

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

BETWEEN:

LAW SOCIETY NORTHERN TERRITORY

Complainant

AND

THONG SUM LEE

Respondent

REASONS FOR DECISION

The Law Society has applied to the Tribunal for findings of unsatisfactory professional conduct and professional misconduct against Thong Sum Lee under section 525 of the Legal Profession Act ("the Act"). The practitioner has admitted that he is an Australian legal practitioner. The application calls into question his conduct as a legal practitioner in a conveyancing transaction in which he was also involved as a registered agent's representative.

There are two counts in the Law Society's Disciplinary Application dated 7 May 2010:-

Count 1 alleges that the practitioner allowed his own interests to conflict with the interests of his client. In substance, the allegation is that in acting as solicitor for a vendor in the sale of real property, he arranged for the deduction from the settlement monies, payable to his client, of agent's commission that he claimed for himself as the agent's representative. This was done without the authority of his client, and notwithstanding a dispute between himself and the vendor's agent as to the amount of that commission.

A statement of the agreed facts is attached to these reasons for decision. It is noted that the facts agreed in paragraph 6 have been amended to the effect that the additional commission was payable in the event that the practitioner was instrumental in the sale of the property.

Count 2 alleges that the practitioner engaged in misleading and erroneous advertising in asserting, in a printed advertisement for his legal practice, that he was a licensed real estate agent, when, in fact, he was a registered agent's representative.

It is not disputed that the practitioner acted as solicitor for the vendor and asserted that he was entitled to \$4,537.50 (being 50% of the total commission) for his services to the vendor as the agent's representative. The agent had conceded that the practitioner was entitled to commission of \$1,815 (being 20% of the total commission) for negotiating the listing of the property but disputed that the practitioner was instrumental in the sale of the property and, therefore, that he had any entitlement to the additional commission,

The parties have agreed that the practitioner arranged for the deduction of the sum of \$4,537.50 for payment to himself from the settlement monies payable to the vendor. It is agreed that the vendor supported the practitioner's claim for commission, but not to the extent of authorising the payment to the practitioner of a particular amount of commission, or indeed any commission at all, from the settlement monies.

The practitioner failed to advise the vendor as to the implications of the deduction, which put it in breach of its contract with the agent. Subsequently, that part of the commission that was in dispute, \$2,722.50, was refunded by the practitioner to the agent. The practitioner retained the balance of the commission.

We accept the Law 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. The practitioner completely failed to observe that duty was absolute. When making arrangements for the settlement of the sale, the proposed deduction appeared in a settlement statement that he prepared and gave to the agent

and the purchaser's conveyancer but not to his client. It appears that he relied upon a letter from his client to the vendor seeking recognition of the practitioner's claim for an unspecified share of the commission. On one view, which we need not determine, the letter could reflect an assumption that the entire commission would be paid to the agent who would then account to the practitioner for his share. Regardless of that, the letter certainly does not authorize the practitioner to deduct any commission for himself from the sale proceeds.

In directing payment of the commission to himself from the settlement monies without any consultation with the client, the practitioner allowed his own interests to conflict with the interests of his client. He was in breach of Rule 8 of the Rules of Professional Conduct and Practice, in particular, Rule 8.1.1, which provides that a practitioner must not allow his interests to conflict with those of his client. The question then arises as to whether the practitioner is guilty of unsatisfactory professional conduct or professional misconduct (section 525(1) of the Act).

These terms are defined in sections 464 and 465 as follows:

"Unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner".

"Professional misconduct includes:

(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice."

The practitioner has conceded that his conduct described in Count 1 amounted to unsatisfactory professional conduct, but he denies professional misconduct.

The admissions made in the practitioner's Answer to the Disciplinary Application are somewhat equivocal, but the matter was argued on the basis that professional misconduct was in issue. The Law Society did not attempt to argue that the admission that the practitioner's conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence was tantamount to an admission of professional misconduct.

In *McLaren v Legal Practitioners Disciplinary Tribunal and the Law Society* [2010] NTSC 02 paragraph [151] Martin (BR) CJ pointed out that the Act provides no clear definition as to what comprises professional misconduct and suggested that it is for the Tribunal to decide where the line is to be drawn by reference to the type of conduct identified as included in each category and the general principles guiding the conduct of legal practitioners.

At the hearing the Law Society sought to argue that by reason of the conduct described in Count 1 the practitioner had been in breach of his obligations with respect to money received by him as a trustee for his client, the vendor. Prior to the hearing the Tribunal had refused a request by the Law Society to vary the application to include such an allegation. At the hearing the Law Society was not permitted to rely on this argument, it being perceived as an attempt to re-introduce an allegation already ruled out.

While in terms of the application before us no breach of trust was involved, it is clear that the practitioner manipulated the settlement to confer on himself a financial benefit. In the event, the client appears to have suffered no detriment but there was a potential for detriment if the agent had sought recovery of the commission from the client. No dishonesty was involved, but no competent and diligent practitioner would allow his interests to conflict with those of his client in such circumstances.

