

In the Matter of David John Martell

Case Number: SCT/81
Date of Hearing: 8 May 2003
Appearing Before: Mr P Cooper (Presiding Member/Practitioner Member)
Mr P Mullins (Practitioner Member)
Ms I Vallin-Thorpe (Lay Member)
In Attendance: Mr J Nimmo (Legal Ombudsman)
Mr J W Broadley (Clerk)
Penalty: Suspended from practice for a period of 12 months, from 6 June 2003

Charges

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

1. In breach of rule 85 of the Rules of the Society, the practitioner acted:
 - (a) for M; and
 - (b) for D;in relation to the making of a loan in the sum of \$7,000.00 from M to D on or about 6 September 2000 ("the M/D loan") and the preparation of a loan agreement and associated documentation in relation thereto.
2. In breach of rule 85 of the Rules of the Society, the practitioner acted:
 - (a) for D; and
 - (b) for S;in relation to the making of a loan in the sum of \$3,000.00 from D to S on or about 6 September 2000 ("the D/S loan") and the preparation of a loan agreement and associated documentation in relation thereto.
3. The practitioner failed to maintain reasonable standards of competence or diligence in that the terms of the M/D loan agreements and the D/S loan agreement did not safeguard the interests of D but exposed her to financial risk.

Particulars

- (a) The M/D loan agreement provided for D to pay M:
 - (i) interest and fees of \$1,650.00 for the initial period of 90 days commencing on the making of the loan on 6 September 2000;
 - (ii) thereafter, interest at the rate of \$1,400.00 per 90 days plus 2% on any outstanding amount due under the agreement until the finalisation of D's personal injuries action arising from an accident which occurred on or about 10 December 1998;
- (b) The D/S loan agreement provided for S to pay D:
 - (i) interest and fees of \$707.14 for the initial period of 90 days commencing on the making of the loan on 6 September 2000;
 - (ii) thereafter, at the rate of 10% per annum on any outstanding amount due under the agreement until the finalisation of S's personal injury action arising from an accident which occurred on or about 23 March 1999;
- (c) Insofar as D borrowed from M in order to onlend to S the sum of \$3,000.00:
 - (i) there was no advantage to D in relation to the initial 90 day period because interest payable to D by S was equal or approximately equal to the interest payable by D to M;
 - (ii) D was disadvantaged in relation to the time after the initial 90 day period because she was obliged to pay interest at 82% per annum to M while S was obliged to pay D interest at the rate of only 10% per annum;
 - (iii) D was subject to the risk of non-payment by S while herself remaining liable to repay M.
4. The practitioner acted in circumstances of conflict between:
 - (a) the interests of D;
 - (b) the interests of M;
 - (c) his own interests.

Particulars

- (i) The practitioner acted as broker in arranging the M/D loan;
- (ii) Pursuant to the terms of the M/D loan agreement, D was liable to pay and M was entitled to receive interest at a rate equivalent to 80% per annum for the initial 90 day period and thereafter at a rate of 82% per annum until finalisation of D's personal injuries claim referred to in paragraph 3(a) hereof;

- (iii) The practitioner acted (and continues to act) for D in relation to that personal injuries claim;
 - (iv) The practitioner acted as solicitor for D and for M in relation to the M/D loan.
5. In breach of rule 86(1) of the Rules of the Society, the practitioner borrowed money from his client M who was not a person falling within any of the categories set out in rule 86 in relation to whom that Rule does not operate.

Particulars

On or about 28 September 2000, the practitioner borrowed the sum of \$10,000.00 from M who was then a client of the practitioner.

6. In breach of rule 85 of the Rules of the Society, the practitioner acted:
- (a) for M; and
 - (b) for H;
- in relation to the making of a loan in the sum of \$10,000.00 from M to H on or about 20 April 2000 and the preparation of a loan agreement and associated documentation in relation thereto.
7. The practitioner has, since about February 2001, adopted a practice of representing to clients that he has paid search fees to an entity called CSA and charging clients for those fees as disbursements paid by him to CSA in circumstances in which:
- (a) CSA is the practitioner's registered business name, having been registered as such on 8 February 2001;
 - (b) the fees represented to clients as having been paid to CSA were substantially higher than the fees actually paid by the practitioner to Lawpoint for conducting the searches;
 - (c) clients have been overcharged to the extent of the difference between the amounts represented as having been paid to CSA and the fees actually paid by the practitioner to Lawpoint;

Particulars

The following are examples of the practice:

- (i) U Pty Ltd purchase from A

Search	Fee billed to client	GST charged to client	Total billed to client	Total charged by Lawpoint including GST	Variance between amount billed and Lawpoint charge
Title search	27.50	2.75	30.25	13.31	16.94
Check search	27.50	2.75	30.25	13.31	16.94
Council search	206.00	20.60	226.60	226.60	0.00
Main Roads search	35.00	3.50	38.50	23.95	14.55
Plan search	27.50	2.75	30.25	13.31	16.94
Land tax search	50.00	5.00	55.00	31.90	23.10
Contaminated land search	50.00	5.00	55.00	38.50	16.50
Company search	35.00	3.50	38.50	21.01	17.49
Total	\$458.50	\$45.85	\$504.35	\$381.89	\$122.46

