

In the Matter of Paul Michael Voll

Case Number: SCT/117
Date of Hearing: 3 & 16 March & 6 April 2004
Appearing Before: Ms C C Endicott (Chairperson/Practitioner Member)
Mr M Conroy (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Fined \$5,000

Charge 1 (GL & CL)

1. In breach of s5H(1) of the *Queensland Law Society Act* 1952 ("the Act"), the practitioner failed in the respects particularised below, to comply with a requirement:
 - (i) to give the Council of the Queensland Law Society Incorporated ("the Council"), within a stated reasonable time, an explanation in writing of a matter being investigated pursuant to s5G(a) of the Act; and
 - (ii) to deliver up to the Council, within a stated reasonable time, his client file to assist in the investigation of a complaint pursuant to s5G(c) of the Act.

Particulars

- (a) By a letter dated 28 April 2003, the Council, by the Society's General Manager, Legal Investigations and Prosecutions, being duly authorised in that regard, requested the practitioner, pursuant to s5G(a) and (c) of the Act, to:
 - (i) Forward a sufficient and satisfactory written explanation of the matters referred to in a letter of complaint dated 24 March 2003 received by the Society from GL & CL, by 20 May 2003; and
 - (ii) Forward his client file to the Society by 20 May 2003.
- (b) No written explanation was received from the practitioner within the time specified.
- (c) The practitioner has failed or refused to deliver all of his client file to the Society and has continued to do so.

Charge 2 (GL & CL)

2. The practitioner failed to comply with a Notice given by the Council under s5H(2) of the Act for a period of 14 days after the giving of the Notice.

Particulars

- (a) On 18 June 2003, the Council, by the Society's General Manager, Legal Investigations and Prosecutions, being duly authorised in that regard, gave the practitioner a written notice pursuant to s5H(2) of the Act.
- (b) The practitioner failed, within the 14 day period specified in the notice, to furnish a reply thereto or to deliver his client file as provided by the notice.

Charge 3 (HWB & DAB)

3. In breach of s5H(1) of the *Queensland Law Society Act* 1952 ("the Act"), the practitioner failed to comply with a requirement to deliver up to the Council, within a stated reasonable time, his final account and a trust account cheque in the matter of HWB & DAB, to assist with the investigation of a complaint by the Society, which requirement was made pursuant to s5G(c) of the Act.

Particulars

- (a) By a letter dated 17 June 2003, the Council, by the Society's General Manager, Financial Assurance and Client Relations, being duly authorised in that regard, requested the practitioner, pursuant to s5G(c) of the Act, to forward the following documents to the Society by 24 June 2003:
 - (i) A final account directed to HWB & DAB; and
 - (ii) A trust account cheque, payable to PBL Trust Account, for the amount refundable to HWB & DAB.
- (b) The practitioner failed to deliver the documents specified in paragraph 3(a)(i) & (ii) to the Society within the time specified and continued to do so until 9 July 2003.

Charge No 4 (GO & VO)

4. In breach of s5H(1) of the *Queensland Law Society Act* 1952 ("the Act"), the practitioner failed in the respects particularised below, to comply with a requirement to give the Council of the Queensland Law Society Incorporated ("the Council"), within a stated reasonable time, an explanation in writing of a matter being investigated pursuant to s5G(a) of the Act.

Particulars

- (a) By a letter dated 24 January 2003, the Council, by the Society's then Acting General Manager, Professional Standards, being duly authorised in that regard, requested the practitioner, pursuant to s5G(a) of the Act, to forward a sufficient and satisfactory written explanation of the matters referred to in a letter of complaint dated 7 May 2002 received by the Society from GO & VO, by 3 February 2003.
- (b) No written explanation was received from the practitioner within the time specified.
- (c) The practitioner has failed or refused to provide an explanation to the Society and has continued to do so.

Charge No 5 (GO & VO)

5. The practitioner failed to comply with a Notice given by the Council under s5H(2) of the Act for a period of 14 days after the giving of the Notice.

Particulars

- (a) On 17 October 2003, the Council, by the Society's General Manager, Financial Assurance and Client Relations, being duly authorised in that regard, gave the practitioner a written notice pursuant to s5H(2) of the Act.
- (b) The practitioner failed, within the 14 day period specified in the notice, to furnish a reply thereto.

