

In the Matter of David William Spain

Case Number: SCT/101
Date of Hearing: 28 July 2003
Appearing Before: Mr P Cooper (Presiding Member/Practitioner Member)
Mr M Byrom (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J Nimmo (Legal Ombudsman)
Mr J W Broadley (Clerk)
Penalty: Fined \$12,000

Charges

1. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that in breach of his duty as a solicitor he acted for both the vendor and the purchaser in the conveyancing transactions particularised hereunder in circumstances where, notwithstanding the interests of his clients conflicted:
 - (i) the purchaser was not informed that the practitioner acted for the vendor;
 - (ii) the purchaser was not informed of the nature and implications of the conflict;
 - (iii) the practitioner did not obtain and the purchaser did not provide a voluntary and informed consent to the practitioner continuing to act; and
 - (iv) the practitioner did not obtain and the vendor did not provide a voluntary and informed consent to the practitioner continuing to act.

Particulars

- (a) During the period April 2001 to November 2001, the practitioner, through his firm SLS and through his firm S, acted for the parties described in the conveyancing transactions particularised in the schedule annexed hereto.
- (b) In respect of each such transaction:
 - (i) the practitioner acted for the purchaser ("the original purchaser") of real property ("the original purchase contract");
 - (ii) the practitioner acted for the original purchaser as vendor in the on-sale of the said property ("the on-sale contract"); and
 - (iii) the practitioner acted for the purchaser ("the end purchaser") in the on-sale contract.
- (c) Further, in respect of each such transaction:
 - (i) the purchase price payable on the on-sale contract exceeded, in some cases substantially, the purchase price payable on the original purchase contract;
 - (ii) the end purchasers' financial consultant ("the financial consultant") for the purposes of arranging finance to complete the on-sale contract was associated with the original purchaser;and in respect of each such transaction other than the transactions of W and M;
 - (iii) the original purchase contract and the on-sale contract settled contemporaneously;
 - (iv) the transfers were effected by way of a transfer by direction; and
 - (v) the vendor named on the on-sale contract was not, at the time of contract, or at the time of settlement, the registered owner of the land.
- (d) Further, in respect of most such transactions, upon settlement, the financial consultant received payment of a substantial part of the purchase price payable by the end purchaser to the original purchaser.
- (e) In respect of each such on-sale contract, the matters referred to in paragraphs (b)(i), (b)(ii), (c) and (d) hereof and each of them were matters material to the interests of the end purchaser.
- (f) In respect of each such on-sale contract, in breach of his duty as a solicitor:
 - (i) the matters referred to in paragraphs (b)(i), (b)(ii), (c) and (d) hereof were not disclosed by or on behalf of the practitioner to the end purchaser;
 - (ii) the practitioner did not obtain and the end purchaser did not provide a voluntary and informed consent to the practitioner acting and/or continuing to act;
 - (iii) the practitioner did not obtain and the original purchaser did not provide a voluntary and informed consent to the practitioner acting and/or continuing to act.

