

JERSEY / JUDGMENT

AG -v- Begg [2012] JRC 209 (13 November 2012)

[2012] JRC 209

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judgment

the bailiff: 1. This judgment arises out of a representation brought by the Attorney General, following a referral by the Disciplinary Committee of the Law Society ("the Disciplinary Committee") pursuant to Article 23(1)(c) of the Law Society of Jersey Law 2005 ("the Law"), alleging that Advocate Andrew Philip Begg failed to uphold the dignity and high ethical standards of the legal profession, as required by Rule 2 of the Law Society of Jersey Code of Conduct, as follows:- (i) On or about 28th May, 2009, knowing that a curatorship was in force and without informing the curator, he removed a suitcase containing silver from [the interdict's] home and took it into his custody. (ii) On 11th September, 2009, knowing that a curatorship was in force and without informing the curator, he procured by mis-representation the transfer of [the interdict's] periodic pension payments out of the control of the curator and into his client account. 2. The Court sat originally on 4th and 5th July to hear evidence at which time Advocate Begg represented himself. On 5th July, the Court held that Advocate Begg was guilty of professional misconduct in respect of both matters and gave a brief summary of certain findings of fact which the Court had made. The Court then turned to consider the appropriate sanction, but it became clear that Advocate Begg was in an emotional state and was not in a position to do himself justice. Accordingly the Court adjourned the question of the appropriate sanction and advised Advocate Begg to obtain legal representation. 3. The Court reconvened on 8th August although Jurats Olsen and Tibbo were not present on this occasion. It follows that they played no part in determining the appropriate sanction. Advocate Scholefield appeared at this hearing on behalf of Advocate Begg and the Court was grateful for his assistance. At the conclusion of the hearing, the Court decided by a majority to impose a fine on Advocate Begg. The Court was unanimous in concluding that the appropriate level of fine was £25,000. 4. The Court now gives the reasons for its decision. The factual background 5. The Court received witness statements from the interdict's son and from Advocate Begg. Both of them also gave oral evidence as did Mr Sprent, who looks after Advocate Begg's financial records. Although there is little dispute as to the essential facts, certain issues arose as to the inferences to be drawn from those facts. Furthermore, the evidence quite properly ranged over a fairly wide area concerning the background to the events leading up to the curatorship and what occurred thereafter. We have of course carefully considered all that evidence but, for the purpose of this judgment, we think it

necessary only to refer to the essential facts. 6. The interdict is a lady who was 80 when she first instructed Advocate Begg in about 2003. She has one son, to whom we shall refer as the Curator. He was the complainant in this case. Over the years Advocate Begg acted for her in relation to a number of matters. It is clear that he and the interdict became friends and he visited her socially as well as professionally. Sometimes meetings would be partly business and partly social. It is clear that she reposed considerable trust in him. Her husband died in 2008 and thereafter she was left living alone in a substantial house. 7. By early 2009 she was displaying mental confusion, forgetfulness and sometimes symptoms of paranoia. We heard considerable evidence from the Curator and Advocate Begg about events prior to the imposition of the curatorship on 9th May, 2009. Suffice it to say that it is clear that the Curator and Advocate Begg did not get on. The Curator thought that Advocate Begg was taking advantage of the interdict, particularly in her deteriorating mental condition, by running up substantial bills and doing things for her which did not really require a lawyer. Advocate Begg, on the other hand, thought that the Curator was not doing enough to look after and comfort the interdict following the death of her husband. We should add that the Curator lives in London but came over to see his mother fairly regularly. It is also clear that the interdict is quite a forceful woman who likes to get her own way. It may well be the case, as both the Curator and Advocate Begg accepted before us, that she tended to play one off against another and that she might say one thing to Advocate Begg and something different to her son. 8. In March 2009 the interdict was detained under Article 6 of the Mental Health (Jersey) Law 1969 for observation following the intervention of her GP and Dr Wilson, the Consultant Psychiatrist of Old Age. The interdict was diagnosed with Alzheimer type dementia. She was observed to be an intelligent articulate woman with well-preserved verbal skills. It was noted that she would be "plausible and appear relatively intact" in free conversation but that "the impairment in new learning, attention and executive function will significantly reduce her judgment, her problem solving skills and her ability to understand and retain the consequences of her proposed actions." 9. Curatorship proceedings were commenced. Advocate Begg, acting on the instructions of the interdict, engaged in considerable correspondence opposing the imposition of a curatorship. However, on 8th May, the Curator was appointed curator by the Court. Advocate Haines had been appointed to represent the interdict in connection with the curatorship application. He apparently informed the Court that the interdict would not oppose the curatorship provided that it was her son who was appointed curator. 10. Advocate Begg rendered his final invoice a few days after the curatorship came into force. By this time there were seven invoices in the total sum of £20,936.27. The majority of that sum, namely £15,260.89 had been incurred in the three months before the curatorship came into effect. The Curator challenged the size of these bills and refused to pay the amounts claimed. This aspect of the matter was the subject of adjudication by the Disciplinary Committee following complaint by the Curator. We were informed that the Disciplinary Committee dismissed an allegation that the fee notes represented professional misconduct. The fee notes were in due course settled with a minor discount. 11. Advocate Begg was formally notified of the curatorship and by e-mail dated 9th May to the Curator, he accepted that the interdict's finances were now entirely a matter for the Curator and that he would leave the Curator to deal with them. 12. Against that background we turn to consider the facts surrounding the first complaint. 13. The interdict had by now

