

In the Matter of Christopher Michael Carberry

Case No: 2949 of 2000
Date of Hearing: 7 September 2000
Appearing Before: Pincus JA
 Moynihan SJA
 Atkinson J
Order: Struck Off

Appeal

Both the Society and the Attorney-General lodged appeals against the inadequacy of the penalty.

On 6 March 2000, the Solicitors' Complaints Tribunal suspended Christopher Michael Carberry for a period of 12 months and ordered that he attend and successfully complete a Queensland Law Society Practice Management Course before applying for a practising certificate after finding him guilty of the following charges:

1. That the practitioner acted in circumstances of conflict between the interests, on the one hand, of his client, AD and the interests, on the other hand, of himself and PB and preferred his own interests and those of PB to AD's interests.
 - (a) On or about 29 July 1996, AGL loaned the sum of \$21,243.46 to MLS repayable at the expiration of one month together with interest in the sum of \$2,000.00; repayment of that loan was guaranteed by PB (who was at that time the principal of the firm, Carberrys) and by the practitioner (who was at that time employed by PB) pursuant to a deed of guarantee dated 29 July 1996.
 - (b) The loan from AGL was made for the purpose of enabling MLS to repay loans which had been arranged by the practitioner in late 1995 or early 1996 for the purpose of enabling MLS to make restitution and to pay MLS's legal costs in connection with criminal charges then pending against MLS.
 - (c) MLS defaulted in repayment of the loan from AGL.
 - (d) As at 4 August 1997:
 - (i) RCHL was a business associate and client of PB;
 - (ii) RCHL was indebted to PB for legal fees and in respect of business debts;
 - (iii) RCHL was a director of and shareholder in HE Pty Ltd.
 - (e) During the period August – September 1997, the practitioner acted as attorney for AD pursuant to a written power of attorney.
 - (f) On or about 4 August 1997, the practitioner agreed to lend to HE Pty Ltd from funds belonging to A", the sum of \$10,000.00 repayable on 5 August 1998 with interest payable quarterly at 18% per annum reducing to 13% per annum. The loan to HE Pty Ltd was secured by:
 - (i) a mortgage debenture given by HE Pty Ltd to AD; and
 - (ii) RCHL's personal guarantee.
 - (g) AGL was at all material times a director of and shareholder in F Pty Ltd.
 - (h) HE Pty Ltd directed that the amount of the loan, namely \$10,000.00, be paid to F Pty Ltd.
 - (i) On or about 5 September 1997, the practitioner drew a cheque in the sum of \$10,000.00 on an account conducted at the Macquarie Bank styled "AD Portfolio Account" which cheque was drawn in favour of F Pty Ltd as payee. The cheque was duly paid on 5 September 1997.
 - (j) The payment referred to in sub-paragraph (i) was made in part satisfaction of the debt due to AGL arising from the loan referred to in sub-paragraph (a).
2. That the practitioner failed to comply with requirements of the Council of the Queensland Law Society Inc ("the society") in relation to the investigation of a complaint made by AD in that he failed to give the Council an explanation in relation to that matter and failed to comply with the requirements of a notice given by the Council of the Society pursuant to Section 5H of the Queensland Law Society Act 1952 and such failure continued for a further 14 days after the giving of such notice.
 - (a) By letter dated 4 February 1998, the Society sought from the practitioner information in relation to the practitioner's operation of bank accounts on behalf of AD and in particular, sought an explanation of a loan "made to people called AGL without any documentation to secure the loan".
 - (b) In response, by letter dated 16 March 1998, the practitioner produced to the Society an epitome of mortgage recording a loan made by AD on 5 August 1997 in the sum of

- \$10,000.00 to HE Pty Ltd secured by mortgage debenture granted by HE Pty Ltd and supported by a guarantee of RCHL.
- (c) By letter dated 20 May 1998 to the practitioner, the Society:
- (i) required to see the mortgage debenture given by HE Pty Ltd and the guarantee given by RCHL;
 - (ii) pointed out that the cheque drawn on 5 September 1997 in the sum of \$10,000.00 was not payable to HE Pty Ltd.
- (d) By letter dated 11 June 1998 to the Society, the practitioner:
- (i) advised that he would attend to registration of the mortgage debenture (but did not provide a copy of that document);
 - (ii) in respect of the Society's inquiry as to the payee of the cheque, referred to his previous advice to the Society set out in sub-paragraph (b) hereof.
- (e) By letter dated 10 July 1998 to the Society, the practitioner advised that:
- (i) "the original executed security documents are in storage" and that he was having difficulties with the storage company;
 - (ii) he had been "contacted by the borrower, RCHL, who wishes to make arrangements for redeeming the debt on the due date which I believe is 8 August 1998".
- (f) By letter to the practitioner dated 12 January 1999, the Society recorded that the practitioner's explanation of the payment to F Pty Ltd on 5 September 1997 was that it represented a loan to HE Pty Ltd made on 5 August 1997 and sought further explanation as to:
- (i) the relationship between F Pty Ltd and HE Pty Ltd;
 - (ii) the purpose of the payment to F Pty Ltd;
 - (iii) whether the amount of \$10,000.00 had been repaid by F Pty Ltd;
 - (iv) whether the practitioner acted for F Pty Ltd.
- (g) By letter to the Society dated 23 February 1999, the practitioner responded to the effect that:
- (i) the payment had been made to F Pty Ltd at the direction of HE Pty Ltd;
 - (ii) he was unaware of any relationship between F Pty Ltd and HE Pty Ltd;
 - (iii) he did not know whether F Pty Ltd had repaid the sum of \$10,000.00;
 - (iv) he did not act for F Pty Ltd.
- (h) By letters to the practitioner dated 5 March 1999, 23 March 1999 and 15 April 1999, the Society sought further explanation in relation to the transaction.
- (i) On 27 April 1999, the Society gave the practitioner notice pursuant to Section 5H of the Queensland Law Society Act 1952 in respect of the correspondence referred to in sub-paragraph (h) hereof.
- (i) The practitioner failed to respond to the notice referred to in sub-paragraph (i) hereof.
- (k) The practitioner failed until 1 November 1999 to produce to the Society any documentation relating to the loan from AD to HE Pty Ltd.
- (l) HE Pty Ltd has not repaid AD the sum of \$10,000.00 or any interest in respect of that loan, save a cheque in the sum of \$328.54 (representing one quarterly interest payment calculated at the non-default rate of 13% per annum) which was banked by the practitioner to the credit of the account referred to in sub-paragraph 1(i) on 12 December 1997.
- (m) The mortgage debenture has not been registered.
3. In breach of Section 5H of the Queensland Law Society Act 1952, the practitioner failed to comply with a requirement of the Council of the Society that he give the Council an explanation in relation to a complaint made by JM & Partners and such failure continued for a further 14 days after notice having been given by the Council of the Society on 6 October 1998 pursuant to Section 5H(2) of the Act.
4. In breach of Section 6(1) of the Trust Accounts Act 1973, the practitioner failed to keep records of all trust moneys and disbursements thereof as would sufficiently explain the transactions and the true position in regard thereto.
- (a) On 30 June 1998, the practitioner deposited to his trust account in the name of Power & Power, the sum of \$2,238.25 representing the balance standing to the credit of the trust account of his former firm, Carberrys.
- (b) Receipt of the said sum of \$2,238.25 was recorded by the practitioner in a trust ledger account styled Carberrys. No individual trust ledgers were established to record amounts comprising the sum of \$2,238.25 held by the