Charge No 6 (GO & VO)

6. On or about 26 March 2002, the practitioner, when acting for GO & VO in relation to a proposed application to the Queensland Building Tribunal seeking a Review of Directions, knowingly and falsely represented to the clients that he had lodged the application on their behalf when, in truth that was not correct and no such application had ever been lodged as the practitioner well knew.

Particulars

- (a) On or about 26 April 2001, the solicitor acted for GO & VO ("the clients") who sought his advice in relation to their dispute with the Queensland Building Services Authority ("the BSA").
- (b) On or about 7 March 2002, the clients received from the BSA a "Direction to Rectify" certain building work to which the practitioner responded on 11 March 2002 requesting the BSA arrange a site inspection with the clients and grant an extension of time for completion of the defects.
- (c) Prior to and on 26 March 2002, the clients inquired from the practitioner on a number of occasions as to the response from the BSA and the practitioner informed the clients that he would be lodging an application with the Queensland Building Tribunal seeking a review of directions. On 26 March 2002, the practitioner informed GO of the wording he was using in the application and that he would forward a copy of the application to the clients by facsimile.
- (d) On 4 April 2002, the practitioner informed VO that "he had served them (the BSA) with the Review Application on 27 March 2002."
- (e) In truth, the practitioner's statement to VO on 4 April 2002 was false and at the time of making it the practitioner had not lodged or served the BSA with a Review Application as the practitioner well knew.
- (f) At no time during the entire retainer period did the practitioner lodge or serve the Review Application as he was instructed to do.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr M J Burns of Counsel instructed by the Queensland Law Society Incorporated
- (b) For the Practitioner:
Mr J P Murphy of Counsel instructed by Messrs Sawford Voll Solicitors
- (c) On behalf of the witness DLP:
ADM by leave

Findings and Orders

1. The Tribunal grants leave to the Applicant to amend paragraph 6(c) in the Notice of Charge filed 12 December 2003 in the last line by deleting "GO" and inserting "VO".
2. The Practitioner admits the matters contained in charges 1 to 5 in the amended Notice of Charge dated 10 December 2003 and admits that he is guilty of those charges.
3. The Tribunal finds charges 1 to 5 proved, finds that matters contained in those charges amount to professional misconduct and finds the Practitioner guilty of professional misconduct.

4. The Tribunal is not satisfied that the Queensland Law Society has proved charge 6 and dismisses that charge.
5. The Tribunal orders that the Practitioner pay a penalty of \$5,000.00 to the Fund within one month.
6. The Tribunal further orders that the Practitioner attend and satisfactorily complete the next available Professional Standards module of the Practice Management Course conducted by the Queensland Law Society Incorporated.
7. The Tribunal further orders that the Practitioner pay to the Queensland Law Society Incorporated the Society's costs of the adjourned hearing on 3 March 2004, the Society's costs of 6 April 2004 and the Society's costs in relation to charges 1 to 5 inclusive, such costs to be agreed and, if not agreed, to be assessed by Monsour Legal Costs Pty Ltd.
8. The Tribunal further orders that the Practitioner pay the costs of the Clerk and of the Recorder of 3 March 2004, 6 April 2004 and such costs of the Clerk and of the Recorder that relate to charges 1 to 5 inclusive.
9. The Tribunal further orders that the Queensland Law Society Incorporated pay the costs of the Practitioner in relation to charge 6, such costs to be agreed, but failing agreement, as assessed by Monsour Legal Costs Pty Ltd.

Reasons

Charges

Five charges have been brought against the practitioner to the effect that he failed to comply with lawful requirements made by the Queensland Law Society that he provide explanations and documents relating to complaints made against him by former clients. The practitioner admits that he failed to comply with the requirements of the Queensland Law Society in these matters as particularised in charges 1 to 5 of the notice of charge and admits that he is guilty of the matters charged.

The Queensland Law Society alleges that the charges constitute professional misconduct and as far as charges 2 and 5 are concerned, failure of a practitioner to respond to a written notice issued under s5H(2) of the *Queensland Law Society Act 1952* is deemed to be professional misconduct.