returned to live in her home and the Curator had managed to employ a live-in carer with effect from 24th May. There was a suitcase in the home which the interdict had always told her son contained the family silver. He had moved it sometime in May from a downstairs hall to the middle bedroom and it had subsequently been placed behind a sofa in that bedroom. 14. Advocate Begg visited the interdict on the evening of 28th May. The interdict said that she was concerned because there were a lot of people coming and going from her house; she was concerned about the safety of the silver. She wanted Advocate Begg to put the suitcase in safekeeping for her. Advocate Begg told us that he was reluctant to do so but he did not want a prolonged discussion about it. He believed she would feel better if he agreed to look after the suitcase for her and so he did. He took it home and put it in the attic of his home. 15. He did not inform the Curator of what he had done and believes that the matter went out of his mind. 16. On the morning of 2nd June, the Curator noticed that the suitcase had disappeared. He asked his mother where it was. She said that she could not remember but thought that perhaps she had taken it to Aurum the jewellers. The Curator called Aurum but they had no knowledge of it. The Curator then telephoned Advocate Begg, who immediately acknowledged that he had the suitcase. Sometime later the Curator went to Advocate Begg's office and took possession of the suitcase. When he opened it, he found that it contained very little silver. It is clear that the Curator was angry about the removal of the suitcase and wrote to Advocate Begg on 2nd June making clear his dissatisfaction and saying that he had been advised to make a police report. There were further exchanges during which the Curator made it absolutely clear that Advocate Begg was no longer to act on the instructions of the interdict. This was followed up with a letter from Benest and Syvret on behalf of the Curator to Advocate Begg. The letter from Benest and Syvret was met with an e-mailed response from Advocate Begg dated 16th June which contained a number of personal and offensive comments about the Curator in terms which were inappropriate for an advocate to write in a professional capacity. Advocate Begg accepted this before us. 17. Not long after this the interdict was moved to Cedar Ward, Clinic Pinel and subsequently to Silver Springs Care Home. Advocate Begg visited the interdict whilst she was at Silver Springs and whilst there the interdict said she was concerned about a silver photo frame being stolen by staff. She requested Advocate Begg to take it into safekeeping and he again did so, notwithstanding that he was aware of the strong stance which the Curator was taking in relation to his disregarding the curatorship over the suitcase of silver. When asked by the Curator, Advocate Begg confirmed on 13th August that he had the photo frame. However, he had again not notified the Curator of what he had done. Nevertheless no disciplinary complaint is brought in respect of this incident, which was of a minor nature. 18. That brings us to the facts giving rise to the second disciplinary complaint, which is the more serious of the two and relates to the pension payable by the Department of Work and Pensions in the United Kingdom ("DWP") to the interdict. 19. On 11th September, the interdict arrived unannounced at Advocate Begg's office. It transpired that she wished to make contact with the DWP concerning payment of her pension. A few days earlier the Curator had given instructions to the DWP that the pension should in future be paid into a new curatorship account which he had opened in his name as curator. 20. In evidence, Advocate Begg said that this request from the interdict came out of the blue and rather caught him on the hop. However it transpired from notes of telephone calls produced at the

