

## In the Matter of Joseph Gerald Lavery

Case No: SCT/50  
Date of Findings: 23 August 2001  
Appearing Before: Ms C C Endicott (Chairperson)  
Mr P L Cooper  
Ms E Jordan (Lay Member).  
Penalty: Struck Off

### Charges

1. (Deleted).
2. In the alternative to charge no. 1, that the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, wrongfully converted or misappropriated trust moneys amounting to the sum of \$20,778.90, the property of the Estate of JML (deceased), by paying the said sum from his trust account and applying the same to his own use and benefit, in circumstances where the practitioner had no lawful entitlement to the same.

### Particulars

- (a) During the period 12 April 2000 to 11 August 2000, the practitioner paid trust moneys in the sum of \$20,778.90 from his trust account as particularised in Schedule B to this Amended Notice of Charge.
  - (b) At all material times the practitioner acted for the executrices of the Estate of JML deceased.
  - (c) Subsequent to the making of the said payments, the practitioner has informed the Society that each of the said payments as particularised related to the matter of the Estate of Lang.
  - (d) Each of the said payments was made without the knowledge, authority or consent of the client executrices, and in circumstances where the practitioner had no other lawful entitlement to the said moneys.
  - (e) Trust moneys in the sum of \$20,778.90 were thereby intermingled by the practitioner with his own moneys or applied by the practitioner to his own use and benefit. The trust deficiency has not been restored.
3. (Deleted).
  4. (Deleted).
  5. That the practitioner is guilty of professional misconduct

or unprofessional conduct or practice in that he, being a solicitor and trustee of property did, during the period January 1999–August 2000, in the various respects particularised hereunder, engage in breaches of the *Trust Accounts Act 1973*, *Trust Accounts Regulations 1973* and/or the *Trust Accounts Regulation 1999*.

### Particulars

- (a) Trust Account Reconciliations
  - (i) In May 1999, in breach of reg 5(c) of the *Trust Accounts Regulations, 1973*, the practitioner failed to reconcile the trust account cash book with the trust account ledger.
  - (ii) For each month during the period June 1999 to July 2000, in breach of s12(1)(a) of the *Trust Accounts Regulation 1999*, the practitioner failed to balance and reconcile the trust account cash book balance with the trust account ledger.
  - (iii) For each month during the period March 2000 to July 2000, in breach of s12(1)(b) of the *Trust Accounts Regulation 1999*, the practitioner failed to reconcile the trust account bank balance with the trust account cash book.
- (b) Trust Account Receipts
  - (i) During the period 7 January 2000–21 August 2000, the practitioner received some 26 deposits to the trust account, totalling funds of \$477,099.24.
  - (ii) In breach of the provisions of the *Trust Accounts Regulation 1999*, the practitioner failed to issue trust account receipts in relation to each of the said 26 deposits.
- (c) Trust Account Cash Book
  - (i) During the period 1 April 2000–21 August 2000, the practitioner made some 96 payments from the trust account, totalling \$50,301.16.
  - (ii) In breach of s11(1) of the *Trust Accounts Regulation 1999*, the practitioner failed to enter particulars of these payments, or any of them, in the trust account cash book, whether within 2 days after the day of such payment, or at all.
  - (iii) During the period 1 April 2000–21 August 2000 the practitioner received some 16 deposits to the trust account, totalling \$34,418.49.
  - (iv) In breach of s11(1) of the *Trust Accounts Regulation 1999*, the practitioner failed to enter particulars of these receipts, or any of them, in the trust account cash book, whether within 2 days after the day of such receipt, or at all.

(d) Trust Account Ledger

- (i) During the period 1 March 2000–21 August 2000 the practitioner made some 112 payments from the trust account, totalling \$232,629.42.
- (ii) In breach of s15 of the Trust Accounts Regulation 1999, the practitioner failed to post particulars of these payments (with the exception of 1 payment in the sum of \$105 on 20 April 2000) to the trust ledger account, whether within 2 days after the day of such payment or at all.
- (iii) During the period 1 January 2000–21 August 2000, the practitioner received some 26 deposits to the trust account, totalling funds of \$477,099.24.
- (iv) In breach of s15 of the *Trust Accounts Regulation 1999*, the practitioner failed to post particulars of these receipts (with the exception of 2 receipts in January 2000 and 2 receipts in February 2000, totalling the sum of \$255,960.62) to the trust account ledger, whether within 2 days after the day of such receipt or at all.

