

In the Matter of Andrew Ardashir Rouyanian

Case Number: SCT/106
Date of Hearing: 14 & 28 July 2003
Appearing Before: Ms C C Endicott (Chairperson/Practitioner Member)
Mr M Conroy (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J Nimmo (Legal Ombudsman) (in part)
Mr J W Broadley (Clerk)
Penalty: Fined \$10,000

Charges

1. Trust Account Reconciliation

In breach of regulation 12(1) of the *Trust Accounts Regulation* 1999 the Practitioner has not as soon as practicable after the end of each month balanced and reconciled the trust account cash book balance at the end of month with the trust account ledger; and reconciled the financial institution statement balance for the trust account at the end of the month with the trust account cash book balance at the end of the month.

Particulars

- (a) On 11 January 2001 the Society conducted an examination of the Practitioner's records pursuant to section 31 of the *Queensland Law Society Act* 1952 ("the Society Act"). The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) The auditor reconciled the trust bank account to the trust account cash book as at 11 January 2001.
- (c) As at the date of the auditor's examination on 11 January 2001 the last complete reconciliation statement prepared by the Practitioner was the reconciliation statement for the month ended 30 November 2000.
- (d) On 24 January 2001 the Society wrote to the Practitioner enclosing a copy of the section 31 Audit Report and requesting his comments.
- (e) On 23 February 2001 the Practitioner wrote to the Law Society and advised that the reconciliations had now been effected.
- (f) On 2 May 2001 the Society wrote to the Practitioner and advised that the section 31 report and subsequent correspondence had been considered by the Section 31 (Audit) Committee of the Society on 26 April 2001 when it was resolved a further audit examination of the Practitioner's practice would be conducted in approximately 12 months.
- (g) On 12 June 2002 a further section 31 audit of the Practitioner's trust account records was carried out by the auditor.
- (h) As at the date of the auditor's examination the last complete reconciliation statement prepared by the Practitioner was the reconciliation for the month ended 30 June 2001.
- (i) The auditor reconciled the trust bank account to the trust account cash book as at 12 June 2002. A listing of ledger account balances as at 12 June 2002 was \$4,659.75 more than the reconciled cash book balance.
- (j) The Practitioner failed to reconcile the trust account records on a monthly basis as soon as practicable at the end of each month in the period 1 July 2001 to 31 May 2002.
- (k) On 31 July 2002, the Practitioner's bookkeeper advised the Society that she had reconciled the trust account records to 30 June 2002.

2. Trust Records Not Maintained Up To Date

In breach of regulations 11(1) and 15 of the *Trust Accounts Regulation* 1999 the Practitioner failed to record details of trust account receipts and trust account payments in his trust account cash book and trust account ledger within two days after the day monies were received or paid.

Particulars

- (a) On 12 June 2002 the Society conducted an examination of the Practitioner's records pursuant to section 31 of the Society Act. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) As a result of this examination the auditor ascertained that the Practitioner's trust records had not been maintained on a daily basis.
- (c) As at the date of the auditor's examination it was noted that no payments and no receipts had been recorded in the Practitioner's trust account cash book for the period from 1 April 2002 to 12 June 2002.

- (d) During the period from 1 April 2002 to 12 June 2002 the Practitioner issued the following cheques and receipts.

Period	Cheques	Receipts
April 2002	49	22
May 2002	21	21
12 June 2002	14	9
Total	84	52

- (e) On 25 September 2002 the Practitioner advised the Society by letter that the trust account records were now maintained to date in the light of his implementation of a computerised accounting package.

3. Trust Account Deficiencies

In breach of section 8 of the *Trust Accounts Act 1973* and regulation 10(1)(a) of the *Trust Accounts Regulation 1999* the Practitioner on nine (9) occasions drew against or caused payment to be made from trust accounts kept by the Practitioner for particular matters conducted by the Practitioner where the amount of withdrawal or payment was more than the amount of cleared funds in the account for that matter.

