

SUPREME COURT OF QUEENSLAND

CITATION: *Legal Services Commissioner v McClelland* [2006] LPT 13

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
DOUGLAS LAING McCLELLAND
(respondent)

FILE NO: S5185 of 2006

DELIVERED ON: 24 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 16 November 2006

TRIBUNAL

MEMBER: de Jersey CJ

PANEL

MEMBERS: Mr K Horsley
Dr S Dann

FINDINGS: **There will be orders and findings as follows:**

- 1. a finding that each charge is established (save in the case of charge two, particular 2.2(b)), the first involving professional misconduct and the second unprofessional conduct;**
- 2. the administration of a public reprimand of the respondent in respect of the first charge;**
- 3. an order that the respondent's local practising certificate be suspended for a period of four months;**
- 4. an order that the respondent pay the applicant's costs to be assessed if not agreed.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – CONVEYANCERS AND LICENSED LAND BROKERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – sharing the receipts of a practice with an unqualified person – failing to furnish to purchasers the requisite “lawyer’s certificate” – resort to substance, rather than form, of relationship between solicitor and unqualified agent

Property Agents and Motor Dealers Act 2000 (Qld), s 365B
Queensland Law Society Act 1952 (Qld), s 3B, s 39
Queensland Law Society Rules 1987 (Qld), r 78

Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498, cited

COUNSEL: S L Lane for the applicant
B G Cronin for the respondent

SOLICITORS: Legal Services Commission for the applicant
Gall Standfield Smith for the respondent

- [1] **de JERSEY CJ:** The respondent solicitor is subject to two charges.
- [2] The first is that between September 2003 and June 2004, in breach of Rule 78 of the *Queensland Law Society Rules 1987* (Qld), he shared the receipts of his law practice with an unqualified person. The second is that over the same period, he failed to provide a Lawyer's Certificate to purchaser clients, in contravention of s 365B(2) of the *Property Agents and Motor Dealers Act 2000* (Qld).
- [3] The relevant facts are agreed, though how they should be characterized, vis-à-vis the charges, is in contention. The respondent is 45 years of age. He was admitted to practice in December 1999. At relevant times, he practised as a sole practitioner at the Gold Coast.
- [4] The circumstances bearing on the first charge are these. Ms Mullins was the sole director and shareholder of Simply Conveyancing Australia Pty Ltd. In September 2003, the respondent and Ms Mullins entered into an arrangement, under which Ms Mullins would organize purchasers to sign contracts and assist them to secure their finance, following which she would refer the client to the respondent, and he would carry the transaction through to completion.
- [5] The respondent and Ms Mullins proceeded on the basis \$2,500 was an appropriate amount for professional fees for such transactions. It was agreed that Ms Mullins be paid \$1,000 for her work, with the balance of \$1,500 going to the respondent.
- [6] The charge involves 32 such transactions. In all cases save one, the contract names Simply Conveyancing Pty Ltd as the purchaser's solicitor. The statement of agreed facts says that when the transaction reached a certain stage, "Simply Conveyancing and/or Mullins...retained the Respondent to complete the conveyancing work for it". Thereafter, the respondent represented to third parties that he acted as solicitor for the purchaser. In 11 cases, the respondent obtained an express authorization from the purchaser "to act on behalf of Simply Conveyancing to complete the conveyance".
- [7] As to payment, in nine cases Simply Conveyancing received the fees, usually in the amount of \$2,500, from the purchaser at settlement. The respondent then forwarded his account, usually for the sum of \$1,500, to Simply Conveyancing for payment. In 18 of the transactions, the respondent collected his fees from the purchasers at settlement, and also collected a payment for Simply Conveyancing, which he forwarded to that company upon production of its invoice. In the remaining five transactions, settlement did not occur, and the respondent did not collect any fees.
- [8] Neither Ms Mullins nor Simply Conveyancing at any stage held a solicitor's practising certificate. Section 39 of the *Queensland Law Society Act 1952* (Qld) provides, as relevant, that "[e]very person who directly or indirectly acts or practises as a solicitor or conveyancer – (a) without having at the time a certificate...shall be guilty of an offence". The hearing proceeded on the basis some of the work done by Ms Mullins was solicitor work.

