

In the Matter of Terence James Boyce

Case Number: SCT/80
Date of Hearing: 23 June 2003
Appearing Before: Mr P Cooper (Presiding Member)
Mr P J Mullins (Practitioner Member)
Ms I Vallin-Thorpe (Lay Member)
Penalty: Struck off

Charges

Loan to K Pty Ltd

1. In or about December 1998 when acting for MJF & CLF in relation to an advance of \$200,000 to K Pty Ltd and JGW & KRW in relation to an advance of \$40,000 to K Pty Ltd by way of an increase on existing advances by other clients to K Pty Ltd, the Solicitor failed to advise his clients that, prior to the advance by the clients of the said \$200,000 on 18 December 1998 and \$40,000 on 21 December 1998, the borrower K Pty Ltd was already in default of an interest payment of \$14,960.00 (1 month's interest at the rate of 11% per annum) under the existing loan facility.

Particulars

- (a) At all material times the Solicitor was a partner of BG Solicitors ('the Firm').
 - (b) The Firm, through the Solicitor, acted for a number of clients who had contributed a total of \$1,632,000 to facilitate the advance of that sum to K Pty Ltd secured by a first registered mortgage over land situated at Riverview Queensland. The advance was made by way of contributory mortgage in the name of BG Securities Pty Ltd an entity owned and controlled by the said Firm.
 - (c) On or about 8 December 1998 the Solicitor approached his clients MJF & CLF and JGW & KRW and offered the opportunity to contribute towards a further advance to K Pty Ltd as a result of which MJF & CLF agreed on that same day to contribute \$200,000 and JGW & KRW agreed on that same day to contribute \$40,000.
 - (d) At the time of the clients' agreement to advance the said sum of \$240,000 on 8 December 1998 K Pty Ltd was already in default of payment of the sum of \$14,960.00 interest on the existing loan for the period 5 December 1998 to 4 January 1999 due to be paid in advance on 5 December 1998 which the Solicitor well knew, yet the Solicitor in disregard to his client's interests, failed to make disclosure of that fact to his clients.
 - (e) On 18 December 1998 MJF & CLF contributed the sum of \$200,000. On 21 December 1998 JGW & KRW contributed the sum of \$40,000 towards a total further advance to K Pty Ltd of \$240,000 and the interest of \$14,960.00 owing by K Pty Ltd and referred to in paragraph 1(d) above was paid from this amount of \$240,000.
 - (f) Subsequently K Pty Ltd fell into default of its loan and has made no payments on the loan since 18 November 1999.
 - (g) Neither MJF & CLF nor JGW & KRW have received payment of their advances of \$200,000 and \$40,000 respectively.
2. In or about April 1999 when acting for JFB in relation to an advance of \$60,000 to K Pty Ltd to replace existing lending clients, Mr & Mrs C, the Solicitor failed to advise his client JFB prior to offering her the opportunity to contribute towards the advance to K Pty Ltd that K Pty Ltd was already in default of an interest payment of \$18,810.00 under the existing loan facility and had previously fallen into default in payment of interest on that facility in December 1998.

Particulars

- (a) At all material times the Solicitor was a partner of BG Solicitors ('the Firm').
- (b) The Firm, through the Solicitor, acted for a number of clients who had contributed a total of \$2,052,000 to facilitate an advance of that sum to K Pty Ltd secured by a registered first mortgage over land situated at Riverview Queensland. The advance was made by way of contributory mortgage in the name of BG Securities Pty Ltd an entity owned and controlled by the said Firm.
- (c) On or about 9 April 1999 the Solicitor approached his client JFB and offered her the opportunity to contribute towards a further advance to K Pty Ltd as a result of which JFB agreed to contribute \$60,000.
- (d) At the time of the approach by the Solicitor to JFB on 9 April 1999 referred to in paragraph 2(c), the Solicitor knew:
 - (i) That K Pty Ltd had defaulted in the payment of interest on the existing loan facility on 5 December 1998 as set out in particular 1.4 above which is hereby incorporated into this particular; and
 - (ii) That K Pty Ltd was in default in payment of interest of \$18,810.00 on the existing loan facility for the period 5 April 1999 to 4 May 1999 which interest was due to be paid in advance on 5 April 1999.
- (e) Despite the Solicitor's knowledge of the matters set out in paragraph 2(d) above, and in disregard of his client's interests, he failed to make disclosure of that information to his client.
- (f) Further, at the time of his approach to JFB on 9 April 1999 set out in paragraph 2(c) above, the Solicitor was also aware of the following:

