SUPREME COURT OF QUEENSLAND

CITATION:	*Legal Services Commissioner v Podmore* [2006] LPT 005
PARTIES:	**LEGAL SERVICES COMMISSIONER** **(applicant)** **v** **MICHAEL LEE PODMORE** **(respondent)**
FILE NO:	S7701 of 2005
DELIVERED ON:	23 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2006; 23 May 2006; submissions 21 June 2006, 7 July 2006
TRIBUNAL MEMBER:	de Jersey CJ
PANEL MEMBERS:	Ms S Purdon Dr S Dann
FINDINGS:	Charges 1,2,3,4,5,6(a),7,8,9 and 11 are established. Each involved professional misconduct. (Matter adjourned for submissions on consequent orders.)
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – DUTIES AND LIABILITIES TO CLIENT – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – conflict of interest – exploitation of vulnerable client – bankruptcy – lack of candour
	Foreign Acquisitions and Takeovers Act 1975 (Cth) *Legal Profession Act* 2004 (Qld), s 276, s 479, s 614 *Queensland Law Society Act* 1952 (Qld), s 3B *Queensland Law Society Rules* 1987 (Qld), r 85, r 86
	Adamson v Queensland Law Society Incorporated [1990] 1 Qd R 498, cited *Attorney-General v Clough* [2002] 1 Qd R 116, cited *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, cited *R v Neil* (2002) 218 DLR (4th) 671, cited *Re Wheeler* [1991] 2 Qd R 690, cited
COUNSEL:	B W Farr for the applicant S R Lewis for the respondent
SOLICITORS:	Legal Services Commission for the applicant The respondent appeared on his own behalf

[1] **de JERSEY CJ:** The Legal Services Commissioner has applied, under s 276 of the *Legal Profession Act* 2004 (Qld), for a finding that the respondent, Mr Podmore, has been guilty of professional misconduct, or alternatively, unsatisfactory professional conduct.

[2] In the hearing and determination of the application, I have been helped by Ms Purdon, from the practitioner panel, and Dr Dann from the lay panel.

[3] The oral hearing took place on 22 and 23 May 2006. The parties subsequently delivered written submissions. Mr Farr's submissions, for the Commissioner, were delivered on 21 June 2006. Mr Lewis's submissions, on behalf of Mr Podmore, were delivered on 7 July 2006. I thank Counsel for the helpfulness of their submissions.

Matters of law

[4] Mr Podmore was at all material times a solicitor practising by himself under the name Michael Podmore and Associates. The charges arise from his acting for clients Mr Ruslan Eshchenko and Mr Eshchenko's company Baronsun Pty Ltd.

[5] The relevant events cover the period of 1998 to 29 June 2004. The *Legal Profession Act* 2004 commenced on 1 July 2004. The complaints founding these charges were made before the commencement of that Act.

[6] Because of s 614(2) of the Act, the complaints are nevertheless to be dealt with under the 2004 Act. Further, the terms "professional misconduct" and "unsatisfactory professional conduct" bear the meanings, under the *Queensland Law Society Act* 1952 (Qld), of the terms "professional misconduct or malpractice" and "unprofessional conduct or practice", respectively.

[7] What, then, are the applicable meanings? For the purposes of the *Queensland Law Society Act*, reference was made to the common law definition of "professional misconduct", as conduct violating, or falling short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency (*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 507; *Re Wheeler* [1991] 2 Qd R 690, 697; *Attorney-General v Clough* [2002] 1 Qd R 116, 135).

[8] Section 3B of the *Queensland Law Society Act* contained a non-exhaustive definition of the term "unprofessional conduct", referring to matters including neglect, delay, excessive charging, and lack of competence or diligence.

[9] Both those concepts should, for this case, be approached that way.

[10] The evidence before the Tribunal comprises affidavits filed by and for both parties, and the oral evidence. In determining whether a charge has been established, the relevant standard of proof is on the balance of probabilities, with the degree of satisfaction varying according to the consequences of a finding of guilt (s 479 *Legal Profession Act*).

Preliminary factual background

[11] Mr Podmore was born on 8 August 1959. He is not currently practising as a solicitor. He first met Mr Eshchenko in August 1996. Mr Eshchenko sought migration advice.

