

Findings and Orders

1. The tribunal rejects the practitioner's application for demurrer.
2. The tribunal finds charge 1 proved and finds charge 2 not proved.
3. The tribunal finds the matters proved amount to unprofessional conduct and the tribunal finds the practitioner guilty of unprofessional conduct.
4. The tribunal orders that the practitioner pay a penalty of \$500.00 to the fund and in addition the tribunal censures the practitioner.
5. The tribunal orders that the practitioner pay half of the Queensland Law Society's costs of and incidental to these proceedings to be assessed by Monsour Legal Costs Pty Ltd, failing agreement between the parties.

Reasons

The tribunal accepts the remarks of Justice Megarry in *Spector v Ageda* in the passage quoted to us at page 48, that:

A solicitor must put at his client's disposal not only his skill, but also his knowledge so far as is relevant, and if he is unwilling to reveal his knowledge to his client he should not act for him.

We do not see those remarks as being constrained by the facts of that particular case. As we understand the allegations in this case, it is a duty that the practitioner was unable to comply with because of his duty of confidentiality to his original client.

The offence alleged is not failure to disclose but of placing himself in this position of conflict and in these circumstances,

we reject Mr Morris's application.

The practitioner accepted instructions from a lender to act on its behalf in taking a mortgage over a property in relation to which the practitioner had previously acted for the purchaser. The contract price was not paid in full on the settlement of the purchase, but was reduced pursuant to a deed of settlement of an earlier dispute. The practitioner did not disclose this to the subsequent mortgagee. The practitioner did not act in the settlement of that dispute. There is no evidence that the deed was a sham. There is no evidence that the original price was inflated artificially and then reduced to its true value. The original valuation has not been challenged.

We've heard submissions as to what the lender may have done if it had had that knowledge, or what other solicitors may or may not have done. All that can safely be said is that it is information which the ordinary lender may regard as relevant, and on the basis of which it may have conducted further inquiries; and in accepting instructions to act on behalf of the lender, the practitioner placed himself in a position of conflict between his duty of disclosure of this information and his duty of confidentiality to a previous client. He should not have accepted instructions in these circumstances.

The tribunal accepts that the practitioner gained nothing from these proceedings or the transactions the subject of these proceedings other than his usual fee. The tribunal notes that there is no evidence of any attempts to mislead or deceive his client. In the circumstances, one would have thought, absent any previous course of conduct, this is a matter which would ordinarily have been dealt with by the Professional Standards Department of the Law Society.

The Solicitors Complaints Tribunal

In the Matter of Practitioner X

Case No: SCT/36
Date of Hearing: 20 June 2000
Appearing Before: Mr J S P O'Keeffe (Chairperson)
Ms C C Endicott (Member)
Ms D A Wilson (Lay Member)
Penalty: Fined \$1,000.00

Charges

1. Being the solicitor for the nominee mortgagee company, AB Nominees, with respect to two transactions of loan from that said company to MI Pty Ltd and being in a duty

relationship with the 13 individual investors who contributed the monies so lent, the practitioner preferred the interests of investor 12 and investor 13 over those of the other investors in the distribution of the proceeds of sale of real property constituting security for the loans.

Particulars

- 1.1 On or about 29 January 1997 AB Nominees advanced the sums of \$480,000.00 and \$150,000.00 to MI Pty Ltd. Each advance was secured by a first mortgage over real property.
- 1.2 The practitioner as an employee of AB practising as AB Partners acted for AB Nominees in that transaction.

1.3 AB Nominees was at all material times a nominee company controlled by the practitioner's employer, AB.

1.4 The funds referred to in paragraph 1.1 were provided to AB Nominees and lodged in the trust account of AB Partners as follows:

Contributor	Amount	Date
Contributor 1	\$60,000.00	17.01.97
Contributor 2	\$32,000.00	17.01.97
Contributor 3	\$30,000.00	17.01.97
Contributor 4	\$60,000.00	17.01.97
Contributor 5	\$15,000.00	17.01.97
Contributor 6	\$80,000.00	16.01.97
Contributor 7	\$20,000.00	15.01.97
Contributor 8	\$10,000.00	15.01.97
Contributor 9	\$30,000.00	17.01.97
Contributor 10	\$10,500.00	17.01.97
	\$48,000.00	16.01.97
Contributor 11	\$75,000.00	16.01.97
	\$75,000.00	16.01.97
Contributor 12	\$62,500.00	17.01.97
Contributor 13	\$25,000.00	15.01.97

1.5 The mortgagor failed to pay the interest owing for the months of February, March, April and May 1997.

1.6 On 16 June 1997, there was received into the trust account of AB Partners the sum of \$136,446.01 from the sale of six (6) lots covered by the mortgage supporting the advance of \$480,000.00 and \$42,403.75 from the sale of two (2) lots covered by the mortgage supporting the advance of \$150,000.00.