practitioner on behalf of various clients.

5. The practitioner withdrew funds from his trust account in circumstances other than those set out in Section 8(1) of the Trust Accounts Act 1973.
 - (a) On 14 August 1998, the practitioner paid from his trust account to ST the sum of \$1,000.00; as at 14 August 1998, the practitioner held trust funds on behalf of ST in the sum of \$606.00 only.
 - (b) On 18 September 1998, the practitioner paid the sum of \$3,500.00 from his trust account to his general account; the sum of \$3,500.00 included an amount of \$1,500.00 received by the practitioner on account of counsel's fees, which counsel's fees were then unpaid and which remained unpaid until 5 October 1998.
 - (c) Between 20 March 1998 and 3 September 1998, the practitioner paid the sum of \$1,750.00 held on behalf of the Estate of JMW from his trust account to his general account in payment of executor's and trustee's fees without first obtaining either an order of the Supreme Court of Queensland approving such payment or consent of the beneficiary of the said estate.
 - (d) On 5 August 1998, the practitioner paid the sum of \$3,027.00 from his trust account to his general account in purported reimbursement of registration fees in circumstances in which the practitioner's general account cheque drawn on 27 July 1998 in the sum of \$3,027.00 in respect of those registration fees had, on 29 July 1998, been dishonoured and a further general account cheque drawn on 5 August 1998 in the same amount had not been presented by the payee and the registration fees had therefore not been paid.
6. In breach of Section 16(1) of the Trust Accounts Act 1973, the practitioner failed on or before 31 May 1998 to give to the Society the report of the auditor of his trust account in respect of the six month period to 31 March 1998.
7. In breach of Section 16(1) of the Trust Accounts Act 1973, the practitioner failed on or before 31 May 1999 to give to the Society the report of the auditor of his trust account in respect of the 12 month period to 31 March 1999.
8. That the practitioner failed to comply with requirements of the Council of the Society in relation to the investigation of a complaint made by RA and MHA in that he failed to give the Council an explanation in relation to that matter and failed to comply with the

requirements of a notice given by the Council of the Society on 23 June 1999 pursuant to Section 5H of the Queensland Law Society Act 1952 and such failure continued for a further 14 days after the giving of such notice.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
D G Clothier instructed by Brian Bartley & Associates.
- (b) For the Attorney General:
P A Keane QC and G Cooper instructed by Crown Law.
- (c) For the practitioner:
P A Keane QC and G Cooper instructed by Crown Law for Attorney General.

Findings and Orders

The Court of Appeal found:

1. It would be inconsistent with the Court's duties to preserve the standards of professional practice not to conclude that what has been found against the respondent demonstrates unfitness to practise.
2. Once it has been determined that a solicitor is unfit to practise, a suspension, even coupled with an order to satisfactorily complete a Practice Management Course, could only apply in exceptional circumstances. An order for suspension should be based on a view that, at the termination of a period of suspension, the practitioner will no longer be unfit to practise.
3. The course of conduct found against the practitioner and the explanations he proffered for it, are not conducive of a conclusion that at the termination of the period, the practitioner would be no longer unfit to practise. It is not in the public interest that he should be permitted to do so. The fact that his name has been removed from the Roll of Solicitors does not prevent the respondent in the future re-establishing his credentials and worthiness to be a solicitor and re-admitted.
4. The orders of the tribunal that the respondent be suspended from practice for 12 months effective from 1 May 2000 and that he attend and successfully complete a Practice Management Course conducted by the Queensland Law Society Inc prior to applying for a practising certificate should be set aside. The name of the practitioner should be struck off the Roll of Solicitors of the Supreme Court of Queensland and the practitioner should pay the Appellant's costs of and incidental to the Appeal to be assessed.