adjourned hearing that in fact the interdict had telephoned Advocate Begg on 9th and 10th September indicating that she wanted to transfer payment of the pension to Advocate Begg's account. It did not therefore come out of the blue, although we accept that this was an error in recollection on the part of Advocate Begg when giving evidence. 21. In any event, Advocate Begg agreed to participate in the interdict's telephone call to the DWP which was conducted from his office. The call was recorded by the DWP and the Court had the benefit of the transcript. It is not necessary to recount the detail of the conversation. Suffice it to say that the interdict began the conversation and said that she wanted her pension to be paid to her lawyer's account. There was some difficulty in her supplying her full details and accordingly she put Advocate Begg on the telephone, describing him as her lawyer. The DWP said that they needed her National Insurance number and Advocate Begg then supplied her pension reference number. That enabled the conversation to proceed and the interdict then resumed the conversation with the DWP. She made it clear that she wanted her pension sent directly to her lawyer. She then put Advocate Begg on the telephone again and the DWP asked for the details of the account to which the payments should be made. Advocate Begg supplied the details of his client account. During the course of this, the DWP said that the interdict had been on the phone only two days ago and changed the bank details to another account. Did she really wish to change them again? This was clearly a reference to the instructions the Curator had given. Advocate Begg consulted privately with the interdict following which the DWP confirmed that they had changed the instructions and that her pension would in future go to the new bank account i.e. Advocate Begg's client account. 22. At the end of the conversation, Advocate Begg asked for one further matter to be dealt with, namely that all correspondence concerning the interdict's pension should come to him at his address and that her old address should not be used anymore. The DWP accepted those instructions and confirmed that that would be the case. 23. Following that conversation, the next pension payment was made to Advocate Begg's client account. In the meantime, the Curator was puzzled that the pension instalment had not been received into the curatorship account. He telephoned the DWP and was told that funds had been sent on 12th September but by 24th September nothing had arrived. He therefore wrote to the DWP on 25th September and also telephoned. In due course the DWP provided the account number into which they had paid the pension but the Curator did not recognise the account at the time. Subsequently, on 19th or 20th October, he realised by reference to another document that it was Advocate Begg's account. He contacted the DWP who informed him that they had received a phone call on 11th September and had been given new bank account details by the interdict and her lawyer. The DWP subsequently provided a transcript of the telephone call to the Curator. Following discovery of what had occurred, the Curator lodged a complaint to the police. The police interviewed Advocate Begg on 26th November, 2010, but subsequently a decision was taken that there were no grounds for prosecution. 24. In his evidence to the Court, Advocate Begg explained that he did not expect the DWP to act on the instructions and he was in effect going through the motions to humour the interdict. He said that even at the end when the DWP confirmed on the telephone that the pension would be paid to his account, he thought that this would not occur once checks were made and it was realised that these instructions conflicted with those from the Curator. He said that, because he did not expect the matter to be acted upon, he never informed his accounts

department of what had occurred and he never knew that the pension instalment had in fact been received into his client account. It transpired that the accounts department had credited the payment to another client of Advocate Begg who also received a pension from the DWP. 25. At no stage did Advocate Begg inform the Curator of what had occurred although it appears from time records submitted at the second hearing that he may have drafted an e-mail to the Curator concerning the pension on 17th September and further amended this on 21st September. However, no e-mail was in fact sent. Only one instalment was actually received into his client account because the Curator discovered what had occurred and corrected the position with the DWP. Advocate Begg in due course refunded the DWP in November 2011. Standard of proof 26. The Court raised with the Attorney General whether the complaint had to be proved to the civil or criminal standard. The Attorney General made submissions and provided authorities on this topic and Advocate Begg did not dissent from his conclusions. 27. Article 26(7) and (8) of the Law are silent on this issue referring merely to the need for the Court to be "satisfied". We were not referred to any local authority, either in relation to the Law or the inherent disciplinary power over advocates previously exercised by this Court. 28. As to other jurisdictions, the courts have not spoken with one voice. Some authorities have suggested that proof beyond reasonable doubt is required, others have referred only to the civil standard of proof on the balance of probabilities. 29. A thorough review of the authorities was undertaken by the Final Court of Appeal of Hong Kong in *A Solicitor-v-Law Society of Hong Kong* (Appeal 24 of 2007 delivered on 13th March 2008; see paras 96 - 116). The conclusion of the Final Court of Appeal was that, having regard to the need to balance the protection of the public with the interests of a lawyer charged with misconduct, the standard of proof for disciplinary proceedings was the civil standard in accordance with the guidance given by the House of Lords in *Re H* (sexual abuse: standard of proof)