[12] Mr Eshchenko was born in Kazakstan in the then USSR in 1969. His father is a successful and wealthy businessman who became interested in investing in real property in Australia in anticipation of retiring here. Mr Eshchenko, the son, pursued that interest on the Gold Coast.

[13] Mr Eshchenko said, and I accept, that Mr Podmore acted as his "business adviser, migration agent, solicitor and adviser in (his) personal and financial affairs". There is no doubt that Mr Eshchenko, the son, had access to very large sums of money for investment purposes.

Credit of major witnesses

[14] When Mr Eshchenko first met Mr Podmore, Mr Eshchenko could not communicate in English, and depended for translation on one Valentine Rostovchev. In 1997-8, Mr Eshchenko undertook a general English course, and later a business English course, at Bond University. He said, and I accept, that since 2002 he has been able to make sense of the daily (English language) newspapers, but still has difficulty reading complex English.

[15] An interpreter was present when Mr Eshchenko gave his oral evidence. Mr Eshchenko was able to give a not insubstantial part of his evidence without the need for interpretation, but interpretation was necessary in situations of any complexity.

[16] While I considered Mr Eshchenko's evidence was vague in some respects, I saw that as a result of his halting comprehension of the English language. Mr Lewis established some discrepancies between Mr Eshchenko's affidavit and oral evidence (for example, in relation to paras 22 and 23 of his affidavit). But again, I put that down as most likely the consequence of Mr Eshchenko's language difficulty. Notwithstanding that vagueness and those discrepancies, I considered Mr Eshchenko a credible witness.

[17] On the other hand, I regret to have to say that I did not generally accept the credibility of the evidence given by Mr Podmore. I specifically rejected some of the evidence he gave on important matters.

[18] For example, Mr Podmore gave oral evidence that the $5,000 referred to in charge six had nothing to do with the sale of 25 Elkhorn Avenue (p 173, l 22). Ray White presented the cheque in that amount on the expressed basis it related to that sale (letter of 3 June 1999: Ex RE 1.10). The witness Mr Cooper put the form of that letter down to administrative error by an accounts clerk. I did not accept Mr Cooper's evidence on that matter. That aside, as to Mr Podmore's credibility, another aspect arises. He said that though "shocked" (p 173, l 20) by the suggestion in the letter that the $5,000 payment related to that particular sale, he did not seek to correct it. Furthermore, his oral evidence was inconsistent with the tenor of his letter of 24 December 2002 (record, part 1, p 77) to the solicitors for the Eshchenko interest, Bernard Ponting and Co. I reject Mr Podmore's oral evidence. The payment of $5,000 plainly did relate to the sale of 25 Elkhorn Avenue.

[19] As another example, relevant to charge nine, on 5 August 2002 Mr Podmore wrote to Bernard Ponting and Co about proceedings commenced against him, saying that "to avoid putting your clients to unnecessary expense I must advise that I am currently bankrupt…" (p 176 record). He had been discharged from his bankruptcy almost a year earlier, on 30 September 2001 (p 57 record). When confronted with this in cross-examination, Mr Podmore was equivocal and evasive (pp 199-200). I am driven to conclude that in presenting himself in that correspondence as an undischarged bankrupt, he lied to advance his own position.

[20] As yet another example, his evidence relating to charge seven was changeable, and his responses to challenge evasive. He sought to divorce the payment of $38,000 provided by Primeline Properties Pty Ltd, from the entitlement of Abbey Glen Pty Ltd under cl 3.22 of the mortgage: his attempt was most unconvincing. See pp 175-182.

[21] Regrettably, there were many other aspects in which Mr Podmore's evidence was unsatisfactory. Some more will emerge in the course of my following treatment of the specific charges. Where Mr Podmore's evidence conflicted with other evidence in the case, I did not accept Mr Podmore's evidence as being generally credible.

[22] I accepted the other evidence in the matter, save for that of Mr Richard Cooper as to the reasons for the payment by Ray White of the amount of $5,000 referred to above.

[23] I turn now to the specific charges.

Charge 1

"1. The respondent failed to advise or refer his client, Mr Ruslan Eshchenko ("Eshchenko"), to obtain independent legal advice concerning a share allocation in January 1999 from Indura Bay Pty Ltd ("Indura Bay") to Abbey Glen Pty Ltd ("Abbey Glen").

