

In the Matter of Paul Gerard Lynch

Case Number: SCT/98
Date of Hearing: 28-29 May & 1 July 2003
Appearing Before: Mr G C Fox (Presiding Member/Practitioner Member)
Ms M Byrom (Practitioner Member)
Ms I Vallin-Thorpe (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Fined \$20,000

Charges

1. That the practitioner is guilty of professional misconduct or unprofessional conduct or practise, in that, in breach of s5H(1) of the *Queensland Law Society Act*, he failed in the respects particularised below to comply with a Council requirement to give the Council in writing within a stated reasonable time an explanation of a matter being investigated, or alternatively, failed in the respects particularised below to produce to the Council within a stated reasonable time a document in his custody, possession or control.

Particulars

In connection with the matter of the investigation of a complaint by EM & Co on behalf of RB & JEB and BIPL

- (a) By letter dated 11 May 2001, the Council, by its Secretary, being duly authorised in that regard, requested the practitioner to forward a sufficient and satisfactory written explanation of the matters referred to in a letter of complaint received by the Society from EM & Co on behalf of RB & JEB and BIPL ("the said clients"), by 4 June 2001. No response was received from the practitioner within the time specified.
- (b) By letter dated 6 June 2001, the Council, by its Secretary, being duly authorised in that regard, and having received no reply to its aforesaid letter of 11 May 2001, requested the practitioner to provide his response by 12 June 2001. By an undated letter received by the Society on 14 June 2001, the practitioner sought an extension of time until 28 June 2001 within which to provide a response to the complaint, which extension was granted. No reply was received from the practitioner within the extended time.
- (c) By letter dated 26 July 2001, the Council, by its Solicitor – Professional Standards, being duly authorised in that regard, requested the practitioner to provide a response to certain further enquiries, and to produce certain documents, pertaining to the matter of the investigation of the complaint on behalf of the said clients, within 14 days of 26 July 2001. No reply was received within the time specified.
- (d) By letter dated 9 August 2001, the Council, by its Solicitor – Professional Standards, being duly authorised in that regard, and having received no reply to its aforesaid letter of 26 July 2001, requested the practitioner to provide his reply by 17 August 2001. No reply was received by the practitioner within the time specified.
- (e) By letter dated 17 August 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, and having received no reply to its aforesaid letters of 26 July 2001 and 9 August 2001, requested the practitioner to provide his response by 22 August 2001. No reply was received from the practitioner within the time specified.
- (f) By letter dated 4 September 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, requested the practitioner to provide a response to certain further enquiries, and to produce certain documents, pertaining to the matter of the investigation of the complaint on behalf of the said clients, by 12 September 2001. No reply was received from the practitioner within the time specified.
- (g) By letter dated 4 October 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, and having received no response to certain of the matters raised in its aforesaid letter of 4 September 2001, requested the practitioner to provide a response by return. No reply was received from the practitioner within the time specified.
- (h) By further letter dated 4 October 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, requested the practitioner to provide a reply to certain further enquiries pertaining to the matter of the investigation of the complaint on behalf of the said clients, by 15 October 2001. No reply was received from the practitioner within the time specified.
- (i) By letter dated 26 October 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, requested the practitioner to provide a response to certain further enquiries, and to produce a certain document, pertaining to the matter of the investigation of the complaint on behalf of the said clients, by 9 November 2001. By letter dated 9 November 2001, the practitioner advised that he would address the matters raised by 12 or 13 November 2001. No reply was received from the practitioner by 13 November 2001.
- (j) By letter dated 19 November 2001, the Council, by its Director – Professional Standards, being duly authorised in that regard, and having received no reply to its aforesaid letter of 26 October 2001, requested the practitioner to provide a response to the letter of 26 October 2001 by return. No reply was received from the practitioner within the time specified.
- (k) The practitioner replied to the Society's letter of 26 October 2001 by letter dated 7 January 2002.

2. That the practitioner is guilty of professional misconduct in that, in the respects particularised below, he failed to comply with a notice given by the Council of the Queensland Law Society Incorporated under s5H(2) of the *Queensland Law Society Act*, for a period of 14 days after the giving of the notice.