Schedule

No.	Property	Original Purchase/Vendor	End Purchaser	Date of Settlement
1.	Lot 465 Sandalwood Drive, Yamanto	DCT	L1	17 May 2001
2.	Lot 477 Sandalwood Drive, Yamanato	DCT	S1	25 May 2001
3.	Lot 470 Yew Street, Yamanto	DCT	V&W	6 June 2001
4.	Lot 424 Oak Court, Yamanto	DCT	K1	13 June 2001
5.	Lot 7 Currawong Street, Doolandella	DCT	T	20 June 2001
6.	Lot 13 Gladys Street, Doolandella	DCT	W1	20 June 2001
7.	Lot 102 Jacana Crescent, Yamanto	DCT	C1	21 June 2001
8.	Lot 168 Dindina Street, Fairview Rise	DCT	M	21 June 2001
9.	Lot 269 Sandalwood Avenue, Yamanto	DCT	L2	23 July 2001
10.	Lot 445 Yew Street, Yamanto	DCT	Mc	27 July 2001
11.	Lot 31 Leonie Place, Doolandella	DCT	P&M	27 July 2001
12.	Lot 20 Jabiru Place, Bellbowrie	DCT	F&R	10 August 2001
13.	Lot 13 Lagoon Crescent, Bellbowrie	McL as trustee for the DCT	H	13 August 2001
14.	Lot 66 Lake Breeze Drive, Loganholme	DCT	C2	27 August 2001
15.	Lot 275 Yew Street, Yamanto	DCT	K2	31 August 2001
16.	Lot 107 Kelso Close, Yamanto	DCT	L3	3 September 2001
17.	Lot 486 Sandalwood Drive, Yamanto	DCT	M& R-S	5 September 2001
18.	Lot 32 Leonie Place, Doolandella	DCT	F	13 September 2001
19.	Lot 31 Jabiru Place, Bellbowrie	DCT	W2	14 September 2001
20.	Lot 267 Sandalwood Drive, Yamanto	DCT	L4	18 October 2001
21.	Lot 461 Sandalwood Drive, Yamanto	PAM&DPL	P	2 November 2001
22.	Lot 462 Sandalwood Drive, Yamanto	DCT	K3	on or about 8 November 2001

2. Not proceeded with.
3. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, in or about December 1998, in breach of his duty as a solicitor:
 - (a) he or his firm, having been engaged by a person (not being an "excepted person" as defined in rule 85) to negotiate or otherwise act in respect of a contract or mortgage under or upon which that person had provided or agreed to provide credit to another person did, during the course of such engagement, act for such other person in respect of a matter in which the credit (or part of it) had been or was intended to be applied, in breach of rule 85 of the *Queensland Law Society Rules*; and
 - (b) Not proceeded with.

Particulars

- (a) In or about December 1998 the practitioner, in breach of rule 85 of the *Queensland Law Society Rules*, acted:
 - (i) for SPL with respect to an advance of \$35,000 to BPL and TJK;
 - (ii) for BPL and TJK with respect to a purchase from MDPL, in respect of which purchase the said advance, or part thereof, was applied.
 - (b) The practitioner also acted in relation the negotiation and preparation of a mortgage over the property acquired by the mortgagor purchasers, by which mortgage the said advance was secured.
 - (c) At the time of the said mortgage the practitioner, in breach of rule 87A of the *Queensland Law Society Rules*:
 - (i) did not hold current mortgage fidelity insurance;
 - (ii) had not advised the Secretary of the Society that he practised in excluded mortgages.
 - (d) The said BD had the primary carriage of the transactions described in particulars (a) and (b) above for and on behalf of the practitioner. In breach of his duty as a solicitor, the practitioner failed, in respect of the said transactions, to exercise any, or any satisfactory supervision over the conduct of his said employee, so as to ensure that the practitioner and his firm did not, in the conduct of his practice, engage in breaches of the *Queensland Law Society Rules*.
4. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, namely trust moneys, withdrew and paid the sum of \$500 from his trust account on or about 27 September 2002, in breach of sections 8(1) and 12(4) of the *Trust Accounts Act*.

Particulars

- (a) On or about 11 July 2002 the practitioner received instructions to act for the vendors, BCC and CLC, in relation to a contract dated 10 July 2002 for the sale of their property at 17 Marlow Street, Woodridge to PJF as purchaser.
- (b) On 15 July 2002 the practitioner received the sum of \$500 into his trust account on behalf of his clients, being deposit moneys paid on behalf of the purchaser pursuant to the contract.

