[2006] LPT 003

LEGAL PRACTICE TRIBUNAL

de JERSEY CJ

MS S PURDON
DR S DANN

NO 754 of 2005

LEGAL SERVICES COMMISSIONER — Applicant

and

JOHN WILLIAM TOWERS — Respondent

BRISBANE

..DATE 22/05/2006

REASONS

THE CHIEF JUSTICE: The respondent is a 48 year old practitioner. He has not practised since 30th June 2004. In September 2001, he was diagnosed as suffering depression. He accepts that his health problems preclude now his practising as a solicitor. He does not hold a practising certificate and has relinquished his practice. He has admitted the charges brought against him and has previously sought to have his name removed from the roll. That requires, however, an order from this Tribunal or the Court of Appeal.

The Tribunal could order that his name be struck off the roll or it could order in terms that that is being done at his request. An order of the former variety would obviously constitute a substantial impediment to any subsequent application for re-admission, whereas an order in the latter form would not necessarily have that effect.

Mr Rolfe, the solicitor appearing for the respondent, submits, in any event, that the respondent's conduct does not warrant striking off and that making such an order in this case, while not of great practical significance for the respondent, would set an unjustified precedent as relevant to other cases. It is necessary, therefore, to embark upon some analysis of the conduct which the respondent has admitted.

The first charge is of grossly excessive charging. The respondent was the attorney of one White, who was from April 2000 incapable of managing his own affairs. The respondent thereafter continued to carry on Mr White's affairs as his

attorney. Under the Power of Attorney, the respondent paid himself $34,933.57 over the period April 2000 to April 2001. It is accepted that he thereby over-charged by an amount of $21,159.27. The respondent's approach included charging $300 per hour for attendances not involving the delivery of professional services: for example, shopping for Mr White and conversing with him. It is the respondent's taking advantage of the incapacity of Mr White for his own benefit together with the extent of the over-charging which warrants this being characterised as professional misconduct. See Veghelyi v. Law Society of New South Wales, a decision of the New South Wales Court of Appeal given on 6th October 1995 where Justice Mahoney said at page 9:

> "Solicitors are informed or are in a position to inform themselves of what work may be required and what are fair and reasonable charges. They are in that sense in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of that advantage. It is, I am inclined to think, the fact that an advantage has been misused which may in a particular case warrant what the solicitor does being categorised as professional misconduct."

That applies a fortiori obviously enough where the client is in a position of relevant incapacity. There is the added feature in this case that the respondent charged at professional rates for non-professional activity. It is not to the point that Mr White had previously accepted charging at the level which the respondent continued to apply. The incapacity having taken over, the respondent should have been scrupulous to ensure his charges as attorney would withstand rigorously independent scrutiny.

They plainly have not and the circumstances amply warrant a conclusion of the exploitation of vulnerability for personal gain. The respondent appears not to have realised that he stood in a fiduciary relationship to Mr White or, at the least, he did not act consistently with the existence of such a relationship.

Susan Misotti, an employee in the office of the Adult Guardian, on behalf of Mr White seeks a compensation order in his favour under Section 288A of the Legal Profession Act (2004) for the amount of the over-charging, which is $21,159.27. The respondent has not charged for work done for Mr White as attorney between 24th April 2001 and 30th June 2004. He continued to act over that period with the agreement of the Adult Guardian. The respondent has the benefit of a costs assessment from Ryans Costs Assessors which means that allowing for the costs due but unpaid and taking account of the over-charging to 24th April 2001, the net amount due back to Mr White is $8788.82. There should be a compensation order in favour of Mr White in that amount.

The second charge, an alternative to the third charge, involves contravention of Section 7 of the Trust Accounts Act (1973). In May 2002, the respondent withdrew $65,000 of Mr White's money from his trust account and deposited it into the respondent's own account at another bank so that Mr White might derive the benefit of higher interest returns. Following the intervention of the Queensland Law Society, the respondent redeposited the amount with the interest into Mr

White's account, so there was no loss to Mr White in a financial sense. The respondent was supported by advice from his trust account auditor. The Adult Guardian has characterised the matter as one of accounting oversight.

The fourth and fifth charges concerned clients named Roche. The respondent acted for them in respect of Supreme Court proceedings which were in due course compromised yielding Mr and Mrs Roche $200,000 which was paid to the respondent in trust. The respondent prepared in-house, as it were, a memorandum assessing his costs at the very large amount of $210,000. He did not deliver that to his clients. Nevertheless, apparently in reliance on the assessment recorded in that memorandum, he withdrew $154,347.32 for his costs, I gather from that $200,000 pool, and subsequently persistently failed to comply with requests from Mrs Roche's solicitors and the Queensland Law Society for an itemised bill of costs.

That failure continued over about four years and the frustration and distrust thereby engendered in his clients would be readily imaginable. The respondent says that he could not and cannot provide an itemised bill because the Queensland Law Society has retained a substantial part of his file for audit purposes. He has, however, had Ryans Costs Assessors do an assessment so far as they can, and that was eventually provided to Mrs Roche, but that occurred about four years after Mrs Roche's initial request.