- (ii) U Pty Ltd purchase from B

Search	Fee billed to client	GST charged to client	Total billed to client	Total charged by Lawpoint including GST	Variance between amount billed and Lawpoint charge
Title search	27.50	2.75	30.25	13.31	16.94
Plan search	27.50	2.75	30.25	13.31	16.94
Land tax search	50.00	5.00	55.00	31.90	23.10
Total	\$105.00	\$10.50	\$115.50	\$58.52	\$56.98

8. The practitioner failed to maintain reasonable standards of competence or diligence in that the practitioner has failed to keep his client GJG informed as to the progress of its claim against LTS.

Particulars

- (a) In or about July 2000, JD on behalf of GJG retained the practitioner to act in relation to a claim against LTS;
 - (b) The practitioner has failed to provide GJG either regularly or at all with reports as to the progress of the claim against LTS;
 - (c) The practitioner has failed to respond to numerous telephone calls from JD seeking information as to the progress of the claim against LTS.
9. In breach of section 5H of the *Queensland Law Society Act 1952* (as amended) ("the Act"), the practitioner failed to comply with a requirement of the Council of the Society ("the Council"), namely that he provide an explanation in writing of the matters referred to in the complaint of JD dated 26 April 2001 and such failure continued for a further 14 days after the giving of notice to the practitioner.

Particulars

- (a) By letter dated 2 May 2001 (together with attachments) the Council sought a written explanation by 24 May 2001 of the matters referred to in a letter of complaint from JD dated 26 April 2001.
 - (b) The practitioner failed to provide such explanation by 24 May 2001 and such failure continued notwithstanding further correspondence from the Society to the practitioner dated 13 June 2001 and 3 July 2001.
 - (c) On 18 July 2001 the Council gave notice to the practitioner under section 5H of the Act.
 - (d) The practitioner failed to provide a response to the Council until 3 September 2001.
10. In breach of section 5H of the Act, the practitioner failed to comply with a requirement of the Council, namely that he provide an explanation in writing of the matters referred to in the complaint of R dated 19 December 2001 and such failure continued for a further 14 days after the giving of notice to the practitioner.

Particulars

- (a) By letter dated 20 December 2001 (together with enclosure) the Council sought written explanation by 15 January 2002 of the matters referred to in a letter of complaint from R dated 19 December 2001.
 - (b) The practitioner failed to provide such explanation by 15 January 2002 and such failure continued notwithstanding further correspondence from the Society to the practitioner dated 16 January 2002.
 - (c) On 29 January 2002, the Council gave notice to the practitioner under section 5H of the Act.
 - (d) The practitioner failed to provide a response to the Society until he forwarded to the Society a letter dated 11 February 2002, which letter was not received by the Society until 18 February 2002.
11. In breach of section 16(1) the *Trust Accounts Act 1973*, the practitioner failed to ensure that the auditor of his trust account audited the accounting and other records and the trust accounts kept by the him in respect of the financial period ending 31 March 2001 and to give to the Society the auditor's report by 31 May 2001 in that such report was not given to the Society until 4 March 2002.
12. The practitioner failed to maintain reasonable standards of competence or diligence in that the practitioner has failed to keep his client CS informed as to the progress of its claims against RDM and C (collectively "the debtors").

Particulars

- (a) In or about July 2000, CS retained the practitioner to act in relation to recovery of a debt due by C;
 - (b) In or about late 2002, CS retained the practitioner to act in relation to recovery of a debt due by RDM;
 - (c) The practitioner has failed to provide CS either regularly or at all with reports as to the progress of the claim against the debtors;
 - (d) The practitioner has failed to respond to numerous telephone calls from CS seeking information as to the progress of the claim against the debtors and has failed to respond to letters from CS dated 7 January, 16 January, 23 January and 29 January 2002 (save for a telephone call made by the practitioner's employee on 25 January 2002).
13. In breach of section 5H of the Act, the practitioner failed to comply with a requirement of the Council, namely that he provide an explanation in writing of the matters referred to in the complaint of CS dated 25 January 2002 and such failure continued for a further 14 days after the giving of notice to the practitioner.