The Tribunal finds that the practitioner guilty of charges 1 to 5 and further finds that the practitioner is guilty of professional misconduct arising from these charges.

The practitioner has disputed charge 6 which alleges that on 4 April 2002 the practitioner knowingly and falsely represented to his clients, GO & VO, that he had lodged an application on their behalf with the Queensland Building Tribunal when that was not correct and when no such application had been lodged as the practitioner well knew. The practitioner denies that he had any conversation with VO on 4 April 2002 and denies ever telling her that he had lodged the application with the Queensland Building Tribunal.

Certain facts are agreed by the Queensland Law Society and the practitioner. The uncontested facts appear to be:

- the practitioner was originally instructed by GO & VO in April or May 2001 to act for them in a dispute with the Queensland Building Services Authority;
- an hourly rate of \$100.00 was agreed for the professional services provided by the practitioner;
- professional services were provided by the practitioner to GO & VO during 2001 in relation to the dispute with the Queensland Building Services Authority and the practitioner had not sent GO & VO an account for those services by March 2002;
- on 7 March 2002 GO & VO received a Direction to Rectify from the Queensland Building Services Authority for defective work carried out by them;
- on 9 March 2002 VO telephoned the practitioner about the Direction to Rectify and made an appointment to consult him about it;
- on 11 March 2002 GO & VO attended at the practitioner's office and instructed him to act for them in relation to the Direction to Rectify;
- the practitioner sent a letter by facsimile to the Queensland Building Services Authority on 11 March 2002 and requested a site inspection so the clients could assess the alleged defects and ascertain what was required to rectify the problem;
- in that same letter, the practitioner requested an extension of time for GO & VO to comply with the Direction to Rectify;
- the Queensland Building Service Authority in its email exhibited to the Affidavit of VO did not agree with the request for an extension of time but permitted an inspection of the site by GO & VO;
- on 20 March 2002 VO and the practitioner spoke on the telephone and discussed lodging an application for review of the Direction to Rectify;
- on 21 March 2002 the practitioner spoke with DLP of the Queensland Building Services Authority and told DLP that GO & VO will be reviewing the Direction to Rectify;
- the practitioner prepared an application for review for GO & VO and in a telephone conversation with VO on 26 March 2002 the practitioner read out the contents of that application;
- the application was not lodged by the practitioner on behalf of GO & VO with the Queensland Building Tribunal;
- on 16 April 2002 VO telephoned the Queensland Building Tribunal and was told that no application for review had been lodged with the Tribunal;
- on 22 April 2002 VO sent a letter by facsimile to the practitioner asking him to advise "... if you have had any correspondence from the BSA regarding the Review Application that you served on them on 27 March as you stated in our last phone conversation";
- the practitioner did not respond to this letter;

- the following day GO & VO lodged a request for an extension of time with the Queensland Building Tribunal in order to bring an application for review of the Direction to Rectify;
- by letter dated 7 May 2002 GO & VO made a complaint against the practitioner alleging that the practitioner had been instructed to complete the review application and that the practitioner had assured GO & VO that these instructions had been complied with and that he had served the Building Services Authority on 29 March 2002.

The Queensland Law Society relies on the evidence of VO to support the charge brought against the practitioner of knowingly making a false representation to GO & VO on 4 April 2002. VO was not a totally credible witness whose evidence was marked by vagueness and reluctance particularly when questioned about issues that reflected badly on the integrity of the business dealings and financial affairs of herself and her husband. The Tribunal is not prepared to prefer her evidence to that of the practitioner's whenever her evidence differs from the evidence of the practitioner unless there is contemporaneous documentary support for the version given by VO.

VO states that she spoke to the practitioner by telephone on 4 April 2002. In that conversation, VO states that the practitioner told her that he had lodged the application for review and that he had served it on the Queensland Building Services Authority on 27 March 2002. No contemporaneous notes of this conversation were produced and the practitioner denies that he spoke to VO at all on 4 April 2002 or on any date after 26 March 2002.

