

LEGAL PRACTICE COMMITTEE OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 002/10

Applicant: LEGAL SERVICES COMMISSIONER

AND

Respondent: GEOFFREY ROBERT MINES

ORDER

Before: Mr R Bain QC (Deputy Chairperson), Ms B Houlihan
(Solicitor member), Ms P Frampton (Lay member)

Date: 01 June 2011

Basis for Judgment: Discipline application filed on 23 March 2010

THE ORDERS, FINDINGS AND REASONS OF THE COMMITTEE:

The Committee has before it one count only now, described in the application as "conduct issue 1", against Mr Geoffrey Robert Mines, a practitioner, and that is that between 6 May 2009 and 16 June 2009, Mr Mines, as a solicitor for the vendors in relation to a contract of sale of a residential property at Morayfield, has been guilty of serious neglect or failed to maintain reasonable standards of competence and diligence in relation to the conduct of the conveyance in which the respondent received instructions to act on behalf of Ms Peta Maree Fletcher and Mr Mark Wayne Griffiths, the clients, in the sale of the Morayfield property. Particulars are subscribed to the charge which I need not rehearse, save to observe that the nub of the matter resides in paragraph 1.5 of the particulars, where it is contended, correctly as a matter of fact, that except: "In the course of distributing moneys received from the sale, [Mr Mines] drew from the settlement money the sum of \$7158.78 and released those funds to one of the

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vendors named on the contract, namely Peta Maree Fletcher, without instructions from both vendors named on the contract to do so.”

That is then developed in paragraph 1.6 of the particulars, which is that: “[Mr Mines] took [that] action ... on the basis of instructions received from one client only, namely Peta Maree Fletcher. On 16 June 2009 [Mr Mines] sent correspondence to Ms Fletcher, stating ... in accordance with your instructions, the net balance settlement funds, \$7158.78 as set out in the Distribution Statement were paid to your nominated Bank of Queensland account. We confirm your advices that you were going to contact the agents in order to arrange for payment of the outstanding invoice for the balance commission.”

Even in rehearsing that at the outset, the light turns immediately to the recognition by Mr Mines, in recording that, that he understood that there was then likely to be an unpaid agent to the extent of a balance commission, and that the payment of that agent depended upon Ms Fletcher’s acting with probity and applying the \$7158.78 plus whatever else may have been payable in order to meet that indebtedness. Ms Fletcher has not made that payment, she did receive that money from Mr Mines, her whereabouts are not known and it is a comfortable inference that she is not a reliable source of payment of the outstanding commission.

As the charge reflects, the respondent’s retainer arose out of having acted for Mr Griffiths and Ms Fletcher as vendors in their sale of what had been formerly their matrimonial property at Morayfield. The current position, and it has been so effectively since that disposition to Ms Fletcher, is that the agent nominated on that contract of sale, Mark Cheney Proprietary Limited, trading as Remax Ultimate, has made claim on Mr Griffiths for the balance of the commission. The upshot is that Mr Griffiths is left fully liable, as one of joint vendors, to the agents as indeed, of course, is Ms Fletcher.

The \$7158.78 which I have repeatedly mentioned is reflected in the material as having been the fourth of four items of receivable cash in the conveyance net of the payment out of the Bank of Queensland which was a secured creditor over the relevant property.

On 16 June 2009, which was the date of settlement of the contract of sale in which Mr Mines acted, in the morning with the settlement due at 2.30 that afternoon, Mr Mines wrote a note to the solicitors for the purchasers which gave what is commonly called a settlement statement. In particular, he specified how some four cheques were to be drawn, the last of which was to Ms Peta M. Fletcher in the sum of \$7158.78. At no stage before he did that instruction and at no stage prior to the settlement or at all did Mr Mines seek Mr Griffiths’ confirmation that in the circumstances of a shortfall in the available funds overall from the settlement of the conveyance first there would be no surplus funds to be received, either by Mr Griffiths or Ms Fletcher, and, indeed,

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there would be a deficiency as regards meeting the agent's outstanding balance commission.

This conduct has to be set against some brief history. Mr Mines as a solicitor was known to Ms Fletcher. Ms Fletcher preferred Mr Mines being engaged as the solicitors for her and her then husband in seeking to sell their property and Mr Mines' actions had extended through a number of contracts, three including the subject contract, two of which had failed to settle. There is no doubt, and ultimately in the course of submissions Mr Mines accepted that both Mr Griffiths and Ms Fletcher were at all material times his clients as the co-owners of the relevant property. That is reflected in extensive correspondence, it is reflected in his own notes and it is reflected in the way in which the instructions came in each case upon the making of a contract by them jointly as co-owners, specifying Mr Mines to be retained to act for them.