1.7 The practitioner caused those funds to be distributed as follows:

Contributor	Amount (No. 1)	Amount (No. 2)	Date
Contributor 13	\$25,343.75		20.06.97
Contributor 12	\$63,359.38		20.06.97
Contributor 11	\$35,684.00	\$38,522.50	20.06.97

And the balance of \$12,058.88 in the number 1 loan and \$3,881.25 in the number 2 loan for payment of interest in June, July and August 1997.

1.8 The practitioner made no or no sufficient disclosure to the other investors of the defaults referred to in paragraph 1.5.

2. Being the solicitor for the nominee mortgage company, AB Nominees, with respect to a transaction of loan from

that said company to SP Pty Ltd and being in a duty relationship with the 22 original investors who contributed to monies so lent and which the replacement investors who contributed monies to replace the investment of the practitioner's personal acquaintance, contributor 12, preferred the interest of the said contributor 12 and acted contrary to the interests of the other original investors in the distribution of the proceeds of sale of real property constituting security for the loan and contrary to the interests of the replacement investors in receiving their contributions and ascribing them to the loan to SP Pty Ltd.

Particulars

2.1 On or about 24 December 1996, AB Nominees advanced the sum of \$1.25 million to SP Pty Ltd on an interest only basis for 12 months.

2.2 The practitioner as an employee of AB practising as AB Partners acted for AB Nominees in that transaction.

2.3 AB Nominees was at all material times a nominee mortgage company controlled by the practitioner's employer, AB.

2.4 The funds referred to in paragraph 2.1 were provided to AB Nominees and lodged in the trust account of AB Partners as follows:

Contributor	Amount
Contributor 17	\$37,000.00
Contributor 3	\$60,000.00
Contributor 18	\$65,000.00
Contributor 6	\$98,000.00
Contributor 19	\$53,000.00
Contributor 20	\$40,000.00
Contributor 21	\$28,000.00
Contributor 10	\$122,500.00
Contributor 22	\$20,500.00
Contributor 23	\$54,000.00
Contributor 24	\$107,000.00
Contributor 25	\$60,000.00
Contributor 26	\$40,000.00
Contributor 5	\$29,500.00
Contributor 12	\$62,500.00 <small>(originally \$125,000.00 but reduced on 17.01.97)</small>
Contributor 1	\$80,000.00
Contributor 27	\$20,000.00
Contributor 28	\$40,000.00
Contributor 29	\$48,000.00
Contributor 8	\$10,000.00
Contributor 30	\$125,000.00
Contributor 7	\$50,000.00

- 2.5 On or about 24 May 1997, the mortgagor fell into default as to the payment of interest and further defaulted in June.
- 2.6 On 24 July 1997, there was received into the trust account of AB Partners an amount of \$66,569.12 from the proceeds of sale of some lots covered by the mortgage. The funds were retained for payment of outstanding interest.
- 2.7 On or about 29 August 1997, a cheque from the mortgagor for interest for the month of August in the sum of \$14,062.50 was dishonoured.
- 2.8 The mortgagor failed to pay the interest due for the month of September.
- 2.9 In about November 1997, AB Nominees granted to the mortgagor an extension for repayment of the advance to 24 March 1998.
- 2.10 The practitioner caused distributions to be made from the funds held in trust to the practitioner's personal acquaintance, contributor 12, as follows:

19.01.98	\$22,000.00
21.01.98	\$24,000.00
30.01.98	\$16,500.00

- 2.11 Those distributions were replaced by other contributions as follows:

19.01.98	\$22,000.00	Contributor 14
29.01.98	\$24,000.00	Contributor 15
30.01.98	\$16,500.00	Contributor 16

- 2.12 Contributor 12 was at all material times a personal acquaintance of the practitioner.
- 2.13 The practitioner made no or no sufficient disclosure to the other investors of the practitioner's knowledge of:
- 2.13.1 the participation of contributor 12 as an investor;
- 2.13.2 the relationship between the practitioner and contributor 12;
- 2.13.3 the defaults referred to in paragraphs 2.5, 2.7 and 2.8.

Appearances

- (a) For the Council of the Queensland Law Society

Incorporated:

Mr R S Ashton, solicitor of Minter Ellison, lawyers.

- (b) For the practitioner:
Mr G Cranny, solicitor of Gilshenan and Luton, solicitors.

