The Law Society of the NT v Somerville [2002] NTSC 50

PARTIES:	THE LAW SOCIETY OF THE NORTHERN TERRITORY v WILLIAM ROBERT SOMERVILLE
TITLE OF COURT:	THE FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	THE FULL COURT OF THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	115/90 (20109811)
DELIVERED:	31 July 2002
HEARING DATES:	31 July 2002
JUDGMENT OF:	Martin CJ, Mildren & Riley JJ

REPRESENTATION:

Counsel:

Plaintiff:	P Barr
Defendant:	In Person

Solicitors:

Plaintiff:	Morgan Buckley
Defendant:	In Person

Judgment category classification:	C
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IN THE FULL COURT OF
THE SUPREME COURT OF THE
NORTHERN TERRITORY OF AUSTRALIA
AT DARWIN
115/01 (20109811)

The Law Society of the NT v Somerville [2002] NTSC 50

BETWEEN:

THE LAW SOCIETY OF THE NORTHERN TERRITORY
Plaintiff

AND:

WILLIAM ROBERT SOMERVILLE
Defendant

CORAM: Martin CJ, Mildren & Riley JJ

REASONS FOR JUDGMENT

(Delivered 31 July 2002)

The Court:

[1] This is an application by The Law Society of the Northern Territory that the defendant's name be struck off the Roll of Legal Practitioners on the ground that the defendant is no longer a fit and proper person to practice as a legal practitioner.

[2] The defendant was first admitted to practice as a barrister of the Supreme Court of Queensland on 9 September 1980. On 28 February 1983 the defendant requested that his name be struck off the Roll of Barristers and he was admitted as a solicitor of the Supreme Court of Queensland. On 6 June

1983 the defendant requested he be struck off the Roll of Solicitors and he was re-admitted to practice as a barrister of the Supreme Court of Queensland. The defendant has also been admitted as a barrister and solicitor of the Supreme Court of Victoria and as a barrister of the Supreme Court of New South Wales. The defendant was admitted as a practitioner of this Court on 8 February 1988.

[3] During the period from May 1988 to September 1989 the defendant practised as a solicitor in Katherine operating as a sole practitioner. As a result of reported deficiencies in his Trust Account, his unrestricted practising certificate was cancelled by The Law Society of the Northern Territory. Seven days thereafter, this Court ordered that the defendant's unrestricted practising certificate be reinstated subject to the condition that his trust account be kept by an independent accountant. The defendant subsequently became bankrupt.

[4] On 26 March 1992, the defendant, whilst a bankrupt, obtained credit of $24,927.50 from a motor vehicle dealer company without informing the company that he was an undischarged bankrupt. He was subsequently charged and convicted of obtaining credit whilst being an undischarged bankrupt without disclosing his status. At the time of that conviction the defendant was employed by the North Australian Aboriginal Legal Aid Service. As a result of his conviction he resigned from that service and subsequently set up in partnership with another solicitor and later operated as a sole-practitioner. On 1 June 2001, the defendant was convicted on his

pleas of guilty to nine counts of stealing contrary to s 210 of the Criminal Code and to twelve counts of fraudulent conversion as a trustee contrary to s 232(1) of the Criminal Code. The total amount stolen by the defendant was $11,117.50 and the total amount of trust monies fraudulently converted for his personal expenses was the sum of $15,466.86. Accordingly, the total sum involved in all the offending amounted to $26,584.36.

[5] At the time of the offences the defendant was conducting a solicitor's practice as a sole-practitioner from an office in Coolalinga Village, Stuart Highway, Virginia. On 25 October 1996, pursuant to the provisions of the *Legal Practitioners Act*, the defendant opened a trust account with the Westpac Bank. He also operated an office account with the same bank. On 27 March 1997 he opened a business account also with the same bank. On 29 May 1997 the defendant advised the Master of the Supreme Court and the Law Society that there was a deficiency in his trust account. On 29 May 1997 the Master appointed a chartered accountant as an examiner of the records of the trust monies in accordance with s 75 of the Act and requested the accountant report to him urgently pursuant to s 75(3) of the Act.

[6] The accountant's report was delivered to the Master on 3 June 1997 and concluded the trust account records had not been properly maintained. The examiner reported that from the reconstruction of the trust records there was a deficiency.

[7] The report stated that the defendant had not deposited monies received from clients to be held on their behalf into the trust account. The defendant had ceased to issue trust account receipts in respect of monies received after February 1997.

[8] The defendant's clients' files were deficient in information which supported payments to and from the trust account. The defendant went through limited trust account papers, his cheque book, trust account receipts and bank statements with the examiner and identified improper transactions on the trust account in an attempt to identify the quantum of monies missing from the account.

[9] He made admissions to the examiner of not issuing trust account receipts, of writing cheques on the trust account payable to cash and of using trust account monies to pay wages.

[10] The Master forwarded a copy of the examiner's report to the Law Society. On 4 June 1997 the Law Society cancelled the defendant's unrestricted practising certificate and on that day this Court appointed a receiver of the trust property.

[11] The receiver's investigation concluded that there should have been $31,285 in the defendant's trust account as at the date of the receivership. In fact there was only $3,259 in the trust bank account resulting in a deficiency of $28,025. The receiver's final report to the Master was issued on 11 December 1997.

[12] As a result of the defalcations, $25,867.21 was paid by the Legal Practitioners Fidelity Fund to those clients who made a claim against the fund for their losses.