The essential contentions for Mr Mines paraphrased, are that Ms Fletcher never gave him any doubt as to her probity or reliability, that Mr Griffiths was content that anything out of the settlement of the sale be accounted to Ms Fletcher and, at least by implication, that there was no need for Mr Mines to contact or to have contact with Mr Griffiths.

Mr Griffiths' recollection of discussions that he had, albeit limited, with Mr Mines and Mr Mines' recollection of those discussions are discordant. The essential difference between them is that in the course of a particular set of exchanges on 5 June 2009, a Friday before the Queen's Birthday weekend and when there was rising concern about obtaining documentation in order to allow the bank particularly to achieve its turnaround for settlement on 16 June, Mr Griffiths told Mr Mines, he contends, that it was surplus that was accountable to Ms Fletcher but surplus only, and on the premise that all the debts otherwise referable to the sale including the commission agent's debts had first been paid.

In the view we take it is not necessary for us to resolve that difference, but having regard to other features of the conversations that day it is highly probable, we think, that Mr Griffiths' account is accurate and to be preferred to that of Mr Mines. Central in that is that, at that stage it had not been realised that there would be no surplus. Rather, if anything, there had been an assumption of some surplus, however modest, but in any event there could not have been a more detailed consideration because what the bank's payout, as a secured creditor, would emerge to be was unknown. Indeed, that was one of the bases of Mr Mines' making contact with Mr Griffiths that day and urging some sense of necessity to complete documentation and to deal with the bank.

What is significant about the 5 June exchanges, however, is that, as Mr Mines recorded in his first response to the Legal Services Commissioner on 24 September 2009 concerning his complaint:

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It was "... only when it came to signing the appropriate Transfer documents and Release/Discharge Authority that it became apparent that the relationship between Ms Fletcher and Mr Griffiths was strained. Ms Fletcher attended my office on Friday 5th June 2009 and signed the Transfer documents and a further copy of the Request to Release Security Document with Bank West. Whilst she was in my office she requested that I contact Mr Griffiths to try and make a suitable arrangement with him for him to likewise sign these documents."

It was out of that contact by Ms Fletcher that the subsequent dealings between Mr Mines and Mr Griffiths arose. As is patent from the terms of that explanation, obviously Ms Fletcher and Mr Griffiths were somewhat at odds, not least because she saw fit to have the solicitor make contact with her former de-facto husband rather than herself to make that arrangement. In any event, one does not need to resort to some general inference because Mr Mines, in the course of submissions when attention was drawn to that, frankly enough eventually accepted that he understood that at least as at 5 June, some 11 days before settlement, Mr Griffiths and Ms Fletcher had parted and ended their de-facto matrimony and, indeed, the sale concerned was the realisation of what had been the matrimonial property.

Whatever may have been the risks and the unacceptability, indeed, of not taking specific instructions from each of two clients with proprietary interests, whether they be a domestic couple or not in other circumstances (and we confine our remarks to the circumstances of this case), at least from 5 June when it was plain that there was "tension" as Mr Mines understates it in the statement, it was incumbent upon him to act rigorously to conserve the interests of each of his two clients and that is underscored by the circumstance that if it came to disposing of money or money's worth there was at least the real and distinct risk that there may be differences between them. More than the differences between them, there was of course always an ambient risk that one or other of them, for that matter, would not prove to be reliable or honest, with the consequence that there was a foreseeable detriment to the other. So much is, of course, what has transpired.

Of 16 June, when there was a realisation after the bank's figures and requirements as a secured creditor had been ascertained and a realisation that there was to be an inability to pay the real estate agent its outstanding commission, Mr Mines' recollection (again from his 24 September 2009 response) is this:

"I therefore contacted Ms Fletcher to ascertain what was to be done with these balance funds. I informed her that there were insufficient funds to cover what I had calculated to be the balance commission due to the agents. Ms Fletcher therefore instructed me to pay such balance settlement funds to her and that she would then arrange for the balance commission to be paid to the agents."

That instruction was, as I observed at the outset, never referred to Mr Griffiths, nor was there any attempt made by Mr Mines to confirm those instructions or to reveal

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any other wishes and instructions from Mr Griffiths. Had there not been agreement between Mr Griffiths and Ms Fletcher, each properly informed, that the money was to be paid to the agent on account of balance commission, that could only have given rise to evident disagreement between them in which the case the fund, as the proceeds of sale of real estate, would have fallen to be a trust fund in the hands of Mr Mines. By virtue of the money having been paid to Ms Fletcher, albeit on her assurance of Mr Mines that she would deal with the agents, Mr Griffiths has been denied the value of trust property. It is Mr Griffiths' intention, in the face of the claim being pursued against him by the real estate agents, to apply the sum of \$7158.78, if he should be compensated in that figure, to meet a large part of the balance commission.

