

# Professional Services Alert

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## ***Legal Services Commissioner v McClelland [2006] LPT 13***

The Legal Practice Tribunal has sounded alarm bells to the legal profession that the sharing of receipts of a legal practitioner's practice with an unqualified person is a serious offence and may lead to grave consequences, both financially and professionally.

The Tribunal held in this case that the Respondent solicitors' conduct involved a serious instance of professional misconduct. The Tribunal ordered the Respondent be publicly reprimanded and his practising certificate suspended for a period of four months.

### **FACTS**

The Respondent practised as a sole practitioner at the Gold Coast.

The Respondent was brought before the Legal Services Tribunal on two charges:

1. Sharing receipts of his law practice with an unqualified person, in contravention of Rule 78 of the Queensland Law Society Rules 1987 (Qld) (QLS Rules); and
2. Failing to provide a Lawyer's Certificate to purchaser clients, in contravention of s.365B(2) of the *Property Agents and Motor Dealers Act 2000* (Qld).

### **Charge 1**

The Respondent and Ms Mullins, the sole director and shareholder of Simply Conveyancing Australia Pty Ltd, entered into an arrangement whereby Ms Mullins would organise purchaser clients to sign contracts and assist them to secure finance, following which she would refer the client to the Respondent, who would represent himself to the client that he acted as their solicitor. Accordingly, he would carry the conveyancing transaction through to completion.

In relation to their professional fees, the Respondent and Ms Mullins agreed as to how the total fee of \$2,500 should be divided between them. They agreed a proportionment of \$2,500 as follows:

- \$1,000 for Ms Mullins work;
- \$1,500 balance going to the Respondent.

As to payment, on nine occasions Simply Conveyancing received the amount of \$2,500 at settlement and the Respondent would forward his account for payment. In 18 of the transactions, at settlement the Respondent collected his fees and a payment to Simply Conveyancing which he forwarded upon production of its invoice.

The Respondent argued that the moneys paid to Ms Mullins/Simply Conveyancing were never receipts of the Respondent's law practice and were merely moneys paid to Simply Conveyancing for its services following its retainer from the purchaser.

The Tribunal disagreed and stated that the Respondent and Ms Mullins *effectively worked in tandem under a collaborative umbrella agreement*. They divided up the work to be accomplished, and determined the proportion in which they would share the overall fee. The Tribunal concluded that this arrangement

whereby the Respondent, in allowing Simply Conveyancing a share of the fee in the amount of \$1,000, essentially involved Simply Conveyancing carrying out its part of the work under the support of the Respondent. The Tribunal stated:

*"...the effect of this arrangement was that the \$2,500 fees for the conveyancing work, which was work that could only legally be carried out by the respondent, was shared between the respondent and Mullins."*

The Tribunal adopted the submission of the Applicant's and accepted that the arrangement the Respondent and Ms Mullins entered into was construed in such a way as to avoid the perception of 'sharing'. Factors the Tribunal considered included:

- Keeping separate office premises;
- Ms Mullin's 'retained' the Respondent to complete the work;
- The Respondent and Ms Mullins each billed the client separately;
- Fees for the Respondent's and Ms Mullins' work were paid separately at settlement, or the full \$2,500 was paid to Simply Conveyancing.

The Tribunal held that the Respondent breached Rule 78 QLS Rules. The Tribunal referred to the Full Court decision in *Adamson v QLS* [1990] 1 Qd R 498 and noted that the Full Court identified that the underlying principle in Rule 78 is the importance of avoiding *de facto conduct of legal practices by unqualified persons*.

In considering whether this breach constituted professional misconduct or unprofessional conduct, the Tribunal stated that the arrangement the Respondent entered into *facilitated illegal conveyancing*. It was crafted with some care to avoid the perception of sharing of receipts. Further, there was uncertainty as to the identity of the purchaser's solicitor at various stages of the property transaction. The Tribunal concluded that it was plainly a case of professional misconduct.

## **Charge 2**

In relation to the second charge, the Tribunal noted that the Respondent failed to provide the purchaser, in 16 transactions, with a lawyer's certificate.

The Tribunal found that this breach went to the competence and diligence of the Respondent. The Tribunal stated that:

*"The respondent's approach bespoke a failure to maintain reasonable standards of competence or diligence (s.3B(1)(c) QLS Act)...A practitioner must have the wit carefully to read and comprehend a provision like this, designed for the protection of clients in an area which he substantially practises."*

The Tribunal accepted that the Respondent did take steps to ensure future compliance with the requirement and found the Respondent's conduct amounted to unprofessional conduct.

## **CONCLUSION**

In making the appropriate orders, the Tribunal held that the breach involved in the first charge amounted to a serious instance of professional misconduct. The respondent entered into an arrangement which facilitated the carrying out of illegal conveyancing work by an unqualified person, and shared the receipts derived from the work with the unqualified person.

The Tribunal considered the gravity of the misconduct warranted a more serious response from the tribunal than an order to simply pay a penalty.

The Tribunal ordered the Respondent be publicly reprimanded and his practising certificate suspended for a period of four months

## Comment

Practitioners should maintain professional independence. This case highlights the importance of a legal practitioner recognising a potential ethical dilemma. The legal practitioner entered into an arrangement with an unqualified person. He was aware of what consequences that would entail if this was discovered. Instead of withdrawing from the arrangement, he crafted it with some care so as to avoid the perception of sharing of receipts.

Consequent upon the very nature of the legal profession, practitioners must conduct themselves professionally and ethically to maintain confidence the community has in the profession and in the administration of justice. Any attempt to dilute that confidence, by entering into arrangements such as that in the present case, are likely to be held as professional misconduct.

This Professional Services Alert was produced by Tim Hancock and the Professional Services Group.