- (i) That 2 of the existing client lenders to K Pty Ltd namely Mr and Mrs C required repayment of their capital loan contribution of \$60,000 in March 1999 to facilitate their purchase of a Unit at Mooloolaba;
- (ii) Due in part to the said \$60,000 not being available to facilitate the purchase of the said unit in terms of the contract of purchase, the date for settlement had been extended and Mr and Mrs C were incurring penalty interest on alternate funds borrowed to complete the transaction;
- (iii) The Solicitor's Firm had agreed to reimburse them for the penalty interest and was in fact paying that interest on behalf of Mr and Mrs C;
- (iv) Because the Firm was paying the penalty interest, it was imperative that other lender clients be quickly found to substitute them for Mr and Mrs C to facilitate repayment of Mr & Mrs Cs' \$60,000 loan moneys.

Loan to C Pty Ltd

3. Between 1 April 1999 and 9 September 1999, when acting for a group of client lenders in relation to an advance through BG Securities Pty Ltd of \$520,000.00 to C Pty Ltd, the Solicitor:
- (a) Acted for those client lenders notwithstanding that their interests conflicted with his own interests and/or the interests of other persons or entities for whom he acted as a solicitor, namely, another group of client lenders and/or BG Securities Pty Ltd;
 - (b) Failed to obtain from those client lenders their voluntary and informed consent to his acting and/or continuing to act in relation to the advance;
 - (c) Deleted;
 - (d) In the alternative to paragraph (c), failed to disclose to those client lenders the nature and implications of his conflicts of interest;
 - (e) Deleted;
 - (f) In the alternative to paragraph (e), encouraged those client lenders to contribute towards the advance in circumstances where he knew, or alternatively ought to have known, that he ought not to have done so;
 - (g) Deleted;
 - (h) In the alternative to paragraph (g), failed to disclose to those client lenders all matters of which he knew, or alternatively ought to have known, which were relevant to their decision whether to contribute towards the advance;
 - (i) Deleted; and/or
 - (j) In the alternative to paragraph (i), failed to give undivided fidelity to the interests of those client lenders.

Particulars

- (a) At all material times the Solicitor was a partner of BG Solicitors ("the Firm").
- (b) At all material times the Firm, through the Solicitor, acted for two separate groups of client lenders in relation to an advance through BG Securities Pty Ltd ("BG Securities") of \$1,120,000 to C Pty Ltd ("C Pty Ltd"). The advance was made in two tranches; an initial one of \$600,000 on or about 10 June 1999 ("the First Advance") and a subsequent one of \$520,000 on or about 14 July 1999 ("the Second Advance") both of which advances were secured by, inter alia, a first registered mortgage over land at Loganholme, Queensland ("the Loganholme Land").
- (c) The client lenders in respect of the First Advance were:

Client Lender	Amount advanced
B Investments Pty Ltd	\$160,000.00
RN & M N	\$50,000.00
DWN Pty Ltd	\$130,000.00
GTMR & YSR	\$50,000.00
EED	\$100,000.00
WVK & KK	\$35,000.00
MTH	\$75,000.00
Total	\$600,000.00
- (d) Both the First Advance and the Second Advance were made by way of contributory mortgage in the name of BG Securities, an entity owned and controlled by the Firm.
- (e) The First Advance was made to finance the purchase of the Loganholme Land by C Pty Ltd from BG Securities as mortgagee in possession in respect of an advance of \$600,000 to M Pty Ltd on or about 18 May 1998.
- (f) At all material times the Solicitor also acted for another group of client lenders with respect to an advance of \$2,052,000.00 to K Pty Ltd ("K Pty Ltd") made by way of contributory mortgage in the name of BG Securities with respect to a development situated at Riverview, Queensland.
- (g) C Pty Ltd was an associated corporation to K Pty Ltd in that TP had been a director of K Pty Ltd and, at all material times, controlled both K Pty Ltd and C Pty Ltd. Further, TP had twice previously been made bankrupt and, in February 1998, he had entered into an arrangement with his creditors pursuant to Part X of the *Bankruptcy Act* 1958 (Cth), which arrangement was current at all material times.