We note at this point that Mr Griffiths has himself sought a compensation order and that compensation order is cast in a higher sum than \$7158.78, but Mr Griffiths, again having had the benefit of consideration in the course of submissions, accepts that the figure paid to Ms Fletcher is the highest compensable figure, because of the constraints otherwise of the Act, in the circumstances of the case.

The matter, then, is seen as coming down to the relatively simple proposition, and we think it a straightforward one, that a solicitor in the circumstances of Mr Mines facing two clients who were themselves personally at odds and with a known obligation jointly and severally – which is to say each was liable to the real estate agent for the entirety of the commission, it being no concern of the agent's the balance between them – was to treat each with equal care and not as a single unit. Mr Mines, in our view, was obliged in the circumstances of 16 June, and had been for some significant time, to have sought Mr Griffiths' instructions before contemplating, let alone, in fact, taking the step of paying out balance proceeds of sale to Ms Fletcher. That, even explained by his trust in Ms Fletcher and his sense that he was acting "quite reasonably" as he insistently submitted, nonetheless, in our unanimous view, amounts to unsatisfactory professional conduct.

The Legal Services Commissioner has addressed the question of orders to be made from the applicant's perspective in these terms:

"Having regard to the conduct as particularized in the discipline application, the Commission [sic] submits that the Committee would be satisfied that deterrence, both general and personal, and the protection of the public, will be met in this case by the imposition of an order publicly reprimanding the respondent."

Ultimately that is the course which, as regards orders sought by the Legal Services Commissioner, this Committee is prepared to take, but in heralding that we should say plainly that the obligations incumbent on solicitors relating to trust property, relating to ensuring that if a solicitor acts for multiple clients then the interests of each of those clients must be properly served and conserved, and there having been plain failure on the part of Mr Mines to appreciate that necessity and to have acted appropriately

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would ordinarily attract a more significant disciplinary order than merely a public reprimand.

Mr Mines has urged repeatedly (in my words) that there was the unexpected circumstance of Ms Fletcher's not keeping her word. As to that, we can only say that it is because of such imperfect human conduct that solicitors have a serious public obligation to protect their clients. Had Mr Mines taken instructions from each of his two clients in this case it would be an archetypical example of the way in which a reasonable and prudent solicitor would be properly serving the public interest and his clients' individual interests, whatever may have been, then, the further extent of their agreement of steps which would have to be taken.

We should also mention in that vein immediately, however, that Mr Mines is accepted by the Legal Services Commissioner as having had a long and apparently successful career as a solicitor and as enjoying an unimpeachable record, and has never been in the adverse notice of the disciplinary authorities before. Mr Mines is also facing a compensatory order sought by Mr Griffiths as we have said and we think that that also is something which in these circumstances can properly be taken into account in having regard to the acceptance of the Legal Services Commissioner's submission as to a public reprimand being all that is necessary as the disciplinary order to meet this occasion.

Passing to the compensatory order, having regard to the provisions of the Act relating to compensatory orders (without rehearsing all of that) we should note, for the record, that the sequence of the engagement is that subsection 458(2)(c) allows this Committee to make one or more of the following several orders, of which a compensation order is one. A compensation order under section 465 relating to pecuniary loss may be only made in certain circumstances, and we should pay attention to those. Those are that if there is a complainant in relation to a discipline application – that is Mr Griffiths – the complainant has suffered pecuniary loss because of the conduct concerned and that it is in the interests of justice that an order of that type be made. We note in passing that none of the disqualifying circumstances featured in subsection 465(2) obtains. We notice also the maximum statutory sum (subject to the consent of any respondent under section 466) and those strictures which I have mentioned then turn attention to the definitions which are provided by Part 3.6. Relevantly "pecuniary loss" in relation to a default means the amount of trust money or the value of trust property that is not paid or delivered, and the second limb of that definition, hinging on fraud, is irrelevant in the circumstances, there being no suggestion of deliberate misconduct of any sort, let alone fraud, on the part of Mr Mines.

As I have mentioned, the moneys paid over to Ms Fletcher were in the nature of trust property resultant upon the realisation of sale of commonly held real estate. In our view, the dictates of section 465 in relation to pecuniary loss then are satisfied, that is to say Mr Griffiths has suffered pecuniary loss because of Mr Mines' conduct, and we

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are also satisfied, by parity of the observations I made earlier concerning the importance of a solicitor's conduct to serve and conserve clients' interests equally when acting for more than one, that it is in the interests of justice for a compensatory order to be made.

