IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 23

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 for Auckland Standards Committee 2

Mr J Katz QC for Mr Sorensen

HEARING at Auckland on 2 August 2012

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] The Tribunal, after hearing professional disciplinary charges laid in the alternative against Mr Sorensen, found him guilty of professional misconduct in a reserved decision issued on 2 May 2011. On 25 May 2011 Mr Sorensen appealed to the High Court against that decision of the Tribunal, and in particular the finding of professional misconduct.

[2] The High Court heard the appeal on 16 November 2011. By its decision of 1 June 2012 the Court dismissed the appeal, and the matter reverted to this Tribunal for a penalty hearing to decide the appropriate sanction.

[3] That hearing was held in Auckland on 2 August 2012 and the Tribunal's decision on sanction was reserved. At that hearing a suppression order was made regarding the names and identifying features of some of those affected by Mr Sorensen's misconduct. That suppression order is formally recorded later in this decision.

Background

[4] The misconduct charge proven against Mr Sorensen involved him knowingly facilitating a dishonest scheme. One of his clients, Ms D, had died and Mr Sorensen was acting in the administration of her will, which he had prepared for her the previous year. The executors of the will, two of Ms D's brothers, proposed, and implemented with Mr Sorensen's assistance, a scheme to unlawfully take money due to some legatees under the will, by diverting the bequests due to those legatees to some of Ms D's siblings.

[5] The scheme was designed to give Ms D's siblings (which of course included the two brothers who were her executors and who personally benefitted from the scheme) an increased share of the estate value. This was to be done by taking money due to various legatees who were not aware of their entitlements

included in the will. Four legacies, totalling $120,000, in the aggregate, were affected.

[6] A key feature of the scheme was to ensure that the legatees did not become aware of their entitlements. To ensure this the legatees were not advised of their entitlements and were not given a copy of the will. They were also to be misled as to any question regarding entitlement, by being given small cash gifts. These were debited from the estate but characterised as an appreciation from Ms D's family.

[7] Mr Sorensen told the executors the scheme was not in accordance with Ms D's will, was not lawful, and that they risked action from the disenfranchised legatees if the scheme was discovered. Notwithstanding this situation, he proceeded to help the executors implement the scheme.

[8] The scheme, to escape detection and allow the money supposed to be utilised to pay the legacies to be successfully taken by family members, required elements of deception and subterfuge. Mr Sorensen took steps to facilitate the scheme and was complicit in ensuring the legatees had little chance of finding out what had occurred as set out in our substantive decision on the charge.[1]

Position of the Standards Committee

[9] The Standards Committee sought that Mr Sorensen's name be struck off the roll of barristers and solicitors. In seeking this sanction it noted that: the amount concerned was significant, $120,000; Mr Sorensen knew the scheme was unlawful but went along with it; Mr Sorensen had assisted and enabled the planned and serious deception involved in the scheme; and the misconduct by Mr Sorensen involved serious matters of dishonesty.

[10] The Tribunal's findings in its substantive decision on the charge, as well as the view of the High Court in dismissing Mr Sorensen's appeal against that

[1] The facts and findings are fully set out in the Tribunal's decision of 2 May 2011, recorded as [2011] NZLCDT 10.

decision,[2] were noted by the Committee as demonstrating the serious dishonesty that had occurred. It recorded the fact that in dismissing his appeal, the High Court had said that it considered Mr Sorensen's conduct was a "*gross departure"* from the standards of conduct expected of legal practitioners.

[11] The Standards Committee submitted that Mr Sorensen's behaviour was far below the standard of integrity, probity, and trustworthiness required of a member of the legal profession. It was well established that the profession's reputation relies on trust, and trust had been severely prejudiced by Mr Sorensen's dishonesty.

[12] It was also a concern, the Committee said, that Mr Sorensen's response, when first asked for an explanation (after the matter had been discovered during a regular Law Society inspection), was to suggest he had behaved appropriately. That, the Standards Committee submitted, was an aggravating factor, saying it showed a striking ignorance of his obligations.

[13] The Standards Committee also noted that Mr Sorensen took no steps, on his own initiative, to bring the matter to the attention of the legatees or to offer to make amends. He arranged for contact with the legatees only after a suggestion from the Law Society.

[14] *Bolton v Law Society*[3] is authority in New Zealand supporting its position on striking off the Standards Committee submitted, noting that the principles established by *Bolton* mean that dishonesty will normally result in striking off.

[15] The submission of the Standards Committee was that the only appropriate regulatory response to Mr Sorensen's misconduct, to ensure public protection and the preservation of the reputation of the profession, was his removal from practice by striking off. His misconduct involved serious dishonesty and the established legal principles applicable in New Zealand required striking off.