[1996] AC 563 . In particular, reliance was placed upon the observation of Lord Nicholls of Birkenhead at 586 where he said:- "The balance of probability standard means that a court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established." 30. Further clarification of the test was given by the House of Lords in *Re B (Children): Care Proceedings: Standard of Proof*

[2009] 1 AC 11 . In that case the House of Lords emphasised that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not (see Lord Hoffman at para 13 and Baroness Hale at para 70). 31. Many allegations of professional misconduct will not involve an allegation of criminal conduct. In our judgment, for the reasons given by the Hong Kong Final Court of Appeal, it would be contrary to the public interest to require proof to the criminal standard in disciplinary cases. We agree that the law of Jersey is to like effect as that in Hong Kong and that the civil standard (as explained in *Re H* and *Re B*) is the applicable standard of proof in disciplinary proceedings concerning advocates and solicitors of the Royal Court. *Re Professional misconduct* 32. The Court had no hesitation in concluding that both complaints were proved and they amounted to professional misconduct on the part of Advocate Begg; indeed by the end of his submissions at the first hearing, Advocate Begg conceded that this was so. The Court would add that, even if the standard of proof had been to the criminal standard, the Court would have been satisfied to that higher standard. 33. It is clear that the Curator suspected that Advocate Begg acted as he did for reasons of personal benefit whilst Advocate Begg strongly denied this. If Advocate Begg did act to benefit himself, that would of course greatly increase the seriousness of what he did and accordingly it was necessary for the Court to make findings of fact in this respect. These were summarised briefly at the conclusion of the evidence and submissions during the first hearing and we record them again for the purposes of this judgment. 34. The Court does not find that Advocate Begg acted with any intention of benefitting himself. We are satisfied that he acted out of a misplaced sense of loyalty to and sympathy for the interdict with whom he had struck up a strong friendship. He found it difficult to say no to her when she asked him to look after silver or assist him in transferring the payment of the pension. 35. In relation to the first complaint, this was not of great seriousness and, had it rested alone, we doubt if the matter would have been pursued. We accept that Advocate Begg took the suitcase into safekeeping in order to humour the interdict. But the gravamen of what he did lies in the fact that he did not tell the Curator what he had done. If he had only telephoned the Curator the next day explaining the situation and inviting the Curator to collect the suitcase, we suspect that nothing would have come of this matter. But his failure to inform the Curator, when added to the poor relationship between them, fuelled suspicion on the part of the Curator that Advocate Begg would not have mentioned the suitcase had he (the Curator) not discovered what had happened. We can understand his suspicion. 36. The second complaint is much more serious. It involved the deception of the DWP, a UK Government Department, by giving them the impression that the interdict was entitled to give the DWP instructions as to the payment of her pension. Advocate Begg knew that this was not the case because of the existence of the curatorship and yet he clothed the interdict's request with respectability by confirming that he was the interdict's lawyer and effectively associating himself with her request. Indeed, he went further, because the interdict's request to transfer the payment would not have succeeded had not Advocate Begg assisted her by giving details of her pension number and subsequently providing details of his account to the DWP. He had several opportunities during the conversation to