The first document that contains any reference to what would be the alleged false representation by the practitioner is the letter of VO sent by facsimile to the practitioner on 22 April 2002. That letter does not identify 4 April 2002 as the date of the alleged conversation between VO and the practitioner. The letter could be referring to a conversation that took place on some date after 27 March 2002 or it could be referring to the telephone conversation of 26 March 2002 when VO spoke to the practitioner.

VO gave evidence that during the conversation on 26 March 2002 the practitioner explained to her about the details of how he was going to go about filing and serving the review application. The practitioner agrees that a discussion in these terms took place on 26 March 2002. The practitioner states that this was the last conversation he had with VO. If that is true, then the reference in the letter of 22 April 2002 to "our last phone conversation" would be a reference to 26 March 2002 and not 4 April 2002 as alleged by VO.

Without more specific and compelling evidence, the Tribunal cannot accept that the letter of 22 April 2002 confirms that a telephone conversation took place between VO and the practitioner on 4 April 2002 in which the alleged false representation was made by the practitioner.

The Tribunal regards the letter of 22 April 2002 with some disquiet. On the evidence of VO, this letter must be regarded as disingenuous to say the least. She gave evidence that she was already aware on 16 April 2002 that the review application had not been lodged on behalf of herself and her husband with the Queensland Building Tribunal nor served on the Queensland Building Services Authority as she had spoken to officers from each of these bodies and had been told that no review application had been lodged or served.

If that is correct, the Tribunal is left wondering as to the real purpose of the letter of 22 April 2002. The answer may perhaps be revealed by the fact that the stamp of the Queensland Building Tribunal appears on the copy of the letter exhibited to the affidavit of VO. An application for an extension of time was lodged by GO & VO the following day with the Queensland Building Tribunal. It would appear that a copy of the letter dated 22 April 2002 was given to the Tribunal in support of that application as evidence of the failure of the practitioner to lodge the review application within time would be relevant to an extension of time application that was made by GO & VO.

The unexplained coincidence between the date of the letter faxed to the practitioner asking for information that VO already knew and the bringing of an extension of time application by GO & VO does not go to the credit of VO whose demeanour in the witness box did nothing to improve the disquiet of the Tribunal over her evidence.

The next piece of documentary evidence relied on by the Queensland Law Society as confirming the existence of a conversation on 4 April 2002 is the letter of complaint of GO & VO dated 7 May 2002 sent to the Queensland Law Society. This letter does not identify 4 April 2002 as the date of a telephone conversation between VO and the practitioner. The letter does not purport to be a full account of the dealings between GO & VO and the practitioner.

The letter of complaint is curiously worded and for the sake of clarity, the relevant parts of the letter are set out as follows: "Subsequently, after several telephone discussions and another meeting, the Practitioner was directed to complete a Review of Directions with the Queensland Building Tribunal. He later assured us that this direction had been complied with and, in fact, read the wording of the document to us over the telephone. The Practitioner also advised us that he had served the Building Services Authority with this Review on 29 March 2002."

The evidence before the Tribunal of VO and the practitioner is that the practitioner had read out to VO the wording of the review application he had drafted during the telephone conversation on 26 March 2002. If that is correct, the conversation when the practitioner allegedly told GO & VO that he had served the review application on 29 March 2002 as stated in the last sentence quoted above is difficult to place confidently in time sequence.

One option would place the advice allegedly being given after 29 March 2002 but another option could place the advice being given in the same conversation referred to in the previous quoted sentence. The Tribunal accepts that that conversation took place on 26 March 2002. VO gave evidence that she did not speak with the practitioner between 26 March 2002 and 4 April 2002 and that on 4 April 2002 the practitioner told her that the review application had been served on 27 March 2002. She states that the reference to 29 March 2002 in the letter of complaint was an error although the alleged conversation had taken place on her evidence only some 4 weeks before the letter of complaint was written.

The Tribunal finds it is unable to regard the letter of complaint as satisfactory or reasonably probative evidence of the allegation made against the practitioner.