Particulars

In connection with the matter of the investigation of a complaint by EM & Co on behalf of RB & JEB and BIPL

- (a) The Council, by its Director – Professional Standards, being duly authorised in that regard, gave the practitioner a written notice in accordance with s5H(2) of the *Queensland Law Society Act* on 14 September 2001;
- (b) the practitioner failed, within the 14 day period specified in the notice, to furnish a reply thereto;
- (c) by letter dated 2 October 2001 and received by the Society that day, the practitioner replied to the aforesaid notice of 14 September 2001. By that letter the practitioner failed to furnish an explanation of the matters the subject of the said notice.
3. That the practitioner is guilty of professional misconduct or unprofessional conduct or practise, in that, in breach of his duties of honesty and candour, on the various diverse occasions particularised hereunder he wrote to the Queensland Law Society Incorporated (“the Society”) concerning the Society’s investigation of the matter of the complaint against him by EM & Co, Solicitors on behalf of RB & JEB and BIPL, which letters contained representations that were, as the practitioner well knew, false or misleading.

Particulars

- (a) During the course of correspondence between the Society and the practitioner concerning the Society’s investigation of the matter of the complaint against the practitioner by EM & Co on behalf of RB & JEB and BIPL, the practitioner wrote letters to the Society dated:
- (i) 16 July 2001;
- (ii) 25 October 2001; and
- (iii) 7 January 2002.
- (b) By his letter of 16 July 2001, the practitioner informed the Society, *inter alia*:
- “The Lump Sum Agreement***
- In the first week of September 2000 I met with JEB to discuss the costs of her upcoming Federal Court trial.*
- It was agreed between JEB and myself that I would take the matter to trial on her behalf for fees of \$100,000.00.”*
- (c) By his letter of 25 October 2001, the practitioner informed the Society, *inter alia*:
- “There is no doubt that JEB agreed that this firm would be paid a lump sum of \$100,000.00 for the matter.”*
- (d) By his letter of 7 January 2002, the practitioner informed the Society, *inter alia*:
- “Allegation that there is no lump sum agreement***
- This is completely untrue. The purpose of my meeting with JEB in early September 2000 was to inform her of the dangers of pursuing the litigation and its cost... I told her that I was prepared to take the matter to completion for a lump sum of \$100,000.00.”*
- (e) By these letters, the practitioner represented to the Society to the effect that in September 2000 he reached an agreement with JEB that he would complete her matter for a lump sum of \$100,000.00.
- (f) The said representations were false or misleading as the practitioner knew, as at the time of each such letter, that no such agreement had been reached.
4. In the alternative to charge 3, that the practitioner is guilty of professional misconduct or unprofessional conduct or practise in that, on various diverse occasions, he wrote to the Queensland Law Society Incorporated (“the Society”) concerning the Society’s investigation of the matter of the complaint against him by EM & Co, Solicitors on behalf of RB & JEB and BIPL, which letters contained representations that were made recklessly, not caring whether they were true or false.

Particulars

- (a) The Society repeats and relies on the representations of the practitioner as particularised in paragraphs 3(a) to 3(f) of charge 3;
- (b) at the time at which each of the representations were made, the practitioner had no reasonable grounds for making them.

5. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he:

- A. in breach of his duty as a solicitor; and/or
- B. in breach of his duty to maintain reasonable standards of competence or diligence;

failed, within a reasonable time after being requested in writing by his clients to do so, to render to the clients a bill of costs covering all work for the clients to which such request related, or for which he had not already rendered a bill of costs.

Particulars

- (a) By letter dated 14 October 2000, JEB, a client of the practitioner, requested that the practitioner provide "our final account made up in full". The said request related to work undertaken by the practitioner's firm on behalf of RB & JEB and BIPL ("the said clients"), in proceedings against the ANZ Bank in the Federal Court.
- (b) By letter dated 23 October 2000, RB & JEB requested that the practitioner provide an account in taxable form as soon as possible.
- (c) By letter dated 20 November 2000, JEB requested that the practitioner deliver an itemised account by 27 November 2000.
- (d) By letter dated 11 January 2001, EM & Co, Solicitors for and on behalf of the said clients requested that the practitioner provide an itemised account within 14 days of the date of their letter.
- (e) Notwithstanding such requests, the practitioner failed or refused to render a bill of costs covering all work for the said clients, to which such requests related, or for which he had not already rendered a bill of costs, until 4 December 2001.

6. That the practitioner is guilty of professional misconduct, or unprofessional conduct or practise in that he:

- A. in breach of his duty as a solicitor; and/or
- B. in breach of his duty to maintain reasonable standards of competence or diligence;

has failed, despite request, to deliver to his clients, RB & JEB and BIPL, all documents which he is holding on their behalf.

Particulars

- (a) By letter dated 14 October 2000, JEB, a client of the practitioner, requested that the practitioner have the client's paperwork ready for collection the following morning. The said request was made by JEB on behalf of herself, RB and BIPL ("the said clients").
- (b) Subsequent to 14 October 2000, both the said clients, and EM & Co, Solicitors for and on behalf of the said clients, have requested, on various diverse occasions, that the practitioner deliver up all documents which he is holding on their behalf.
- (c) Notwithstanding such requests, the practitioner has failed or refused to deliver to the said clients or to their solicitors, all documents which he is holding on their behalf.