- [9] Rule 78 of the *Queensland Law Society Rules* provides that “[a] practising practitioner shall not share with any unqualified person receipts from his practice” except in three designated situations (none of which applies here), or “[w]here the Council has approved of his doing so and he complies with any conditions subject to which the approval was given”. In this case no such approval was sought or given. A council ruling in relation to Rule 78 provides that “[t]he Council has no objection in principle to a practitioner sharing the receipts of this business with an unqualified person and will consider an application for approval provided the agreement or arrangement for such sharing is in writing”, and provides for certain things, one of which is “[t]hat a person who does not hold a current practising certificate...shall not act as legal adviser or practitioner”.
- [10] The issue falling for consideration is whether the respondent shared receipts from his practice with an unqualified person. Plainly Ms Mullins and Simply Conveyancing were unqualified persons. The question is whether the respondent shared with them, or one or other of them, receipts from his practice.
- [11] The substance of the situation was the client’s necessary legal work was carried out by the respondent, as solicitor, and Ms Mullins, as legally unqualified clerk. They agreed on a division of the work, the respondent confining himself to that segment which appealed to him. They effectively worked in tandem under a collaborative umbrella agreement. They agreed as to how the total fee, \$2,500, should be divided between them. In the result, the respondent was sanctioning the carrying out of a solicitor’s work by an unqualified person, in circumstances where it suited him not to attend himself to that early work on the purchaser’s behalf. Another way of analysing it, is that in carrying out that early work, Ms Mullins effectively did so on behalf of the qualified respondent, on the understanding she was to be paid the proportion of the overall fee relevant to the work she did.
- [12] Mr Cronin, who appeared for the respondent, essentially submitted that the moneys paid to Ms Mullins or Simply Conveyancing were never “receipts” of the respondent’s law practice: they were moneys paid to Simply Conveyancing for its services following its retainer from the purchaser. He presented the work done by the respondent and Simply Conveyancing, and their respective financial returns, as entirely distinct.
- [13] But that ignores the significant consideration of the antecedent arrangement, under which the parties divided up the work to be accomplished, and determined the proportion in which they would share the overall fee; and the fact that this was appreciably solicitor type work which Ms Mullins and Simply Conveyancing were by law forbidden to undertake.
- [14] Hence the reality of the arrangement: it should be seen as the respondent’s retainer, to an extent via his agent Simply Conveyancing, with the respondent sharing his \$2,500 fee to the extent of allowing Simply Conveyancing \$1,000. Implementation of the arrangement involved Simply Conveyancing doing its part of the work effectively under the auspices of the respondent.
- [15] Very similar circumstances confronted the Full Court in *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498. That court held that an arrangement between the practitioner and his unqualified conveyancing clerk involved the sharing of receipts contrary to the rule.

- [16] In *Adamson*, while the unqualified clerk was technically an employee of the practitioner, in respect of the conveyancing work the clerk maintained separate premises; she brought in conveyancing clients and attended to their conveyancing business in her own office; she then referred the files to the practitioner for completion. That clerk received 75 per cent of the professional costs for conveyancing work introduced by her to the practice. As has been seen, in this case, the proportion of the total fee charged to the client for the conveyancing work which went to the unqualified person was 40 per cent.
- [17] In *Adamson*, the court identified, as the vice underlying Rule 78, the importance of avoiding “the de facto conduct of legal practices by unqualified persons” (p 503).
- [18] The Tribunal is content, finally, to adopt the submission of Ms Lane, who appeared for the applicant, expressed as follows:
 “The applicant submits that it is apparent that the details of the arrangement between the respondent and Mullins were constructed so as to avoid any perception of ‘sharing’: Mullins kept separate office premises; Mullins ‘retained’ the respondent to complete the work; the respondent and Mullins each billed the client separately; and the fees for the respondent’s and Mullins’ work were paid separately at settlement, or the full \$2,500 was paid to Simply Conveyancing. In this way, the perception that the respondent was paying money that he had received in his practice was avoided. However, the applicant submits that the details of the payments are irrelevant to a consideration of the respondent’s overall conduct: the effect of the arrangement was that the \$2,500 fees for the conveyancing work, which was work that could only legally be carried out by the respondent, was shared between the respondent and Mullins.”
- [19] In these circumstances, the breach of Rule 78 alleged in charge one is established.
- [20] The next question which arises is whether the conduct involved in charge one should be characterized as “professional misconduct” or as “unprofessional conduct”, as those concepts applied under the *Queensland Law Society Act*, applicable because of the timeframe of these events. The Tribunal assayed some analysis of those concepts recently in *Legal Services Commissioner v Podmore* [2006] LPT 5. The term “professional misconduct” was dealt with in this way:
 “For the purposes of the *Queensland Law Society Act*, reference was made to the common law definition of ‘professional misconduct’, as conduct violating, or falling short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.”
- As to “unprofessional conduct”, this was said:
 “Section 3B of the *Queensland Law Society Act* contained a non-exhaustive definition of the term ‘unprofessional conduct’, referring to matters including neglect, delay, excessive charging, and lack of competence or diligence.”
- [21] In this context, this was plainly a case of professional misconduct, as was the view of the Full Court in the factually comparable case of *Adamson*. As put for the

applicant, this arrangement “facilitated illegal conveyancing”. As to gravity, it was an arrangement apparently crafted with some care to avoid a perception of sharing. It also raised the prospect of undesirable uncertainty as to the identity of the purchaser’s solicitor at various stages of the transaction.