- (h) On 5 December 1998 K Pty Ltd failed to pay to BG Securities the sum of \$14,960.00 that was then due and payable for interest with respect to the advance referred to in paragraph 3(f).
- (i) On 5 April 1999 K Pty Ltd again failed to pay to BG Securities the sum of \$18,810.00 that was then due and payable for interest with respect to the advance referred to in paragraph 3(f).
- (j) Between 1 April 1999 and 14 July 1999, the Solicitor approached various persons in order to secure their participation as contributory lenders in relation to the Second Advance to C Pty Ltd, in consequence of which, on 14 July 1999 the Second Advance was made, contributed by the following client lenders:

Client Lender	Amount advanced
A H & J A N Super Fund	\$100,000.00
SWM & CBM	\$50,000.00
CBM	\$50,000.00
LRS & PMS	\$10,000.00
BEC & EAC	\$90,000.00
WGS & AMTS	\$30,000.00
ABB & SPB	\$100,000.00
CEZ	\$35,000.00
OZ	\$55,000.00
Total	\$520,000.00

- (k) The Solicitor encouraged the client lenders referred to in paragraph 3(j) to contribute towards the Second Advance by the making of various written and oral statements to those client lenders as follows:
 - (i) TP and K Pty Ltd as guarantors of the Second Advance had a “previous borrowing history with (the Firm) and have paid interest on time” (written);
 - (ii) There was a “loan to value ratio” of 59% (written);
 - (iii) The “purpose of the loan was to complete construction of Stages 2 and 3 of the subdivision which will include a new road entry into the estate. This will greatly improve saleability of these Stages (as compared to Stage 1)” (written);
 - (iv) Stages 2 and 3 contain “32 Lots, 22 of which have been pre-sold to a superannuation company which intends to contract the borrower to construct house/land packages on each of the Lots” (written);
 - (v) The Loganholme Land was “good land”, and the development of the Loganholme Land was a “good one” (oral);
 - (vi) The development of the Loganholme Land had been “mostly completed and the development needed a short term loan to complete the final stages of the development” (oral);
 - (vii) The development of the Loganholme Land would “be completed within 12 months and it is a very safe investment” (oral);
 - (viii) The opportunity to contribute towards the advance represented “an excellent investment opportunity” (oral);
 - (ix) The Loganholme Land had a valuation of “approximately \$2,000,000.00 so that the loan to value ratio is about 59%” (oral).
- (l) The Solicitor failed to disclose to the client lenders referred to in paragraph 3(j):
 - (i) The matters referred to in paragraphs 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h) and 3(i);
 - (ii) That there had been previous attempts to develop the Loganholme land, most recently by M Pty Ltd;
 - (iii) That BG Securities had previously loaned funds to M Pty Ltd with respect to the Loganholme Land, namely an original advance of \$400,000 on or about 9 January 1995 and a more recent advance of \$600,000 made on or about 18 May 1998;
 - (iv) That M Pty Ltd had gone into administration in or about 1997 and had subsequently entered into a deed of company arrangement before defaulting on that deed of company arrangement in or about September 1998;
 - (v) That M Pty Ltd was wound up on 10 September 1998;
 - (vi) That M Pty Ltd had defaulted on its 1995 loan prior to going into administration and had then defaulted on its 1998 loan on or about 18 November 1998;
 - (vii) That as a result of the liquidation of M Pty Ltd, BG Securities entered into possession of the Loganholme Land as mortgagee;
 - (viii) That the advance to M Pty Ltd made on or about 18 May 1998 in the sum of \$600,000 was made by the client lenders referred to in paragraph 3(c) through BG Securities. After BG Securities entered into possession as mortgagee, those client lenders were approached by the Solicitor to, in effect, provide vendor finance for C Pty Ltd’s purchase of the Loganholme Land from BG Securities for the value of M Pty Ltd’s indebtedness to that company, namely, \$600,000;
 - (ix) That the client lenders referred to in paragraph 3(c) agreed to the proposal referred to in paragraph (h) and, thereafter, the First Advance was wholly used in the purchase by C Pty Ltd of the Loganholme Land;
 - (x) That Valuers had provided a valuation of the Loganholme Land on 22 March 1999 in the sum of \$340,000;
 - (xi) That Valuers had advised on 21 April 1999 that the forced sale value of the Loganholme Land on an ‘as is’ basis was \$250,000;
 - (xii) That there were council rates of \$25,062.60 owing with respect to the Loganholme Land;