Particulars

- (a) On 12 June 2002 the Society conducted an examination of the Practitioner's records pursuant to section 31 of the Society Act. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) The reconciliation of the Practitioner's trust account as at 30 June 2002 disclosed that there was a deficiency of \$8,173.43 by virtue of nine trust ledger accounts being overdrawn at that time as follows:

Matter	Matter Name	Date Overdrawn	Amount
22/00342	DC re Miscellaneous	01/07/02	\$0.08
Westpac	R&Co Trust Account	18/06/02	\$500.00
21/00181	TG re Miscellaneous	14/06/02	\$5,000.00
22/00213	PH Purchase	05/04/02	\$752.75
21/00101	A Purchase	05/04/02	\$0.10
22/00216	G&SN&N re Miscellaneous	05/04/02	\$720.00
22/00227	RPQPL re Miscellaneous	04/04/02	\$200.00
21/00179	A&MB Purchase	20/03/02	\$1,000.00
21/0070	GA re Litigation	24/01/02	\$0.50
Total			\$8,173.43

- (c) The Practitioner paid funds from the above Trust Accounts in each matter when there were insufficient funds so to do.
- (d) On 25 September 2002 the Practitioner wrote to the Society and advised the reasons for the trust account deficiency were due to errors in the maintenance of the ledgers which had occurred due to the inexperience of secretarial personnel. The Practitioner advised that all monies had been reinstated into trust.
- (e) The deficiencies were restored as to the sum of \$3,173.43 on 23 August 2002 and as to the sum of \$5,000.00 on 26 August 2002.

4. Trust Account Deficiencies

In breach of section 8 of the *Trust Accounts Act 1973* and regulation 10(1)(a) of the *Trust Accounts Regulation 1999* the Practitioner on 17 occasions drew against or caused payment to be made from a trust account kept by the Practitioner for particular matters conducted by the Practitioner where the amount of withdrawal or payment was more than the amount of cleared funds in the account for that matter.

Particulars

- (a) On 12 June 2002 the Society conducted an examination of the Practitioner's records pursuant to section 31 of the Society Act. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").

- (b) In the course of the audit the auditor ascertained that 17 individual trust ledger accounts had been overdrawn and the deficiency restored as follows.

Name of Account	Amount	Date Overdrawn	Date Restored
A&MB purchase	\$300.00	28/02/02	23/08/02
GN & SN re miscellaneous	\$700.00	05/03/02	23/08/02
B&JH p/f M	\$262.50	27/06/02	01/07/02
NG p/f F	\$97.94	21/03/02	09/04/02
B1 re B2 student visa	\$60.00	23/03/01	16/05/01
BE&Y p/f S	\$0.60	28/05/01	12/04/02
CR&AC p/f UPL	\$176.75	28/11/01	23/08/02
CR&AC p/f UPL	\$666.75	14/12/01	12/04/02
FB p/f L&S	\$27.50	23/01/02	12/04/02
K purchase	\$59.95	23/08/01	12/04/02
MF p/f K	\$30.90	19/11/01	12/04/02
SVR&GC re BCC appeal	\$2.00	08/05/01	12/04/02
SJ&B p/f B&V	\$12.60	30/11/01	05/12/01
SJ&B p/f B&V	\$12.60	25/01/02	12/04/02
TH p/f H	\$0.04	26/04/01	06/05/01
T re WC	\$63.00	30/05/01	31/05/01
VV&LG p/f B	\$1.51	08/10/01	12/04/02

The Practitioner paid funds from the Trust Accounts in each of the above matters when there was insufficient funds so to do as set out in the above table.

5. Trust Account Deficiency

In breach of section 8 of the *Trust Accounts Act 1973* the Practitioner withdrew from his trust account and paid to his general account funds in the sum of \$2,091.14 in excess of the amount due to him for his fees and outlays in the matter of CMC re Personal Injuries Claim.