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[2] *S v New Zealand Law Society (Auckland Standards Committee No. 2)* HC Auckland CIV-2011-404-3044, Winkelmann J. 1 June 2012.
[3] [1994] 2 All ER 486.

Position of Mr Sorensen

[16] For Mr Sorensen, it was submitted that while protection of the public is important, together with the need to uphold proper standards, the public and the profession needed no protection from Mr Sorensen. He was said not to have demonstrated any serial defaults or a lack of appreciation of the errors he committed and their consequences. It was also said that it had not been shown that "*the present problem is symptomatic of some greater evil. Nor is the practitioner's general honesty or integrity in issue."*[4]

[17] It was further submitted that Mr Sorensen had co-operated during the investigation, admitted his errors, accepted the Tribunal's findings, had no previous disciplinary history, and had shown contrition. As a man of high standards he felt the findings against him keenly, it was said, and the shame and ignominy visited on him by the Tribunal's findings on the misconduct charge were themselves a very real penalty.

[18] It was suggested for Mr Sorensen that he was not unfit to be a practitioner, and that his actions did not mean that he lacked probity, integrity and trustworthiness such that a striking off should follow. Instead, it was submitted, his conduct demonstrated a gross and culpable error which was out of character and inconsistent with his position and the regard in which he was held in the community. References and letters of support for Mr Sorensen were before the Tribunal supporting this submission.

[19] This, it was said, highlighted the real question to be asked – whether the public needed protection from Mr Sorensen. The answer to that was said to be in the negative. Similarly, his clients and other members of the profession dealing with him were said not to require such protection. In those circumstances it was submitted that striking off would be purely punitive, not reflecting the true purpose of sanction in the professional disciplinary regime, the protection of the public.

[4] Paragraph 7 of submissions for the practitioner dated 25 July 2012.

[20] For Mr Sorensen it was submitted that the principles of *Bolton* had been modified by *Salsbury v The Law Society.*[5] *Salsbury,* it was said, indicated two issues the Tribunal should consider in this case.

[21] First, in deciding sanction the Tribunal should have regard to Mr Sorensen's rights under s 9 New Zealand Bill of Rights Act 1990 when making its decision on sanction. That section provides that no person may be subject to "*cruel, degrading, or disproportionately severe treatment or punishment".*

[22] Second, the Tribunal should note that there is a small category of cases involving dishonesty which may not require the usual rigorous application of the principles noted in *Bolton.*

[23] As we understood it, this line of argument developed for Mr Sorensen was that in all the circumstances of his case, striking off would be disproportionately severe, and such a penalty would infringe his rights under s 9. In aid of this proposition it was submitted to us that there is a discernable trend in Australian disciplinary cases which enabled a view on parity of penalty to be taken by the Tribunal in imposing a sanction on Mr Sorensen. It was suggested that in Australia the cases demonstrated a more benign approach to penalty, especially where conduct could be countenanced as an aberration, one-off, and unlikely ever to be repeated, where there was felt no need for retribution, punishment, or the *"sending of messages to the public or the profession."*[6] This was especially so when considering the fact that there was recognition[7] that not every case involving dishonesty required the rigid application of *Bolton*.

Discussion

[24] The approach in *Bolton* has been reaffirmed as the guiding principle in professional disciplinary cases in New Zealand in a number of recent instances.[8]

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[5] [2008] EWCA Civ 1285.
[6] Paragraph 24 of submissions for the practitioner dated 25 July 2012.
[7] *Salsbury*, supra.
[8] Including: *Parlane v New Zealand Law Society* CIV-2010-419-1209 (High Court, Hamilton)*; Dorbu v New Zealand Law Society (No.2)* (2012) NZAR 481 (High Court, Auckland); *B v Canterbury Standards Committee 1 of the Lawyers Complaints Service of the New Zealand Law Societ*y CIV-2011-409-1930, (2012) NZHC 1274 (High Court, Christchurch).

[25] We do not consider that the case examples of the Australian approach to disciplinary sanction submitted on behalf of Mr Sorensen assist us. Those cases can only illustrate a position adopted in certain fact specific cases, and Mr Sorensen's case has its own factual features which make such a comparative approach unreliable.

[26] We note also that the Australian approach indicated by the cases provided does not, in any event, over-ride clear New Zealand precedent which establishes *Bolton* as the appropriate approach in New Zealand.

[27] The Tribunal accepts that *Bolton* may not automatically mean that misconduct involving a failure in probity, integrity, or trustworthiness will necessarily result in striking off. It has always been a matter of balance, as Sir Thomas Bingham noted in *Bolton*, saying that a striking off order will not necessarily follow a serious lapse in probity, integrity, or trustworthiness, and that the decision whether to strike off or suspend often involves a fine and difficult exercise of judgment in such case.[9] Serious instances of dishonesty however are in a category where *Bolton* makes it clear that it is very unlikely that anything less than striking off will meet the purposes of the professional disciplinary regime.