- (xiii) That it had originally been agreed by C Pty Ltd, BG Securities and the client lenders referred to in paragraph 3(c) that, in consideration of the assignment of the M Pty Ltd loan to C Pty Ltd, penalty interest from the date of default by M Pty Ltd would be paid by C Pty Ltd;
 - (xiv) That a dispute subsequently arose between BG Securities and C Pty Ltd as to the payment of that penalty interest and, in compromise of that dispute, it was agreed between BG Securities and C Pty Ltd that, although any arrears of interest owed by M Pty Ltd would be paid by C Pty Ltd, such arrears would not be paid at the penalty rate of interest and, further, payment of those arrears was deferred until completion of the development;
 - (xv) That, prior to the making of the Second Advance, K Pty Ltd owed to BG Securities at least \$27,360 for interest payable with respect to the advance referred to in paragraph 3(f);
 - (xvi) That, by agreement between C Pty Ltd and K Pty Ltd, at least \$27,360 of the Second Advance would be paid by C Pty Ltd to K Pty Ltd in order to discharge K Pty Ltd's indebtedness for interest pursuant to the advance referred to in paragraph 3(f);
 - (xvii) That a written authority had been provided by C Pty Ltd to the Solicitor in order to effect the agreement referred to in paragraph (p) prior to the Second Advance being made;
 - (xviii) That the Loganholme Land did not have a loan to value ratio of 59%;
 - (xix) That the guarantors of the Second Advance had, in the case of K Pty Ltd, fallen into default of its obligations to pay interest to BG Securities on two previous occasions and, in the case of TP, he had a chequered financial history and was currently a person under a form of insolvency administration.
- (m) On or about 19 July 1999, from the funds received through the Second Advance, the Solicitor caused to be paid \$27,360 to the client lenders with respect to the advance referred to in paragraph 3(f) in order to discharge K Pty Ltd's indebtedness for interest pursuant to that advance.
 - (n) As at 8 September 1999 K Pty Ltd was again in default in payment of interest of \$27,360 due under the advance referred to in paragraph 3(f).
 - (o) On or about 8 September 1999, from the funds received through the Second Advance, the Solicitor caused to be paid \$27,360 to the client lenders with respect to the advance referred to in paragraph 3(f) in order to discharge K Pty Ltd's indebtedness for interest pursuant to that advance.
 - (p) The client lenders to K Pty Ltd who benefited from the interest payments referred to in paragraphs 3(m) and 3(o) were:

