

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Gregory Alan Pointon* [2008]
LPT 16

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
GREGORY ALAN POINTON
(respondent)

FILE NO/S: 7344/06

ORIGINATING
COURT: Legal Practice Tribunal

DELIVERED ON: 19 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 17 November 2008

JUDGE: Byrne SJA assisted by

PRACTITIONER
PANEL
MEMBER: Ms C C Endicott

LAY PERSON
PANEL
MEMBER: Ms K A Keating

ORDER: **That the respondent:**
1. be publicly reprimanded for professional misconduct;
2. pay a fine of \$10,000 ; and
3. pay the Commissioner's costs of the proceeding to be assessed.

PROFESSIONS AND TRADES – LAWYERS – SOLICITOR
AND CLIENT – DUTIES AND LIABILITIES TO CLIENT –
PROFESSIONAL MISCONDUCT- where the respondent acted
for buyers in conveyancing transactions – where the respondent
failed to disclose information regarding independence of the
vendors from the financial advisors – whether the respondent's
omissions amounted to professional misconduct.

LSC v Madden (No 2) [2008] QCA 301

LSC v Podmore [2006] LPT 005

COUNSEL: Mr A J MacSporran S.C. for the applicant
Mr A J H Morris QC for the respondent

SOLICITORS: Legal Services Commission for the applicant
 Gilshenan & Luton for the respondent.

- [1] By this discipline application, it is alleged that, in breach of his duty as a solicitor, Mr Pointon failed to give undivided fidelity to the interests of his clients in not disclosing information material to their decisions whether to enter into contracts to buy real property.¹
- [2] The particulars allege, and Mr Pointon admits, that:
- “1.1 At all material times, [he] was a principal of the law practice Perrin Pointon Solicitors, at ... Chevron Island ...
 - 1.2 During 1998 and 1999, [he] acted for ... buyers in ... conveyancing transactions ...
 - 1.3 In each transaction, [he] was aware of and failed to disclose to each buyer the following information:
 - (a) That Investland (sic) Pty Ltd and National Asset Planning Corporation Pty Ltd (NAPC) were acting in concert together to market and/or sell properties in such a way as might provide a purchaser with a defence to an action brought by the seller concerning termination of the contract; and
 - (b) That NAPC and/or Coral Reef Group Pty Ltd was to receive a substantial marketing fee on settlement of the transactions.”

Marketing Strategy

- [3] Coral Reef Group Pty Ltd (“Coral Reef”) marketed and sold Gold Coast residential units. The units were acquired by Coral Reef from the developers for on-sale or else marketed and sold on behalf of the developers. Mr Bilborough was Coral Reef’s sole director and shareholder.
- [4] Coral Reef engaged National Asset Planning Corporation Pty Ltd (“NAPC”), another company controlled by Mr Bilborough, to conduct the marketing and sale of the properties.
- [5] Mr Bilborough had an interest in Investlend Pty Ltd (“Investlend”). Investlend gave prospective purchasers financial advice about the acquisition of residential units NAPC had for sale. It also acted as a finance broker, obtaining finance for a purchaser who required such a service.

¹ The charge contains a further allegation that the undisclosed information was material to the client’s consideration whether to “continue with the purchase” once the contract had been concluded. As the case was argued, however, this contention did not assume significance.

- [6] Coral Reef or NAPC was paid a fee for marketing the units. The fee was well in excess of the maximum commission payable to a real estate agent who introduced a purchaser: for example, on a sale for about \$140,000 (in which Mr Pointon acted for the purchaser), Coral Reef was paid almost \$30,000.
- [7] In NAPC's marketing strategy, telemarketers canvassed the public to gather together a sufficient number to attend an investment seminar. Seminar participants were told about yields on Gold Coast property investments. Some were offered discounted return fares and accommodation at the Gold Coast.
- [8] On arriving at the Gold Coast, a prospective purchaser was assigned a "runner". The runner took the investor to Investlend's office and remained while a representative carried out a financial analysis. The analysis demonstrated the tax advantages and affordability of a negatively geared acquisition of units NAPC had for sale. Projections of capital growth were also furnished. Investors were pressured to buy a unit that same day.
- [9] If the investors agreed to buy, they left a cheque for the deposit and usually completed a mortgage brokerage agreement. The runner then took them to a solicitor included on a panel of solicitors maintained by NAPC. The runner usually remained during the consultation with the solicitor.

Mr Pointon

- [10] Mr Pointon knew Mr Bilborough, and that he ran Coral Reef and NAPC. He knew Mr Quinlivan, who operated Investlend's mortgage brokerage business. And he appreciated that NAPC's marketing strategy involved telemarketing, seminars and invitations to attend the Gold Coast to view selected properties. He knew: of the runners and what they did; that Investlend supplied an investment analysis to prospective purchasers; and that Coral Reef or NAPC was to be paid a substantial fee out of the price – typically, about \$30,000.
- [11] Mr Pointon told prospective purchasers that he was an independent solicitor with no financial or other involvement with the developer or with the marketing group other than the client's referral, for which nothing was paid by him. His habit was to explain the terms of the contract the client was about to sign.
- [12] Mr Pointed acted for purchasers in this way ten times. He did not tell any of them about the marketing fee. Nor was the fee mentioned in reconciliation statements later sent to the clients.