Particulars

- (a) On 12 June 2002 a section 31 audit of the Practitioner's trust account records was carried out. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) Examination of transaction files by the auditor revealed that in the matter of CMC re Personal Injuries Claim the Practitioner paid excess funds from the Trust Account ledger to the Practitioner's General Account **which occurred on 16 April 2002** as follows:

Amount received into Trust Account	\$80,899.85
Less: Amount paid to client	<u>\$51,209.46</u>
Amount paid for costs and outlays	29,690.39
Less: Amount billed to client and transferred to the Practitioner's General Account	<u>27,599.25</u>
Excess Amount overpaid to the Practitioner and transferred into his General Account	<u><u>\$2,091.14</u></u>

- (c) The Practitioner was advised of this overpayment by the auditor on 17 July 2002 at which time he informed the Auditor that general account funds in the sum of \$2,091.14 would be paid into the trust account and then refunded to the client from the trust account.
- (d) The Practitioner refunded the sum of \$2,091.14 to his trust account on 7 August 2002.

6. Delay

The Practitioner is guilty of serious neglect and delay and a failure to maintain reasonable standards of competence and diligence in that the Practitioner failed to lodge loan agreements for stamping.

Particulars

- (a) On 11 and 12 January 2001 the Society ("the Society") conducted an examination of the Practitioner's records pursuant to section 31 of the Society Act. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) Examination of the file of CMSPL re Loan Agreements by the auditor revealed that the file had not been conducted in accordance with the client's instructions and that trust monies had not been properly dealt with.
- (c) The Practitioner acts for lenders, GWMSPL, JWMSPL and HMSPL in the advance of funds to CMSPL. Each of the lenders are shareholders in the borrowing company. Loan agreements were prepared between each individual lender and the borrowing company.
- (d) CMSPL purchased a medical centre in late 1998. Loan documents were prepared and signed on 26 February 2000. The loan agreements formalised funds advanced to enable the completion of the purchase.

- (e) On 14 December 2000 funds of \$1,800.00 were received into the Practitioner's trust account from C&A trust account (the Practitioner's former employer) for anticipated stamp duty in relation to the loan agreements.
- (f) As at the date of the audit the loan agreements had not been stamped.
- (g) On 24 January 2001 the Society wrote to the Practitioner enclosing a copy of the section 31 report covering the recent audit of his practice and requesting his comments.
- (h) On 23 February 2001 the Practitioner wrote to the Society in respect of the stamping of the loan agreements and advised that the subject loan agreements had been lodged with the Office of State Revenue for assessment.
- (i) On 2 May 2001 the Society wrote to the Practitioner and advised that the section 31 report and subsequent correspondence had been considered by the Section 31 (Audit) Committee on 26 April 2001 when it was resolved a further audit examination of the Practitioner's practice would be conducted in approximately 12 months.
- (j) On 12 June 2002 a further section 31 audit of the Practitioner's trust account records was carried out by the auditor.
- (k) The review of the said transaction file by the auditor revealed that:
 - (i) nothing appeared to have happened since his last examination;
 - (ii) the last action appears to be 10 December 1998;
 - (iii) unstamped loan agreements were held on file; and
 - (iv) there is no evidence of loan agreements being lodged with the Office of State Revenue.
- (l) On 8 August 2002 the Society wrote to the Practitioner forwarding a copy of the section 31 report advising that the trust account had not been satisfactorily kept and advising that the report would be referred to the Professional Standards Committee for its consideration and requesting that the Practitioner make any submissions to the Society prior to close of business on 30 August 2002.
- (m) On 26 August 2002 the Society having received no response from the Practitioner again wrote to the Practitioner seeking written comments in respect of the matters raised in the report within the next seven days.
- (n) On 28 August 2002 the Practitioner rang David Franklin of the Society and advised he would provide comments within the next seven days.
- (o) On 25 September 2002 the Practitioner wrote to the Society and advised that the loan documentation had been lodged with the Office of State Revenue on the day of his letter, namely, 25 September 2002. The Practitioner blamed the late lodgment of the documents on administrative oversights and said he would take personal responsibility as to the payment of any late fees assessed.

7. Misrepresentation

By letter dated 23 February 2001 the Practitioner made false misrepresentations to the Society as to the lodgment of loan agreements with the Office of State Revenue and advice given to his client, CMSPL.