[28] In New Zealand the disciplinary regime normally responds to serious dishonesty by striking off the errant practitioner, given that it invariably reflects unfitness to practise. While *Salsbury* may indicate that there is a small category of cases involving dishonesty at the very bottom of the scale which could justify a decision not to strike off, it does not suggest that *Bolton* no longer reflects appropriate penalty principles in serious cases.

[29] While we accept that a minor incident of dishonesty may be able to be addressed without the application of the full rigour of *Bolton,* it will always depend on all the facts and circumstances, and it would need to be an exceptional case where an incident of dishonesty did not adversely affect the reputation of the profession and the need to maintain public confidence in the profession.

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[9] At 491-492.

[30] To ensure a sanction is not disproportionately severe requires consideration of the nature and seriousness of the charges, the findings made, and the penalty applied in a comparable context. We consider that Mr Sorensen's conduct raises very serious issues of professional misconduct involving dishonesty at a level that takes it well outside the small residual of dishonesty cases at the lower end of the scale where striking off may not be required, as referred to in *Salsbury*.

[31] In Mr Sorensen's case there have been elements of deception and subterfuge in implementing the dishonest scheme to deprive the legatees of an aggregate amount of $120,000. Mr Sorensen was an integral part of the scheme, which needed his co-operation and assistance to facilitate it. His previous good character and record do not displace the view that we have reached that, by reason of his conduct, he is not a fit and proper person to be a practitioner.

[32] The appropriate sanction is striking off. We do not accept that the application of such a sanction should be affected by matters such as Mr Sorensen's currently expressed appreciation of what he did as wrong; his admissions and contrition, including agreeing to compensate the legatees; the suggestion that he has already suffered a very real penalty by the fact of being found guilty; that his conduct was out of character and inconsistent with his position and reputation, suggesting a one-off error; and that because such an incident would not reoccur the public and the profession do not need protection from Mr Sorensen.

[33] The seriousness of his misconduct is such that public protection is very much in issue. None of the factors noted for Mr Sorensen displace a requirement to strike off when weighed against the nature and seriousness of his misconduct and the purposes of the disciplinary regime. We note also the importance of the preservation of the reputation of the profession.

[34] Under the Lawyers and Conveyancers Act 2006, maintenance of public confidence in the provision of legal services, and the protection of consumers of

legal services are given prominence.[10] These are reflective of the principles outlined in *Bolton.*

[35] The Tribunal has unanimously formed the opinion that Mr Sorensen's conduct in facilitating the scheme he knew to be dishonest, with its particular elements of deception and subterfuge in which he co-operated, means that Mr Sorensen is not a fit and proper person to be a practitioner. The Tribunal considers that the only appropriate sanction is to strike Mr Sorensen's name off the roll of barristers and solicitors.

[36] Suspension is not a sufficient response to maintain public confidence in the provision of legal services, or to protect the public. In respect of the first point, we cannot see that any right-minded member of the public would accept the conduct as an error that did not require Mr Sorensen to be removed from practice. His conduct is so far below what is an acceptable standard of honesty that the reputation of the profession would be adversely affected if he was not permanently removed from legal practice. In respect of the second point, we have no surety that the risk there would never be an instance where he agreed to act in the way he did on this occasion, would be removed by suspending Mr Sorensen for a period not exceeding three years.[11] He has been shown by his conduct to be lacking in honesty and integrity when confronted with a situation that required him to stand up to the course of conduct sought from him, and he has seriously damaged the trust which is so essential to the profession.

[37] We have spent some time considering the submissions made for Mr Sorensen, that striking his name off the role was not necessary and that he was fit to be a practitioner, but we see striking off as inevitable in the circumstances of his misconduct. The proper course in our view, to deal adequately with the need to protect the public, and importantly, to reflect the seriousness of his misconduct and its affect on the profession's reputation, a matter on which the public must have complete confidence, is to permanently remove Mr Sorensen from practice by striking him off. Any re-entry to the profession in the future would then be subject

[10] Section 3(1).
[11] The maximum period of suspension available under s 242(1)(e) Lawyers and Conveyancers Act 2006.

to the control and the assessments associated with the readmission process Mr Sorensen would have to go through at that time.

[38] The Standards Committee also sought a censure, but we give no separate censure. We consider the order striking Mr Sorensen's name from the roll is the ultimate censure, and any separate censure is effectively subsumed by that order.

[39] In respect of costs, we consider that Mr Sorensen should bear the costs he has imposed on the profession as a result of his misconduct. For Mr Sorensen it was submitted that if a striking off or suspension order was made that might justify no costs orders or only a minimal costs order. If that reflected an ability to pay issue we agree it is something we would take into account, but in fact evidence before the Tribunal indicated that Mr Sorensen's earnings have actually improved since he voluntarily gave up legal practice. He now earns significantly more in his church role than he did in his legal practice, so there is no discount to be attached to the fact he has been struck off.