Particulars

1.1 At all material times:

(a) the respondent was a legal practitioner;

(b) the respondent carried on the law practice of Michael Podmore & Associates as a sole practitioner;

(c) Indura Bay was a company acquired by the respondent for and at the direction of Eshchenko;

(d) Baronsun Pty Ltd ("Baronsun") was a company owned and controlled by Eshchenko;

(e) Abbey Glen was a company whose sole director and shareholder was the respondent's wife, Jo-Anne Podmore.

1.2 In or about January 1999, the respondent acted as a solicitor for Eshchenko for the purpose of establishing a real estate franchise business to be operated by Indura Bay.

1.3 The respondent arranged for the allocation of the shareholding of Indura Bay to be as follows:

(a) 9% ("C" class or non-voting shares) to Abbey Glen,

(b) 40% (ordinary shares) to Reppals Pty Ltd ("Reppals"), a company controlled by Jamie Bourke, a real estate agent and manager of the proposed business.

(c) 51% (ordinary shares) to Baronsun.

1.4 The share allocation to Abbey Glen was in addition to legal fees paid by Eshchenko to the respondent for the establishment of the company.

1.5 The respondent failed to advise or refer Eshchenko to obtain independent legal advice in relation to the proposed share allocation to Abbey Glen."

[24] Mr Eshchenko's company Baronsun purchased 25 Elkhorn Avenue in early 1998. Mr Podmore acted for Baronsun. Early the following year, the property being vacant, Mr Podmore suggested to Mr Eshchenko that a real estate business might be established there. Mr Eshchenko agreed, and left it to Mr Podmore to set up the venture. Through his company Indura Bay Pty Ltd, Mr Eshchenko purchased the LJ Hooker Surfers Paradise franchise, and one Jamie Bourke purchased the rent roll (through his company Reppals Pty Ltd). Mr Podmore suggested, and Mr Eshchenko agreed, that Mr Bourke manage the business.

[25] Again at Mr Podmore's suggestion, Mr Eshchenko agreed to allocate shares in his company Indura Bay to Mr Bourke's company Reppals, and Abbey Glen. At relevant times, Mr Podmore's wife was the sole director and shareholder of Abbey Glen. Mr Podmore had himself been a director and shareholder prior to his becoming bankrupt on 30 September 1998. The share structure of Indura Bay became: 51 per cent held by Baronsun; 40 per cent held by Reppals; and nine per cent "C" class non-voting shares held by Abbey Glen. Mr Lewis submitted the issue to Abbey Glen was designed to ensure Mr Eshchenko retained control of his company, but the 51 per cent shareholding guaranteed that control.

[26] Mr Podmore's justification, advanced to Mr Eshchenko, for the allocations of shares to his wife's company, was recognition of Mr Podmore's efforts in the purchase of the property, and to provide an incentive to Mr Podmore to involve himself in the management of the business to protect Mr Eshchenko's interest.

[27] Mr Podmore accepted that he acted as solicitor for Mr Eshchenko and/or Baronsun in this matter. In his affidavit (para 60), he claimed to have advised Mr Eshchenko to speak to his accountant about the proposal. In his oral evidence, he said that he

suggested to Mr Eshchenko that he seek "alternative advice". He certainly did not specify that Mr Eshchenko should seek independent legal advice, or give Mr Eshchenko any written advice on these aspects. See para 60 of his affidavit, and the transcript at pp 133 l 25, 134 l 8-15, and 136 l 5-18.

[28] Mr Podmore seriously erred in not advising Mr Eshchenko that Mr Eshchenko should seek independent legal advice in relation to the proposed issue of shares in Indura Bay to Mr Podmore's wife's company. The issue of the shares – of value even though non-voting – put Mr Podmore, as Mr Eshchenko's solicitor, in a position where Mr Podmore's interests were in conflict. Compare *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 171; *R v Neil* (2002) 218 DLR (4^{th}) 671, 683. It was not enough to suggest that Mr Eshchenko seek accountancy advice, or "alternative" advice. That he seek independent legal advice was an obvious requirement, and placing this charge into the context of the others, I do infer – as submitted for the Commissioner – that the inappropriate approach taken by Mr Podmore was motivated by self interest.

[29] In finding this first charge established, I characterize it as an instance of professional misconduct.

