

In the Matter of Stephen Paul Lather

Case Number: SCT/112
Date of Hearing: 23 October 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: Stuck off

Charges

1. That the practitioner acted in circumstances of conflict between his own interests and those of his wife and the interests of the estate of SGT of which the practitioner was a trustee and executor.

Particulars

- (a) The practitioner and PBO were at all material times the joint trustees and executors appointed pursuant to Will dated 30 April 1992 ("the Will") of the estate of SGT ("the estate") who died on 20 August 1997.
- (b) The Will provided for:
 - (i) a number of specific pecuniary legacies;
 - (ii) the residue of the estate to be applied as to 50% to each of SAPT and RNLI.
- (c) The pecuniary legacies were paid during 1999;
- (d) As at 1 September 2001, the principal assets of the estate comprised:
 - (i) a house situated at 27 Warren Road, Reigate, Surrey, UK which had been subject to a life interest which terminated on 31 January 2001;
 - (ii) a home unit which had been occupied by SGT prior to her death;
 - (iii) a debt owed to the estate in the sum of \$20,000.00 (together with interest thereon) by AJP pursuant to a loan made by the practitioner in his capacity as a trustee of the estate on or about 14 May 2001;
 - (iv) the sum of \$565,921.75 held by the practitioner in his trust account on behalf of the estate;
 - (v) various shares.
- (e) During the period 12 September 2001 to 28 February 2002, the practitioner advanced to MAM from the monies held in his trust account on behalf of the estate and from the proceeds of sale of the estate's shares (amounting to \$309,687.11) sums totaling \$768,550.00 to fund the purchase by MAM from EMC of the freehold of the ERMC for the sum of \$1,150,000.00 and the purchase by MAM of debts (amounting to \$2,751,079.97) owed by EMC to Westpac Banking Corporation for the sum of \$100,000.00.
- (f) In consideration of such payments:
 - (i) MAM issued to the practitioner as trustee 10 of 20 \$1.00 "A" class shares, 350 "B" class redeemable preference shares and 300 "C" class redeemable preference shares, each "B" and "C" class share having a face value and redeemable value of \$1,000.00 (total \$650,000.00) ranking first in relation to repayment of capital on a winding up of MAM and being entitled to dividends at the rate of 10% per annum on the face value of the shares;
 - (ii) MAM assumed an unsecured indebtedness to the estate for the balance funds advanced.
- (g) The practitioner had a personal interest in the transaction referred to in subparagraphs (e) and (f) in that:
 - (i) on or about 18 February 2002, MAM leased the freehold of the club to EMC;
 - (ii) on or about 18 February 2002, EMC entered into a Club Management Services Agreement with MPL pursuant to which MPL was entitled to be paid remuneration at the rate of \$120,000.00 per annum, increasing by 5% annually over the 10 year term of the agreement;
 - (iii) the practitioner was a director of and 50% shareholder in MPL.
 - (iv) the practitioner acted for and charged professional costs and outlays to MAM in relation to the transaction amounting to \$26,900.00.
- (h) The practitioner's wife had a personal interest in the transaction referred to in subparagraphs (e) and (f) in that she was issued 10 "B" class redeemable preference shares having a face value and redeemable value of \$1,000.00 each;

- (i) By agreement dated 24 December 2002, the practitioner (purporting to act as sole trustee of the estate) accepted the surrender of the "B" class and "C" class redeemable preference shares in consideration of payments by MAM of \$300,000.00 and \$360,000.00 respectively together with interest at 8% per annum on the sum of \$360,000.00 from 28 February 2002 payable by instalments as follows:

24 December 2002	\$230,000.00
31 March 2003	\$10,000.00
30 April 2003	\$10,000.00
31 August 2003	balance and interest

- (j) MAM has made the following payments:

23 January 2003	\$230,000.00
1 April 2003	\$10,000.00
1 May 2003	\$20,000.00

but the balance of \$410,000.00 remains outstanding and MAM proposes to defer repayment until 31 August 2004.

2. The payments made by the practitioner to MAM referred to in paragraph 1 hereof were made in breach of s8(1) of the *Trust Accounts Act* because:

Particulars

- (a) the Will did not authorise such investment of estate monies;
- (b) the practitioner and PBO were appointed to act jointly as trustees and executors of the estate, but PBO did not authorise the payments.
3. The practitioner failed to maintain reasonable standards of competence and diligence in relation to the transactions referred to in paragraph 1 hereof in that:

Particulars

- (a) the practitioner failed to document the estate's interest as beneficiary of the trust on which the practitioner held the MAM shares referred to in subparagraph 1(f)(i) hereof;
- (b) the practitioner failed to document the indebtedness of MAM to the estate referred to in subparagraph 1(f)(ii) hereof; and
- (c) the practitioner advanced the estate's funds to MAM without the knowledge or approval of the residual beneficiaries of the estate.
4. The practitioner dishonestly paid to himself without authority sums totaling \$179,100.00 purportedly for executor's and trustee fees in relation to the estate.