[22] The circumstances relevant to the second charge are these. Section 365B of the *Property Agents and Motor Dealers Act* provides that a lawyer engaged in relation to the purchase of a residential property “must give the buyer a lawyer’s certificate in the approved form and explain to the buyer the purpose and nature of the certificate”.

[23] The section is as follows:

“365B Lawyer’s disclosure to buyer about independence

- (1) This section applies if a buyer or prospective buyer (**buyer**) engages a lawyer in relation to the purchase or proposed purchase of a residential property under a relevant contract.
- (2) The lawyer must give the buyer a lawyer’s certificate in the approved form and explain to the buyer the purpose and nature of the certificate.
- (3) The lawyer’s certificate must be signed and dated by the lawyer and must state –
 - (a) whether the lawyer is independent of the seller, the seller’s agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and whether the lawyer has a business, family or other relationship with any of those persons; and
 - (b) whether the lawyer has received, is receiving, or expects to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer; and
 - (c) the lawyer has explained to the buyer the purpose and nature of the certificate.
- (4) In this section –

‘benefit’ means monetary or other benefit.”

[24] The applicant submitted that because the respondent had an arrangement with Simply Conveyancing “in connection with the sale” of the properties (sub-s (3)(a)), any certificate given would necessarily have had to refer to that. But that arrangement related to the purchase. The section is directed towards alerting purchasers to any connection their lawyer may have with those involved on the other side of the transaction, such as might imperil the lawyer’s capacity to discharge his or her obligation to the purchaser independently. The words “in connection with the sale” should be read literally, that is, involving connection with the sale, by contrast with the purchase.

[25] Particular 2.2(b) of the charge is not established, although the balance of the charge is.

- [26] In the case of 16 transactions over the period subject to charge two, the respondent failed to provide the purchaser with any lawyer's certificate. The charge is therefore established. The respondent has taken steps to ensure future compliance with this requirement: he has given an undertaking to the Office of Fair Trading, and has agreed to allow that agency access to his files to audit compliance.
- [27] The Tribunal accepts the submission advanced by the applicant that this breach is properly characterized as one going to competence and diligence, amounting to unprofessional conduct. It was based on a misreading of the legislation, and Mr Cronin submitted it did not even reach the level of unprofessional conduct. But the respondent's approach bespoke a "failure to maintain reasonable standards of competence or diligence" (s 3B(1)(c) *Queensland Law Society Act*), which put it into that category. A practitioner must have the wit carefully to read and comprehend a provision like this, designed for the protection of clients in an area in which he substantially practises. The "failure" referred to in s 3B(1)(c) would not embrace all cases of error, but this is substantial enough to fall within its ambit.
- [28] Turning to the question of what orders should be made consequent upon the establishment of the charges, the breach involved in the first charge must be considered a serious instance of professional misconduct. The respondent entered into an arrangement which facilitated the carrying out of illegal conveyancing work by an unqualified person, and shared the receipts derived from the work with the unqualified person. While it is true that he terminated the arrangement upon its being detected by the Queensland Law Society, there is no indication he would have done so had the matter not come to light in that way.
- [29] On the other hand, the respondent has cooperated with the Commission by providing responses when required during the investigation, he has taken steps to ensure his conduct in respect of the second charge does not recur, and he is not subject to other adverse disciplinary findings. Also, he did not lie to a Law Society officer, as did Mr Adamson (p 507).
- [30] The gravity of the misconduct involved in the first charge does however warrant a more serious response from the Tribunal than his being ordered to pay a pecuniary penalty, a response which will not only require the respondent to pause so that he can come to a better appreciation of his ethical obligation, and his supervening obligation in particular to uphold the law, but will also signal clearly to the profession generally the unacceptability of this sort of expedient conduct. That said, the misconduct involved in the first count does not warrant striking off, but should lead to a period of suspension from practice.
- [31] There will be orders and findings as follows:
1. a finding that each charge is established (save in the case of charge two, particular 2.2(b)), the first involving professional misconduct and the second unprofessional conduct;
 2. the administration of a public reprimand of the respondent in respect of the first charge;
 3. an order that the respondent's local practising certificate be suspended for a period of four months;
 4. an order that the respondent pay the applicant's costs to be assessed if not agreed.