

In the Matter of Practitioner X

Case No. SCT/53
Date of Hearing: 9 October 2001
Appearing Before: Ms C C Endicott (Chairperson)
Mr P Short
Ms I Vallin-Thorpe (Lay Member)
Penalty Fined \$2,000.00

Charges

1. That the practitioner inserted a date of execution on a form of transfer which he knew to be false.

Particulars

- (a) On or about 24 August 1995, the practitioner drew and tendered to CJN a form of transfer to JGB and MB of a home unit at Surfers Paradise.
- (b) CJN executed the transfer as transferor in or about August 1995 and the practitioner witnessed CJN's execution of the transfer.
- (c) On or about 30 November 1995, the practitioner signed the form of transfer as witness to execution by CJN and inserted in the document as the date of execution by CJN 30 November 1995.
2. The practitioner submitted the transfer for stamping in or about December 1995 knowing that:
- (i) it had been executed by CJN in or about August 1995;
- (ii) on its face, it appeared to have been executed on 30 November 1995;
- (iii) penalty stamp duty was likely to be assessed if the Stamps Office were aware that the transfer had been executed in or about August 1995;
- (iv) by failing to advise the Stamps Office of the true date of execution, an assessment of penalty stamp duty would be avoided.
3. In or about January 1997, the practitioner accepted payment from his client NI Pty Ltd of the sum of \$56,000.00 in respect of fees purportedly paid for the practitioner's acting as a director of NI Pty Ltd during the period September 1995 to January 1997 in circumstances in which he was not entitled to such payment.

Particulars

- (a) As at January 1997, the practitioner was indebted to the Australian Taxation Office in the sum of \$150,000.00.

- (b) In or about January 1997, NI Pty Ltd paid the practitioner's said debt to the Australian Taxation Office.

- (c) NI Pty Ltd's payment was made in respect of the following:

Balance outstanding costs and outlays claimed by the practitioner	\$47,285.14
Directors fees September 1995 – January 1997 calculated at \$800.00 per week	\$56,000.00
Advance payment to the practitioner pursuant to retainer agreement with NI Pty Ltd	\$46,714.86

\$150,000.00

- (d) The practitioner was not appointed as a director of NI Pty Ltd until on or about 15 January 1997.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr B Bartley, solicitor of Brian Bartley & Associates
- (b) For the practitioner:
Mr ME Johnson of counsel instructed by Winchester Young & Maddern, solicitors.
- (c) For the complainant:
Ms RV appeared in person

Findings and Orders

The tribunal found the facts as alleged in the charges 1, 2, and 3, and which were admitted by the practitioner, to be proved.

The tribunal found that the practitioner has been guilty of professional misconduct on the charges as admitted.

The tribunal ordered that the practitioner pay a penalty of \$750.00 for each of charges 1 and 2, and a penalty of \$500.00 for charge 3, totalling in all \$2,000.00. The tribunal ordered that the financial penalty be paid within one month of the date of the order.

The tribunal further ordered that the practitioner pay the costs of the Queensland Law Society Incorporated, including the costs of the Recorder and of the Clerk, such costs to be agreed and, failing agreement, as assessed by Monsour Legal Costs Pty Ltd.

The tribunal was satisfied that it did have the basis to entertain the compensation application by Ms RV following the hearing.

The Solicitors Complaints Tribunal

The tribunal did not accept the arguments urged by the practitioner's counsel that 28 days notice of the application was required by s6(G).

The tribunal was not, however, satisfied that the applicant had suffered any pecuniary loss because of the practitioner's proven misconduct.

The tribunal therefore dismissed the application for compensation and made no award of costs in respect of the application.

Reasons

The solicitor did not "contest the substance" of three charges relating to his professional conduct and was found guilty and fined on each charge. Rather than holding up proceedings, the tribunal members agreed to impose the penalty and deliver these reasons later.

All three charges related to the solicitor's dealings with a long-standing client CJN for whom the solicitor was both legal adviser and general agent appointed under an Enduring Power of Attorney.

The first 2 charges arise out of the dating of a conveyance of a home unit at Surfers Paradise transferred in 1995 from CJN to his friends JGB and MB. CJN had reached a compromise of a family dispute with his daughter, the complainant to the law society, and immediately after transferred the unit to JGB and MB, and then went on an overseas trip with JGB and MB. The solicitor was present and thus witnessed the execution of CJN of the conveyance document but did not then prepare the declaration necessary for JGB and MB to receive a concessional rate of stamp duty. As they were out of the country he waited for their return and in November had them sign the declaration and then signed the conveyance as witness and dated the document not when it was signed in August but when he signed as witness in November. That was wrong but there is no suggestion it was done to create rights or alter or affect the rights of others or to create a fraudulent or false consequence (such as to create a fraudulent preference). Comparisons with documents backdated to avoid rights on bankruptcy are extreme and there is no suggestion of fraud in this case. The only apparent consequence of inserting the date of signing as witness rather than the date of the document's creation by execution is that a late stamping penalty of about \$50 is avoided. The late penalty is frequently waived by the Office of State Revenue when a satisfactory explanation is given, such as a party being out

of the country. Were it not for a foolish answer to questions in other proceedings and correspondence where the solicitor says that the avoidance of the penalty was his purpose, the error in dates could be regarded as rather trivial (see page 38 of the evidence before Justice Muir). The tribunal members believe the fine imposed is the appropriate penalty.

As to the third charge, the solicitor did not "contest the substance of the charges". The solicitor by pleading wanted the matter disposed of at the hearing and by agreement there was no positive assertion of dishonesty. It is important to recall that the solicitor is charged under charge 3 with receiving money where he is not entitled to receive it, and by his plea he accepts the substance of the charge. He is not charged with acting in a position of conflict or overcharging, or with any other matter that is referred to in the voluminous and largely irrelevant material in the affidavits. We must confine ourselves to the charge before us and resist the temptation to surmise what might have been, and in this respect, the evidence of the accountant and director of NI Pty Ltd, the company that made the payment in question, is firstly that the company had an expectation to pay the solicitor for the work done, secondly that the work was done and done satisfactorily, thirdly that the amount of the payments was discussed and agreed, and finally there has been no assertion that there is an overpayment. Of course, we are aware that CJN is suffering from an illness and is not in a position to complain and his agent is the solicitor. However the accountant and the Public Trustee have been made aware of the extent of the fee and it seems that the issue is the capacity in which the solicitor received the fee not the quantum of the fee. If he was paid partly as solicitor partly as Attorney under Power, or partly as a friend and business colleague of the accountant and CJN that does not seem to sound as professional misconduct if the payment is lawful and accepted by the parties as fair and reasonable. Even if some of the payment was made in advance, that would not be a matter of professional misconduct if the payment is lawful and fair. Many professionals and tradespeople insist on payment in advance. Indeed in some industries and professions that is the norm, and there is no basis for a solicitor to be treated differently.

Nevertheless, the tribunal accepted the plea of guilty to charge 3 in that the tribunal accepted that the solicitor had received money in his role of a company director when he was not entitled to receive it. However, the tribunal was of the view that charge 3 should only attract a nominal fine.