WE Pty Ltd Super Fund	SWM & CBM
BET & MAT	WN
SN	MJF & CLF
JGW & KRW	JFW Settlement Fund
Estate of JFW	TMR Retirement Fund
JFB	JHD & DMD
AG & LMG	GGM & GMM
F Superannuation Fund	JE & MIE
JGD & PD	JB & EH
PJC Allocated Pension	BAL
VCE & JDE	MPB
MO Pty Ltd	IN
LJM	RG & KG
BAC & RC	IN & JAR
AFD & JMED	AEC & HC
JMD	E Superannuation Fund
 - (q) The Solicitor knew, or alternatively ought to have known, of each of the matters particularised in paragraphs 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h), 3(i) and 3(l), either at the time of receiving instructions to act for each of the client lenders or, in any event, prior to making the Second Advance.
 - (r) Each of the matters referred to in paragraphs 3(b), 3(c), 3(d), 3(e), 3(f), 3(g), 3(h), 3(i) and 3(l) was material to the interests of the client lenders and to their decision whether to contribute towards the advance.
 - (s) The Firm received fees for professional services of and incidental to acting for the client lenders referred to in paragraphs 3(c), 3(j) and 3(p) and BG Securities in connection with the advances referred to in paragraphs 3(b) and 3(f), from which receipts the Solicitor benefited.
 - (t) In the premises particularised, the Solicitor preferred the interests of:
 - (i) The client lenders referred to in paragraph 3(c) and 3(p);
 - (ii) BG Securities;
 - (iii) His own interests;
 over the interests of, and with prejudice to, the client lenders referred to in paragraph 3(j).

4. By letter dated 11 March 1999, when acting for MTH in relation to an advance of \$75,000 to C Pty Ltd, the Solicitor falsely told W & A, accountants for MTH that his firm had lent moneys to K Pty Ltd over a previous period of two (2) years and interest payments had been made when due, when to the Solicitor's knowledge that was false.

Particulars

- (a) At all material times the Solicitor was a partner of BG Solicitors ('the Firm').
- (b) The firm, through the Solicitor, acted for a number of clients who had contributed a total of \$600,000 to facilitate an advance of that sum to M Pty Ltd secured by first registered Bill of Mortgage over land situated at Loganholme, Queensland ('the land'). The advance was made by way of contributory mortgage in the name of BG Securities Pty Ltd an entity owned and controlled by the Firm. The client lenders were:

Client/Lender	Amount
MTH	\$75,000.00
WVK & KK	\$35,000.00
RN & MN	\$50,000.00
DWN Pty Ltd	\$130,000.00
GTMR & YSR	\$50,000.00
EED	\$100,000.00
B Investments Pty Ltd	\$160,000.00
Total	\$600,000.00

- (c) As a result of the default by M Pty Ltd under the said mortgage, BG Securities Pty Ltd exercising its power of sale as mortgagee under the said mortgage took steps to sell the land.
- (d) By letter dated 19 February 1999 to the Firm, RM Solicitors advised that it was the intention of its client C Pty Ltd to purchase the said land at a purchase price of \$600,000 being the outstanding debt then owing by M Pty Ltd to the Solicitor's lender clients.
- (e) Subsequently, the Solicitor caused a letter dated 24 February 1999 to be sent to all client lenders to M Pty Ltd advising them of the C Pty Ltd offer and asking them to advise whether they agreed to sell the land for \$600,000 and to provide vendor finance in the sum of \$600,000 to C Pty Ltd.
- (f) Each of the abovementioned client lenders communicated their agreement to the C Pty Ltd purchase and vendor financing except, initially, MTH who, through her accountants W & A by facsimile to the Firm dated 8 March 1999, sought further information.
- (g) In that facsimile of 8 March 1999 from W & A the following question was asked:

'(v) what investigations have you carried out regarding C Pty Ltd's financial capacity to meet principal and interest.'

- (h) By letter dated 11 March 1999 the Solicitor responded to W & A saying, inter alia:

'5. C Pty Ltd is a shelf company set up to undertake this development. Enclosed is a Statement of Assets and Liabilities and Income and Expenditure to 30 September 1998 for TP and K Pty Ltd. We are advised that the assets referred to in the Statement are either owned by Mr TP or K Pty Ltd. This firm has lent moneys to K Pty Ltd over a period of two (2) years. Interest payments have been made when due.' (Emphasis added)

