In the Matter of David Alan Evans

Case Number: SCT/78
Date of Hearing: 25 July 2003
Appearing Before: Mr P Short (Presiding Member/Practitioner Member)
Mr M Byrom (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J W Broadley (Clerk)

Penalty: Fined $7,500

Charges

The Council of the Queensland Law Society Incorporated requires the Practitioner to answer the following charges:

MH

1. Between in or about early May 1999 and October 1999 when acting for RP in a loan transaction with RSPL, the solicitor preferred the interests of another client, namely MH, to those of RP.

Particulars

(a) At all material times, the solicitor was employed by WPS (the Firm) of 26 Orchid Avenue, Surfers Paradise, Queensland.

(b) On or about 17 September 1997, the Firm, acting on behalf of various of its client lenders, approved an application from RSPL for an advance by those client lenders to RSPL of $264,000.00. The advance was made through the Firm's nominee mortgage company WNPL.

(c) Pursuant to that approval, of the total loan funds approved of $264,000.00, the sum of $230,000.00 was drawn down and advanced to RSPL in four tranches on 30 October 1997, 16 November 1998, 6 January 1999 and 12 February 1999.

(d) In or about early May 1999 one of the said clients lenders MH contacted the solicitor seeking redemption of his loan contribution of $10,000.00.

(e) Around the same time in or around the first week of May 1999 the solicitor contacted one of the Firm's clients, one RP, to ascertain whether he was interested in advancing $10,000.00 to RSPL to replace MH's existing contribution of $10,000.00.

(f) By letter dated 11 May 1999 the solicitor forwarded to RP a Mortgage Investment Summary of the existing advance of $264,000.00 to RSPL and an Investment Authority for execution by RP to be executed by him if he was interested in making the $10,000.00 advance. The solicitor advised RP in that letter that he presently had the sum of $16,411.84 in his cash management account with the Firm representing accumulated loan repayments and accrued interest.

(g) As at 11 May 1999 RSPL was in default of payment of interest in the sum of $2,970.83 due and owing but not paid on 30 April 1999 under the said advance which the solicitor knew. That same day 11 May 1999 the solicitor facilitated the issue and service upon RSPL of a Notice of Exercise of Power of Sale and Demand for Possession Notice pursuant to s84 of the *Property Law Act* 1974.

(h) At the time of writing the letter to RP in paragraph 1(f) the solicitor was aware that RSPL was in default in payment of interest under the said advance as set out in paragraph 1(g) and that the said Notice of Exercise of Power of Sale and Demand for Possession Notice had been sent or was to be sent to RSPL that day.

(i) Notwithstanding that knowledge the solicitor failed to notify RP of the said default in his letter to RP of 11 May 1999.

(j) The abovementioned Mortgage Investment Authority forwarded to RP on 11 May 1999 was signed by RP and returned to the solicitor by facsimile transmission the following day 12 May 1999.

(k) On or about 17 May 1999 the solicitor facilitated the transfer of $10,000.00 held in the Firm's general trust bank account to the credit of an individual trust ledger account of RP to the Firm's advance trust ledger account and on that same day the said sum of $10,000.00 was paid to the Firm's client lender MH by way of return of his investment.

(l) As at the date of receipt of the signed Mortgage Investment Authority from RP on 12 May 1999 and the transfer in payment of the said sum of $10,000.00 to MH on 17 May 1999, RSPL was still in default in payment of the interest the subject of the abovementioned Notice pursuant to s84 of the *Property Law Act* 1974 which the solicitor well knew. Notwithstanding that knowledge, the solicitor failed to disclose to RP RSPL's default before facilitating the payment of RP monies to MH.

(m) By virtue of the conduct referred to in paragraphs 1(i), 1(k) and 1(l) the Solicitor preferred the interests of MH to the interests of RP.

(n) In the result, the default of RSPL continued and by contract of sale dated 28 April 2001 the property securing the advance was sold and produced a net pro rata distribution to the Firm's client lenders of $57,115.77 representing a loss of $172,884.23 on the initial advance of $230,000.00.

RP

2. Between in or about early May 1999 and October 1999 when acting for RP in a loan transaction with RSPL, the solicitor preferred the interests of other clients to those of RP in failing to make full and frank disclosure to his client RP.

Particulars

(a) At all material times, the solicitor was employed by WPS (the Firm) of 26 Orchid Avenue, Surfers Paradise, Queensland.

(b) On or about 17 September 1997 the Firm, acting on behalf of various of its client lenders, approved an application from RSPL for an advance by those client lenders to RSPL of $264,000.00. The advance was made through the Firm's nominee mortgage company, WNPL.