[40] In respect of compensation to the disenfranchised legatees, Mr Sorensen filed affidavits swearing to arrangements he had made regarding compensatory payments to legatees.

[41] In his affidavit of 26 July 2012 filed with the Tribunal, Mr Sorensen swore the detail of arrangements made for him to compensate some of the legatees. Of the $20,000 due as a legacy to [redacted], Mr Sorensen stated that he had paid her $10,000 as part compensation, and intended to pay her the balance by the end of this year. Similarly, he swore that he had paid [redacted] $5,000 of the $20,000 she was due by way of legacy, and that he would pay her the balance of $15,000 by the end of the year. Joint legatees AS and MS, due $30,000 under the will, had indicated that they did not require him to compensate them for the $30,000 misappropriated by the executors, Mr Sorensen deposed.

[42] Mr Sorensen also swore, in an affidavit dated 16 August 2012 filed since the penalty hearing, that another legatee had indicated he would accept $10,000

from Mr Sorensen as compensation for his legacy of $50,000 under the will which had been taken by others.

[43] We are able to make compensation orders pursuant to ss 156(1)(d) and 242(1)(a) Lawyers and Conveyancers Act 2006, which we will do to reinforce these arrangements which Mr Sorensen has deposed are in place and agreed with the various legatees. There was some discussion by counsel as to the limit of any such compensation orders.

[44] Regulation 32 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 states that:

> "*The maximum compensation that a Standards Committee may order pursuant to section 156(1)(d) of the Act is $25,000."*

[45] For the Standards Committee, Ms J McCartney SC submitted that a proper reading of s 156(1)(d) Lawyers and Conveyancers Act 2006 allowed the making of separate orders against the same lawyer in respect of any persons who had suffered loss. The limit of $25,000, she submitted, was applicable to the amount of each such order, not to the aggregated amount of a number of separate orders benefitting different persons. For Mr Sorensen, Mr J Katz QC appeared to accept that position. We accept that position also, and in any event note that Mr Sorensen has deposed that he will compensate legatees as set out earlier in this decision.

[46] We are also satisfied that the losses have been suffered by the disenfranchised legatees "*by reason"* of Mr Sorensen's misconduct, as required by s 156(1)(d). He has been found to have been complicit in the scheme proposed by the executors, and acted in a way which facilitated the scheme.

Orders

[47] The Tribunal makes the following orders;

(a) The name of HANS TIMOTHY SORENSEN is ordered to be struck off the roll of barristers and solicitors;

(b) Mr Sorensen is ordered to pay the Standards Committee's costs as claimed, amounting to $8,212. He is also ordered to reimburse the New Zealand Law Society the amount of $17,200 it is required to pay the Crown under s 257 Lawyers and Conveyancers Act 2006;

(c) Mr Sorensen is to compensate, pursuant to s 156(1)(d) Lawyers and Conveyancers Act 2006, each of those legatees seeking recompense. The compensation shall in each case be for the amount he has agreed with each such legatee. Accordingly, Mr Sorensen:

> Is ordered to pay [redacted] the sum of $10,000 as compensation;
> Is ordered to pay [redacted] the sum of $10,000 as compensation; and,
> Is ordered to pay [redacted] the sum of $15,000 as compensation.

Each such amount is to be paid by 31 December 2012, or within such further time as the relevant legatee may allow. In respect of each of these compensation orders, Mr Sorensen is to advise the Standards Committee in writing of the date and amount of any compensatory payment made within 14 days after making such payment, and is also to forthwith advise the Standards Committee in writing of any further time for payment that may be agreed with any legatee.

Other matters

[48] Mr Sorensen was granted interim name suppression when he appealed the Tribunal's decision finding misconduct, to the High Court. He did not pursue name suppression following the dismissal of his appeal by the High Court, and we note his name suppression now lapses on the delivery of this decision on penalty, in accordance with the determination of the High Court at the time his appeal was dismissed.

[49] At the conclusion of the penalty hearing the Tribunal suppressed the name and identifying details of the testator, Ms D, and the disenfranchised legatees involved in this matter. That is now formally recorded as an order for permanent suppression of those details. Names of some legatees are set out in this determination for the purposes of the compensation order, but in all published copies of this decision their names shall be redacted, except the copy provided to Mr Sorensen via his counsel or as allowed by s 240(3) Lawyers and Conveyancers Act 2006.

[50] For the purposes of s 257 Lawyers and Conveyancers Act 2006, costs are certified at $17,200.

DATED at AUCKLAND this 24th day of August 2012

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D J Mackenzie
Chair