

In the Matter of Owen Frank Cooper

Case Number: SCT/118
Date of Hearing: 28 April 2004
Appearing Before: Mr G C Fox (Presiding Member/Practitioner Member)
Mr M Conroy (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Fined \$4,000.

Charges

1. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, in breach of his duty as a solicitor, he failed to honour an undertaking given by his Firm in writing on 26 August 2002 to C Lawyers.

Particulars

- 1.1 At all material times, the practitioner was the sole principal of CW Solicitors ("the Firm").
 - 1.2 In or about August 2002, the practitioner acted for the seller, P, in a conveyance of real property situated at Girral Avenue, Ashmore ("the property"). C Lawyers, acted for the buyer, D.
 - 1.3 The contract for the sale and purchase of the property ("the Contract") provided, by way of a special condition, for certain rectification work to be carried out to the swimming pool and surrounds situated on the property, namely, such works as were necessary in order for the swimming pool fence to comply with the requirements of the Gold Coast City Council and repainting the interior of the swimming pool ("the Works").
 - 1.4 As at 26 August 2002, the Works had not been completed by P.
 - 1.5 For the purposes of effecting the settlement of the Contract and, on 26 August 2002, the practitioner's Firm forwarded a facsimile letter to C Lawyers, the relevant terms of which were as follows:

"We undertake to hold in our trust account the sum of \$5,700.00 being two weeks rent and retention money until all work is finalised."
 - 1.6 At all material times subsequent to the giving of the undertaking referred to in paragraph 1.5 above ("the Undertaking"), the practitioner either knew or ought to have known that the Undertaking had been given.
 - 1.7 Settlement of the Contract took place on 29 August 2002 and the sum of \$5,700.00 was retained by the practitioner in the Firm's trust account pursuant to the Undertaking ("the Retention Moneys").
 - 1.8 The practitioner disbursed the Retention Moneys on 3 September 2002 in, inter alia, satisfaction of other costs that were owed to him by P and P's husband, without any reference to C Lawyers or their client.
 - 1.9 At the time when the Retention Moneys were disbursed, the Works had not been completed in that:
 - (a) The swimming pool fence did not comply with the requirements of the Gold Coast City Council;
 - (b) The interior of the swimming pool had not been repainted.
 - 1.10 On 9 September 2002, after the disbursement of the Retention Moneys, the Firm forwarded a facsimile transmission to C Lawyers which advised that "all work that our client had to complete pursuant to the contract was attended to by 5pm on Thursday the 5th instant. We are instructed therefore, to send to your client the sum of one week's rent in the sum of \$350.00."
 - 1.11 On 9 September 2002, C Lawyers responded to the facsimile transmission referred to in paragraph 1.10 above advising that "the work has not been completed pursuant to the contract" and requiring "that the funds remain in trust until the completion of this matter pursuant to the Trust Act".
 - 1.12 The practitioner failed to honour the Undertaking by distributing trust moneys that his Firm had previously undertaken to hold, prior to the completion of the Works and, further, without providing prior advice to the recipient of his undertaking of his intention to do so.
2. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, in breach of his duty as a solicitor and in breach of his duty to maintain reasonable standards of competence or diligence, the Practitioner failed to exercise proper supervision of his staff in their dealings with C Lawyers.

Particulars

- 2.1 The Council repeats and relies on paragraphs 1.1 to 1.11 of the Particulars provided in support of Charge 1.

- 2.2 In the facsimile transmission forwarded by the practitioner's Firm to C Lawyers on 9 September 2002 and referred to in paragraph 1.10 of the Particulars provided in support of Charge 1, C Lawyers were advised that "We are further instructed to disburse the balance monies on our clients instructions".
- 2.3 By that advice, it was impliedly represented to C Lawyers that, at the time when the facsimile was sent, the Retention Moneys were still retained in the practitioner's trust account pursuant to the Undertaking.
- 2.4 The representation referred to in paragraph 2.3 above was false or, alternatively, misleading because the Retention Moneys had been disbursed from the practitioner's trust account on 3 September 2002.
- 2.5 The practitioner failed to maintain reasonable standards of competence or diligence in that he permitted or allowed his staff to forward a facsimile transmission to C Lawyers that contained an implied representation that was false or, alternatively, misleading.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr M J Burns of Counsel instructed by Queensland Law Society Incorporated
- (b) For the Practitioner:
Mr P W Hackett of Counsel instructed by Colwell Wright Solicitors