Particulars

- (a) In April 1998, the practitioner sought counsel's advice as to *inter alia*, his entitlement as co-executor of the estate to charge a commission as executor in circumstances in which the practitioner was charging professional costs to the estate in respect of the services provided by him as a solicitor.
- (b) By memorandum of advice dated 29 April 1998, counsel advised the practitioner to the effect that it was "difficult to perceive a Court allowing the practitioner a commission which would entitle him to a greater fee than that to which he is entitled pursuant to the charging clause contained in the Will as contemplated by the Testatrix" and that accordingly "there would be no advantage in the practitioner applying to obtain an award of commission as opposed to charging the estate for work performed by his firm acting in the administration of the estate".
- (c) Notwithstanding counsel's advice, the practitioner paid to himself the following sums purportedly by way of executor and trustee fees:

19 May 2000	\$25,000.00
10 October 2000	20,000.00
7 March 2001	50,000.00
2 May 2001	20,000.00
12 December 2001	25,000.00
21 December 2001	6,000.00
21 January 2002	5,500.00
1 March 2002	17,600.00
24 May 2002	10,000.00
Total	\$179,100.00

- (d) The practitioner made such payments to himself without:
- (i) the knowledge or approval of his co-executor, PBO;
- (ii) the knowledge or approval of the residual beneficiaries of the estate;
- (iii) making application pursuant to s68 of the *Succession Act* 1981.
- (e) In addition to such fees, the practitioner charged professional costs (including sundries) to the estate during the period September 1997 to August 2002 amounting to \$62,226.00.

5. The practitioner dishonestly and in breach of s8(1) of the *Trust Accounts Act* used funds amounting to \$80,698.28 held by him as trustee and executor of the estate for the purpose of making an unsecured loan to a syndicate of investors or to companies associated with them in circumstances in which the practitioner held a 25% interest in the syndicate and held or was intended to hold a 25% interest in those companies.

Particulars

- (a) On or about 23 November 2001 or 26 November 2001, APL contracted to purchase from the receivers of a private mortgage investment scheme controlled by LNPL, the EH property situated at 151 Flinders Street, Townsville for the sum of \$965,000.00 ("the APL contract");
- (b) The APL contract was entered into by APL as nominee for BQPL;
- (c) Pursuant to the APL contract, the sum of \$50,000.00 was payable by APL forthwith by way of deposit;
- (d) On or about 23 November 2001, the practitioner paid the sum of \$50,000.00 to the vendor from funds held by him on behalf of the estate by way of payment of the deposit;
- (e) On or about 30 November 2001, the practitioner paid the further sum of \$25,000.00 from funds held on behalf of the estate to BQPL to be applied in payment of expenses related to the purchase by BQPL of the EH;
- (f) The payments referred to in subparagraphs (d) and (e) hereof were made by way of unsecured loans to BQPL and were made on the basis that those monies would be repaid on settlement of the purchase of the EH;
- (g) The payments referred to in subparagraphs (d) and (e) hereof were made by the practitioner in the expectation that he would hold 25% of the shares in BQPL;
- (h) At some time prior to 13 February 2002, it was agreed by BQPL that the purchase of the EH would proceed in the name of SQPL as purchaser in lieu of BQPL;
- (i) On or about 13 February 2002, the practitioner paid the further sum of \$5,000.00 held on behalf of the estate to MFS by way of a fee in respect of a finance application made by SQPL in connection with the purchase of the EH;
- (j) The payment of the sum of \$5,000.00 referred to in subparagraph (i) hereof was made by the practitioner in the expectation that he would hold 25% of the shares in SQPL;
- (k) On or about 15 January 2002, the practitioner paid to himself from funds held on behalf of the estate the sum of \$698.28 by way of reimbursement of travel and other expenses incurred by him in connection with the purchase of the EH;
- (l) The payments referred to in subparagraphs (d), (e), (i) and (k) hereof were made by the practitioner without the knowledge or authority of PBO;
- (m) The practitioner made the following further payments from sums held on behalf of the estate to EPL by way of fees in respect of application for finance in connection with the purchase of the EH:
- | | |
|------------------|-------------|
| 13 November 2001 | \$10,000.00 |
| 14 February 2002 | \$5,000.00 |
- (n) The agreement referred to in subparagraph 1(i) hereof provided for payment by MAM of the sum of \$125,812.50 in respect of the funds advanced by the practitioner in relation to the EH by instalments as follows:
- | | |
|----------------|----------------------|
| 25 May 2003 | \$20,000.00 |
| 25 June 2003 | \$20,000.00 |
| 25 July 2003 | \$20,000.00 |
| 31 August 2003 | balance and interest |
- (o) MAM has made the following payments:
- | | |
|--------------|-------------|
| 5 June 2003 | \$14,000.00 |
| 17 June 2003 | \$6,000.00 |
| 1 July 2003 | \$10,000.00 |
- but the balance of \$50,000 due to the estate remains outstanding and MAM proposes to defer repayment until 31 August 2004.