- (c) On or about 6 September 2002 the vendor clients terminated the practitioner's instructions and uplifted their file.
 - (d) By letter to the practitioner dated 11 September 2002 Messrs O&B informed the practitioner that:
 - (i) they had received instructions to act for the practitioner's clients, BCC and CLC;
 - (ii) the contract was at an end;
 - (iii) the purchaser was in default and the deposit forfeited to the vendors pursuant to the terms of the contract;and asked that the practitioner account to the vendors for the deposit, care of their office.
 - (e) By another letter to the practitioner dated 11 September 2002, the purchaser advised that under no circumstances was the practitioner to release the deposit to Messrs O&B or their client.
 - (f) By letter to the practitioner on behalf of the purchaser dated 17 September 2002, the practitioner was directed on behalf of the purchaser to refund the said deposit in favour of M&RPL.
 - (g) On 27 September 2002, notwithstanding the notice to the practitioner that entitlement to the said trust moneys was in dispute, the practitioner caused or permitted the said sum of \$500 to be withdrawn from his trust account and paid to M&RPL, in breach of sections 8(1)(a) and 12(4) of the *Trust Accounts Act*.
5. Not proceeded with.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr R G Perrett, Solicitor of Messrs Clayton Utz Solicitors
- (b) For the Practitioner:
Mr J D Weller of John D Weller & Associates Solicitors

Findings and Orders

1. The Society having not proceeded with charges 2, 3(b) and 5 and the Practitioner having pleaded guilty to charges 1, 3(a) and 4 contained in the Notice of Charge, the Tribunal finds the charges 1, 3(a) and 4 proved.
2. The Tribunal finds the charges admitted and proved amount to professional misconduct and finds the Practitioner guilty of professional misconduct.
3. The Tribunal orders that the Practitioner pay a penalty of \$12,000.00 to the Fund.
4. The Tribunal accepts the undertaking of the Practitioner not to act for both parties in any conveyancing transactions.
5. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated and incidental to these proceedings, including the costs of the recorder and the Clerk to the Tribunal, such costs to be agreed, and failing agreement, to be assessed by Monsour Legal Costs Pty Ltd.
6. The Tribunal further orders that the penalty be paid by equal monthly instalments of \$1,000.00 each, the first instalment commencing one month from today.
7. In relation to the costs ordered to be paid, the Tribunal orders that the Practitioner pay such costs within twelve months of agreement or assessment whichever is the later.

Reasons

Charge 1

This charge involves the practitioner acting for both parties in a situation where the practitioner was as a result of his conduct in breach of his duty as a solicitor. There were 22 transactions.

The Society has conceded that the practitioner disclosed the situation of conflict that he found himself in, in four transactions. However, the attempted disclosure which is evidenced by the letter of the practitioner at page 329 of the material of the Society was false in that it was misleading.

The practitioner's dealings were part of a larger number of transactions totalling some 130 for the same vendor. The practitioner was in breach of his duty as a solicitor. He acted for both the vendor and the purchaser in the conveyancing transactions in circumstances where, notwithstanding the interests of his clients conflicted, the purchaser was not informed that the practitioner acted for the vendor.

The purchaser was not informed of the nature and the implication of the conflict. The practitioner did not obtain and the purchaser did not provide a voluntary and informed consent to the practitioner continuing to act, and the practitioner did not obtain and the vendor did not provide a voluntary and informed consent to the practitioner continuing to act.

Charge 3(a)

This charge relates to mortgage lending and to a breach of rule 85. The Society concedes that it is a breach of a technical nature. It was not intentional. It occurred as a result of the practitioner's ignorance of rule 85.

Charge 4

This charge relates to a breach of the *Trust Account Act*. The Society concedes that it was not a knowing breach, and that there was no loss.

In arriving at its findings, the Tribunal has taken into account the full co-operation which the practitioner has shown towards the Society, and has taken into account:

- the practitioner's early plea of guilty;
- the agreement by the practitioner to the use of hearsay affidavits that resulted in substantial time and costs savings;
- the steps taken by the practitioner to re-organise his practice to prevent the re-occurrence of the offences;
- the undertaking given by the practitioner in relation to conveyancing transactions;
- the extent that the practitioner has undertaken pro bono work for the community;
- and the practitioner's acceptance of responsibility for his firm's actions completely, and that he has shown genuine remorse.

While the Tribunal endorses the commitment of the profession generally and this practitioner in particular to the undertaking of pro bono work, it should be done in a manner that is consistent with the discharge of the solicitor's obligations to each and every one of his clients.