Findings and Orders

1. The tribunal gives leave to the Queensland Law Society Incorporated to amend charge 2 on page 3 of the notice of charge by deleting the words "in the distribution of the proceeds of the sale of real property constituting security for the loan" and inserting at the end of that paragraph, the words "and making an equivalent distribution to the said contributor 12".
2. The tribunal finds charges 1 and 2 proved and finds the practitioner guilty of unprofessional conduct.
3. The tribunal orders that the practitioner pay a penalty of \$1,000.00 to the fund. The tribunal further orders that the penalty be paid by no later than 20 August 2000.
4. The tribunal orders that the practitioner pay the costs of the Queensland Law Society Incorporated of and incidental to these proceedings, as agreed between the parties and, failing agreement to be assessed by Monsour Legal Costs Pty Ltd

Reasons

The Council of the Queensland Law Society Incorporated has two charges against the practitioner, which essentially allege that the practitioner preferred the interests of some investors over those of other investors. Through the practitioner's solicitor, the practitioner accepted the two charges but not necessarily the supporting particulars.

The practitioner's solicitor addressed the tribunal on numerous aspects of the particulars on which the practitioner joined issue or, in some cases, positively disagreed, and he put to the tribunal her arguments in rebuttal or by way of explanation. No sworn evidence was given in respect thereto. The tribunal is of the opinion that it would have been appropriate for affidavit or oral evidence to have been given rather than outline the practitioner's case from the bar table.

Having considered the affidavit evidence and the submissions made on behalf of both parties and the fact that the practitioner has accepted the two charges, the tribunal finds the charges proved. It is for the tribunal to decide whether the conduct of the practitioner

constitutes professional misconduct or unprofessional conduct.

Mr Ashton, solicitor for the Queensland Law Society Incorporated, cited numerous authorities, including *QLS v Smith* delivered on 4 April 2000 and a decision of the Supreme Court of South Australia in *Legal Practitioners Conduct Board v Kerin*, 1996. He referred the tribunal to the helpful article by Mr David Searles published in the June 1992 edition of the Queensland Law Society Journal.

Mr Cranny, solicitor for the practitioner, referred the tribunal to the decision of this tribunal delivered on 23 May 2000 in *QLS v X*

All of these have been considered by the tribunal.

Furthermore Section 3B(1) of the *Queensland Law Society Act* sets out what could be described as examples of unprofessional conduct or practice, but in Smith's case the Queensland Court of Appeal held that by virtue of subsection (2) of Section 3B, those examples are not all inclusive.

In his article Mr Searles examines the test for findings of professional misconduct and unprofessional conduct and quotes helpful extracts from numerous authorities.

To find professional misconduct, the tribunal must be satisfied the conduct of the practitioner was such that it would be reasonably regarded as disgraceful or

dishonourable by professional brethren of good repute and competency. Whilst the conduct of the practitioner before us was not of an acceptable standard, it would not, in our opinion, be considered by the practitioner's professional peers as disgraceful or dishonourable. However, the practitioner has failed to maintain reasonable standards of competency or diligence in the conduct of the contributory mortgage transactions so that the interests of all investors were treated equally and fairly.

The tribunal finds the practitioner guilty of unprofessional conduct.

Mr Ashton, for the Queensland Law Society Incorporated, submitted that a fine would be an adequate penalty. Mr Cranny, for the practitioner submitted that a censure would be appropriate and adequate, or alternatively, at worst, a small fine. The practitioner has had a professional career since admission on 1 February 1998, without any known complaints to the Society. It was indicated to the tribunal, that the practitioner was supervised by the partner in the practice in the conduct of the contributory mortgage transactions. There is no evidence of dishonesty or personal gain.

The tribunal is of the opinion that a fine is the appropriate penalty.

The Solicitors Complaints Tribunal

In the Matter of Practitioner X

Case No: SCT/37
Date Of Hearing: 18 July 2000
Appearing Before: Mr G C Fox (Chairperson)
Mr P L Cooper
Ms D A Wilson (Lay Member)
Penalty: That the charge against the practitioner be dismissed and that the Queensland Law Society Incorporated pay one half of the costs of the practitioner incidental to the proceedings

Charges

In the circumstances that the practitioner's nominee mortgage company, AB Pty Ltd, was the vehicle for a contributory mortgage loan to BB Pty Ltd and he was in a duty relationship with the 21 original investors who contributed the funds for that loan and with the three replacement investors who contributed monies to replace the investment of JS the practitioner appropriated to his own use funds totalling \$8,383.33 collected by way of penalty interest which were properly accountable to the original and replacement investors.

Particulars

1. On or about 24 December 1996, AB Pty Ltd advanced the sum of \$1.25 million to BB Pty