The practitioner's evidence is that he prepared as instructed the review application which he read out to VO over the telephone on 26 March 2002. He asserts that he told GO & VO that he wanted them to pay to him the Tribunal filing fee of \$200.00 before he would lodge the review application on their behalf. He gave evidence that VO was aware that there was a filing fee of \$200.00 as she had filed a similar review application with the Queensland Building Tribunal in 2001. He did not confirm this request in writing as he was certain that VO knew from their conversation that he would not take this step to progress the review application before the funds he had requested had been paid into his trust account.

He acknowledged that he had received the letter faxed to him on 22 April 2002 and he did not respond as he thought the letter was ridiculous. He was informed of the complaint made against him in mid May 2002 and he imprudently declined to respond to that complaint. He considered that the complaint was effectively a dispute over money and that dispute had resulted in his failure to lodge the review application as requested by GO & VO.

The Tribunal is not prepared to draw an inference from the practitioner's lack of response to the letter of 22 April 2002 and to the letter of complaint that he had no reasonable explanation for his failure to lodge the review application for GO & VO. The practitioner's failure to respond to these letters is consistent with his lack of response to the correspondence which is the subject of charges 1 to 5 but it is not a basis on which to substantiate the allegation of VO.

Evidence was given by DLP of the Queensland Building Services Authority. He stated that he had had several conversations with the practitioner about GO & VO between 21 March 2002 and 17 June 2002 and during those conversations the practitioner told DLP that he was not acting for GO & VO as they had not sent the practitioner any money. No notes of these conversations were made by DLP or the practitioner but DLP did make a note of the conversation he had with the practitioner on 17 June 2002 when he records that the practitioner and GO & VO were having a dispute over fees.

The Tribunal accepts the evidence of DLP as impartial and credible. He readily and quite properly accepted during his evidence that the conversation that he originally attributed to 21 March 2002 actually took place on 17 June 2002. The Tribunal considers that the evidence of DLP supports to some extent the version of events put forward by the practitioner but does not support the allegation made by VO. DLP clearly stated that VO strenuously criticised the practitioner about not doing what he had been told to do but that he could not recall VO saying anything to him about the practitioner lying to her.

The Tribunal has been urged by the Queensland Law Society to find that the practitioner made a knowingly false representation to VO on 4 April 2002. To find that the false representation had occurred, the Tribunal must accept the evidence of VO on this point.

This is a serious allegation of fraud made against the practitioner and the Tribunal must be satisfied on the civil standard of proof that the false representation occurred as alleged. The required standard of proof is as described by the High Court of Australia in *Briginshaw v Briginshaw*.

The passage that best explains the standard of proof required in these proceedings is found in the judgement of Dixon J as:

"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

The evidence before the Tribunal did not result in the Tribunal coming to a reasonable satisfaction that the false representation was made by the practitioner as alleged on 4 April 2002. VO was not a completely satisfactory witness and the letter dated 22 April 2002 does her no credit in light of her own sworn evidence that she already knew that the review application had not been lodged by that date. That letter has the tone of an attempt to create evidence for a stance that will benefit GO & VO and does not have the tone of sincerity. The letter of complaint to the Queensland Law Society is no more clear in establishing the probability that the false representation had been made on 4 April 2002 than the letter of 22 April 2002 had done.

The Tribunal is not satisfied that the Queensland Law Society has proved charge 6 and dismisses that charge.

Penalty

The Practitioner deliberately failed to respond to lawful requirements made to him by the Queensland Law Society over a period of time. He admits that his failures were wrong and his Counsel has submitted that the Practitioner has learned a valuable lesson from these charges.

The Queensland Law Society relies on the co-operation of its members to ensure that the statutory obligations of the Society under the *Queensland Law Society Act* are fulfilled.

The Practitioner has failed to cooperate with the Society and the process of regulation of the profession was placed at risk. The importance of solicitors co-operating with the Society has recently been highlighted by the comments of the Chief Justice in the decision of the Court of Appeal in Council of the *Queensland Law Society Inc v Whitman* delivered in October 2003.

The Tribunal has given consideration to the comparative penalties referred to it. The Tribunal considers that a fine is appropriate in this case, and imposes a penalty of \$5,000 payable to the Fund and payable within one month of today.

Due to the consistent failure of the Practitioner to comply with his professional obligations, the Tribunal considers that it is necessary for the Practitioner to refresh his knowledge of his professional obligations.