

In the Matter of Richard Frank Ebbott

Case Number: SCT/109
Date of Hearing: 4 September 2003
Appearing Before: Mr P Cooper (Presiding Member/Practitioner Member)
Mr M Conroy (Practitioner Member)
Ms E Jordan (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Fined \$25,000

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 acted for both the buyer and the seller in the conveyancing transactions particularised in the Schedule hereto in circumstances where, notwithstanding the interests of his client buyer ("the client") conflicted with the interests of the seller he:
 - (i) failed to obtain from the client a voluntary and informed consent to his acting and/or continuing to act in the transaction; and/or
 - (ii) failed to give undivided fidelity to the interests of the client; and/or
 - (iii) failed to disclose to the client the nature and implications of the conflict; and/or
 - (iv) failed to disclose to the client all matters known to him which were relevant to the client's decision to enter into and/or proceed with the transaction.

Particulars

- (a) During the period March 2001 to December 2001 the practitioner acted in the conveyancing transactions particularised in the Schedule annexed hereto.
- (b) In respect of each such transaction:
 - (i) the practitioner acted for both the buyer and the seller;
 - (ii) the buyer was referred to the practitioner by or on behalf of the marketing agent particularised in the Schedule.
- (c) Further, in respect of each such transaction:
 - (i) the practitioner received a fee for professional services of and incidental to his acting for each of the buyer and the seller in connection with the transaction;
 - (ii) upon settlement the practitioner paid to, or to the account of the marketing agent a substantial sum (as particularised in the Schedule) from the sale proceeds ("the marketing commission");
 - (iii) the marketing commission substantially exceeded the commission lawfully payable to a "real estate agent" pursuant to s70 of the *Auctioneers and Agents Act* 1971;
 - (iv) the claim by the marketing agent for payment of the marketing commission was not disclosed by the practitioner to the client at any time;
 - (v) the payment to the marketing agent of the marketing commission was not disclosed by the practitioner to the client at any time;
 - (vi) whereas the payment of the marketing commission was disclosed in the settlement statement produced for the seller upon settlement, such disclosure was omitted from the settlement statement produced for the client;and in respect of most such transactions:
 - (vii) the marketing commission was paid in addition to the commission payable upon settlement to the seller's real estate agent.
- (d) In respect of each such transaction the practitioner knew, or ought reasonably to have known each of the matters particularised in paragraphs (b) and (c) hereof, either at or about the time of receiving instructions to act for the client, or, in any event, at a time prior to settlement of the transaction.
- (e) In respect of each such transaction:
 - (i) the matters particularised in paragraphs (b) and (c) hereof, and each of them were matters material to the interests of the client;
 - (ii) the practitioner did not inform or otherwise disclose to the client the matters particularised in paragraphs (b) and (c) hereof, save and except that with respect to transactions no. 2, 14 and 15 the contract of sale disclosed that the practitioner acted for both the buyer and the seller.
 - (iii) the client did not provide a voluntary and informed consent to the practitioner acting or continuing to act for the client with respect to the transaction.
- (f) In respect of each such transaction, in breach of his duty as a solicitor, the practitioner:
 - (i) failed to obtain a voluntary and informed consent to his acting or continuing to act;

- (ii) failed to give undivided fidelity to the interests of the client;
- (iii) failed to disclose, or cause to be disclosed to the client, the matters particularised in paragraphs (b) and (c) hereof (save and except that with respect to transactions no. 2, 14 and 15 it was disclosed that the practitioner acted for the client and the seller);
- (iv) failed to advise or recommend to the client that the client obtain, prior to settlement, an independent valuation of the property the subject of the transaction;
- (v) acted for the client with respect to the transaction and permitted the client to effect settlement of the transaction, notwithstanding the matters referred to in paragraphs (i) to (iv) above, and each of them.