Concerted Action Discovered

- [13] Mr and Mrs O'Neill consulted Mr Pointon as prospective purchasers of a \$164,900 unit on Chevron Island.² They signed a contract to buy the unit after consulting him. Later, Mrs O'Neill told Mr Pointon that they may not wish to proceed with the purchase because an accountant had said that the acquisition did not look like a good investment.
- [14] Mr Pointon gave the O'Neills written advice that because Investlend had secured finance approval from the Commonwealth Bank, there were not grounds to terminate the contract. Investlend was sent a blind copy of the letter. At that time, Mr Pointon supposed that Investlend was functioning independently of NAPC in providing investment advice and arranging finance.
- [15] By 18 May 1998, Mr Pointon realized that Investlend was acting in concert with NAPC in its marketing of the residential units. On that day, on behalf of the O'Neills, he wrote to the vendor's solicitors saying that attempts to enforce the contract would be "strenuously defended". He contended that the O'Neills had not received an unconditional offer of finance in accordance with their instructions to Investlend and were entitled to rescind and recover the \$1,000 deposit. The letter continued:

"4. We are specifically instructed by our clients that in defending any attempt to enforce the Contract of Sale they will be asking questions regarding breaches of the *Privacy Act* under which the developer has been informed that the terms and conditions of the purported loan approval from the Commonwealth Bank.

Our clients will further raise issues regarding collusion between National Asset Planning Corporation, Investlend and the developer."

- [16] The *Privacy Act* breach reference is to the fact that Investlend had told the vendor that the Commonwealth Bank had approved a loan to facilitate the O'Neills' purchase. The "collusion" was Mr Pointon's characterization of a co-operative relationship with NAPC indicated by Investlend's having revealed the loan approval to the vendor.
- [17] The vendor promptly agreed to termination of the contract.

Practitioner's Integrity not Assailed

- [18] The discipline application does not charge that Mr Pointon acted dishonestly or with an improper motive or object.³

² Coral Reef stood to get a \$34,900 marketing fee on this transaction.

³ Nor does the application allege that he should have appreciated that the information he omitted to disclose about the marketing fee and "acting in concert" was material to a decision whether to buy: rather, the case, as charged, is that the unrevealed information was of that character.

- [19] Concerning the non-disclosure of the marketing fee, the agreed statement of facts includes that Mr Pointon:

“did not consider it his duty or responsibility to inform purchaser clients that a sum of money would be paid to the marketing company by way of a fee. [He] would have advised purchaser clients of the marketing fee if he had evidence to believe that the fees paid meant that the property would be grossly over priced.”

- [20] Mr Pointon, however, accepts that disclosure to a client of the marketing fee may have resulted in a decision not to buy.
- [21] As to the non-disclosure of the “acting in concert” in respect of the seven or so clients who consulted him after mid-May 1998, again he accepts that they may not have bought had he suggested that Investlend and NAPC were acting in concert to market the units.⁴
- [22] Mr Pointon offers no explanation for his omission to disclose what he knew of the absence of independence of Investlend. But it is not charged that he withheld the information for some such reason as to prefer NAPC’s interests to those of his clients or to enhance his prospects of obtaining future client referrals. As the charge is framed⁵ the non-disclosures call his competence into question, not his integrity.

Professional Misconduct

- [23] The number and nature of Mr Pointon’s grave errors of judgment amount to conduct that falls “short of, to a substantial degree, the standard of professional conduct observed or approved by the members of the profession of good repute and competency ...”⁶. He should have seen to it that their choice was appropriately informed with the potentially influential information he had. He is guilty of professional misconduct.

Sanction

- [24] There are features in mitigation.
- [25] Mr Pointon has co-operated with the Legal Services Commission and the Queensland Law Society. He altered his procedures to reduce the risk of repetition

⁴ Particular 1.3(a) includes an allegation that the concerted action was such as “might provide a purchaser with a defence to an action brought by the seller ...”. As the case was conducted, it is difficult to see how significance can be accorded to this. For one thing, there was no identification of the legal basis on which the joint action could give rise to a defence in proceedings to enforce the contract. Mr Pointon admits, however, that there was such a chance.

⁵ As to the significance of the wording of a charge and particulars for the hearing of a discipline application, see *LSC v Madden (No 2)* [2008] QCA 301, [56], [72], [76].

⁶ *LSC v Podmore* [2006] LPT 005, [7]

of such misconduct. And there are no adverse findings by a disciplinary body against him.⁷

- [26] The impact on Mr Pointon's clients received little attention. Apart from the O'Neills, it is not shown that any purchaser sought to be extricated from a purchase. Only one has claimed that the contract would not have been made had he been apprised of the marketing fee. None is shown to have suffered loss through completing the purchase or to have suggested that the choice to buy would have been different if Investlend's "collusion" had been revealed.

Disposition

- [27] All considered, Mr Pointon's conduct deserves a public reprimand, a \$10,000 fine and, as agreed, an order that he pay the Legal Service Commissioner's costs of the proceeding to be assessed.

⁷ Significance was sought to be attached to the circumstance that it was only shortly before the hearing began that an alternative charge alleging deceit and dishonesty was abandoned. It was said that its subsistence for more than two years put extraordinary pressure on Mr Pointon that ought to be taken into account in mitigation. But Mr Pointon has not given evidence. Absent evidence about the effect, if any, the discontinued charge has had on him, not much weight can be attached to this.