6. The practitioner acted in circumstances of conflict between the interests of his client, the BT of which the practitioner was the trustee and the interests of his wife JPL and preferred his wife's interests to those of his client.

Particulars

- (a) As at October 2001, there was owing to the BT by the practitioner's wife JPL, the sum of \$25,000.00 secured by a registered mortgage over the property at 50 Ainsley Avenue, Ashmore, being the home occupied by the practitioner and his wife;
- (b) In or about October 2001, the property at 50 Ainsley Avenue, Ashmore was sold and thereafter the practitioner took no steps to obtain repayment of the debt to the BT or to obtain security therefor.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr B Bartley, solicitor of Messrs Brian Bartley & Associates Solicitors
- (b) For the Practitioner:
Mr B G Cronin of Counsel

Findings and Orders

1. The Tribunal grants leave to the Society to file an amended Notice of Charge dated 23 October 2003.
2. The Tribunal orders that the text on the final page of the affidavit of the practitioner sworn 22 October 2003 following the words "general comments" be struck out and those words so struck out not be published.
3. The Tribunal finds the Charges as amended Numbered 1 to 5 proved and charge 6 not proved.
4. The Tribunal finds that the charges as proved amount to professional misconduct and that the Practitioner is guilty of professional misconduct.
5. The Tribunal orders that the Practitioner be struck off the Roll of Solicitors of the Supreme Court of Queensland.
6. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated and incidental to these proceedings, including the costs of the recorder and the Clerk of the Tribunal, such costs to be agreed and, failing agreement, to be assessed by Monsour Legal Costs Pty Ltd.

Reasons

Charges 1 to 3 and 5 relate to the practitioner's dealings with the estate assets of the Estate of SGT and the investments made by the practitioner on behalf of that estate.

The practitioner was a co-executor with PBO. The practitioner unilaterally made investment decisions without authority and without consulting his co-executor in circumstances when he and his co-executor should jointly have authorised the investment on behalf of the estate.

There was no discussion with the residual beneficiaries as to their wishes, nor was there authorisation obtained to undertake the investment or transactions. The transactions show a conflict between the interests of the practitioner or his wife, as opposed to the interests of the estate of which he was a Trustee.

In respect of charge 4, we have had regard to the particulars and the decision of Judge Noud, and have also taken into account *Re Gosch* [1982] 1 QB at page 105. We are satisfied that the practitioner's conduct in all the circumstances amounts to dishonesty in paying himself executorial fees amounting to \$179,100 over a period of two years commencing on 19 May 2000 to 24 May 2002.

This finding is reinforced by the reason of the practitioner not consulting with his co-trustee and obtaining his consent, nor consulting with residuary beneficiaries in seeking their agreement, which would have been required in the absence of his obtaining approval from the Court for his commission.

The practitioner elected to file a late affidavit which the Tribunal received into evidence. No great weight may be attached to this affidavit, as it was not tested under cross-examination in circumstances where the Queensland Law Society have indicated they required to cross-examine the practitioner.

Counsel for the practitioner clearly indicated that the practitioner would not attend today, nor any subsequent day, if an adjournment was granted for this purpose.

On all the evidence in respect of charges 1 to 5, we are satisfied that the necessary standard of proof under the *Briggishaw* test has been discharged by the Queensland Law Society.

The evidence shows that the practitioner appears to have acted in a cavalier fashion, showing scant regard for his clients' interests, and has treated his clients' funds as though they were his own personal funds.

The Queensland Law Society submitted that the correct penalty was striking-off, and Counsel for the practitioner did not oppose this.