see the error of his ways but he did not do so. 37. Advocate Begg explained to us that it never occurred to him that the DWP would act on telephone instructions of this nature even if he participated in the call. The Jurats have accepted that explanation but it nevertheless discloses a gross error of judgment on the part of Advocate Begg. Even if he did not think the DWP would act on the instructions, he should never have participated in a conversation which amounted to a deception of the DWP. The public (including government departments) are entitled to place their trust in the legal profession and we have no doubt that the transfer of the pension payment only took place because the DWP was persuaded by the participation of the interdict's lawyer that what she was requesting was in order. 38. We find it all the more surprising that Advocate Begg should have participated as he did when he knew of the attitude of the Curator to any intervention on his part as a result of the correspondence following the incident with the suitcase. He had been clearly warned by Benest and Syvret (on behalf of the Curator) in their letter of 23rd June that the Curator would not hesitate to seek the assistance of the Court and/or the Law Society in the event that the interdict was encouraged or induced to enter into any transaction without the authority of the Curator. 39. In summary, it was serious professional misconduct because Advocate Begg, as an officer of the Court, knowingly assisted in the breach of a court order, namely the curatorship, and participated in a deception of the DWP to the effect that the interdict was entitled to give that Department instructions concerning the payment of her pension. The fact that Advocate Begg may have persuaded himself that the DWP would not act on the telephone instructions was no reason to participate in the call. His duty was to advise the interdict gently but clearly that he could not assist in her plan because of the existence of the curatorship. It was of some concern to the Court that Advocate Begg did not seem to appreciate the gravity of what he had done until his cross-examination by the Attorney General, by the end of which he seemed for the first time to appreciate the full extent of his misjudgement. The appropriate sanction 40. The Attorney General recommended a suspension from practice for a period of four months. 41. Advocate Scholefield argued that this was excessive. He referred to the previous cases where the Court had imposed a sanction on an advocate and argued that some of these were more serious than the misconduct of Advocate Begg. As in relation to sentencing in criminal cases, it is not usually of assistance to refer to a different case and try and argue that the instant case is more or less serious than the other case by reference to the detailed facts. Furthermore, it is clear that, in some of the cases upon which Advocate Scholefield relied, the Court was not referred to the observations of Sir Thomas Bingham MR in *Bolton-v-Law Society*

[1994] 1 WLR 512

- 518:- "If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of

judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension. ... In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires. Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly that he has learnt his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be so, the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of the profession brings many benefits, but that is a part of the price." 42. Advocate Scholefield submitted that Bolton reflected a very severe approach which should not be followed in this jurisdiction. We cannot agree. The Court has already endorsed the approach of Bolton in the case of the representation Attorney General-v-Michel

[2012] JRC 099 albeit in the context of a very different case from the present. Furthermore, the Court is quite satisfied that the need to uphold the reputation of the profession in Jersey is just as compelling as the need to do so in the United Kingdom. There appear to us to be no valid grounds for adopting a more lenient approach to misconduct in this jurisdiction. It follows that we again endorse the approach laid down in Bolton . 43. Advocate Scholefield

further argued that the facts of this case did not require suspension, even on the Bolton approach. This was not a case of lack of integrity or dishonesty; the worst that could be said was that Advocate Begg assisted in the deception of the DWP, but he did so for motives of sympathy for his longstanding client rather than for any personal benefit. He also referred to Advocate Begg's financial position and we heard evidence from Mr Sprent in this regard. We do not think it necessary to record in a public judgment the details of the evidence we were given but suffice it to say that, as a sole practitioner, Advocate Begg's earnings are not in the same league as those of advocates practising in many other firms. We also accept that the effect of a suspension for four months would probably mean the end of his current practice, on the basis that all the staff would have to be released as their salaries are all dependent on the personal earnings of Advocate Begg. 44. Despite the mitigation put forward by Advocate Scholefield, one of the Jurats felt that, to reflect the seriousness of what Advocate Begg had done by way of deceiving the DWP and acting to assist a contravention of the curatorship order, a period of suspension was required, albeit not necessarily of the length moved for by the Attorney General. However the majority of the Jurats were just persuaded that the matter could be dealt with by way of a fine. Having regard to the financial information presented to the Court, it concluded that a fine of £25,000 was appropriate to reflect the professional misconduct in this case. Authorities Law Society of Jersey Law 2005. Mental Health (Jersey) Law 1969. A Solicitor-v-Law Society of Hong Kong (Appeal 24 of 2007 delivered on 13th March 2008). Re H (sexual abuse: standard of proof)

[1996] AC 563 . Re B (Children): Care Proceedings: Standard of Proof

[2009] 1 AC 11 . Bolton-v-Law Society

[1994] 1 WLR 512

- 518. Attorney General-v-Michel

[2012] JRC 099 . Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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