- (i) The abovementioned statement that *'interest payments have been made when due'* in relation to K Pty Ltd was false at the time it was made as the Solicitor well knew. At the time of making the statement the Solicitor was aware of the following:
- That K Pty Ltd was a borrower from other lender clients of the Firm in the sum of \$1,632,000 as at December 1998 secured by a contributory bill of mortgage in the name of BG Securities Pty Ltd;
 - That on 5 December 1998 K Pty Ltd was liable to pay interest of \$14,960 under the mortgage for the period 5 December 1998 to 4 January 1999;
 - That K Pty Ltd had defaulted on the payment of that said interest on 5 December 1998;
 - That in or around December 1998 the Solicitor was instrumental in arranging a further advance to K Pty Ltd of \$240,00 from his client lenders to increase the loan from \$1,632,000 to \$1,872,000;
 - That K Pty Ltd was unable to pay the said interest of \$14,960 due on 5 December 1998 until the further advance of \$240,000 was made available to it;
 - That settlement of the said further advance took place on 21 December 1998 at which settlement the said interest of \$14,960 was paid from the further advance of \$240,000.

R Pty Ltd

5. On 9 November 1999 when acting for first mortgage client lenders to R Pty Ltd, the Solicitor preferred the interests of another client lender the second mortgagee, TP Pty Ltd Pty Ltd, to the interests of the first mortgage client lenders.

Particulars

- (a) At all material times, the Solicitor was a partner of BG Solicitors ("the firm").
- (b) At all material times the Firm acted for the following clients in relation to the advance of \$285,000 to R Pty Ltd to be secured by first registered mortgage over Lots 33, 34, 35 and 36 situated near Gin Gin Queensland:

Client/Lender	Amount Advanced
G Pty Ltd	\$30,000.00
WPW	\$65,000.00
Mr and Mrs EOK	\$50,000.00
Mr and Mrs J AT	\$50,000.00

Mr and Mrs WKN	\$50,000.00
Mr and Mrs A EC	\$40,000.00
Total	\$285,000.00

- (c) The advance was made by way of contributory mortgage in the name of BG Securities Pty Ltd an entity owned and controlled by the said Firm.
- (d) At all material times the Firm also acted for TP Pty Ltd in relation to another advance of \$60,000 to R Pty Ltd to be secured, inter alia, by second registered mortgage over the land described in paragraph 5(b) and two other blocks of land.
- (e) On 5 November 1999 the sale of Lot 34 was settled and the Solicitor facilitated the release by BG Securities Pty Ltd of that piece of land from the said first registered mortgage in exchange for a payment of \$82,000 from R Pty Ltd received on 8 November 1999.
- (f) Subsequently, on 9 November 1999 without the knowledge or authority of any of the first mortgage client lenders referred to in paragraph 5(b), the Solicitor facilitated the receipt of the said sum of \$82,000 to the firm's Trust Account as follows:
- | | |
|-----------------------------------------------------------------------------------|--------------------|
| (i) to the first registered mortgage client lenders referred to in paragraph 5(b) | \$68,333.33 |
| (ii) to TP Pty Ltd, the second registered mortgage client lender | \$13,666.67 |
| Total | \$82,000.00 |
- (g) The Solicitor facilitated the distribution of the sum of \$13,666.67 to the client lender TP Pty Ltd on 13 March 2000.
- (h) In the absence of the authority of the first registered mortgage client lenders to pay the said sum of \$82,000 or any part thereof to anyone other than themselves, those client lenders were entitled to receive the full amount of \$82,000.
- (i) In paying the client lender TP Pty Ltd the said sum of \$13,666.67 without the authority of the said first mortgage registered client lenders, the Solicitor preferred the interests of the client lender TP Pty Ltd to the interests of the client lenders set out in paragraph 5(b).
6. On 3 December 1999, when acting for first mortgage client lenders to R Pty Ltd, the Solicitor preferred the interests of another client lender the second mortgagee, TP Pty Ltd Pty Ltd to the interests of the first mortgage client lenders.