(e) Trust Account Cheque Butts

- (i) During the period 1 January 2000–21 August 2000, the practitioner drew some 96 trust account cheques in respect of which the cheque butts, in breach of s10(3) of the *Trust Accounts Regulation 1999* failed to identify the name of the person on whose behalf the cheque was drawn and/or contain a brief description of the matter for which the cheque was drawn.
- (ii) In the case of some 15 of the cheque butts referred to in paragraph (e)(i) above, no details at all were recorded, in breach of s10(3) of the *Trust Accounts Regulation 1999*.
- (iii) In January 2000 the practitioner drew some 4 trust account cheques, each payable to the practitioner, in relation to the matter of the Estate of Rowe, in respect of which payments the cheque butts, in breach of s10(3) of the *Trust Account Regulation 1999*, wrongly identified the said cheques as having been drawn in relation to another matter (namely the matter of Trelman Pty Ltd).

(f) Delay in Banking Trust Funds

- (i) In breach of s7(3) of the *Trust Accounts Act 1973*, the practitioner, on the occasions particularised hereunder, failed to pay trust moneys into his trust account on the day of receipt, or as soon as practicable thereafter:

**Schedule**

Receipt No.	Nature of Payment	Amount	Date of Receipt	Date Banked
412	Cash	30.00	22.01.99	19.02.99
413	Cash	350.00	22.01.99	19.02.99
414	Cash	1,600.00	08.02.99	15.02.99
427	Cash	155.00	25.06.99	30.06.99
429	Cash	935.00	08.07.00	23.07.99
430	Cash	50.00	08.07.99	Outstanding

(g) Back Dating of Trust Account Receipts

- (i) In breach of the provisions of the *Trust Accounts Regulation 1999*, the practitioner failed to issue trust account receipts forthwith upon the receipt of trust moneys and thereafter issued back dated receipts, bearing the date of deposit to the trust bank account instead of the actual date of issue of the receipt.

**Schedule**

Receipt No	Receipt Date	Form of Payment	Amount	Date Banked	Date of Issue of Receipt
438	22.07.99	Cheque	2,479.30	22.07.99	On or after 02.08.99
442	09.09.99	B/cheque	775.00	09.09.99	On or after 25.10.99
443	24.09.99	B/cheque	875.00	24.09.99	On or after 25.10.99
447	03.11.99	D/d	1,410.00	03.11.99	On or after 23.12.99
448	18.11.99	Cash	2,000.00	18.11.99	On or after 23.12.99
449	24.11.99	Cheque	2,167.00	24.11.99	On or after 23.12.99
450	10.12.99	Cheque	400.00	10.12.99	On or after 23.12.99

(h) Overdrawn Trust Account Ledgers

- (i) On each of the occasions particularised below, the practitioner, in breach of reg5(d) of the *Trust Accounts Regulations 1973* or s10(1) of the *Trust Accounts Regulation 1999*, drew against, or caused a payment to be made from his trust account in circumstances where the amount of the withdrawal or payment exceeded the amount held on behalf of the client in question.
- (ii) The said moneys, being trust property held by the practitioner on behalf of other persons, were thereby applied to a purpose (including, in certain cases, to the practitioner's own use and benefit) in breach of the trust upon which they were held, until the relevant deficiency was restored to the trust account.

**Particulars**

Trust Ledger	Date of Payment	Amount O/drawn	Payee	Date of Restoration of Deficiency
P	24/02/99	150.00	OSR	19/03/99
A.J. V P/ L	3/03/00	250.00	Lavery & Assoc	7/03/00
D & B	4 /05/00	100.00	Lavery & Assoc	11/05/00
	8/05/00	24.00	OSR	11/05/00
B	8/05/00	24.00	OSR	17/05/00
L	26/07/00	157.00	Maroochydore S.C.	1/08/00
	28/07/00	18.00	Lavery & Assoc (AC Fox)	1/08/00
	28/07/00	24.00	OSR	1/08/00
	1/08/00	299.00	Lavery & Assoc	15/08/00

6. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, namely clients’ trust moneys, dealt with that property in breach of the terms of the trust and in breach of s8 of the Trust Accounts Act by, without authority, or any other lawful entitlement, intermingling the property with his own property and thereby applied the same to his own use and benefit.