Findings and Orders

1. The Tribunal grants leave to the Queensland Law Society to amend its Notice of Charge in accordance with the document handed up.
2. The Tribunal finds the matters set out in the amended Notice of Charge dated 27 April 2004, as admitted by the Practitioner, proved and that those matters constitute professional misconduct.
3. The Tribunal finds the Practitioner guilty of professional misconduct.
4. The Tribunal orders that the Practitioner pay a penalty to the Fund in the amount of \$4,000.00.
5. The Tribunal orders that the Practitioner attend and satisfactorily complete the Professional Standards module of the next available Practice Management course conducted or approved by the Queensland Law Society Incorporated.
6. The Tribunal accepts the undertaking of the Practitioner given through his Counsel to pay compensation to D in the sum of \$2,970.00 care of the Queensland Law Society Incorporated within 14 days.
7. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated of and incidental to this application together with the costs of the Clerk and the recorder such costs to be agreed but failing agreement to be assessed by Monsour Legal Costs Pty Ltd.
8. The Tribunal allows the Practitioner 30 days within which to pay the penalty and 14 days following assessment to pay costs so ordered.

Reasons

The practitioner is charged with failure to honour an undertaking and failure to exercise proper supervision. The practitioner has properly entered a plea of guilty to both charges.

At the heart of the matter is an undertaking given by a clerk of the practitioner in terms as follows: "We undertake to hold in our Trust Account the sum of \$5,700.00, being two weeks rent and retention moneys until all work is finalised"; and a subsequent letter written by the practitioner's book-keeper advising, "We are further instructed to disburse the balance moneys on our client's instructions."

The funds were in fact disbursed on the instructions of the practitioner's client. the work had not been completed. It remains of concern that the practitioner still believes that an undertaking must be accepted to be effective, and that a condition could be implied that he could disburse the funds the subject of the undertaking on the instructions of his client.

There can be no basis for these beliefs. He allowed an unqualified person to draft an undertaking in terms that imposed a heavy duty on him. He did not then and still does not appear to understand the extent of that duty.

The duty is clearly set out in the Solicitors' Handbook at s.12.

I read paragraph 1:

It is of fundamental importance to the administration of justice and the orderly transaction of their clients' business that practitioners can be relied upon to do what they say they will do.

Paragraph 2:

A practitioner is responsible as a matter of professional conduct for carrying out an undertaking given by a member of staff.

Paragraph 5:

An undertaking may be given orally or in writing, but if orally should be confirmed over the signature of a practitioner who is a principal. Undertakings given by an employee should be confirmed by a principal. However, in any event, it may be enforced against the principal.

Paragraph 7:

A practitioner should not give an undertaking which the practitioner is unable to implement personally.

We have been addressed on whether the conduct amounts to professional misconduct or unprofessional conduct. We accept that the position is as set out in the Administrative Decisions Tribunal in the Law Society of New South Wales v. Martin, which has been handed to us.

Paragraph 26 states:

Although ordinarily we would expect that non-compliance with the solicitor's undertaking would be regarded as professional misconduct, there are in our view particular circumstances here which put the conduct in the less serious category of unsatisfactory professional conduct.

We cannot find that the particular circumstances of this case are sufficient to reduce the conduct to unprofessional conduct.

In relation to penalty, we accept that the plea of guilty was made in a timely and responsible manner and that the practitioner has cooperated with the Queensland Law Society.

We have been assured that the practitioner has put in place processes to ensure that all contentious correspondence emanating from his firm will be signed by a solicitor with the exception of formal correspondence in conveyancing matters.

We also take into account the undertaking provided by the practitioner to pay compensation to the aggrieved party