# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Council of the Queensland Law Society Inc v Lowes* [2003] QCA 201 |
| PARTIES: | **COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED**<br>(appellant)<br>**v**<br>**GEOFFREY HAROLD CANNING LOWES**<br>(respondent) |
| FILE NO/S: | Appeal No 7951 of 2002<br>Charge No 73 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Solicitors Complaints Tribunal at Brisbane |
| DELIVERED ON: | 23 May 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 9 May 2003 |
| JUDGES: | de Jersey CJ, Jerrard JA and Helman J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed with costs to be assessed** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – GROUNDS FOR DISCIPLINARY ORDERS – IMPROPER DEALING WITH MONEY, SECURITIES OR PROPERTY – PARTICULAR CASES – where solicitor misappropriated trust funds and unduly delayed administration of estate – whether Solicitors Complaints Tribunal should have found solicitor acted dishonestly<br><br>*Queensland Law Society Act* 1952 (Qld), s 6Z(2)<br><br>*Briginshaw v Briginshaw* (1938) 60 CLR 336, applied<br>*Fox v Percy* [2003] HCA 22, (2003) 197 ALR 201, considered |
| COUNSEL: | M J Burns for the appellant<br>A J Glynn SC for the respondent |
| SOLICITORS: | McCullough Robertson for the appellant<br>Gilshenan and Luton for the respondent |

[1] **de JERSEY CJ:** The Council of the Queensland Law Society Inc appeals in relation to findings of the Solicitors' Complaints Tribunal, in August 2002, that the respondent solicitor was guilty of charges brought against him "to the extent that they do not amount to dishonesty". The findings relate to his misappropriation of $5,137 of trust funds, between February 2000 and January 2001, in respect of his clients Mr and Mrs Frost; misappropriation of $1,550 between 18 July 1997 and 29 January 1999 in relation to the Scraggs estates; and approximately five years undue delay in the administration of one of those estates.

[2] The focus of the appeal was on the Tribunal's not finding dishonesty. The appellant submits in effect dishonesty must reasonably have been found. It is relevant to note at once the basis on which the charges were presented.

[3] The terms of the charges had raised the possibility of a finding of dishonesty. Some of them used, for example, the term "misappropriation". But early in the course of the proceedings before the Tribunal, Counsel for the Law Society made it clear that the Society was not necessarily contending that the respondent had been dishonest, leaving the issue of his state of mind for consideration by the Tribunal. That seems a little odd, where Counsel for the appellant now submits its failure to find dishonesty "bewildering", and the intervening event was the respondent's oral evidence on which the Tribunal relied for a finding the other way. I would have thought a contention of dishonesty open from the start.

[4] In the Tribunal's reasons, it said it was "not without some difficulty" that it was "not prepared to find that the practitioner acted dishonestly". In this appeal, which is by way of rehearing (s 6Z(2) *Queensland Law Society Act* 1952), the appellant, as I have said, submitted that the only finding reasonably open was that the respondent had acted dishonestly, warranting a finding of professional misconduct and the striking of his name from the roll.

[5] Counsel for the respondent contrasts that strong position with the non-committal stance taken initially before the Tribunal. I think it fair to say the appellant should have advanced a contention of dishonesty from the outset in this case. That position was, from a prosecutorial position, reasonably open. But we must now assess the position, not as a primary adjudicatory body, but as an appellate body.

[6] In the event, the Tribunal found the respondent guilty of the less serious species of dereliction, unprofessional conduct. He was fined $15,000, directed to attend a practice management course, subjected to further audits, and ordered to pay the Society's costs.

[7] The Tribunal's decision was based on affidavit evidence, together with oral evidence, and in particular, a substantial body of evidence from the respondent. In their reasons, the members of the Tribunal note that they had the "opportunity to observe him for a lengthy period under cross-examination". Acknowledging the approach counselled in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362, they declined to find the respondent had been dishonest.

[8] We were referred by Counsel for the appellant to the High Court's recent analysis, in *Fox v Percy* [2003] HCA 22, of the proper approach of an appellate court engaged upon a rehearing, to a finding made after an assessment of the credibility of oral evidence: see especially paras 22-31. It is helpful to set out para 29:

> "In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process."

[9] In an attempt to demonstrate patent unreasonableness in the Tribunal's having declined to find the respondent acted dishonestly, Mr Burns, who appeared for the appellant, helpfully took us through a large part of the evidence relating to the particular charges. I now briefly – and without disrespect to his valuable and comprehensive analysis – summarize what emerged from that survey.

**The Scraggs misappropriation**

[10] The respondent had by 24 July 1996 completed the administration of these deceased estates, save for the registration of transmissions by death. Yet some many months later, he transferred monies from his trust account to his business account on four occasions, which sums he claimed represented fees for work and reimbursement of outlays for which he had not previously been paid.

[11] On 18 July 1997, for example, he transferred $750, yet was eventually constrained to concede that he had already charged and been paid for that work. On 17 October 1997 he transferred $250, on 16 January 1998, $200 and then on 29 January 1999, $350.

[12] The respondent could not produce relevant accounts or debit notes to support those drawings. As to the lapse of time between the completion of the work and the making of the transfers, the respondent claimed that when reviewing the files at the later times, he noticed that he had earlier simply overlooked making the charges.