**Particulars**

- (a) On 26 May 1999 the practitioner withdrew the sum of \$495, the property of his client Atkinson from the trust account to the general account for costs and outlays.
- (b) At the time of the payment no bill of costs and outlays had been rendered to the client, the payment was not supported by authorisation in writing, and the practitioner had no other lawful entitlement to the said moneys, which were thereby mixed with the practitioner’s own moneys and applied to the practitioner’s own use.
- (c) On the dates appearing in the schedule hereunder, the practitioner withdrew the sum of \$1,059.55, the property of his clients BJ and HPO from the trust account to the general account for costs and outlays.

Date	Amount
17/01/00	80.00 (being part of a withdrawal of \$100)
17/01/00	50.00
20/01/00	200.00
10/03/00	379.55
17/03/00	300.00
22/03/00	50.00
	<u>\$1,059.55</u>

At the time of the payments, no bill of costs and outlays had been rendered to the client, the payments were not supported by authorisation in writing, and the practitioner had no other lawful entitlement to the said moneys, which were

thereby mixed with the practitioner’s own moneys and applied to the practitioner’s own use.

7. That the practitioner is guilty of professional misconduct or unprofessional conduct or practise in that he, being a solicitor and trustee of property, has failed to comply with the requirements of s16(1) of the Trust Accounts Act with respect to the audit of his trust account.

**Particulars**

- (a) At all material times the practitioner conducted a trust account and was a trustee within the *Trust Accounts Act 1973* (“the Act”);
- (b) In breach of s16(1) of the Act, the practitioner has:
  - (i) failed to ensure the audit of his trust account; and
  - (ii) failed to lodge an audit report with the supervising entity
 for each of the financial periods ended 31 March 1999 and 31 March 2000.

8. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, wrongfully converted or misappropriated trust moneys amounting to the sum of \$4,224.91 the property of the Estate of SGR (deceased), by paying the said sum from his trust account and applying the same to his own use and benefit, in circumstances where the practitioner had no lawful entitlement to the same.

**Particulars**

- (a) At all material times the practitioner acted for the executrix of the Estate of SGR deceased.
- (b) During the period 30 July 1999–20 January 2000, the practitioner paid trust moneys in the sum of \$5,798.34 from his trust account as particularised in Schedule C to this Amended Notice of Charge.
- (c) The trust ledger for the Estate of SGR deceased particularises each such payment as being in respect of Lavery & Associates – costs and outlays.
- (d) The practitioner held a general form of trust account authority from the executrix dated 30 July 1999, authorising the withdrawal from the trust account and payment to the general account of such costs as contained in the practitioner’s accounts.
- (e) At the time of the payments particularised in Schedule C:
  - (i) the payments did not fall within the scope of the said trust account authority as the practitioner had not rendered any account or accounts;

**The Solicitors Complaints Tribunal**

- (ii) the payments were made without the knowledge or consent of the executrix, and in circumstances where the practitioner had no other lawful entitlement to the moneys;
  - (iii) the practitioner had, however, rendered professional services on behalf of the executrix for which a fair and reasonable fee was an amount in the sum of \$1,573.43, being a sum to which the practitioner would have been lawfully entitled pursuant to the terms of the trust account authority had an account for such costs been rendered to the executrix.
- (f) In the premises, trust moneys in the sum of \$4,224.91 (being the amount by which the payments to the practitioner exceeded a fair and reasonable fee for professional services rendered by the practitioner) were thereby intermingled by the practitioner with his own money and applied by the practitioner to his own use and benefit. The trust account deficiency has not been restored.

9. (Deleted).

