 above. We now set out our reasons for that decision.

[35] Mr Sanders suggested that his references to the time the Authority was signed, to both D and the Complaints Committee, constituted only “*technical*” misrepresentations. He submitted that the date represented as the date of execution of the Authority was not material to the transaction said to have been authorised, and its consequences. What was material, he said, was that verbal instructions to make the transfer had been received before the actual transfer was made, that those instructions were subsequently reduced to writing, and that Mr Sanders had not differentiated clearly enough as between the date the Authority was signed and the date the Authority had been given. As it was, the date was not accurately recorded by the Authority, as the evidence was that Mr P instructed Mr Sanders regarding the transfer in the first week of November 2006, not 15 November 2006, but this is not a key issue in respect of the representation charges.

[36] As noted, Mr Sanders admitted the charge of making a false representation to D and the Complaints Committee. His explanation was that it was an innocent mistake, because he focussed on the time of the transactions to which the Authority related rather than on its date of execution.

[37] The facts and timeline regarding the issues the subject of Mrs P’s complaint lead us to the view that Mr Sanders, if not deliberately intending to mislead, has been reckless as to accuracy, with the same result, that misleading information has been provided to both D and the Complaints Committee.

[38] When Mrs P became aware of the fact that funds in which she had an interest had been transferred to Mrs R, she instructed her solicitors, D, to ask about that matter. From the letter written by D to Mr Sanders on 13 August 2007,² it appears that the only fund transfer to Mrs R known to Mrs P at that time was an amount of \$72,723.16, as that is the only amount asked about in the letter.

[39] In his letter of reply to D on 16 August 2007³, Mr Sanders said that in fact the total amount transferred had been approximately \$173,000. He said in his letter that the transfer constituted a loan advance to Mrs R, and that he had been instructed and authorised to make the transfers constituting the loan advance by Mr P, who Mr Sanders believed was also authorised by Mrs P. Mr Sanders noted that Mr P’s instructions were contained in several telephone calls and were subsequently reduced to writing. Mr Sanders then attached a copy of the Authority⁴ to the letter.

² Exhibit “I” on Mrs P’s affidavit of 17 September 2009

³ Exhibit “J” on Mrs P’s affidavit of 17 September 2009

⁴ See the attachment to Exhibit “J” noted in footnote 3

[40] The Authority provides for a signature, followed by a date. After Mr P's signature on the Authority it reads "*Dated 15-11-2006*". Mr Sanders says he dated it, when it was signed in July 2007, "*15-11-06*" because he wanted to reference the Authority to the date of the verbal authority he had received and the date the transactions had actually occurred. In fact they were 1 November 2006 and 3 November 2006, respectively.

[41] Mr Sanders, as a solicitor of many years experience, must have known that anyone looking at that Authority would expect the date "*15-11-2006*", immediately under the signature of Mr P, to represent its execution date. We note that completion of the Authority, which the parties have agreed was July 2007, followed a letter from D on 22 June 2007 enquiring about funds Mr Sanders had received from sales of Mr and Mrs P's investment properties. If Mr Sanders had any concerns about the adequacy of his instructions to make the transfer to Mrs R, he was now on notice that the issue was going to be the subject of scrutiny.

[42] When Mr Sanders received the follow-up letter from D dated 13 August 2007, seeking a reply to its earlier letter of 22 June 2007, he sent D the Authority. He must have known that D would interpret that as representing an Authority obtained in writing close to the time of the transactions, in November 2006, whereas it is actually an Authority obtained in writing after enquiry by D, on behalf of Mrs P, in July 2007.

[43] There is undoubtedly a misrepresentation by Mr Sanders in the way he produced and referred to the Authority, and that has been admitted by Mr Sanders. His innocent mistake explanation is a matter for us to consider in penalty. In our view the evidence we had before us indicates that Mr Sanders has endeavoured to strengthen his position regarding the authorisation he had to make the transfer to Mrs R by dating the Authority in the way he did. Perhaps he hoped it may divert any enquiry into whether or not he had proper authorisation, or at least make less obvious that he had nothing in writing which authorised the transfer for some eight months following the transaction, and then only after a question was asked by D that meant arrangements would come under scrutiny.