(c) Pursuant to that approval, of the total loan funds approved of $264,000.00, the sum of $230,000.00 was drawn down and advanced to RSPL in four tranches on 30 October 1997, 16 November 1998, 6 January 1999 and 12 February 1999.

(d) In or about early May 1999 one of the said client lenders MH contacted the solicitor seeking redemption of his loan contribution of $10,000.00.

(e) Around the same time in or around the first week of May 1999 the solicitor contacted one of the Firm's clients, one RP, to ascertain whether he was interested in advancing $10,000.00 to RSPL to replace MH's existing contribution of $10,000.00.

(f) By letter dated 11 May 1999 the solicitor forwarded to RP a Mortgage Investment Summary of the existing advance of $264,000.00 to RSPL and an Investment Authority for execution by RP to be executed by him if he was interested in making the $10,000.00 advance. The solicitor advised RP in that letter that he presently had the sum of $16,411.84 in his cash management account with the Firm representing accumulated load repayments and accrued interest.

(g) As at 11 May 1999 RSPL was in default in payment of interest in the sum of $2,970.83 due and owing but not paid on 30 April 1999 under the said advance which the solicitor knew. That same day 11 May 1999 the solicitor facilitated the issue and service upon RSPL of a Notice of Exercise of Power of Sale and Demand for Possession Notice pursuant to s84 of the *Property Law Act* 1974.

(h) At the time of writing the letter to RP in paragraph 2(f) the solicitor was aware that RSPL was in default in payment of interest under the said advance as set out in paragraph 2(g) and that the said Notice of Exercise of Power of Sale and Demand for Possession Notice had been sent or was to be sent to RSPL that day.

(i) Notwithstanding that knowledge the solicitor failed to notify RP of the said default in his letter to RP of 11 May 1999.

(j) The abovementioned Mortgage Investment Authority forwarded to RP on 11 May 1999 was signed by RP and returned to the solicitor by facsimile transmission the following day 12 May 1999.

(k) On or about 17 May 1999 the solicitor facilitated the transfer of $10,000.00 held in the Firm's general trust bank account to the credit of an individual trust ledger account of RP to the Firm's advance trust ledger account and on that same day the said sum of $10,000.00 was paid to the Firm's client lender MH by way of return of his investment.

(l) As at the date of receipt of the signed Mortgage Investment Authority from RP on 12 May 1999 and the transfer in payment of the said sum of $10,000.00 to MH on 17 May 1999, RSPL was still in default in payment of the interest the subject of the abovementioned Notice pursuant to s84 of the *Property Law Act* 1974 which the solicitor well knew. Notwithstanding that knowledge, the solicitor failed to disclose to RP RSPL's default before facilitating the payment of RP monies to MH.

(m) By letter dated 20 May 1999 the Solicitor advised each of the other client lenders to RSPL of the default by RSPL in payment of the said interest the subject of the abovementioned Notice but did not advise the client RP of such default until approximately five months later by letter dated 11 October 1999.

(n) By virtue of the conduct referred to in paragraphs 2(i) and 2(l) the Solicitor preferred the interests of MH to the interests of RP.

(o) By virtue of the conduct referred to in paragraph 2(m) the Solicitor preferred the interests of all lender clients except RP to the interests of RP.

(p) In the result, the default of RSPL continued and by contract of sale dated 28 April 2001 the property securing the advance was sold and produced a net pro rate distribution to the Firm's client lenders of $57,115.77 representing a loss of $172,884.23 on the initial advance of $230,000.00.

Appearances

(a) For the Council of the Queensland Law Society Incorporated:
Mr P Mylne of Counsel instructed by the Queensland Law Society Incorporated

(b) For the Practitioner:
Mr R V Hanson QC instructed by Gilshenan & Luton Solicitors

Findings and Orders

1. The Practitioner having pleaded guilty to two charges arising from the replacement of a member in a syndicated loan which took place in May 1999, at a time when the evidence shows the loan was in default, the Tribunal finds that the charges are proved and amount to professional misconduct. The Tribunal finds the Practitioner guilty of professional misconduct.

2. The Tribunal orders that the Practitioner pay a penalty in the amount of $7,500.00 to the Fund.

3. The Tribunal further orders that the Practitioner attend and satisfactorily complete the next available module called "Professional Standards" in the Practice Management course.

4. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated of an incidental to today's hearing, including the costs of the recorder and the Clerk, and also the costs reserved on two directions hearings on 22 October and 3 December 2002, such costs to be agreed, and if not agreed, to be assessed by Monsour Legal Costs Pty Ltd. The Tribunal makes no order as to costs in relation to the hearing on 20 August 2002.

Reasons

1. The Practitioner faces two professional conduct charges arising out of the substitution of one client (RP) for another client (MH) in a syndicated loan that was then in default. The amount involved was $10,000 in a syndicated loan of $264,000. The Practitioner did not tell the incoming investor that the borrower missed an interest payment 11 days previously and did not tell the incoming investor that he had issued a s84 Notice (under the *Property Law Act*) saying the mortgagee proposed to exercise its powers relying on that default.

2. The charge is that he thus preferred one client's interest to the other. He did not have any personal interest in the syndicated loan and was an employee of the firm that had been retained. The charge is he failed to treat clients equally. He is also charged with a similar charge flowing from the fact that from May until about October he told most syndicate members of the situation but did not tell RP the full story.

3. In his Affidavit, the Practitioner swears, "I accept the two charges against me."

4. A practitioner has a fiduciary duty not to act in circumstances where there is a conflict between his duty to different clients. A practitioner cannot serve "two masters" at the same time in the same transaction unless he has the informed consent of both to the double employment. Whilst every member of a lending syndicate may not need or have separate legal representation, they are entitled and expect to be treated fairly and equally.

5. A practitioner, no less in lending syndicates as in other situations, has an obligation to avoid a situation where his duty to one client cannot be fulfilled without compromising his duty to another. Put another way, a practitioner when acting for two or more lenders in a syndicate must act equally where they have similar rights and cannot prefer the interest of one to the interest of another.

6. In this syndicate, one investment was to be paid out, but at the time the borrower was in default. The Practitioner says he regarded it as a technical or minor default that would not result in a financial loss, and he gives his reasons for this in paragraph 11 of his affidavit.

7. In lending transactions where the documents contain so-called "boiler plate" default clauses, technical defaults are not an uncommon event and borrowers can be in technical default almost all the time. The failure to make an interest payment when due is not likely to be a technical default and the Practitioner, by issuing the s84 Notice, is taking a serious step. He must have understood this. The Practitioner did not, however, share the fact default had occurred with the incoming investor RP, and thus he did not give information that would allow RP (his client) to decide if he was prepared to take the risk. This was a serious breach of his duty. The obligation of a practitioner is to disclose all the facts to a client and get informed consent to a course of action.

8. The Practitioner was an employee and relatively inexperienced (with four years' experience) when this transaction took place in 1999. He clearly did not treat the two clients equally and did not protect the interest of the client RP, when he allowed him to invest in a defaulting borrowing, while using RP's contribution to redeem another client's (MH's) investment.

9. The second charge arises out of the same transaction, where the Practitioner advised other members of the syndicate on 20 May that default had occurred but did not tell RP until 11 October. Even when he did tell RP, he misled him by saying the loan had been in default "for a little while". He is not charged with misleading his client, but with preferring the interest of "other" (unnamed) clients to the interest of RP. It is difficult to imagine that much flowed from this breach of duty, as RP's investment and remedies were syndicated and he did not have much option but to go along with the enforcement. However, he was entitled to the information that others had received.

10. He admits these errors and accepts that he has breached his duty by thus preferring the interest of one client to another.

11. We find the Practitioner is guilty of professional misconduct and have made an order the practitioner pay a penalty to the fund, attend and satisfactorily complete a training program and pay costs. We believe this is the appropriate level of punishment. There was no systemic breach of duty by the Practitioner and there was no suggestion that he was motivated or induced to act as he did by personal gain or advantage. His situation is not similar to the cases of *Carberry* or *Boyce*, with the two penalties in those cases that have been urged on us by Counsel for the Law Society. There is no personal interest here nor a systemic breach or misconduct. However, the situation is not as simple as case SCT/36, with the penalty in that case urged on us by Counsel for the Practitioner. We think that a fine of $1,00 is too low for the facts here.

12. The Practitioner here seems to have simply been unaware or not mindful at the time that his obligations were of a fiduciary nature and not just a matter of commercial decision. He succumbed to the pressure that he should act just as a businessman or banker, rather than as a practitioner.

13. In setting this level of penalty we have taken into consideration the possibility that his assessment was that the default was a technical default. We have also considered the isolated nature of the offence, the relative inexperience of the Practitioner, the apparent contrition of the Practitioner and early plea and cooperation with the Law Society. The Practitioner will also have to pay a considerable cost award.