Particulars

- (a) On 11 and 12 January 2001 the Society conducted an examination of the Practitioner's records pursuant to section 31 of the Society Act. The accountant appointed for the purpose of the examination was WT Hourigan of the Society's Audit Department ("the auditor").
- (b) Examination of a transaction file in respect of the file of CMSPL re Loan Agreements disclosed that a Loan Agreement was prepared and signed on 26 February 2000 to formalise the advance of funds in a transaction had not been stamped even though on 14 December 2000 funds of \$1,800.00 were received into the Practitioner's trust account for anticipated stamp duty in relation to the loan agreements.
- (c) On 24 January 2001 the Society wrote to the Practitioner enclosing a copy of the section 31 report covering the recent audit of his practice and requesting his comments.
- (d) By letter dated 23 February 2001 the Practitioner wrote to the Society in respect of the section 31 audit and made the following statements:
 - "CMSPL re Loan Agreement"*
 - "The subject loan agreements have been lodged with the Office of State Revenue for assessment."*
 - "I have contacted the Directors of the client and advised them of the requirements under the Stamps Act, reminding them of their obligation to have to stamp the Loan Agreements as they have been entered into."*
 - "I have also explained to the client that penalties will ensure and this has been accepted by the client."*
- (e) On 2 May 2001 the Society wrote to the Practitioner and advised that the section 31 report and subsequent correspondence had been considered by the Section 31 (Audit) Committee on 26 April 2001 when it was resolved a further audit examination of the Practitioner's practice would be conducted in approximately 12 months.
- (f) On 12 June 2002 a further section 31 audit of the Practitioner's trust account records was carried out by the auditor.

- (g) The review of the transaction file by the auditor revealed that:
 - (i) nothing appears to have happened since his last examination;
 - (ii) the last action appears to be 10 December 1998;
 - (iii) unstamped loan agreements were held on file;
 - (iv) there is no evidence of loan agreements being lodged with the Office of State Revenue; and
 - (v) there is no evidence of any discussions between the Practitioner and his client concerning stamp duty obligations and penalties for late lodgment.
- (h) On 26 August 2002 the Society again wrote to the Practitioner seeking written comments in respect of the matters raised in the report within the next seven days.
- (i) On 28 August 2002 the Practitioner rang David Franklin of the Society and advised he would provide comments within the next seven days.
- (j) On 25 September 2002 the Practitioner wrote to the Society and admitted that the loan documentation had been lodged with the Office of State Revenue on the day of his letter, namely, 25 September 2002. The Practitioner blamed the late lodgment of the documents on administrative oversights and said he would take personal responsibility as to the payment of any late fees assessed.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr P Ryan, Solicitor of Messrs Biggs & Biggs Solicitors
- (b) For the Practitioner:
Mr J A Logan SC instructed by Messrs Gilshenan & Luton Solicitors

Findings and Orders

1. The Tribunal grants leave to the Queensland Law Society Incorporated to amend the Notice of Charge dated 20 March 2003.
2. The Tribunal finds that all seven charges brought against the Practitioner have been proven and that all seven charges amount to unprofessional conduct.
3. The Tribunal finds the Practitioner guilty of unprofessional conduct.
4. The Tribunal orders that the Practitioner pay a penalty of \$10,000.00 to the Fund.
5. The Tribunal further orders that the files of the Practitioner be inspected twice each year for a period of two years from this date by an experienced solicitor, appointed by the Professional Standards Committee of the Queensland Law Society Incorporated, at the cost of the Practitioner and that reports on these inspections be given to the Queensland Law Society Incorporated and copies of the reports be given to the Practitioner.
6. The Tribunal further orders that the Practitioner attend and satisfactorily complete a Practice Management course conducted by the Queensland Law Society within the next twelve months.
7. The Tribunal further orders that the penalty be paid by twelve equal monthly instalments commencing one month from today's date.
8. The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated of and incidental to this application to be assessed by Monsour Legal Costs Pty Ltd, such costs to include the costs of the recorder and of the Clerk.
9. The Tribunal further orders that the Practitioner be allowed twelve months within which to pay the costs so ordered.

Reasons

The practitioner has been charged with five counts of breach of the provisions of the *Trust Accounts Regulations* 1999 and with one count of delay and one count of making a false representation to the Queensland Law Society. The charges arose from an examination of the practitioner's records under section 31 of the *Queensland Law Society Act* 1952 in January 2001 and in June 2002.