Charge 2

> "2. In breach of his fiduciary duty to his clients Eshchenko and Baronsun, the respondent acted in circumstances of conflict and preferred his own interests by allocating additional shares in Indura Bay to Abbey Glen upon a redistribution of the shareholding in Indura Bay in or about September 1999.
>
> Particulars
>
> 2.1 In or about August 1999, the respondent acted for Eshchenko in legal proceedings against Reppals. Part of the settlement of these proceedings was that Reppals agreed to transfer its 40% shareholding in Indura Bay to Baronsun.
>
> 2.2 In or about September 1999, and at the same time as the redistribution of Reppals shareholding, the respondent transferred or allocated an additional 30 shares in Indura Bay to Abbey Glen, thereby increasing Abbey Glen's shareholding to 40 "C" class shares.
>
> 2.3 The respondent received no authority from Eshchenko (on behalf of Baronsun) to transfer the additional shares to Abbey Glen.
>
> 2.4 In March 2001, Eshchenko became aware of the transfer of the additional 30 shares to Abbey Glen.
>
> 2.5 On 23 March 2001, the respondent arranged for the additional 30 shares to be transferred to Baronsun."

[30] In August 1999, Mr Eshchenko decided to terminate Mr Bourke's management of the Elkhorn Avenue real estate business. On Mr Podmore's advice, Mr Eshchenko engaged Phillips Fox to design a strategy for Mr Bourke's removal from the business. That led to a resolution of the issue in August 1999. Mr Eshchenko paid Mr Bourke $80,000 in return for Reppals' 40 per cent shareholding in Indura Bay. This is significant as an indication of the value of the shares in Indura Bay.

[31] On 6 September 1999, another 100 shares in Indura Bay were issued. Sixty-nine were allocated to Baronsun, and 31 to Abbey Glen, increasing the latter company's shareholding from nine per cent to 20 per cent. Mr Eshchenko signed the documentation to facilitate those issues, but – as I find – nevertheless did not appreciate what was occurring. His comprehension of business documentation in English was then still very limited. Mr Lewis referred to the last sentence in para 13 of the affidavit of K H Davis (p 360), which was not challenged. It amounts, however, to hearsay, and does not cause me to doubt Mr Eshchenko's evidence on this aspect.

[32] I find that Mr Eshchenko learnt of these issues only years later from his manager Lorraine Lovatt (who gave evidence which I accepted). Mr Eshchenko then sought from Mr Podmore the transfer from Abbey Glen to Baronsun of all of Abbey Glen's shares in Indura Bay.

[33] In the result, Abbey Glen transferred 30 Indura Bay shares to Baronsun on 23 March 2001. It took a further request from Mr Eshchenko, before Abbey Glen transferred its remaining 10 shares to Baronsun, which occurred on 28 November 2001.

[34] In his oral evidence, Mr Podmore denied the suggestion he arranged for the issue of the additional 100 shares in Indura Bay without Mr Eshchenko's knowledge (p 145, l 45). In relation to the question of independent legal advice, Mr Podmore was asked (p 148, l 42): "Did you advise him (Mr Eshchenko) to obtain independent legal advice before that additional allocation of shares occurred?" Mr Podmore answered: "At the time no, because we'd both been with James Daniel at Phillips Fox when he'd – the instructions were given that the shares were to be split between Baronsun and Abbey Glen." In later evidence, Mr Podmore asserted that the Phillips Fox solicitor, Mr Daniel, knew about the 100 shares issue, saying: "Their letter is quite clear". But the letter to which Mr Podmore was referring, which is at p 425 of the record, makes no mention of that share issue.

[35] I find this charge established. Mr Podmore exploited, for indirect personal advantage, Mr Eshchenko's reliance on him, and Mr Eshchenko's need to depend on Mr Podmore because of his lack of familiarity with the English language. The other analysis is that dealing commercially with Mr Eshchenko, the respondent overlooked the significance of his being Mr Eshchenko's solicitor: but I am satisfied it plainly went beyond that.

[36] This also amounted to professional misconduct, and of serious order.

Charges 3, 4 and 5

[37] I deal with these charges together. They are in these terms:

Charge 3

"3. In breach of Rule 86(3) of the *Queensland Law Society Rules* 1987, the respondent:

(a) acted for Baronsun, in relation to an advance to Abbey Glen in circumstances where Abbey Glen was a related person of the respondent as defined by Rule 86(4); and/or

(b) failed to ensure that a mortgage document which secured the loan was registered in a timely fashion.