There is evidence that around the relevant time the practitioner had a significant illness that may have impaired his judgement. He referred to this in a letter to the applicant dated 25 May 2010 but acknowledged that there was no excuse for his "serious lapse". The Tribunal is of the same opinion.

The practitioner's conduct comprised unsatisfactory professional conduct in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of an Australian legal practitioner. It was also conduct that involved a substantial failure to reach or maintain a reasonable standard of competence and diligence so as to comprise professional misconduct.

In relation to Count 2, although the facts are agreed, it was submitted on behalf of the practitioner that the conduct did not occur in connection with the practise of law, and therefore could not be unsatisfactory professional conduct within the meaning of section 464. However, the placing of a newspaper advertisement that related to the practitioner's legal practice may reasonably be construed as conduct occurring in connection with the practice of law.

It was agreed that the practitioner's erroneous description of his qualifications was made inadvertently and without intention to mislead. Such an error is relatively trivial and does not amount to conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. It is a matter that may have been of more concern to the Agents Licensing Board. Count 2 is therefore not made out.

We therefore move on to consider an appropriate penalty for Count 1. The practitioner has had previous disciplinary breaches. In July 1995 the Law Society found him guilty of professional misconduct in absenting himself from a trial as Counsel, for which he was admonished. In August 1999 the Law Society found him guilty of unprofessional conduct when, in family law proceedings, he made offensive remarks about his own client and then attributed them to counsel. He was fined \$750. In May 2000 he admitted to charges relating to breach of duty to his client and the court and overcharging. He undertook that he would complete a Civil Procedure course, but failed to do so within the time allowed. In June 2001 he was found guilty of professional misconduct in failing to comply with his undertaking and his right to practise was suspended for four months. Following an unsuccessful appeal, this suspension took effect from 31 August 2001. He appears to have completed the course in Civil Procedure in February 2001.

Section 525 of the Act provides the Tribunal with wide powers in the event of a finding of professional misconduct, including an order specifying that conditions be imposed on the practitioner's practising certificate. The Law Society has submitted that an order should be made restricting the practitioner's right to practice, presumably, on the premise that he is unfit to practise as a sole practitioner with an unrestricted practising certificate.

In considering what orders may be appropriate, the Tribunal must take into account the need to protect the public, and also the effect that an order will have on the legal profession. The latter consideration involves the setting of proper standards of conduct and facilitation of the trust and confidence that must exist between legal practitioners.

The practitioner's conduct involved a significant departure from the standard of conduct that may be expected from a competent and diligent legal practitioner, but no deceit was involved. There is also evidence that the practitioner was suffering serious ill-health and, possibly, stress. He immediately admitted his fault and his remorse appears to have been genuine. He is unlikely to offend again and he has offered an undertaking that he will not act as a solicitor and agent in the same transaction.

Bearing in mind the practitioner's age and state of health it is unlikely that he would be able to find employment as a restricted practitioner, but this need not deter the Tribunal should it conclude that he is unfit for practice.

In relation to the practitioner's previous disciplinary breaches, those dealt with in May 2000 and June 2001 are of the most concern, involving breach of duty to his client and the court and breach of an undertaking. However, by inference, he was deemed fit to return to practice following his suspension and he practised for nearly ten years before infringing again.

The Tribunal is satisfied that the practitioner is a fit and proper person to engage in legal practice and that it is not necessary that restrictions be placed on his practising certificate. A substantial fine would be sufficient recognition of the seriousness of his conduct. Having said that, in our view, the practitioner would do well to recognize that another breach of the conduct rules is likely to have much graver consequences for him.

It was submitted that the practitioner had already suffered significant financial loss in defending himself against similar proceedings before the Agents Licensing Board. That loss has been estimated to be around \$65,000, but there is no evidence and the details are not clear. This loss is unfortunate, but the Tribunal must also consider the deterrent effect of any penalty and the practitioner's previous record.

Section 525(5) of the Act provides that the Tribunal may order the practitioner to pay a fine not exceeding 100 penalty units for unsatisfactory professional conduct or 1,000 penalty units for professional misconduct. We were informed that the monetary value of a penalty unit for the purposes of this application is \$110.

The practitioner will be fined the sum of \$10,000. A public reprimand is also warranted.

An order for costs follows in the absence of exceptional circumstances (section 529(1)). No such circumstances were suggested and none are apparent.

The Tribunal, having found Thong Sum Lee guilty of professional misconduct, orders that he be publicly reprimanded, pay a fine in the sum of \$10,000, and pay the costs of the Law Society.

Count 2 is dismissed.

Dated :

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LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

IN THE MATTER OF
AN APPLICATION BY

THE LAW SOCIETY NORTHERN
TERRITORY
Applicant

AND

THONG SUM LEE
Practitioner

AGREED FACTS

1. Thong Sum Lee ("the practitioner") was born on 7 June 1949. He was first admitted to practise in the UK in 1975 but did not practise. He was admitted to practise in New South Wales on 28 May 1976. He was admitted to practise in the Northern Territory on 5 August 1986. The practitioner was given an unrestricted practising certificate in 1990.
2. At all material times the practitioner was a sole practitioner who practised under the name of TS Lee & Associates.
3. At all material times the practitioner was a provisional registered agent's representative pursuant to section 33 of the *Agents Licensing Act* until September 2007 when he became a registered agent's representative.