Particulars

- (a) By letter dated 5 April 2002 (together with attachments) the Council sought a written explanation by 12 April 2002 of the matters referred to in a letter of complaint from CS dated 25 January 2002.
- (b) The practitioner failed to provide such explanation by 12 April 2002.
- (c) On 17 April 2002 the Council gave notice to the practitioner under section 5H of the Act.
- (d) The practitioner has failed to provide a response to the Council to that notice.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr B Bartley, Solicitor of Messrs Brian Bartley & Associates
- (b) For the practitioner:
Mr A MacSparran of Counsel instructed by Messrs Burns Solicitors
- (c) For the Complainant:
No appearance

Findings and Orders

1. The Tribunal finds the matters set out in the amended Notice of Charge dated 12 November, 2002, as admitted by the practitioner, proved.
2. In relation to all charges considered as a whole, the Tribunal finds that the matters amount to professional misconduct.
3. The Tribunal finds that the practitioner is guilty of professional misconduct.
4. The Tribunal orders that the practitioner be suspended from practice for a period of 12 months, the suspension to take effect from 6 June 2003, and to expire on 4 June 2004, and until 6 June 2003 on the condition that the practitioner not engage in any activity in respect of the firm of M Lawyers whereby he would undertake work in respect of any file of that firm, including communications with clients, preparation of documents or court appearances, but excluding administrative functions necessarily required to be performed by the practitioner for the continued running of the firm of M Lawyers.
5. The Tribunal orders that after 4 June 2004, the practitioner may apply for an employee level practising certificate for 12 months from the date of issue of that certificate.
6. The Tribunal further orders that the practitioner must undertake and complete to the satisfaction of the Queensland Law Society Incorporated the practice management course, prior to applying to the Queensland Law Society Incorporated for an employee level practising certificate.
7. In accordance with the practitioner's undertaking given by the practitioner through his counsel, the practitioner must undertake over the next two years, commencing today, a maximum of six drug tests per annum for illegal drugs which will result in a negative result, the drug tests to be taken at the direction of the Queensland Law Society and to be carried out by a party nominated by the Queensland Law Society at the expense of the practitioner, the results to be made available to the practitioner and the Queensland Law Society.
8. The Tribunal accepts the undertaking given by the practitioner through his Counsel to continue with regular treatments with his psychiatrist, Dr G, over the next two years.
9. The Tribunal further orders the practitioner pay the costs of the Queensland Law Society in relation to this application and the previous hearing, and the costs of the Clerk to the Tribunal and the recorder, such costs to be agreed and, failing agreement, to be assessed by Monsour Legal Costs Pty Ltd.
10. The Tribunal further orders that the practitioner be allowed nine months to pay the costs so ordered from the date of agreement regarding costs or from assessment whichever is the later.
11. The Tribunal refuses to make a compensation order on the basis that it is not satisfied that M has suffered pecuniary loss because of the practitioner's professional misconduct set out in the Notice of Charge.

Reasons

The Tribunal has had regard to the personal references and the client statements that have been tendered in evidence today. The Tribunal is of the view that the practitioner is a person of some integrity, who has gone to considerable lengths on occasions to assist his clients.

The practitioner has never been before this Tribunal before.

There was a conflict of medical evidence between Dr G and Dr N about the practitioner's diagnosis. Urine drug testing arranged by Dr N confirmed the presence of cannabinoids that were said to be inconsistent with the practitioner's stated drug use. The findings were significantly higher than the minimum cannabinoid level required for a positive test.

Dr N found that if the practitioner continued to use cannabis in the manner or in that manner, or in a manner that would produce a finding in those terms, then it was probable that the practitioner would experience further difficulties in the practice of the law. We accept Dr N's evidence in that respect.

We are concerned that the practitioner may have a dependence on cannabis. Because of this concern, we need to protect the public from being exposed to a practitioner who may have such a problem. Of course, these Charges are serious ones. The practitioner has demonstrated a lack of insight into his proper responsibilities as a solicitor.

Charges 1 to 6 involve transactions where the practitioner was in a conflict of interest situation. The over-charging which is the subject of Charge 7 is also a very serious matter, as are Charges 8 to 13 in relation to the practitioner's dealing with clients and with the Queensland Law Society. There needs to be a real deterrent to the profession at large from participating in conduct of this kind, which continue to bring the profession into disrepute.

The practitioner here did enter an early plea to these Charges. The Tribunal considers suspension to be the appropriate penalty, rather than striking off.

To the extent that some of this practitioner's problems are due to depressive illness, Dr G, his treating psychiatrist, is optimistic about his progress to date and his prognosis for the future. Dr G thought he would be fit to recommence practice within a month or two from now on a graduated basis, but the requirements for a real deterrent and the requirement to protect the public dictate that the practitioner must be suspended from practice for a 12 months period.

Whether the practitioner's problems are principally related to a drug problem or to a depressive illness, we think we can be, and we are satisfied, that at the end of the 12 months period during which he continues his medical treatment, and during which he submits himself effectively to random drug testing, that he will be fit to resume legal practice as an employee solicitor only, and then after a further 12 months period where he will be required to work as an employed solicitor, that we can then be confident that it's appropriate that he then be allowed to apply for a principal level certificate.

In that regard, we note the provisions of section 41A of the *Queensland Law Society Act*, which is, it seems to us, available to the Society.