[13] In relation to the nine offences of stealing, the defendant received funds from clients in the form of cash, money orders or cheques which were required to be paid into his trust account in accordance with his duties as a solicitor and in compliance with the *Legal Practitioners Act*. The funds were not paid to his trust account. The cash and the money orders were used directly for his own purposes whilst cheques were paid into his office account and the proceeds subsequently used for the defendant's own purposes.

[14] In relation to the twelve offences against s 232(1) of the Code, the defendant drew cheques on his firm's trust account and took the proceeds in cash or used the proceeds to meet personal or business debts, or paid the proceeds to his business or office account for disposing of the proceeds for his personal use.

[15] The learned sentencing Judge accepted that the defendant was genuinely ashamed of his conduct and deeply remorseful for his offences and gave him credit for bringing the matters to the attention of the Law Society and the Court and for his assistance to the examiner of his trust account records in attempting to identify the amount of missing trust monies. However, the learned sentencing Judge observed that it was clear from the bank records

and other materials that the point had been reached where discovery of the defendant's taking of trust monies was imminent.

[16] His Honour observed the defendant had led an industrious, self-supporting life; that he had also been a significant contributor to society through honorary and community work; that he had served on judicial panels for rugby clubs; he had served on the Queensland Arts Council, the Theatre Board for the Australia Council and had served as a Captain in the Australian Army Legal Corp for five years.

[17] Reports from a psychologist and a psychiatrist indicated that the defendant suffered from low self-esteem and poor self-image which caused him to experience intense internal stress. However the psychological and psychiatric assessments did not suggest the defendant was suffering from some recognised psychiatric condition or mental capacity which affected his ability to appreciate the nature, quality and consequences of his actions. It was submitted on his behalf at the time of the sentencing hearing that he was an incompetent money manager who had been overwhelmed by personal and family problems and never intended that anyone should suffer financially from his actions because he believed that he would be able to repay the monies taken from fees due to him. The learned sentencing Judge observed that although that may have been the position initially, as the weeks and months passed, the defendant could hardly have failed to realise that this was a vain hope unless there was some radical change in his approach to business dealings. Consequently the learned sentencing Judge imposed an

aggregate sentence of imprisonment for three years and ordered that the sentence be suspended after the defendant had served a period of twelve months.

[18] In his own affidavit sworn 29 July 2002, the defendant repeats his regret, shame and remorse for his actions and repeats his apologies to those who have suffered as a consequence. He says that due to his lack of financial management skills it is not his intention to ever seek to practice as a solicitor in the future. It appears not only from the affidavit, but also from what the defendant submitted to us this morning, that his intention is, at some stage in the future, to seek to obtain a practising certificate as a barrister.

[19] While serving his sentence, the defendant obtained a job training trainer's certificate and taught literacy, numeracy and computing in the education area of the prison. He provided assistance in designing and facilitating the legal information workshop for remand prisoners and a letter from the Programs Co-Ordinator dated 5 March 2002 thanking him for his assistance has been exhibited to his affidavit. Since his conditional release on 6 March 2002, the defendant has been able to obtain some work as a labourer and foreman in the painting industry and he has made submissions to the relevant authorities for assistance to establish an active and purposeful prisoner's aid institution to provide assistance to prisoners serving sentences and on their release in the areas of rehabilitation, employment, accommodation and repatriation. He has received support from the Northern

Territory Legal Aid Commission, the Criminal Lawyers Association, the Northern Territory Aboriginal Justice Advocacy Committee and ATSIC in the establishment of such a service. He hopes, eventually, to obtain employment with that service if and when it is established.

[20] The defendant has offered to undertake not to apply for a practising certificate before 6 March 2005, not to apply for any practising certificate until his debt to the Legal Practitioners Fidelity Fund is repaid and not to apply for a practising certificate other than as counsel.

[21] The jurisdiction of the Supreme Court in this proceeding is not to punish or to further punish the practitioner, but to protect the general public: see *NSW Bar Association v Evatt* (1968) 117 CLR 117 at 183. Our function is to protect the public and the administration of justice by preventing a person from acting as a legal practitioner where by reason of his or her conduct, that person is no longer fit to remain a member of a profession which plays an important part in the administration of justice and in which the public is entitled to place great trust.

[22] The issue for this Court is whether, in view of the admitted conduct, the defendant is a fit and proper person to remain a member of the legal profession. If his conduct demonstrates that he is not the ordinary course must be that an order must be made for his name to be removed from the Roll, even if something less is likely to ensure that he would not be able to practice as a practitioner. The Court has to consider the maintenance of

public confidence in the profession and must ensure that only those that have observed the required standards are permitted to remain members of the legal profession.

[23] As Doyle CJ observed in *The Law Society of South Australia v Murphy* [1999] SASC 83 at para 34:

> By allowing a practitioner to remain on the Roll of Practitioners the Court holds the practitioner out as a fit and proper person to practice.

[24] In our opinion, the acceptance of the undertakings proposed would not adequately reflect the significance of the conduct of the practitioner, would not act as a deterrent to others who are like minded to commit such offences and would leave a situation open where, at some later time, the defendant would not face the hurdle of establishing that he is fit to be a practitioner, but only the lesser hurdle of satisfying the Court that he should be released from his undertaking in order to obtain the practising certificate that he now seeks.

[25] In our opinion, the gravity of the conduct requires that the practitioner's name be removed from the Roll of Practitioners and accordingly, that order is so made.