Particulars

3.1 On 1 June 1999, and at the request of the respondent, Baronsun advanced the sum of $155,000.00 ("loan") to Abbey Glen.

3.2 The loan was to assist the respondent in financing the purchase by Abbey Glen of a house property situated at 18 Ballow Street, Amity Point;

3.3 The respondent prepared the mortgage document which secured the loan and provided for interest to be payable to Baronsun at the rate of 5% for one year.

3.4 Baronsun executed the mortgage document on 30 June 1999 but the respondent did not lodge the document at the Department of Natural Resources until 18 October 1999.

3.5 The respondent failed to advise or refer Eshchenko to obtain independent legal advice in relation to the making of the loan to Abbey Glen.

3.6 At all material times, the respondent represented to Eshchenko that he would refinance the loan by obtaining a loan from the ANZ Bank.

3.7 On 8 June 2000, the respondent arranged for Baronsun to execute a release of mortgage and prior to the repayment of the principal and interest.

3.8 On 23 June 2000, the respondent partially repaid the loan to the extend of $150,000. Despite demands from Baronsun to do so, the respondent continued in his failure to repay the entirety of the loan.

3.9 On 4 March 2003, Baronsun obtained default judgment against Abbey Glen in the sum of $16,700.98 representing the balance moneys owing to Baronsun for the loan."

Charge 4:

"4. In respect of the advance referred to in Charge 3 above, the respondent acted in circumstances of conflict by preferring his own interests to that of his client.

Particulars

4.1 The Commissioner repeats and relies upon particulars 3.1 to 3.9 of Charge 3."

Charge 5

"5. In breach of Rule 85 of the *Queensland Law Society Rules* 1987, the respondent acted for both Baronsun and Abbey Glen in respect of the loan referred to in Charge 3.

Particulars

5.1 The Commissioner repeats and relies upon particulars 3.1 to 3.9 of Charge 3."

[38] In April 1999, Mr Podmore caused Abbey Glen to enter into a contract to purchase a house property at 18 Ballow Street, Amity Point, North Stradbroke Island. Abbey Glen needed to borrow funds to complete. Mr Podmore's regular bank was not prepared to fund the purchase. After discussing the matter with Mr Eshchenko, Mr Podmore agreed, on behalf of Abbey Glen, with Baronsun, for Baronsun to lend Abbey Glen $155,000 over a term of 12 months at five per cent interest, secured by a mortgage over the property. Baronsun advanced those funds on 1 June 1999. Mr Eshchenko executed the mortgage on 30 June 1999. Under its terms, $162,750 was due for payment on 4 June 2000.

[39] In his oral evidence (p 153, l 30), Mr Podmore accepted that the purchase contract was due for settlement in early June 1999. Yet extraordinarily Mr Podmore did not lodge the mortgage for registration until 18 October 1999. Mr Lewis relied on there being no evidence of the time ordinarily taken to secure registration. But the point is that the mortgage should have been lodged for registration forthwith upon execution (30 June 1999).

[40] Rule 86(3) of the *Queensland Law Society Rules* 1987 (Qld) provides as follows:

"A practitioner must not act for a client who wants to invest an amount if –

(a) the amount to be invested is to be borrowed by a related person."

The term "related person" is defined to include a member of the practitioner's family ((b)(i)), and "a corporation…in which…a person mentioned in paragraph…(b) has shares…" (c). Abbey Glen fell within that category.

[41] In this case, not only, in breach of the rule, did Mr Podmore act for Baronsun in the transaction, but also, as he concedes (para 86 affidavit), he failed to advise Mr Eshchenko and Baronsun to obtain independent legal advice (which is itself contrary to Mr Lewis's submissions, para 37).

[42] The breach does not end there. Mr Podmore also failed to ensure that Abbey Glen adhered to the terms of the mortgage, which required payment of $162,750 on 4

June 2000. A sum of $150,000 was paid 19 days late, on 23 June 2000. Notwithstanding Mr Eshchenko's demands, Abbey Glen failed to pay the balance, and on 4 March 2003 Baronsun was driven to having to obtain default judgment against Abbey Glen, in the sum of $16,700.98, which Abbey Glen never satisfied.