Particulars

- (a) At all material times, the Solicitor was a partner of BG Solicitors (the Firm).
- (b) At all material times the Firm acted for the following clients in relation to the advance of \$285,000 to R Pty Ltd to be secured by first registered mortgage over Lots 33, 34, 35 and 36 near Gin Gin Queensland:

Client/Lender	Amount Advanced
G Pty Ltd	\$30,000
WPW	\$65,000
Mr and Mrs EOK	\$50,000
Mr and Mrs JAT	\$50,000
Mr and Mrs WKN	\$50,000
Mr and Mrs AEC	\$40,000
Total	\$285,000

- (c) The advance was made by way of contributory mortgage in the name of BG Securities Pty Ltd an entity owned and controlled by the said Firm.
- (d) At all material times the Firm also acted for TP Pty Ltd in relation to another advance of \$60,000 to R Pty Ltd to be secured, inter alia, by second registered mortgage over the land described in paragraph 6(b) and two other blocks of land.
- (e) On 30 November 1999 the sale of Lot 35 was settled and the Solicitor facilitated the release by BG Securities Pty Ltd of that piece of land from the said first registered mortgage in exchange for a payment of \$82,000 from R Pty Ltd which sum was received by the Firm on 1 December 1999.
- (f) Subsequently, on 3 December 1999 without the knowledge or authority of any of the first mortgage client lenders referred to in paragraph 6(b), the Solicitor facilitated the receipt of the said sum of \$82,000 to the firm's Trust Account as follows:
- | | |
|-----------------------------------------------------------------------------------|--------------------|
| (i) to the first registered mortgage client lenders referred to in paragraph 6(b) | \$68,333.33 |
| (ii) to TP Pty Ltd, the second registered mortgage client lender | \$13,666.67 |
| Total | \$82,000.00 |
- (g) The Solicitor facilitated the distribution of the sum of \$13,666.67 to the client lender TP Pty Ltd on 13 March 2000.
- (h) In the absence of the authority of the first registered mortgage client lenders to pay the said sum of \$82,000 or any part thereof to anyone other than themselves, those client lenders were entitled to receive the full amount of \$82,000.
- (i) In paying the client lender TP Pty Ltd the said sum of \$13,666.67 without the authority of the said first mortgage registered client lenders, the Solicitor preferred the interests of the client lender TP Pty Ltd to the interests of the client lenders set out in paragraph 6(b).
7. Deleted.
8. Deleted.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr M J Burns of Counsel instructed by Messrs McCullough Robertson, Solicitors
- (b) For the Practitioner:
Mr R A Mulholland QC instructed by Messrs Gilshenan & Luton, Solicitors
- (c) For the Complainants:
Ms CEZ appeared in person
Mrs DK appeared in person

Findings and Orders

1. The Tribunal, having noted that the Practitioner has pleaded guilty to the Further Amended Notice of Charge filed by leave today, finds the charges amount to professional misconduct.
2. The Tribunal finds the Practitioner guilty of professional misconduct.
3. Although acknowledging that there is no finding of dishonesty, the Tribunal orders that the name of the Practitioner be struck off the Roll of Solicitors of the Supreme Court of Queensland.
4. The Tribunal orders that the costs of the Queensland Law Society Incorporated as agreed at \$20,000.00 between the parties together with the costs of the recorder and the costs of the Clerk be paid by Terence James Boyce. In relation to the costs of the Clerk and the Recorder, the Tribunal orders that they be assessed by Monsour Legal Costs Pty Ltd and that those costs be paid within two years of today's date.
5. The Tribunal is satisfied that the following Complainants have suffered pecuniary loss because of Mr Boyce's professional misconduct and orders that Terence James Boyce pay \$7,000.00 to each of the following:
 - MJF
 - CLF
 - JVW
 - KRW
 - JFB
 - JAT
 - GET
 - WKN
 - SJN
 - EOK
 - DK
6. The Tribunal orders that payments of compensation be made at a rate of \$14,000.00 per quarter, the first payment to be made on 1 September 2003 and subsequent payments each quarter thereafter. The Tribunal further orders that those payments be made to the Queensland Law Society Incorporated for distribution to the Complainants.
7. In relation to the claims by the Complainants listed in paragraph 3(j) of the Further Amended Notice of charge, the Tribunal adjourns consideration of those applications for compensation on behalf of those parties to a date to be fixed in October 2003.