[44] Mr Sanders continued that approach when writing to the Complaints Committee on 11 December 2007, the matter the subject of the Complaints Committee Representation Charge. In its letter to Mr Sanders of 29 November 2007⁵, the Committee referred to Mr Sanders taking action on the authority to release funds "*dated 15 November 2006*". Mr Sanders was asked to explain his position to the Committee in relation to the funds transferred and said to be pursuant to the authority noted.

[45] In his letter of 11 December 2007 responding to the Complaints Committee, Mr Sanders made the comments referred to above in paragraph 35. He emphasised that he had acted on 3 November 2006 to make the transfer pursuant to his verbal authority, which he said was given on 1 November 2006, not 15 November, "*the date the verbal authority was reduced to writing*".⁶ Despite Mr Sanders' claim that he was

⁵ Exhibit "HRL-21" on affidavit of Henricus Roux Laubscher dated 20 October 2009

⁶ Paragraph 4 in the letter which is exhibit "HRL-25" on the affidavit of Henricus Roux Laubscher noted above at footnote 3

focusing on the dates of verbal authorisation he said he had received, and the date of the transaction, his representation in the letter about the date being the date of execution is unequivocal. This repeats his approach taken in his letter to D.

[46] We are left with a clear view that, at the very least, Mr Sanders has been reckless in the way he has portrayed the date on which he obtained the written authority. He is an experienced solicitor and would have been well aware of the implications of what he was representing in his correspondence to both D and the Complaints Committee about the Authority.

[47] In our view Mr Sanders has failed to obtain a required authority to make the fund transfer to Mrs R. He has shown a lack of professionalism and precision in his approach to obtaining authority to transfer joint funds. When confronted with an enquiry into these matters he has, in a rather muddled and confused way, endeavoured to repair defects in his arrangements by having an authority signed some eight months later. He then attempted to disguise the true date of the written authority by making representations that could have misled D and the Complaints Committee.

[48] The Law Society sought suspension, and suggested a period of three months. In addition it sought a censure and costs. The Society also noted that Mr Sanders had previously been the subject of disciplinary proceedings arising from misconduct. While we note those proceedings, and their nature (involving conflict of interest and failure to provide independent advice), they arose 20 years ago and we do not consider that they should bear on our current decision on penalty.

[49] For Mr Sanders, it was submitted that there was no intention to mislead, and that the focus of the enquiries to which he was responding was about the existence of an authority, not the date it was reduced to writing. It was only an interpretation issue it was said, and while Mr Sanders acknowledged his representations were misleading, they were not material to the central issue regarding existence of an authority.

[50] For the reasons we have noted we consider that Mr Sanders actions constituted more than an innocent misinterpretation, and that Mr Sanders was prepared to allow an impression to be formed that the Authority was put in place around the time of the transactions, not 8 months later when enquiries began. It has the appearance of an ex post facto tidy up of arrangements to reduce risk of disciplinary proceedings being commenced regarding absence of any authority. In the event it has compounded Mr Sanders' difficulties.

[51] In respect of the charges proven or admitted, this Tribunal Orders that JOHN HARDWICK SANDERS;

- [a] Shall not practise as a solicitor on his own account, whether in partnership or otherwise, until authorised by the Tribunal to do so;
- [b] Is censured for his failure to comply with regulatory requirements governing the way in which trust funds are to be held and applied, and for

his muddled and unprofessional attempt to mislead others regarding the time he obtained authority in writing;

- [c] Shall pay costs of \$7,180.50 towards the costs of the New Zealand Law Society. This represents 50% of the Society's costs;
- [d] Shall contribute to costs payable by the New Zealand Law Society to the Crown under Section 257 Lawyers and Conveyancers Act 2006, by paying the Society \$4,666.50, representing 50% of such costs.

[52] We received evidence of Mr Sanders' poor financial circumstances and we consider those circumstances make it inappropriate to order full recovery of costs incurred by the Law Society. We consider at least a 50% contribution to costs appropriate, given that his actions have put the Law Society to some expense. For the same reason we do not impose a fine or suspension. Mr Sanders is an elderly man with little income and few assets. He has retired from legal practice, but hopes to undertake some part-time legal work at some stage to obtain some income. We do not consider there is any risk to the public if Mr Sanders is employed in legal practice because he will not be operating without oversight and he will not have responsibility for a trust account.

DATED at WELLINGTON this 10th day of August 2010

D J Mackenzie
Chair