7. That the practitioner is guilty of professional misconduct or unprofessional conduct or practise in that he, being a solicitor and trustee of property, namely clients' trust moneys, dealt with that property in breach of s7 of the *Trust Accounts Act* by dishonestly, or alternatively, without any lawful entitlement, permitting the intermingling of the property with his own property, and thereby applied the same to his own use and benefit.

Particulars

- (a)
 - (i) On 8 September 2000, trust moneys in the sum of \$50,000 were received into the practitioner's general account from and on behalf of the practitioner's clients, RB & JEB and BIPL ("the said clients") in circumstances where the practitioner had no lawful entitlement thereto.
 - (ii) On 3 October 2000, further trust moneys in the sum of \$25,000 were received into the practitioner's general account from and on behalf of the said clients, in circumstances where the practitioner had no lawful entitlement thereto.
 - (iii) Notwithstanding the practitioner had no lawful entitlement to the said trust moneys, he permitted them to be retained in his general account, mixed with his own moneys, and applied to his own use.
 - (iv) The payments particularised in (i) and (ii) above were received by the practitioner into his general account dishonestly in that, at the time of their receipt, he well knew he had no lawful entitlement thereto.
- (b)
 - (i) On 16 July 2001, trust moneys in the sum of \$2,664.04, the property of the practitioner's client, WC ("the said client"), were received into the practitioner's general account in circumstances where the practitioner had no lawful entitlement thereto.
 - (ii) Notwithstanding the practitioner had no lawful entitlement to the said trust moneys, he permitted them to be retained in his general account, mixed with his own moneys, and applied to his own use.
 - (iii) Following an examination of the practitioner's accounts by the Society in November/December 2001, the practitioner rendered an account to the said client on 22 January 2002, thereby restoring the trust deficiency.
- (c)
 - (i) On each of 18 June 2001 and 25 June 2001, trust moneys in the sum of \$1,000, the property of the practitioner's clients, TKM and DVM ("the said clients") were received into the practitioner's general account, in circumstances where the practitioner had no lawful entitlement thereto.
 - (ii) Notwithstanding the practitioner had no lawful entitlement to the said trust moneys, he permitted them to be retained in his general account, mixed with his own moneys and applied to his own use.

- (iii) Following an examination of the practitioner's accounts by the Society in November/December 2001, the practitioner rendered accounts to the said clients on 22 January 2002, thereby restoring the trust deficiency.
 - (iv) The payments particularised in (i) above were received by the practitioner into his general account dishonestly in that, at the time of their receipt, he well knew he had no lawful entitlement thereto.
- (d) (i) On 16 May 2001, trust moneys in the sum of \$2,500, the property of the practitioner's client, FJC ("the said client") were received into the practitioner's general account, in circumstances where the practitioner had no lawful entitlement thereto.
- (ii) Notwithstanding the practitioner had no lawful entitlement to the said trust moneys, he permitted them to be retained in his general account, mixed with his own moneys and applied to his own use.
 - (iii) Following an examination of the practitioner's accounts by the Society in November/December 2001, the practitioner rendered an account to the said client on 22 January 2002, thereby restoring the trust deficiency.
 - (iv) The payment particularised in (i) above was received by the practitioner into his general account dishonestly in that, at the time of its receipt, he well knew he had no lawful entitlement thereto.
8. That the practitioner is guilty of professional misconduct or unprofessional conduct or practise in that in October 2000, in breach of his duty as a solicitor, he induced, by improper means, his clients, RB & JEB and BIPL to agree to the settlement of certain proceedings in the Federal Court of Australia.