Reasons

The practitioner pleads guilty to six charges:

Charges 1 and 2 involve a failure to disclose relevant information to lender clients. Charge 3 involves a failure to disclose a conflict of duty and of interest. Charge 4 relates to false disclosure to a firm of accountants that a borrower had made interest payments as and when due. Charges 5 and 6 relate to preferring the interests of one set of clients over another set of clients in the application of funds received on a settlement.

The solicitor's conduct on two separate occasions resulted in some monies being paid to a series of second mortgagees when the whole of the funds ought to have gone to the first mortgagees.

It is made clear by both Queen's Counsel for the practitioner and Counsel for the Queensland Law Society that there is no allegation of dishonesty against the practitioner.

The charges therefore amount to breaches of duty to properly advise clients and properly disclose information within the practitioner's knowledge relevant to the clients' decisions to enter into the loan transactions. They also involve the misapplication of funds involving a preferment of the interests of one set of clients over another.

These are very serious matters, which, on the evidence, have had serious financial consequences for the clients involved. The conduct occurred over a period of 15 months.

Both the Queensland Law Society and the practitioner submit to us that the appropriate penalty is a 2.5 years suspension. The practitioner is also prepared to undertake not to be involved in mortgage lending practice post-suspension.

The practitioner is prepared to pay compensation totalling \$77,000 to various clients affected by his conduct and he proposes to make those payments by instalments of \$14,000 per quarter. Each affected client would receive \$7,000; that is the statutory maximum.

It is submitted that the Tribunal should take the practitioner's agreement to pay the compensation as a matter which is relevant to our consideration of the appropriate penalty.

We are mindful of the fact that it would be inappropriate to suspend a practitioner for a period longer than three years. The court has expressed the view that a suspension for a period longer than three years would be inappropriate and should be replaced by a strike off order.

Further, the Tribunal should only suspend a practitioner if it considers that, at the end of the period of the suspension, the Practitioner will then be fit to practice.

Here, the practitioner has not given evidence before us. He has not been present today. We have not had the opportunity to come to a view that would satisfy us that after a two and a half-year period of suspension, he would be fit to practice.

Of concern is that over a period of time between December 1998 and March 2000, he has engaged in a series of matters with lender clients where he has placed himself in a conflict of interests situation and where he has not disclosed highly relevant information to potential lenders.

To a person, those lenders have said that if they had been properly informed by the practitioner of the relevant information, they either would not have or may not have lent the funds they did.

The practitioner has, on a number of occasions over a 15-month period, seriously breached his duty to those lender clients. Given his propensity to act in this way repeatedly over a 15-month period, we cannot be satisfied that he will be fit to practice after a 2.5 years suspension.

Given that finding, we should then only suspend a practitioner in "exceptional circumstances" (see *Queensland Law Society v Carberry; Attorney-General v Carberry* [2000] QCA 450 at paragraph [38]).

These are not exceptional circumstances. The circumstances are such that the practitioner, although not dishonest, has committed a series of serious breaches of duty that have resulted in some significant monetary losses to clients. This was not a one-off error of judgment or a mistake that might qualify it as exceptional.

This Tribunal has a duty to protect the public from practitioners who are likely to conduct themselves in ways that seriously fall short of the standard required of solicitors.

Given our view that the practitioner will not be fit to practice in two and a half years, we really have no option but to strike him off the Roll in order to protect the public.

The other relevant factor is the deterrent factor. Mortgage lending practices of some solicitors have become an area of increasing problems, complaints, unprofessional practices and professional misconduct.

The Tribunal has dealt over recent times with other matters arising from this area of practice. Every solicitor should be alert to potential conflicts of interests. This includes those carrying on a mortgage lending practice.

We do not come to this position lightly. We recognise that both Queen's Counsel for the practitioner and Counsel for the Queensland Law Society submitted to us that suspension was the appropriate penalty. However, for the reasons we have expressed, we cannot discharge our obligations to protect the public except by the strike off order we propose to make.

The strike off order also sends an appropriate message to the Solicitors of Queensland by way of a deterrent from engaging in a behaviour involving the sort of repeated and serious breaches that have occurred here.