That brings us to consideration of what should be terms of a compensatory order in the circumstances. We are cognisant that we may make orders on conditions and we are cognisant that the compensatory orders arising under the Act have deliberately statutorily limited compass. We do not for a moment imply that Mr Griffiths would not be reliable in attending to the payment of the outstanding balance being sought against him by the agents, but it would be inappropriate for this Committee not to recognise that the purpose of the compensatory order is effectively to replace a component of a trust fund, and that the only basis upon which then, in turn, Mr Griffiths would be entitled to use that money would be, of course, to meet what had been the common exposure of him and Ms Fletcher.

Mr Griffiths (at the risk of repetition, of course) is facing himself, as a person jointly and severally liable to the real estate agents, the entirety of the present debt notwithstanding that he may have, and he has we would have thought, residual rights as regards Ms Fletcher. On that basis we think it appropriate that there be a compensatory order which, in essence, is that Mr Mines make good the detriment of the \$7158.78, but only on the condition that Mr Griffiths in whose favour the order would be made would execute and provide an authority and direction to Mr Mines to pay on Mr Griffiths' behalf the balance of the agent's commission from that sum. To be plain, should the agent's commission not be wholly satisfied out of that sum, that then goes back to the general law position between Mr Griffiths and Ms Fletcher.

That also involves, of course, Mr Mines' being prepared to accept such an authority and direction. It would involve, of course, for that moment in time acting on Mr Griffiths instruction (ironically) to effect that. It would be achieved though, on that instruction, by Mr Mines paying directly to the agent if that be what he is instructed.

I should say specifically of the order which I have heralded that we are not unconscious of the submission which has been made by Mr Mines that, because the ultimate liability in more regular circumstances to pay the agent's commission rested equally presumably on Ms Fletcher and Mr Griffiths, therefore the compensatory order should only be half that of the sum which was given to Ms Fletcher. There are two matters which we think answer that. The first is Ms Fletcher has, in fact, been given the entirety of the sum, not her half of the sum, as it were. In any event, as I have said on, I think, two occasions in the course of these reasons, the liability, that is the detriment which Mr Griffiths faces, is a liability for the whole of the commission, and that approach that we propose is consistent with the High Court's authority in cases such as *Maguire v Makaronis*, in short emphasising the necessity in these circumstances of detriment about trust property to restore the trust property and that the restoration of the trust property is the appropriate test. So those combined

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circumstances of it being trust property which was to be protected and which was lost and, more importantly, Mr Griffiths' exposure to the real estate agents in the whole dispose of Mr Mines' submission that it be limited to half.

That leaves, I think, only the question of costs. The Commissioner has not sought its costs generally, only outlays, which it puts in the sum \$2895.20, the fees to a conveyancing solicitor, Mr Maguire, who provided some advice in the report to the Legal Services Commissioner. That is the same matter which was addressed at the outset when Ms Prasad sought to read Mr Maguire's affidavit and the associated tender of which was rejected by this Committee.

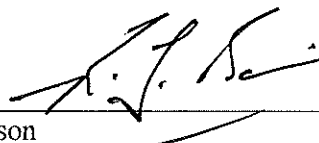
It is not necessary for me here to repeat the reasons for that. Suffice it as regards the costs question that Mr Mines should not have to pay for a report which was in the circumstances of this case misdirected as regards evidence against him, was advice to the Legal Services Commissioner and which we consider was not necessarily to be obtained in the conduct of the investigation or the application. By "not necessarily to be obtained", we do not impugn the Legal Services Commissioner's having done that but rather leave that as a matter of the Commissioner's judgment as to what and how things should be done in the preparation of an application. Suffice it, for present purposes, we do not see that as a proper outlay to be put against Mr Mines as a cost to him.

Therefore, and for the reasons which we have given, the orders will be that:

- (1) Mr Geoffrey Robert Mines be publicly reprimanded.
- (2) There be a compensation order against Mr Mines in favour of Mr Griffiths in the sum of \$7158.78, which Mr Mines has three months from this day to pay. We condition, however, the payment of that sum upon Mr Griffiths' providing an authority and direction to Mr Mines to pay from that sum all or so much as may be the balance of the outstanding commission claimed by Mark Cheney Proprietary Limited, trading as Remax Ultimate.

And as the basis of those orders we find Mr Mines guilty of unsatisfactory professional conduct in the terms of conduct issue 1 alleged against him.

We direct that these orders, findings and reasons be published upon the website of the Legal Practice Committee.


Chairperson

17/6/2011.
Date

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