In summary, the charges that are based on trust account breaches relate to the failure of the practitioner to reconcile the trust account of his firm, the failure of the practitioner to record details of trust account receipts and payments within 2 days of the monies being received or paid, overdrawn his trust account on 26 occasions and withdrawing from his trust account and paying to his general account the sum of \$2,091.14 in excess of fees and outlays owed to him by a personal injuries client.

The delay charge is based on the failure of the practitioner to lodge loan agreements signed in February 2000 for stamping until September 2002. The false representation charge is based on an assertion made by the practitioner in a letter to the Society dated 23 February 2001 by which the practitioner stated that the loan agreements had been lodged with the Office of State Revenue for assessment when that assertion was not true. The documents were not lodged for stamping by the practitioner until 25 September 2002.

The practitioner has admitted the conduct alleged against him in the charges and has admitted the particulars set out in the charges. The Tribunal finds that all of the charges have been proven.

The practitioner has admitted for each charge that he has been guilty of unprofessional conduct. The Society accepts that the first six charges as proven constitute unprofessional conduct and has submitted that the appropriate penalty for these six charges would be the imposition of a monetary penalty.

The Society submits that charge 7 as proven constitutes professional misconduct. The Society submits that it is important for a practitioner to be entirely frank in communications with his professional regulator and that corresponding in a manner that misled the Society is misconduct in this case warranting an order striking the practitioner off the role of solicitors.

It was suggested by the Society that the practitioner made the false representation deliberately in order to stop the Society further investigating the delay in lodging the loan agreements for stamping. This suggestion is denied by the practitioner who also denies that the false representation was made deliberately or dishonestly.

The practitioner submitted that he had not lodged the documents for stamping immediately after the documents were signed as he had been waiting for funds to come from his former partnership. The practitioner further stated that when the failure to lodge the documents for stamping was brought to his attention in the audit report of January 2001, he dictated his response intending to lodge the documents but then he went on to other things and he did not check that the documents were being lodged before he signed the letter to the Society. The practitioner stated that he was unaware that the file was then inadvertently archived and not brought up again to his attention until the next audit report of August 2002.

The practitioner submitted that the falsehood was the product of gross carelessness but was not deliberately designed to mislead the Society nor to stop the Society from further investigating the matter. In support of that assertion, the practitioner adduced evidence from his treating doctor that the practitioner had been under treatment for a variety of medical disorders during 2001 and as well had undergone counselling over the break up of his marriage. These factors would have interfered with the practitioner's ability to give full attention to the exigencies of his practice. The practitioner adduced evidence from numerous character referees who attested to the honesty and integrity of the practitioner. The Tribunal accepts this evidence that the practitioner is a man of honest character and disposition.

The Tribunal has to decide between the submission made by the Society that the false representation was made deliberately and the submission of the practitioner that the false representation was gross carelessness on his part. A finding of a deliberately false representation would almost invariably result in very serious consequences for the practitioner – either a striking off or a suspension from practice.

In view of the seriousness of the charge and the consequences to the practitioner, the Society has the onus of establishing that the proven false representation constitutes deliberate misconduct on the *Brigginshaw* standard. The words of Dixon J (as he then was) in *Brigginshaw* are guidance for the Tribunal:

“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... Except upon criminal issues to be proven 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 Society cannot prove absolutely the fact that the false representation was deliberately made in circumstances where the practitioner has denied this fact. The Society can at best suggest that an inference of deliberate conduct should be drawn from the circumstances in which the false representation was made. Taking in to account the evidence and submissions of the Society and the evidence of the practitioner, the Tribunal is unable to reach a level of reasonable satisfaction that the practitioner deliberately misled the Society.

The Tribunal accepts that the practitioner's explanation of his conduct was honestly given and finds that he was guilty of gross carelessness which he has admitted. The practitioner had dictated the statement in his letter to the Society in February 2001 at a time when he intended to have the loan agreements lodged for stamping but he was careless in failing to follow up the matter when he signed the letter and careless in his office systems that permitted the file to be archived resulting in a situation where no bring ups would bring the matter to his attention again.

The Tribunal finds that the proven conduct of the practitioner in charge 7 amounts to unprofessional conduct and merits a monetary penalty.