

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Dwyer* [2009] LPT 08

PARTIES: **LEGAL SERVICES COMMISSONER**
(Applicant)

v

MICHAEL PATRICK DWYER
(Respondent)

FILE NO/S: 9434/08

DIVISION: Legal Practice Tribunal

PROCEEDING: Discipline Application

ORIGINATING COURT: Brisbane

DELIVERED ON: 1 May 2009

DELIVERED AT: Brisbane

HEARING DATE: 30 March 2009

JUDGE: Byrne SJA assisted by

LAY PANEL MEMBER: Ms K A Keating

PRACTITIONER PANEL MEMBER: Mr P J Mullins

ORDER: **That the respondent:**

- 1. be publicly reprimanded for professional misconduct;**
- 2. engage Peter Lynch to provide a six month practice management coaching program and thereafter to provide a report to the Legal Services Commissioner confirming the respondent's participation in the training required under that program;**
- 3. pay the Legal Services Commissioner's costs fixed at \$2,500.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – DUTIES AND LIABILITIES TO CLIENT – DEALINGS WITH CLIENT – PROFESSIONAL MISCONDUCT – where respondent failed to manage client trust accounts according to professional

obligations – where respondent showed neglect in conduct of a client’s court case – where respondent admits to all charges – whether respondent’s actions constituted professional misconduct – whether practice management course preferable to pecuniary penalty

Browne v Dunn (1893) 6 R 67

ss 8, 12(3) *Trust Accounts Act* 1973

COUNSEL: Mr B I McMillan for applicant

Mr B W Farr SC for respondent

SOLICITORS: Legal Services Commission for applicant

Brian Bartley & Associates for respondent

- [1] By this Discipline Application, the respondent, a solicitor, confronts five charges. All are admitted; and the respondent accepts that he is guilty of professional misconduct.
- [2] One charge involves neglect in the conduct of a case in court. The other four arise from the respondent’s failure to manage his trust account consistently with legal and professional obligations. Importantly, there is no allegation that he dealt dishonestly with trust funds or that his misconduct reflects on his fitness to practise. The Legal Services Commissioner (“the Commissioner”) accepts that the respondent’s misconduct in respect of the trust account was caused by inadequate office procedures.

Birmingham Complaint

- [3] The first charge concerns a failure to act promptly on a client’s instructions to transfer money held in the trust account.
- [4] In May 2004, Mr Birmingham retained the respondent to hold \$1,000,000 in his trust account. The client was involved in a dispute with his previous legal advisers over \$200,000 claimed by them for professional fees.
- [5] The \$1,000,000 was transferred to the trust account in July 2004.
- [6] In December 2005, Mr Birmingham made a written demand for payment to him of \$10,000 out of the money held in trust on his behalf. That instruction was not complied with within 14 days of receipt of the demand, contrary to s.12(3) of the *Trust Accounts Act* 1973 (“the Act”). The money was not transferred until mid-January 2006.
- [7] On 21 December 2005, Mr Birmingham, in writing, insisted on the immediate transfer of all funds in the trust account in excess of the disputed \$200,000. That was not done until early February 2006.

Darvall Complaints

- [8] Charge 3 concerns payments out of the trust account without appropriate authority, contrary to s.8 of the *Act*.
- [9] In early 2003, the respondent received instructions from Mr Charles, a director of Kensea Pty Ltd (“Kensea”), and Mr Darvall, an “authorised representative” of that company, to act for it in connection with the sale of Kensea’s business.
- [10] In May 2003, the Australian Government Solicitor, representing the Child Support Registrar, informed the respondent of a court order restraining Mr Darvall and Kensea from dealing with Kensea’s business without the Registrar’s consent and that the Registrar had consented to sale of the business on the basis that the price was to be held in the respondent’s trust account until the Registrar agreed to distribution of the money.
- [11] A few days later, the Registrar consented to distributions to the Australian Taxation Office and to those of Kensea’s trade creditors named in a list. That list did not include the respondent.
- [12] In early June, Mr Darvall wrote to the respondent telling him that as “Kensea is under a Court order to only pay out the creditors listed on the letter...we will need a bill for your agreed costs so that I can get authority to pay.”
- [13] The respondent had previously acted for Kensea in other matters and was owed \$3,306.11 for professional services. On 6 June 2003, he transferred that sum to his general account for those services rendered. However, he did not have an authority to do so of the kind envisaged by s.8 of the *Act*.
- [14] The fourth charge relates to payment out of the trust account of moneys mentioned in a tax invoice issued by the respondent to Kensea. This included \$1,250 for his professional fees, \$825 for Counsel’s fees, and \$96.80 for outlays.
- [15] On 17 June 2003, the respondent withdrew the \$825 from his trust account, without authority to do so, and paid the barrister.
- [16] The fifth charge relates to the withdrawal on 20 June 2003 of \$1,375 from the trust account, which was paid to the general account for the respondent’s professional fees.
- [17] The \$3,306.11 and the \$825 have since been refunded to the trust account.

Competence

- [18] Another charge arises out of a complaint by Mr Dryland, who, in July 2004, retained the respondent to resist an application for an apprehended violence order.
- [19] Mr Dryland’s case involved a denial of the incident of violence alleged against him.

[20] During the hearing, the respondent, who acted as advocate, failed to put his client's case when cross-examining.

[21] The Court made an apprehended violence order against Mr Dryland.

[22] It is not alleged that there was a connection between a failure to comply with the rule of practice in *Browne v Dunn* (1893) 6 R 67 and the outcome of the hearing. Rather, the undisputed case is merely that there was a failure to cross-examine appropriately.

Professional Misconduct

[23] Considered in its entirety, the respondent's conduct rises to the level of professional misconduct.

Practice Management

[24] Mr Peter Lynch provides practice management advice to Queensland law firms. He has guided the respondent since December 2006. His consultancy services included recommendations on practice effectiveness and for managing client expectations.

[25] In Mr Lynch's assessment, the difficulties Mr Dwyer encountered when the misconduct took place were attributable to the solicitor's decision to act in a high proportion of legally assisted criminal and family matters where client communication and file management challenges are substantial.

[26] Mr Lynch has seen improvements in Mr Dwyer's practice management. Files are better organised. There is weekly trust balancing. Billing practices have improved.

[27] Mr Dwyer has agreed to cooperate with Mr Lynch in a coaching program, at the end of which a report is to be supplied to the Commissioner. This would involve a commitment from Mr Lynch of about 3-4 hours per month over six months, at an estimated cost of \$6,000-\$8,000.

[28] Mr Lynch has also given persuasive reasons for thinking that the program he proposes would, in this instance, be preferable to the Queensland Law Society Practice Management Course.

[29] The Commissioner submits that the Tribunal would consider it appropriate that the respondent engage Mr Lynch to provide the practice management services proposed. And Mr Lynch's evidence justifies that approach.

[30] The Commissioner also contends that while, ordinarily, a substantial fine would be appropriate for the kind of misconduct proved, in view of the expense the respondent will incur with Mr Lynch over the next six months, a pecuniary penalty is not warranted.

[31] The Commissioner proposes, the respondent accepts, and the Tribunal is persuaded that the following orders are appropriate:

The Respondent:

1. is publicly reprimanded;
2. is to engage Mr Peter Lynch to provide a six month practice management coaching program and thereafter to provide a report to the Legal Services Commissioner confirming the respondent's participation in the training required under that program; and
3. is to pay the applicant's costs fixed at \$2,500.