Schedule

| Transaction No. | Seller | Buyer | Property | Purchase Price | Settlement Date | Marketing Agent | Marketing Commission |
|-----------------|---------|-----------|---------------------------------------|----------------|------------------|-------------------|------------------------|
| 1. | ISCPL | NAK & LAK | Unit 14, Il Villagio, Sunnybank Hills | 265,000.00 | 20 April 2001 | VR&MGPL | 25,217.50 |
| 2. | ISCPL | CM & DM | Unit 23, Il Villagio, Sunnybank Hills | 265,000.00 | 20 April 2001 | VR&MGPL | 25,217.50 |
| 3. | ISCPL | PSK & LLK | Unit 32, Il Villagio, Sunnybank Hills | 272,500.00 | 9 May 2001 | VR&MGPL | 25,011.25 |
| 4. | ISCPL | DWL & SL | Unit 11, Il Villagio, Sunnybank Hills | 263,500.00 | 26 July 2001 | CC | 25,011.25 |
| 5. | ISCPL | EPB & PAB | Unit 10, Il Villagio, Sunnybank Hills | 265,000.00 | 4 September 2001 | VR&MGPL | 25,217.50 |
| 6. | ISCPL | CSK | Unit 5, Il Villagio, Sunnybank Hills | 272,500.00 | 6 September 2001 | NPSPL | 25,011.00 |
| 7. | ISCPL | PR & AWR | Unit 34, Il Villagio, Sunnybank Hills | 275,000.00 | 4 October 2001 | VR&MGPL | 24,942.50 |
| 8. | ISCPL | SRK | Unit 9, Il Villagio, Sunnybank Hills | 263,500.00 | 16 October 2001 | IPG | 27,500.00 |
| 9. | ISCPL | DR & JH | Unit 2, Il Villagio, Sunnybank Hills | 265,000.00 | 31 October 2001 | ISCPL obo VR&MGPL | 27,967.50 |
| 10. | GHPL | GDD & JAO | Lot 20 Gemview Place, Calamvale | 186,000.00 | 3 October 2001 | WESPL | 10,450.50 |
| 11. | GHPL | AGF & JVF | Lot 10 Gemview Place, Calamvale | 184,950.00 | 8 November 2001 | NPSPL | 30,222.50 |
| 12. | GHPL | NDG & SGG | Lot 8 Gemview Place, Calamvale | 184,950.00 | 20 November 2001 | NPSPL | 30,222.50 |
| 13. | CGPSPL | GS & SS | Unit 4, Uni Lodge, Rockhampton | 120,000.00 | 2 August 2001 | CG obo VR&MGPL | 30,050.00 |
| 14. | CGPSPL | GR | Unit 3, Uni Lodge, Rockhampton | 111,000.00 | 7 December 2001 | CG obo VR&MGPL | 26,050.00 or 28,655.00 |
| 15. | G&JREPL | DCM & IMM | Lot 12 Aspley Manor, Aspley | 150,000.00 | 20 December 2001 | BHPL | 19,800.00 |

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr R G Perrett, Solicitor of Messrs Clayton Utz Solicitors instructed by the Queensland Law Society Incorporated.
- (b) For the Practitioner:
Mr P E Smith of Counsel instructed by Messrs Gilshenan & Luton Solicitors

Findings and Orders

1. The Tribunal grants leave to the Queensland Law Society Incorporated to amend the amended Notice of Charge as follows:
 - (a) In charge (c)(iii) by deleting "s70" and substituting "s76";
 - (b) In charge (f)(iii) by deleting "13 and 14" and inserting "14 and 15".
2. The Tribunal finds all charges set out in the amended Notice of Charge dated 2 September 2003 as amended proved.
3. The Tribunal finds the charges amount to professional misconduct and that the practitioner is guilty of professional misconduct.
4. The Tribunal accepts the undertaking of the practitioner, given through his counsel, not to accept any fresh instructions to act for both parties in conveyancing matters.
5. The Tribunal further orders that the practitioner pay a penalty of \$25,000.00 to the Fund.
6. The Tribunal further orders that the practitioner pay the costs of the Queensland Law Society Incorporated incidental to these proceedings, but not the costs of the application for the adjournment, including the costs of the recorder and the Clerk to the Tribunal, such costs to be agreed and failing agreement, to be assessed by Monsour Legal Costs Pty Ltd.
7. The Tribunal further orders in relation to the penalty that it be paid by equal calendar monthly instalments, commencing one month from today. If any instalment is not paid, the balance then outstanding becomes immediately due and payable.
8. In relation to payment of costs, the Tribunal further orders that they be paid over six months by equal calendar monthly instalments, the first to commence 30 days after determination of the costs.

Reasons

The Tribunal notes that the practitioner has pleaded guilty to the charge.

The Tribunal accepts in the circumstances of this case the submission by the Society regarding the duty to advise or recommend that the client obtain an independent valuation. The practitioner did not concede this aspect of the charge.

The practitioner has tabled through his counsel an undertaking not to accept any fresh instructions to act for both parties in conveyancing matters, which the Tribunal accepts.

The Tribunal hopes that the findings in this case are noted by the profession at large of the risks involved when practitioners act for both parties in a transaction.

The charges relate to the practitioner acting for both parties in 15 transactions where the practitioner was, as a result of his conduct, in breach of his duty as a solicitor.

The Society has conceded that in some of the transactions, the practitioner was acting for both parties.

In arriving at his decision, the Tribunal has taken into account the following:

- (a) The practitioner's plea of guilty;
- (b) The practitioner's remorse;
- (c) The references tabled by the practitioner;
- (d) That there is no evidence of any complaint by any buyer;
- (e) That the practitioner has altered the method of his practice in conveyancing transactions; and
- (f) The undertaking given by the practitioner not to accept fresh instructions to act for both parties in conveyancing matters.