[43] In relation to charge four, Mr Podmore clearly preferred his own interests over those of Baronsun. Repayment of the loan was left unsecured, as by registered mortgage, for a substantial period; Mr Podmore's wife's company failed to observe the terms of the mortgage; the interest rate was lower than the standard rate (as Mr Podmore conceded in his oral evidence); the full amount was never repaid; and the default judgment was not satisfied. It was extraordinary that Baronsun should have had to resort to the expedient of court proceedings.

[44] When challenged under cross-examination about his defaults in respect of these transactions, Mr Podmore sought to characterize, what was a simple purchase/loan mortgage, as part of a "joint venture" between Abbey Glen and Baronsun or the two principal natural persons. He could not intelligibly articulate any comprehensible basis in law for the existence of a joint venture. The reference to joint venture was no more than a contrivance manufactured to explain away Mr Podmore's professional dereliction, and to advance it did him no credit. There was nothing to suggest the existence of a joint venture between those parties, in relation to this transaction. Significantly, at all times, full beneficial ownership of the property which was purchased rested in Abbey Glen.

[45] Mr Lewis ingenuously characterized this as simply "a venture between two friends that was commercially unsuccessful…not an uncommon occurrence". That ignored the fact that one of the friends was the other's solicitor, and that other was in a situation of supervening vulnerability.

[46] Rule 85 of the *Queensland Law Society Rules*, relating to charge five, provides as follows:

> "A practitioner, or a firm of practitioners, engaged by a person to negotiate or otherwise act in respect of a contract or mortgage under or upon which that person has provided or agrees to provide credit to any other person shall not during the course of such engagement act for such other person in respect of the same matter or in respect of any other matter in which the credit (or any part of it) has been or is intended to be applied unless the provider of the credit shall be an excepted person."

Mr Eshchenko and Baronsun did not fall within the description, "excepted person" (which covers, eg, banks, insurance companies, credit unions etc). Consequently, by acting also for Abbey Glen, Mr Podmore breached that Rule. I do not accept Mr Lewis's submission this default fell short of professional misconduct or unprofessional conduct. The breach of rule 85 must be assessed in light of the surrounding circumstances.

[47] Each of these three charges was established, and each of them involved professional misconduct.

Charge 6

> "6. In breach of his duty as a solicitor, the respondent failed to disclose to Eshchenko and/or Eshchenko's father that he

received consulting fees from Ray White Surfers Paradise ("Ray White") in respect of:

(a) his referral of Eshchenko (on behalf of Baronsun) to Ray White in 1998 for the purchase of a commercial property by Baronsun; and

(b) his referral of Maylake Pty Ltd (a company controlled by Eshchenko's father), to Ray White in 1999 for the management of three commercial properties owned by Maylake Pty Ltd ("Maylake").

Particulars

6.1 In or about October 1998, Baronsun engaged Ray White to negotiate the purchase of a commercial building situated at 25 Elkhorn Avenue, Surfers Paradise. The purchase was completed on 23 October 1998 for the price of $1,912,500.00.

6.2 On 3 June 1999, Ray White paid the sum of $5,000.00 to the respondent for "consulting fees".

6.3 At all times, the respondent acted for Baronsun in relation to the purchase of 25 Elkhorn Avenue, Surfers Paradise and was not authorised by either Eshchenko or Baronsun to charge or receive a fee in relation to the purchase.

6.4 On or about 1 August 1999, the respondent engaged Ray White to manage three commercial properties owned by Maylake.

6.5 During August 1999, Ray White paid the sum of $10,000.00 to the respondent being a commission for the retainer of Ray White as manager of the properties.

6.6 Neither Maylake nor Eshchenko had knowledge of or consented to the payment of the commission of $10,000.00 by Ray White to the respondent."

[48] Charge 6(b) was withdrawn.

[49] On 23 October 1998, after extended negotiations, Baronsun purchased the commercial property in Elkhorn Avenue to which I earlier referred. A representative of Ray White Surfers Paradise had latterly been involved in those negotiations. They reached a point where the vendor agreed with the purchaser on a price, but refused to pay the agent any commission. At Mr Podmore's invitation, Mr Eshchenko agreed to pay Ray White $20,000 as commission, and did so in May 1999.