[13] The Tribunal found that the transfers were made without authority or entitlement, but not dishonestly. Rather, they were the result of "matters under the practitioner's control: poor office systems, poor accounting systems and his own carelessness".

[14] There was obviously potential strength in a submission that in effecting these four transfers, of round sums, so long after the completion of any relevant work, without there being any adequate supporting documentation, and on the basis of a casual review of the file suggesting that monies were due, the practitioner should have been regarded as having acted dishonestly. That submission was made to the

Tribunal, but not accepted, essentially because having heard the respondent comprehensively cross-examined, the Tribunal doubted he acted dishonestly, to the point where a finding of dishonesty could not safely have been made in the context of the *Briginshaw* test.

[15] That the Tribunal expressed its conclusion "not without some difficulty" itself suggests it went about its task carefully. Notwithstanding the points very fairly made by Mr Burns through his submissions, I do not consider this to be a case where the court should gainsay the advantage obviously enjoyed by the Tribunal in its having witnessed and heard the respondent's oral evidence.

**The Frost misappropriation**

[16] This relates to a series of drawings by which the respondent misappropriated $5,137: he drew $14,327 although entitled to only $9,190. Much of the discrepancy is explained by his having charged monthly "retainers" of $750 instead of the agreed $700. The respondent levied charges twice a month on three occasions, which he ultimately conceded had been wrong.

[17] The respondent put the overcharging down to unwitting administrative errors. The Tribunal accepted that, concluding that the errors were the result of "poor office systems, poor accounting systems and his own carelessness". (The amount overcharged has been repaid.)

[18] Mr Burns criticized the Tribunal's approach in a number of respects, but I do not believe the aggregation of the features he emphasized necessitated a finding of dishonesty, as being the only finding which could reasonably have been made. Further, as Mr Burns conceded, in terms of a finding of dishonesty, the appellant's case in relation to these misappropriations was less strong than in the case of the Scraggs misappropriation.

**The Frost letter**

[19] Finally, there is the respondent's letter of 23 February 2000, written to Mr and Mrs Frost, seeking their agreement to his charging the $700 per month retainer. In that letter, the respondent falsely asserted that over the preceding nine months, "approximately $6,500" had been paid to him for work done for the Frosts. The correct figure was $12,898.

[20] The appellant's contention was that this was a deliberate understatement designed to ensure the retainer proposal would be agreed to. In fact the total erroneously quoted approximated to roughly $700 per month. If the correct figure had been included, the proposed $700 per month thereafter would perhaps have been seen as involving a discounted amount. Hence the Tribunal's view that "the error rendered the letter in fact less persuasive of its intent". The Tribunal concluded the letter had been written with a carelessness characteristic of the respondent.

[21] Mr Burns emphasized that the respondent drafted the letter and that it was he who "consciously selected" the figure of $6,500. But the respondent was cross-examined about the matter, and upon the particular explanation he offered (that the figure was an estimate of the time which his wife had spent in relation to the file, and that he had not intended to convey the impression that the figure included the work to

which he had personally attended). Others may well have rejected that explanation as implausible. But again I would not in this case gainsay the Tribunal's advantage through having heard the oral evidence, to the point of condemning its ultimate conclusion as disingenuous, or patently unreasonable, or glaringly improbable. It is however a pity that the Tribunal did not express any more detailed analysis of the evidence.

[22] In the course of the hearing, I criticized the Tribunal for the paucity of its expression of reasons. There should have been a detailed analysis of the transactions, with reasons assigned for the Tribunal's rejection of at least the major points made by Mr Burns on the evidence. His submissions before the Tribunal were comprehensive.

[23] I should say I believe this Tribunal has over the years worked well, although its failure on occasions properly to express its reasons has warranted some lack of confidence – especially where the court on appeal has previously directly criticized that failure, and with often, as here, apparently little beneficial consequence.

[24] Those who constitute the Tribunal have performed a greatly important public function, and one subject to a lot of scrutiny. Decision makers subject to scrutiny are consequently obliged to descend to particularity in setting forth the basis of their decisions.

[25] These reasons meet the ultimate points, but with scantly expressed bases. Had more detail been exposed, the appeal itself may perhaps have been avoided.

[26] In whatever form the Tribunal survives currently proposed reforms, I hope whoever constitute it come, once and for all, to accept one basic stipulation, inherent even in the rule of law: that such decisions are only authoritative if accepted, and only accepted if explained. I am confident had the Tribunal descended further into particularizing the reasons for this decision, this appeal, in the result wastefully consumptive of public resources, may well have been avoided.

[27] In my view the Tribunal's findings should not be disturbed on appeal. I would dismiss the appeal, with costs to be assessed.

[28] **JERRARD JA:** I have read the reasons for judgment of the Chief Justice and respectfully agree with those and the order proposed.

[29] **HELMAN J:** The case against the respondent on the allegation – such as it was – of dishonesty was circumstantial: it depended on the drawing of inferences unfavourable to the respondent concerning his state of mind. The Tribunal declined to draw those inferences, as, on the evidence, it was entitled to do. For the reasons given by the Chief Justice I too conclude that the Tribunal’s findings should not be disturbed. I agree that the appeal should be dismissed with costs.