

Recent Regulatory happenings

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AN UPDATE ON TWO RECENT CASES INVOLVING THE SOCIETY, AND ANOTHER ARISING FROM THE REPRESENTATIONS OF CAALAS ON BEHALF OF SOME OF ITS CLIENTS.

Legal Practitioners Disciplinary Tribunal makes a finding of professional misconduct

The Society initiated a disciplinary action against solicitor TS Lee (the Practitioner), alleging that he had engaged in conduct that amounted to professional misconduct when acting as both the agent's representative on the sale of a property and solicitor for the vendor in the subsequent conveyance.

The application proceeded by way of a statement of agreed facts, the salient ones of which were that:-

- The Practitioner was at the relevant time both a solicitor and a registered agent's representative for a rural real estate agency. In that latter capacity he earned commissions, which were a percentage of the commission the client paid to the agency on the sale.
- On 1 May 2007 the Practitioner obtained a sales listing of a property at Howard Springs, and the vendors entered into a sales agreement with the agency. Having secured the listing, by virtue of his own agreement with the agency, the Practitioner became entitled to receive 20% of the commission payable by the vendor to the agency at settlement.
- On 26 October 2007 the vendor and the purchaser signed an offer to purchase in relation to the property, which was regarded by the agency and the Practitioner as a sale of the property. This step in the process was undertaken by the principal of the agency rather than the Practitioner. The Practitioner and his principal then disagreed about the Practitioner's entitlement to any further commission. The Practitioner asserted that he was entitled to commission for the listing and for the sale which would have amounted to 50% of the total commission. The agency asserted that the Practitioner was entitled to commission only for the listing and not the sale, which would have been only 20% of the total commission.
- The vendors engaged the Practitioner to act as their solicitor with respect of the sale. The Practitioner informed the vendors that he was in dispute with the agency about the commission. The vendors then sent a fax to the agency (with a copy to the Practitioner) expressing their wish that the agency give the Practitioner "the commission share on the sale" of the property. The Practitioner thought this fax meant he had received instructions to direct a payment of \$4537.50 (50% of the total commission) for sales commission to himself. In his capacity as solicitor for the vendors, the Practitioner drew up a settlement statement listing one of the payments to be made from the funds available settlement as \$4537.50 to himself for "sales commission as agent". He sent the settlement statement to the conveyancer for the purchaser of the property and to the agency.
- The sale of the property settled on and the Practitioner received \$4,537.54 sales commission and an additional amount for legal fees in accordance with the settlement statement.

- It was agreed that by directing payment of the \$4,537.50 to himself, the Practitioner put the vendors in breach of the agreement with the agency. The vendors did not authorise the practitioner to direct payment of the \$4,537.50 to himself and the vendors did not authorise the practitioner to place them in breach of the agreement. The Practitioner did not provide the vendors with any advice regarding the implications of him being paid and retaining the sum of \$4,537.50.
 - On 22 February 2009 the Practitioner paid \$2,722.50 to the agency. This sum represented the amount of the commission in dispute between the agency and the Practitioner. The agency did not pursue the vendors for the balance of the commission as any money recovered would then be payable to the Practitioner for the commission due to him for the listing and he had already received that sum from the proceeds of the sale of the property.
- The Tribunal accepted the Society's submission that the practitioner had a duty to fully disclose the material circumstances to his client, and to advise the client about the circumstances and how the client's legal position might be affected. He completely failed to observe that duty was absolute. The Tribunal held that while there was no breach of trust, the Practitioner had manipulated the settlement to confer a financial benefit on himself, and there was potential detriment to the client as a result. The Tribunal was of the view that "*no competent and diligent practitioner would allow his interests to conflict with those of his client in such circumstances*". The Tribunal accepted that the practitioner's judgment may have been impaired due to illness around that time but held that there was no excuse for his serious lapse in judgment. The Tribunal found that the conduct involved a substantial failure to reach or maintain a reasonable standard of competence and diligence amounting to professional misconduct as defined in s.465 of the *Legal Profession Act*.
- The Tribunal imposed penalties comprising an order for a public reprimand and fine, and ordered the practitioner to pay the Society's costs.
- A second charge, of unsatisfactory professional conduct related to erroneous advertising of the practitioner's qualifications as a licensed real estate agent (when he was in fact a registered agent's representative), was dismissed on the basis that it was a relatively trivial error and not conduct that would fall within the statutory definitions.

Application for admission as a practitioner refused

On 25 August 2011, the Hon Chief Justice Trevor Riley delivered his judgment in relation to an application for admission as a legal practitioner by Thomas John Saunders ([2011] NTSC 63).

The Admission Board had, after considering the Applicant's application, resolved to refer the question of whether he was a fit and proper person for admission to the Court for determination under s.32 of the *Legal Profession Act*.

The Society opposed the application for admission, on the grounds that the applicant had been convicted of offences of dishonesty which were of relatively recent occurrence, that he had given a misleading account of the facts surrounding the offending to the Court of Summary

Jurisdiction, demonstrating a lack of candour, and that he swore affidavits for the Admission Board and in the proceedings before the Court which failed to give a candid account of the circumstances of his offending.

His Honour found that the Applicant made a deliberate decision to not make certain disclosures to Centrelink, and made a conscious decision to mislead Centrelink in order to obtain funds he was not entitled to, yet he tried to assert that there were failings by Centerlink staff in not providing him with forms. At the time of giving his evidence, the Applicant maintained an explanation for his conduct which sought to minimise his culpability and deflect blame to others.

The application was refused on the grounds that the Applicant had

committed and been convicted of offences of dishonesty, which at the time of commission demonstrated that he was not a fit and proper person for admission, coupled with the fact that he had failed to provide the Admission Board and the Court with a candid account of the commission of the offences. This failure meant that at the time of the Court's consideration the Applicant was not a fit and proper person for admission.

His Honour was critical of the fact that the Applicant had not provided any evidence as to how, or to what extent, the applicant had recognised the error of his ways and sought to address his rehabilitation. It was not sufficient to rely solely on the lapse of time from the recording of the convictions as a basis for admission.

ACCC takes action over debt collection

The Central Australian Aboriginal Legal Aid Service (CAALAS) raised concerns with the Australian Competition and Consumer Commission on behalf of clients who had received debt collection notices from a Victorian law firm demanding the payment of outstanding DVD rental charges, along with additional costs and penalties. The notices were misleading and deceptive in a number of respects.

In proceedings taken by the ACCC [*Australian Competition*

and Consumer Commission v Sampson [2011] FCA 1165] against the solicitor responsible for the sending of the notices, the Federal Court upheld the ACCC's allegation that the solicitor, Pippa Sampson, had contravened s.52 of the *Trade Practices Act*, by making various statements, in notices which she caused to be sent to those indebted to her clients, which were misleading or deceptive or likely to mislead or deceive.

Sampson was restrained from making any similar representations

for a period of five years, ordered to publish corrective advertising, ensure that she and her staff undertake trade practices compliance training, and pay \$30,000.00 towards the ACCC's costs. Even though it was a Northern Territory legal service that highlighted the issue, as the solicitor is a Victorian practitioner it will fall to the Victorian Legal Services Commissioner to determine whether any professional disciplinary action should also be pursued against her. ●

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