[50] On 3 June 1999, Ray White Surfers Paradise paid $5,000 to Mr Podmore for "consulting fees" in relation to the purchase of that property. Mr Eshchenko first

became aware of that payment in November 2000, when Ms Lovatt drew it to his attention.

[51] I have referred above to Mr Podmore's claim in evidence that this payment related to other work he had previously performed for Ray White, over a couple of years. Neither Mr Podmore, nor the relevant representative then engaged with Ray White, Mr Richard Cooper, who gave evidence to similar effect, could produce any applicable bill of costs. Mr Cooper gave evidence that he was aware of the allegation Mr Podmore had received a secret commission. He confirmed that Mr Podmore had never asked him to look out any relevant fee note. I have referred above to other features which cause me to reject Mr Podmore's claims in relation to this payment.

[52] I find charge 6(a) established. The amount of $5,000 represented a profit which accrued to Mr Podmore, without the knowledge of Mr Eshchenko, by dint of his acting for Baronsun in this transaction. His receipt of the sum, without notice to the client, breached his fiduciary duty to his client.

[53] Mr Podmore's receipt of this amount, without disclosure to Mr Eshchenko, amounted to a serious instance of professional misconduct.

Charge 7

"7. In breach of his duty as a solicitor, the respondent:

(a) facilitated the payment of a brokerage fee to Abbey Glen in respect of a loan made by Baronsun to Primeline Properties Pty Ltd ("Primeline") in circumstances where Abbey Glen had never been engaged as a broker in the transaction;

(b) failed to advise or refer Eshchenko to obtain independent legal advice in relation to the loan by Baronsun to Primeline.

Particulars

7.1 In or about June or July 1999, an agreement was reached between Baronsun and Primeline whereby Baronsun would advance the sum of $3,800,000.00 to Primeline for the development of vacant land at Nerang.

7.2 At no time was Abbey Glen or the respondent involved in the brokering of this loan on behalf of Baronsun.

7.3 Subsequently, Eshchenko retained the respondent on behalf of Baronsun, to act in relation to the advance and prepare the mortgage and other documents.

7.4 The respondent prepared mortgage No 703511432 and Company Charge No 712387. The mortgage provided that:

(a) Abbey Glen would be paid a brokerage fee by Primeline equivalent to 1% of the loan facility (clause 3.2(ii)); and

(b) the lender's legal fees and outlays would be payable by Primeline in the sum of $18,770.00 (clause 5.11).

7.5 At no time did the respondent discuss the terms of the mortgage with Eshchenko who relied upon the respondent to ensure the terms of the mortgage were appropriate and adequate.

7.6 By letter dated 29 July 1999, the respondent wrote to the Primeline's solicitors ("Hutcheons") enclosing the mortgage documents for signature and attaching a 'broking company invoice' from Abbey Glen. The respondent required payment of the brokerage fees to Abbey Glen "prior to the date of the advance by bank cheque".

7.7 On 30 July 1999, the mortgage was executed and a bank cheque for $38,000.00 payable to Abbey Glen, was paid to the respondent."

[54] In June or July 1999, Baronsun agreed to advance $3.8m to Primeline for its development of then vacant land at Nerang. Neither Mr Podmore nor Abbey Glen was involved in the brokering of that loan agreement.

[55] Subsequently Mr Eshchenko retained Mr Podmore, on behalf of Baronsun, to prepare related mortgage documentation. Mr Podmore prepared a mortgage, and included provision that Abbey Glen be paid a brokerage fee by Primeline equivalent to one per cent of the loan facility (cl 3.2(ii)), and that the lender's legal fees and outlays be paid by Primeline.

[56] On 13 July 1999, and again on 29 July 1999, Mr Podmore wrote to the solicitors for Primeline requiring payment of the brokerage fee. On 30 July 1999 the mortgage was executed, and a bank cheque in the sum of $38,000 payable to Abbey Glen was provided to Mr Podmore.

[57] I accepted Mr Eshchenko's evidence that he was unaware of the provision for the brokerage fee, and that it was never raised with him by Mr Podmore. Mr Podmore accepted that he did not raise with Mr Eshchenko the existence of cl 3.2(ii). Mr Podmore also accepted that he at no stage raised with Mr Eshchenko the subject of the $38,000, or suggested Mr Eshchenko obtain independent legal advice in relation to the matter. See p 181, ll 49-60.