<b>Schedule B</b>			
<b>Date paid from Trust Account</b>	<b>Cheque No.</b>	<b>Particulars of Payee</b>	<b>Amount paid from Trust Account</b>
12/04/00	84037	Lavery & Associates	300.00
15/04/00	84036	Lavery & Associates	305.10
16/04/00	84035	Lavery & Associates	200.00
17/04/00	84039	Lavery & Associates	500.00
19/04/00	84038	Lavery & Associates	50.00
26/04/00	84042	Lavery & Associates	410.70
26/04/00	84043	Lavery & Associates	48.20
26/04/00	84044	Lavery & Associates	100.00
27/04/00	84045	Lavery & Associates	50.00
2/05/00	84046	Lavery & Associates	150.00
2/05/00	84047	Lavery & Associates	50.00
2/05/00	84050	Lavery & Associates	100.00
2/05/00	84051	Lavery & Associates	100.00
5/05/00	84053	Lavery & Associates	408.00
5/05/00	84054	Lavery & Associates	400.00
7/05/00	84055	Lavery & Associates	159.00
8/05/00	84057	Lavery & Associates	274.00
8/05/00	84058	Lavery & Associates	91.90
8/05/00	84059	Lavery & Associates	120.15
11/05/00	84060	Lavery & Associates	120.40
11/05/00	84061	Lavery & Associates	48.35
11/05/00	84063	Lavery & Associates	1,000.00
11/05/00	84064	Lavery & Associates	1,000.00
11/05/00	84065	Lavery & Associates	305.10
15/05/00	84062	Lavery & Associates	440.00
15/05/00	84066	Lavery & Associates	265.00
16/05/00	84069	Lavery & Associates	716.56
16/05/00	84070	Lavery & Associates	99.00
25/05/00	84073	Lavery & Associates	2,000.00
6/06/00	84081	Lavery & Associates	200.00

8/06/00	84083	Lavery & Associates	200.00
8/06/00	84084	Lavery & Associates	817.55
8/06/00	84085	Lavery & Associates	240.00
9/06/00	84082	Lavery & Associates	50.00
9/06/00	84086	Lavery & Associates	300.00
13/06/00	84087	Lavery & Associates	350.00
13/06/00	84088	CTRE	1,500.00
13/06/00	84089	Lavery & Associates	300.00
18/06/00	84090	Lavery & Associates	305.10
20/06/00	84091	Lavery & Associates	200.00
22/06/00	84092	B C	200.00
27/06/00	84094	Lavery & Associates	200.00
28/06/00	84095	Lavery & Associates	1,000.00
30/06/00	84096	Lavery & Associates	200.00
6/07/00	84097	Lavery & Associates	350.00
6/07/00	84098	Lavery & Associates	711.54
6/07/00	84102	Lavery & Associates	305.10
06/07/00	84099	Lavery & Associates	200.00
11/07/00	84100	Lavery & Associates	150.00
12/07/00	84101	Lavery & Associates	200.00
17/07/00	84105	Lavery & Associates	221.50
17/07/00	84106	Lavery & Associates	200.00
17/07/00	84109	Lavery & Associates	246.00
19/07/00	84110	Lavery & Associates	400.00
19/07/00	84111	Lavery & Associates	220.65
28/07/00	84114	Lavery & Associates	300.00
28/07/00	84118	Lavery & Associates	1,000.00
7/08/00	84121	Lavery & Associates	200.00
11/08/00	84123	Lavery & Associates	200.00

<b>Schedule C</b>		
<b>Date paid from Trust Account</b>	<b>Particulars of Payee</b>	<b>Amount paid from Trust Account</b>
30/07/99	Lavery & Associates	500.00
2/08/99	Lavery & Associates	600.00
9/08/99	Lavery & Associates	300.00
13/08/99	Lavery & Associates	200.00
18/08/99	Lavery & Associates	150.00
13/09/99	Lavery & Associates	150.00
15/09/99	Lavery & Associates	100.00
21/09/99	Lavery & Associates	200.00
4/10/99	Lavery & Associates	50.00
14/12/99	Lavery & Associates	176.20
14/12/99	Lavery & Associates	109.45
14/12/99	Lavery & Associates	45.00
15/12/99	Lavery & Associates	100.00
17/12/99	Lavery & Associates	300.00
20/12/99	Lavery & Associates	600.00
23/12/99	Lavery & Associates	305.10
23/12/99	Lavery & Associates	176.20
23/12/99	Lavery & Associates	59.57
28/12/99	Lavery & Associates	100.00
30/12/99	Lavery & Associates	100.00
31/12/99	Lavery & Associates	41.82
7/01/00	Lavery & Associates	400.00
11/01/00	Lavery & Associates	335.00
11/01/00	Lavery & Associates	100.00
12/01/00	Lavery & Associates	200.00
20/01/00	Lavery & Associates	400.00