Facts in relation to Allegation 1

4. On 1 May 2007 the practitioner was engaged by real estate agent firm called Litchfield Realty ("the agency") as a registered agent's representative. In that capacity the practitioner earned income by way of commissions.
5. The terms of the agreement between the practitioner and the agency in relation to commission were oral and subject to later dispute between them. If the practitioner signed a client to the agency that was called a sales listing. If he was responsible for the sales listing he was to be paid 20% of the commission payable by the client to the real estate agency at the settlement of the sale of the property.
6. In general terms, a further amount of 30% of the commission payable by the agency was payable if the property was sold. The agency and the practitioner later disputed whether the practitioner was entitled to this further commission.
7. The commission payable was a percentage of the commission the client paid to the agency on the sale.


8. On 1 May 2007 the practitioner obtained a sales listing by arranging for the directors of W & V Welffer Pty Ltd ("the vendor") to sign a sole and exclusive agency agreement ("the agreement") with the agency for a property owned by the vendor at 85 Dichondra Road, Howard Springs ("the property").
9. By reason of the agreement the practitioner became entitled, in his role as agent's representative, to receive from the agency 20% of the commission payable by the vendor to the agency at settlement of the sale of the property.
10. On 26 October 2007 the vendor and the purchaser signed an offer to purchase in relation to the property. This was regarded by the agency and the practitioner as a sale of the property.
11. The practitioner and the agency disagreed about the practitioner's entitlement to any further commission. The practitioner asserted that that he was entitled to commission for the listing and for the sale, that is, 50% of the total commission or \$4537.50. The agency asserted that the practitioner was entitled to commission only for the listing and was not entitled to any commission from the sale, that is, for only 20% of the total commission or \$1815.
12. On 26 October 2007 the vendor engaged the practitioner to act as the vendor's solicitor with respect of the sale.
13. Sometime on or before 21 December 2007 the practitioner informed the directors of the vendor that he was in dispute with the agency about the commission. On 21 December 2007 the directors of the vendor 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. By reason of this the practitioner thought he had received instructions to direct a payment of \$4537.50 for sales commission to himself. Annexed hereto and marked "A" is a copy of that fax.
14. On 21 December 2007, in his capacity as solicitor for the vendor, the practitioner drew up a settlement statement listing one of the payments to be made from the funds available settlement as \$4537.52 to TS Lee for "sales commission as agent". The practitioner sent the settlement statement on that day to the conveyancer for the purchaser of the property and to the agency.
15. The sale of the property settled on 4 January 2008. The practitioner appointed a conveyancing agent to attend at settlement on his behalf.
16. On 4 January 2008 the practitioner received a cheque in the sum of \$4537.54 for sales commission and a cheque in the sum of \$880 for legal fees in accordance with the settlement statement.
17. The actions of the practitioner in directing payment of the \$4537.50 to himself from the settlement put the vendor in breach of the agreement. The vendor did not authorise the practitioner to direct payment of the \$4537.50 to himself and the vendor did not authorise the practitioner to place it in breach of the agreement.

18. The practitioner did not provide the vendor with any advice regarding the implications of him being paid and retaining the sum of \$4537.50.
19. On 22 February 2009 the solicitor paid the agency \$2722.50 toward the commission payment required to be made by the vendor to the agency pursuant to the agreement. This sum represented the amount of the commission in dispute between the agency and the practitioner.
20. The agency did not pursue the vendor for the balance of the commission due by the vendor to the agency pursuant to the agreement as the money recovered would then be paid by the agency to the solicitor for the commission due to him as a sales representative who arranged the listing and the agency believed the solicitor had already received that sum from the proceeds of the sale of the property.

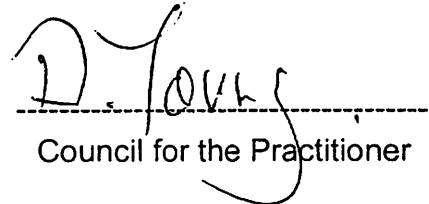
Facts in relation to Allegation 2

21. The practitioner was on 26 May 2008 a registered agent's representative.
22. The practitioner caused a printed advertisement for his legal practice to be placed in the Northern Territory News, appearing on 26 May 2008, in which the practitioner erroneously asserted that he was a licensed real estate agent.
23. The practitioner's erroneous description of his qualifications was made inadvertently and without intention to deliberately mislead.

Dated: 9 May 2011



Counsel for the Law Society



Council for the Practitioner

To Ken Jones
cc. TS Lee

Ref 85 Dicandra Rd

Dear Ken,

Val & I would like you
to give TS Lee the Commission Share
of the Sale of 85 Dicandra Rd.

TS Lee had worked hard for the
Sale. He was at 85 Dicandra every
Weekend during the period the place
was for sale showing prospective buyers
the orchard.

Thank you

Regards

Bee & Val Welfer

21/12/07