

In the Matter of Christopher Michael Carberry

Case No: SCT/31
Date of Hearing: 22 February 2000, 23 February 2000 & 6 March 2000
Appearing Before: Mr T M Treston (Chairperson)
Mr P Martinez
Mr G Campbell-Ryder (Lay Member)
Penalty: Suspended for a period of twelve (12) months

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.

Particulars

- (a) On or about 29 July 1996, AGL loaned the sum of \$21,243.46 to MLS repayable at the expiration of one (1) 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 AD, 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 fourteen (14) days after the giving of such Notice.

Particulars

- (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 enquiry 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.
- (j) 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. The practitioner withdrew funds from his trust account to make payments to himself for professional costs and outlays in circumstances other than those set out in Section 8(1)(c) of the Trust Accounts Act 1973 and contrary to his clients' express instructions.

Particulars

- (a) Between November 1998 and August 1999, the practitioner acted for ACB and IMS as executors of the Will of ADE in relation to the administration of ADE's Estate.
- (b) On or about 10 November 1998, ACB authorised the practitioner's firm, Power & Power, to transfer from funds received into its trust account a sum not exceeding \$3,000.00 in payment of costs and outlays in relation to the estate.
- (c) By letter dated 8 March 1999, ACB instructed the practitioner not to take any money from trust for his costs without obtaining the executors' approval and by facsimile sent on 8 March 1999 (incorrectly dated 8 March 1998), the practitioner confirmed that he had not and would not make any payment from trust without authority.
- (d) The practitioner effected the following transfers from funds held in trust on behalf of the said estate in payment to himself without authorisation in writing and contrary to the instructions given by ACB on 8 March 1999:

09 April 1999 - \$1,060.50

22 April 1999 - \$1,875.00

29 April 1999 - \$2,650.00

4. 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 fourteen (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.
5. 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.

Particulars

- (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.
6. 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.

Particulars

- (a) On 14 August 1998, the practitioner paid from his trust account to ST the sum of \$1,000.000; 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.

7. 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 (6) month period to 31 March 1998.
8. 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 twelve (12) month period to 31 March 1999.
9. 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 fourteen (14) days after the giving of such Notice.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr B D Bartley, solicitor of Corrs Chambers Westgarth, solicitors.
- (b) For the practitioner:
Mr D L Atkinson of Counsel (in part) instructed by A W Bale & Son, solicitors.

Mr S T Bale (in part), solicitor of A W Bale & Son, solicitors.

Mr J A Baker, solicitor of A W Bale & Son, solicitors.

Mr P Feeney (in part) of Counsel instructed by A W Bale & Son, solicitors.

Findings and Orders

1. The Tribunal ordered under Section 6L(1) of the Queensland Law Society Act that the preliminary application for the hearing of the charges to be heard in private be itself heard in private.
2. The Tribunal refused the application of the practitioner for the hearing of the charges to be held in private.
3. The Tribunal ordered that the hearing of application by the parties with respect to admission of affidavit material be held in private.

4. The Tribunal admitted the affidavit of SSC sworn 21 February 2000 with all of the exhibits subject to the deletion of paragraph one on page one of the Proof of Damage of AD.
5. The Tribunal admitted the affidavit of SSC sworn 21 February 2000 with all of the exhibits subject to the deletion of paragraph one on page one of the Proof of Damage of AD; the deletion from the letter of the Queensland Law Society Inc to the practitioner dated 8 July 1999 of the word "misappropriation" and the two lines that follow it; and deletion from the letter of the Queensland Law Society Inc to A W Bale & Son dated 28 October 1999 of the first sentence in paragraph 4.
6. The Tribunal admitted sub-paragraphs 8(a) and 8(b) of the affidavit of Christopher Michael Carberry with the exhibits CMC1 and CMC2 sworn 21 February 2000. The Tribunal refused to admit to evidence the affidavit of John Alexander Baker sworn 21 February 2000.
7. In relation to Charge No. 1, the Tribunal found that there was a potential conflict of interest. The Tribunal was not satisfied that the practitioner deliberately preferred the interest of someone other than his own client, whether that be his own interest or the interest of himself and PB. The practitioner's attention to instructions which he had displayed a lack of competence and ignorance. The Tribunal found that in the circumstances of the potential conflict of interest, the interests of others were inadvertently or accidentally advanced.
8. The Tribunal was not satisfied that the applicant had made out its case in relation to Charge No. 3.
9. The Tribunal was satisfied that the practitioner was in breach of the Trust Accounts Act as set out in Charge No. 5.
10. By majority, the Tribunal found that Charge No. 1 was proved on grounds set out above.
11. The Tribunal found Charges 2, 4, 5, 6(a), 6(b), 6(d), 7, 8 and 9 proved.
12. The Tribunal, by majority, found that the facts as found and set out above in relation to Charge No. 1 constituted professional misconduct.
13. The Tribunal found the facts set out in Charges, 2, 4 and 9 constituted professional misconduct.
14. The Tribunal found the facts set out in Charge Nos. 5, 6(a), 6(b), 6(d), 7 and 8 constituted unprofessional conduct.

15. The Tribunal ordered that the practitioner be suspended from practice for a period of twelve (12) months and that the period of suspension should not come into effect until 1 May 2000.
16. The Tribunal further ordered that the practitioner attend and successfully complete a Practice Management Course conducted by the Queensland Law Society Inc prior to applying for his Practising Certificate.
17. The Tribunal further ordered that the practitioner pay compensation in the sum of \$7,000.00 to AD on or before 6 September 2000.
18. The Tribunal further ordered that the practitioner pay the costs of the Queensland Law Society Inc as assessed by Hickey & Garrett, cost assessors.

Reasons

The practitioner made an oral application that the Tribunal hearing be heard in private. The Tribunal understood the anxiety of the solicitor in the practitioner's position and appreciated that he may suffer harm even if the charges were dismissed, but Section 6L contemplates that prima facie hearings must be held in public and that implies that a particular reason not applicable to the general run of cases must be shown to exist, justifying an Order under the Section.

The Tribunal was not satisfied that any particular reason had been established. The Tribunal would not make an Order that the hearing be held in private.

In relation to Charge No. 3, despite the wording of the facsimile from ACB and the practitioner's response of 8 March 1999, the Tribunal was not satisfied that the Society had made out its case as alleged in relation to the transfer of 9 April 1999. It noted that this amount, together with the earlier transfers, total \$3,000.00.

In relation to the transfers on 22 April 1999 and 29 April 1999, the practitioner's employee had arranged for the executors to sign a conveyancing retainer on 19 April 1999. In the circumstances, the Tribunal was not satisfied that the Society had made out its case in relation to these two transfers.

In relation to Charge No. 5, the decision of the Tribunal was that even if the practitioner was not in breach of the Trust Accounts Act immediately upon receipt of the moneys, it was satisfied that he was in breach in failing to take necessary steps promptly to comply with the provisions of the Act. The Tribunal was satisfied that the practitioner was in breach of the Act as set out in the Notice of Charge.

In relation to Charge No. 1, the Tribunal, by majority, found that there was a potential conflict of interest. The Tribunal noted the standard of proof required and the seriousness of the charge alleged. It was not satisfied that the practitioner deliberately preferred the interests of someone other than his client, that being his own interest or that of himself and PB. His attention to the instructions which he had displayed a lack of competence and ignorance. The Tribunal further found by majority, that in the circumstances of potential conflict of interest, the interests of others were inadvertently or accidentally advanced.