## The Solicitors Complaints Tribunal

### Appearances

- (a) For the Council of the Queensland Law Society Incorporated:  
Mr RG Perrett, solicitor of Clayton Utz, solicitors
- (b) For the practitioner:  
Mr LJ Ryan, solicitor of Hills, solicitors

### Findings and Orders

1. The tribunal granted leave to the Queensland Law Society Incorporated to amend the Notice of Charge in accordance with the document handed to the tribunal today.
2. The tribunal finds the practitioner guilty of the charges as admitted by the practitioner.
3. The tribunal further finds that the charges as admitted amount to professional misconduct.
4. The tribunal orders that the name of Joseph Gerald Lavery be struck from the Roll of Solicitors of the Supreme Court of Queensland.
5. The tribunal orders that Joseph Gerald Lavery pay the costs of the Queensland Law Society Incorporated, including the costs of the Clerk and of the Recorder of these proceedings, those costs to be agreed, and in the absence of agreement to be assessed by McClellan Legal Costs.

### Reasons

The practitioner is charged with five charges involving wrongful conversion or misappropriation of Trust monies totalling approximately \$25,000, and involving various breaches of the *Trust Accounts Act 1973*, *Trust Accounts Regulations 1973* and *Trust Accounts Regulations 1999*.

The practitioner has not contested the factual basis of these charges and has admitted the charges.

The practitioner thereby admits that he did wrongfully misappropriate monies placed in trust with him by his clients. Those clients appear to have been fully trusting of the practitioner's integrity to deal with their funds in an honest and professional manner as their solicitor.

The practitioner admitted that he persistently and deliberately breached their trust by using their monies without their knowledge or authority for his own personal benefit.

This behaviour breaches the essential trust reposed by clients and the community in solicitors and must be viewed very seriously by this tribunal.

The practitioner also admits that he failed to keep adequate Trust Account records for his practice over a period of 18 months. Indeed, for a lengthy period of that time there were hardly any records kept at all involving his Trust Account.

The provisions in the *Trust Accounts Act and Regulation* have been passed to protect the public when their money is deposited with solicitors. The Act and Regulations set out clear provisions that all solicitors of Queensland have been expected to follow rigorously.

The Queensland Law Society is charged with the duty to oversee the profession's compliance with those statutory provisions.

The practitioner fully admits his deficiencies in the conduct of the Trust Account during the relevant 18 month period.

The tribunal finds that all of the charges are proven.

The tribunal finds that the charges amount to professional misconduct by the practitioner.

As to penalty, the tribunal has taken into account the submissions of the Society and of the practitioner. The Society relies on the guidance given by decisions of the Court of Appeal, particularly more recent decisions such as the *Carberry* case and other like cases.

The practitioner acknowledges the cogency of the statements in those cases, but submits that the circumstances in his particular case enable this tribunal to distinguish his case from the strict application of the Court's views.

On this point the tribunal has noted the submissions of the practitioner that he is in fact a fit and proper person to act as a solicitor in a variety of matters including litigious matters; that he remains a fit and proper person and a person of good fame and character to enable him to appear before Courts; and that he has the necessary professional and personal qualifications to continue to be a person of standing in the community.

However, the tribunal cannot accept those submissions and cannot accept that those submissions lead inexorably to a conclusion that this tribunal should permit the practitioner to remain in practice in some restrictive form.

The tribunal relies instead on the guidance given by the Courts in the cases referred to in the submissions of Mr Perrett for the Society. In particular, the tribunal would like to refer to the words by Pincus JA in the case of *Carberry*:

*"A legal practitioner may let down a client in many ways, mishandling of clients' money being only one of them; but fair dealing with such money is basic."*

The tribunal also refers to the comments contained in the case of *Law Society of NSW and Bannister*, in which it was said:

*"The normal consequence of the misappropriation by a solicitor of a client's money is that his name be removed from the Roll"*

The tribunal therefore has no hesitation in finding that, due to the admitted and proven professional misconduct, this practitioner is not a fit and proper person to practise as a solicitor. The tribunal cannot condone any order which would enable the practitioner to continue to practise in Queensland as a solicitor.