These charges involve professional misconduct for his drawing such a substantial sum for his costs without proper authority and then making no adequate justification to his client over such a protracted period.

Mrs Roche seeks a compensation order under Section 289 of the Legal Profession Act in the amount of $4659.89. That is an amount of solicitor and own client costs incurred through her private representation in the course of the Legal Services Commission's inquiry and prosecution of the respondent. There is no question but that those fees were incurred and reasonably. Mrs Roche has explained here this morning that she engaged Mr Dierke, an external solicitor, out of frustration at the length of time being taken by the Law Society and the Legal Services Commissioner in bringing this to a point. The initial complaint to the Law Society about the conduct of the respondent occurred as long ago as 2001.

For a compensation order to be made under Section 289(1) the legislature has ordained that the disciplinary body must first be satisfied "that the complainant has suffered pecuniary loss because of the conduct concerned" - that is, the conduct of the respondent - and, secondly, that it is in the interests of justice that such an order be made.

The respondent, through Mr Rolfe, has argued that this expense was incurred not because of the respondent's conduct, but because of Mrs Roche's decision, understandable though it may have been, to retain private solicitors. There should, he

submitted, have been no need for that because her interests could sufficiently have been safeguarded and promoted by the Legal Services Commission.

Before one could conclude in terms of Section 289 that the practitioner's conduct was the reason for the loss claimed under the compensation order sought, one would need to establish a proximate connection between that conduct and the relevant loss. That would not necessarily be excluded by the intervention of the independent decision to retain the solicitors, but in circumstances where the Legal Services Commissioner might be expected to have promoted the interests of Mrs Roche adequately, I take the view that the chain of causation, in effect, has been broken and that it would not be warranted now to conclude that the respondent's conduct was the proximate cause of this loss of $4659.89 suffered by Mrs Roche.

I feel very sorry for her in this situation, because I can understand the frustration which led to her incurring that amount, but the other point to be made is that in strictness she could, were a case of over-charging ultimately to be established, arguably seek to recover that expenditure as part of the loss in any separate Court proceedings to be brought against the respondent. Now, I say in strictness because there is an ultimately theoretical aspect to that, because, as we have been informed this morning, the respondent is out of the country and it seems unlikely that there would be any practical recovery against him.

But for all of those reasons, and with regret, Mrs Roche, I have to say that the stipulation in the legislation cannot in this case be established.

The sixth charge involved the reinvestment of $405,999.78 of a client, Ms Dalton's money, to secure again a higher interest rate. The circumstances are similar to those involved in the second charge.

The seventh charge concerned transferring $10,000 trust moneys of Mr Arscott into the respondent's general account without written authorisation from his client under Section 8(1)(c) of the Trust Accounts Act. The respondent had authority from his client, he says, but not, as he concedes, in compliance with the Act.

The eighth charge concerns the respondent's transfer of $949.20 trust account moneys into his general account without authority. Those clients were Mr and Mrs Kilo.

The ninth charge concerns a similar breach in relation to another client, Mr McMurdy, in relation to an amount of $500. The respondent puts this down to clerical error on the part of an employee.

The tenth charge concerns similar breaches in respect of another client, Mr Scanlon, concerning two amounts, $14,000 and $235.92. In this case, as with the similar charges, there was no detriment to the client who agreed with what was done,

but the point remains, as the respondent concedes, that he failed to comply with an important statutory safeguard for clients, namely, Section 81C of the Trust Accounts Act.

The eleventh and twelfth charges concern clients named Paterson. They relate to similar breaches involving amounts of $950, $6930 and $192.50. The respondent makes a similar reply to those charges.

Other than charges 1 and 4, the trust account breaches should in this case be characterised as unsatisfactory professional conduct. That is because there was no suggestion of dishonesty, the respondent's default not going beyond failure to comply with the technical requirements of the legislation, important though they be.

The applicant submits fairly that the respondent has shown repeated and persistent failure to adhere to professional standards. As I said earlier, the exploitation of a client stricken by incapacity in charge 1 adds a reprehensibility which, in my view, taken with the other breaches and, notably, the respondent's cavalier treatment of the affairs of Mr and Mrs Roche, warrants the conclusion that the Tribunal should not continue to hold out the respondent as fit to practise.

There is in addition the respondent's virtual concession that he is no longer fit to practise. Reference may be made to the case of Rae, a decision of the Solicitors Complaints Tribunal of 15th October 2002.

There will be orders:

1. That the name of the respondent be removed from the local roll of practitioners;

2. That the respondent pay compensation to Graeme Laskey White in the sum of $8788.82 pursuant to Section 289(1) of the Legal Profession Act (2004) by 22nd June 2006;

3. That the respondent pay the applicant's costs, to be assessed if not agreed.

Thank you, Mrs Roche, for your understanding.