Particulars

- (a) The practitioner acted for Messrs RB & JEB and BIPL ("the clients") as applicants in Federal Court Application no. Q135 of 1999, the trial of which commenced on 3 October 2000.
 - (b) On 5 October 2000, whilst JEB was under cross-examination, the conduct of the trial was adjourned and settlement negotiations ensued
 - (c) On 6 October 2000, JEB, on behalf of the clients, informed the practitioner that the clients were not prepared to settle the matter and that they wished to proceed with the trial;
 - (d) In breach of his duty as a solicitor, the practitioner told the clients, to the effect, that:
 - (i) he would withdraw as their solicitor;
 - (ii) as a consequence thereof, the clients would be exposed to the risk that the respondent would ask for the proceedings to be dismissed and for the payment by the clients of its costs;
 - (iii) he would inform the Trial Judge that he, the practitioner, had discussed with his client, JEB, the evidence of another witness, one PM, whilst she was under cross-examination;
 - (iv) he would inform the legal representatives for the respondent that he, the practitioner, had discussed with his client, JEB, the evidence of the said PM whilst she was under cross-examination;
 - (v) he would, as a consequence of his said disclosures to the Court and/or to the legal representatives of the respondent (as particularised in paras (iii) and (iv) above) be obliged to stand down from the matter;
 in the event that the clients did not agree to settlement of the matter.
 - (e) As a consequence of each of the practitioner's representations particularised in paragraph (d) above, the clients agreed to settlement of the matter on 6 October 2000.
9. That the practitioner is guilty of unprofessional conduct or practise, in that, in relation to the conduct of his practice:
- A. he has been guilty of undue delay; and/or
 - B. he has been guilty of a failure to maintain reasonable standards of competence or diligence.

Particulars

- (a) By letters dated 11 January 2001, 29 January 2001 and 9 April 2001 respectively, EM & Co wrote to the practitioner on behalf of the practitioner's former clients, RB & JEB and BIPL ("the said clients").
- (b) By these letters, the practitioner was requested to provide, *inter alia*, return of the said clients' files, an itemised account and the return of moneys paid by the said clients to the said practitioner.
- (c) The practitioner failed or refused to reply to the said letters, or any of them, necessitating EM & Co to refer the matter to the Queensland Law Society Inc on 9 May 2001 for further action.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr A J MacSporran of Counsel instructed by Messrs Clayton Utz, Solicitors
- (b) For the Practitioner:
Mr P J Davis of Counsel instructed by Messrs Dearden Lawyers
- (c) For the Complainant:
The Complainant appeared as witness in person

Findings and Orders

1. The Tribunal finds the facts alleged in charges 1, 2 and 9 as admitted by the Practitioner, proved.
2. The Tribunal further finds charges 3, 4, 7(a), 7(c), 7(d) and 8 not proved.
3. The Tribunal finds charges 5, 6, and 7(b) proved.
4. The Tribunal finds that the charges proved, taken as a whole, amount to professional misconduct.
5. The Tribunal finds the Practitioner guilty of professional misconduct.
6. The Tribunal orders that the Practitioner pay a penalty of \$20,000.00 to the Fund.
7. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society of these proceedings, including reserved costs, together with the costs of the recorder and the Clerk to be assessed, in default of agreement, by Monsour Legal Costs Pty Ltd. The Tribunal orders that those costs be paid within six (6) months from the date of assessment or agreement whichever is the earlier.
8. The Tribunal further orders that the Practitioner pay the penalty at the rate of \$2,000.00 per month for a period of ten months from the date of this order.
9. The Tribunal further orders that the Practitioner pay compensation to the Complainant, JEB, in the sum of \$6,068.50 by payment to her solicitors, EM & Co, upon the Practitioner's undertaking that that amount, in addition to amounts he has already paid to that firm in relation to their fees, equals or exceeds the sum of \$7,000.00.

Reasons

The charges

The evidence on the central issues in these proceedings was provided by JEB and the practitioner. The evidence of JEB's daughter and husband did not assist us on the central issues. Having heard the evidence of JEB and the practitioner, we feel the evidence of both was based to a significant extent on reconstruction of past events. That is not to say their accounts were dishonest.

The facts alleged in charges 1 and 2 are admitted by the practitioner. We find those charges proved.

In relation to charge 3, JEB gave evidence that the practitioner led her and her husband to believe that he would act on a "no win no fee" basis. In fact, she paid him \$4,000 on March 7, the day following her first consultation. She cannot recall why she paid the \$4,000.

She says that the Practitioner required \$100,000 to be placed in his trust account before the trial commenced and this amount would be sufficient to cover the cost of a 7-day trial. This amount was paid by \$50,000 direct deposit to the practitioner's business account, \$25,000 by cheque to his trust account and \$25,000 by direct deposit to his business account.

She says that her daughter paid the money to the trust account on her instructions. The evidence establishes that this was clearly not so and was paid by the practitioner's staff.

JEB signed a trust account authority to transfer the \$25,000 in trust to the business account. The trust account authority was dated 4 October 2000, the second day of the trial. By signing the authority, JEB knew the practitioner was receiving the money beneficially. No reason was advanced for this payment to be treated differently to the other payments.

She indicated in her evidence that she believed the \$50,000 had been paid into the business account pursuant to the trust account authority signed by her. She was clearly in error in believing that she had signed this trust account authority.

