[2005] LPT 001

LEGAL PRACTICE TRIBUNAL

de JERSEY CJ

MR P MULLINS
MS K KEATING

LEGAL SERVICES COMMISSIONER

and

MICHAEL VINCENT TWOHILL

BRISBANE

..DATE 15/06/2005

ORDER

THE CHIEF JUSTICE: This is a disciplinary action application under section 276 of the Legal Profession Act 2004. The respondent solicitor has admitted misdealing with trust moneys in breach of trust and in contravention of section 8 of the Trust Accounts Act 1973. That section limits the purposes for which money may be withdrawn from a solicitor's trust account.

The trust governing the moneys in issue here was established in July 2001 when the respondent's client Mr Adam Cottrell and Mrs Cottrell deposited into his trust account a sum of $44,166.87. The money was deposited by them and received by the respondent on the basis the respondent would not disperse that money from the trust account except in accordance with the joint written instructions of Mr and Mrs Cottrell or an order of the Family Court. Neither of those limitations was ever satisfied.

In breach of the trust the respondent transferred sums totalling $11,586.25 on six occasions over the period 3rd August, 2001, to 11 February, 2003. He transferred the sums from his trust account into his general account, ostensibly in discharge of his client Mr Cottrell's liability to him in respect of costs and outlays.

When on the 8th of January, 2003, the Family Court made orders for the distribution of the amount of $44,166.87 the deficiency in the trust account came to light. The then solicitors for Mrs Cottrell complained about delay in

distribution and their complaint was channelled to the respondent through the Queensland Law Society.

On the 11th of February, 2003, Mr Cottrell restored the amount of the deficiency. In a letter to the Law Society in February 2004 the respondent admitted the breaches. He expressed remorse for his actions. His explanation was a belief that the Family Law dispute appeared to have resolved.

The amounts drawn were, as I have said, amounts to which the respondent would otherwise have been entitled in relation to costs against his client Mr Cottrell. That is inferentially why Mr Cottrell was prepared ultimately to rectify the deficiency. The point in the end, however, is that the respondent was premature in making those drawings which were contrary to the precise terms of the trust and he thereby breached the trust and the Act.

The question arises whether the respondent's breach should be characterised as professional misconduct or as the somewhat less serious species of dereliction, unprofessional conduct. Following Adamson v Queensland Law Society Inc, 1991, Queensland Reports 498 at 507, professional misconduct involves departure from generally observed standards by a substantial degree.

On the other hand, in the relevant terms of the inclusive provision, which is section 3B of the Queensland Law Society Act 1952, which applies notwithstanding the enactment of the

Legal Profession Act 2004, unprofessional conduct would involve a failure to maintain a reasonable standard of diligence.

This case involved six unauthorised withdrawals from the trust account of amounts aggregating more than $11,000 from a fund of approximately $44,000. It was plainly a serious instance of misconduct. The sacrosanct character of trust account moneys has been emphasised: see for example Barwick and the Council of the Law Society of New South Wales, 2004, New South Wales Court of Appeal 32, paragraph 118, and in Re a Practitioner 1941, South Australian State Reports, 48 of 51.

It is difficult not to regard these present breaches as involving a substantial departure from what may reasonably be expected of conscientious practitioners. Any dealings in contravention of the Trust Accounts Act 1973 should be viewed seriously. There should, therefore, be a finding that the respondent has been guilty of professional misconduct.

I turn to the question of penalty. The respondent was admitted in October, 1983, and has since practised continuously. He has practised in various firms and as sole principal, since August, 1999, of Twohill Lawyers. He is 51 years of age.

This is the first occasion on which the respondent has been the subject of disciplinary action by the Legal Services Commission or the Queensland Law Society. No irregularities

have previously or subsequently been reported in relation to his conduct of his trust account. Before us he has the benefit of supportive references. Also, he has been aware of the real prospect of disciplinary action in relation to this matter since early February, 2004.

No client has been defrauded and no one has been left out of pocket as a result of these breaches. The respondent acted expediently and in a precipitate way and committed serious errors of judgment. In determining the appropriate penalty in these circumstances, public protection is the important consideration, attracting the aspects of general and special deterrence. That the respondent, a practitioner of considerable experience, committed these breaches, indicates a need to deter him, quite apart from the question of deterrence generally.

In terms of seriousness, the matter is generally similar to the case of Anthony Bailey, determined by the Solicitors Complaints Tribunal on the 11th of March 2004. The amount involved in the unauthorised transfers in that case was a little over $16,000 and following a finding of unprofessional conduct, not professional misconduct, the Tribunal fined the practitioner $5,000 and required him to complete the next trust accounts module.

The provision for the payment of a financial penalty is now set out in section 280 subsection (4) paragraph (a) of the Legal Profession Act 2004 and paragraph (c) of that subsection

refers to "an order that the practitioner undertake a complete a stated course of further legal education." Notwithstanding the more serious finding has been made here, a similar response to that given in Bailey's case should apply here.

A question arises as to the destination of any pecuniary penalty. Desirably it should end up in a situation where it can be utilised for purposes advancing the Courts or the profession. Section 208 of the Legal Professional Act 2004 sets up the Legal Practitioner Interest on Trust Accounts Fund. The recipients of distributions from that fund are those prescribed in section 209. Section 208 subsection (4) specifies, in an inclusive sense, amounts which may be received into that account.

There seems no reason why the amount of any fine imposed in proceedings of this character could not lawfully be received into that Fund and then distributed consistently with section 209. It would be extremely worthwhile, I think, were either the Fidelity Fund or the Supreme Court Library or the Commissioner or a disciplinary body to benefit from the distribution of such moneys.

There will, therefore, be an order that the respondent pay to the Legal Practitioner Interest on Trust Accounts Fund, established by section 208 of the Legal Profession Act 2004, within six months from today, a pecuniary penalty in the amount of $5,000; and an order that, as soon as practicable, the respondent undertake and complete the trust accounts

module of the continuing legal education program conducted by the Queensland Law Society; and a further order that the respondent pay the costs of and incidental to this proceeding of the applicant, the Legal Services Commissioner, to be assessed if not agreed.

In the event of the respondent's failure to comply with any of these orders, the matter is to be re-listed before the Tribunal for further consideration. There will also be liberty to apply in respect of any perceived difficulty in the order that the pecuniary penalty be paid to the Legal Practitioner Interest on Trust Accounts Fund.