The practitioner alleges that the money was paid pursuant to a lump sum agreement and that he would conduct the trial for this amount. Normally, one would expect a prudent practitioner to set out such an arrangement clearly in writing to avoid any allegation of impropriety. The practitioner did not do this.

We find that it is probable that both the practitioner and JEB had a common view that the \$100,000 was to be retained by the practitioner beneficially. This leaves open the issue of whether it was a lump sum agreement, as contended by the practitioner, or an agreement to undertake work to this value, giving rise to the potentiality of a refund or further payment.

Although the evidence and discussions regarding refunds suggest the latter, given the unsatisfactory state of the evidence, we cannot find on the required standard of proof and evidence that the practitioner, knowingly when he wrote to the Law Society, made representations which he believed were false and misleading. Accordingly, we find this charge not proved.

Our findings should not, however, be interpreted as any approval by this Tribunal of the practice of oral lump sum agreements. The practice is undesirable and dangerous and lies at the heart of the institution of these proceedings.

Charge 4 is phrased in the alternative and, for similar reasons, we find that charge not proved.

In relation to charge 5, we find that the bill was not delivered within a reasonable time. In the circumstances, we find charge 5 proved.

In relation to charge 6, if the agreement was a lump sum agreement, as contended by the practitioner, then he had been paid and he had no lien. It is submitted by the practitioner that JEB's letter to him of 14 October 2000 repudiated the agreement and the practitioner accepted that.

In that event, he, under rule 84, had a month or such a time that was reasonable in the circumstances to deliver a bill or lose his lien. He did not deliver a bill within a reasonable time. We find that the practitioner did not have an entitlement to a lien. We find charge 6 proved.

In relation to charge 7, for the reasons outlined in charges 3 and 4, we find charge 7(a) not proved. In relation to charge 7(b), the costs involved were party and party costs. The costs belonged to the client not the practitioner. When they were paid to him, they were paid impressed with a trust. They were required to be banked to a trust. We find this charge proved. He had clearly performed the work to this value. We do not find that the practitioner acted dishonestly.

In relation to charges 7(c) and (d), on 4 March 2002, the practitioner advised the Queensland Law Society that the monies were paid pursuant to lump sum agreements. No evidence has been led to the contrary. We do not accept that the legislative regime in relation to costs prohibits oral retainers. It limits the amounts which may be charged pursuant to such agreements. In any event, we find that the practitioner reasonably believed he had an entitlement to these funds. We find these charges not proved. We repeat our earlier comments in relation to the undesirability of such lump sum oral agreements.

In relation to charge 8, we find the evidence of Mr N and Mr G to be credible and we accept their evidence. We reject the evidence led by the Society to the extent that it conflicts with this. We find that the matter clearly settled on October 5. Given the state of the evidence and the findings we have made as to credit, we could not find this charge proved even if the matter had not settled until 6 October. We find the charge not proved.

The facts alleged in charge 9 are admitted by the practitioner. We find that charge proved.

We find the charges proved taken as a whole amount to professional misconduct. We find the practitioner guilty of professional misconduct.

Penalty

We have taken into account the decision in *Webster* and the other matters referred to us. We take into account that there has been no finding of dishonesty against the practitioner.

We take into account that there has been no personal gain by his actions.

The references tendered indicate his willingness to represent clients in need, regardless of fee. He is an experienced, skilled practitioner. His positions taken in these proceedings since he obtained legal representation have been cooperative and responsible.

He has properly conceded the issue of costs. We say properly because the concession indicates an acceptance of his responsibility as the author of these proceedings by adopting charging practices in relation to which we have already made adverse comment.

In the circumstances, however, he has displayed a contemptuous disregard for his obligations to the Society and the need for clear and unequivocal relations with his clients. Given his experience and knowledge, these matters are inexcusable. We have considered whether a fine or a suspension is appropriate. We take into account the damaging effect of a suspension on a sole practitioner.

In the circumstances, we feel that a fine is appropriate. The practitioner is fined a penalty of \$20,000 to be paid to the fund. The practitioner is ordered to pay the costs of these proceedings, including reserved costs and the costs of the recorder and the Clerk of the Society, to be assessed in default of agreement by Monsour Legal Costs. These costs to be paid six months from assessment. We order that the practitioner pay the fine over a period of 10 months, paying \$2,000 a month.

In relation to the claim for compensation, we order that the practitioner pay to the complainant, JEB, the sum of \$6,068.50 by payment to her solicitors, EM & Co, on the practitioner's undertaking that that amount, in addition to amounts he has already paid to that firm in relation to their fees, equals or exceeds the sum of \$7,000.