[58] Mr Lewis submitted there was no deception of Mr Eshchenko. The deception lay in not telling Mr Eshchenko his solicitor would not only be reimbursed legal fees, but also receive a brokerage fee for a transaction he had not brokered. Mr Eshchenko would not have been inclined to exploit Primeline in that fashion, and that it was done behind his back, and by a solicitor, lent it a reprehensible character.

[59] I have referred earlier to my rejection of evidence given by Mr Podmore in relation to this subject. I accepted the evidence of Mr Foster.

[60] This charge was plainly established, and equally plainly involved professional misconduct of serious proportion.

[61] The conclusion is compelling: yet again, Mr Podmore unscrupulously exploited his extremely wealthy client's vulnerability – essentially through unfamiliarity with the English language, to his own financial betterment.

Charge 8

"8. In breach of his duty as a solicitor, the respondent failed to safeguard the interests of his client (Eshchenko on behalf of Baronsun) and exposed Eshchenko to financial risk in circumstances where:

(a) the respondent sold Eshchenko shares in an unincorporated company;

(b) the respondent failed to advise or refer Eshchenko to obtain independent legal advice concerning the sale of the shares;

(c) the respondent derived a financial benefit from the sale of the shares to the extent of:

(i) a payment in the sum of $40,000.00 being made to Abbey Glen, a company controlled by the respondent;

(ii) the sum of $60,000.00 being diverted from loan moneys provided by Primeline and collected by the respondent on behalf of his client and applied to the respondent's own use.

Particulars

8.1 In or about April 2000, Eshchenko on behalf of Baronsun, agreed to purchase from Abbey Glen, a 5% shareholding in a company to be incorporated in Jersey called Pearl Delta (Jersey) Limited ("Pearl").

8.2 The respondent represented to Eshchenko that Pearl would be entitled to receive a 35% founding shareholding of another company yet to be acquired and incorporated, namely Pan Pacific Multi Media Pty Ltd ("Pan Pacific") for the purpose of operating in the entertainment industry.

8.3 Eshchenko, through his related company, Albert One Holdings Limited (Gibralta) ("Albert") agreed to pay the

sum of $400,000.00 to acquire the shareholding in Pearl, which sum was to be paid as follows:

(a) $40,000.00 upon execution of the agreement for purchase in Australia.

(b) $360,000.00 upon completion of all documentation recording the respective shareholdings of Abbey Glen, Albert and other shareholders.

8.4 On behalf of Abbey Glen, the respondent received the sum of $40,000.00 from Eshchenko.

8.4 (sic) The respondent, without authority, recovered part of the remaining $360,000.00 by directing Primeline (through Hutcheons) to make the following payments to the respondent from the advance due to Baronsun payable under the agreement referred to in Charge 7:

(a) by a letter dated 26 April 2000, the respondent claimed an entitlement to the sum of $40,000.00 in respect of 4 settlements, paid as below:

27 April 2000	-	$20,000.00
27 April 2000	-	$10,000.00
28 April 2000	-	$10,000.00

(b) by a facsimile letter dated 20 June 2000, the respondent claimed an entitlement to a further sum of $20,000 in relation to 2 settlements due to settle on 22 June 2000. The following payments were made to the respondent:

29 June 2000	-	$10,000.00
30 June 2000	-	$10,000.00

8.5 The diversion of part of the loan moneys from Baronsun to the respondent was made by the respondent without the authority of Eshchenko on behalf of Baronsun.

8.6 Despite demands to do so, the respondent failed to repay the money which he derived from the sale of the shares when it became apparent that Pearl would never be incorporated.

8.7 On 23 July 2003, a sequestration order was made against the respondent in respect of a District Court judgment for the sum of $145,853.62 obtained by Eshchenko and Baronsun which included the sum of $60,000 (and interest) as referred to in particular 8.5."

[62] In about April 2000, Mr Podmore told Mr Eshchenko of an investment prospect, and invited Mr Eshchenko's participation. It involved establishing a company called "Pan Pacific Multi Media Limited" to be listed on the Hong Kong Stock Exchange. A company to be incorporated in Jersey, to be called "Pearl Delta (Jersey) Limited" was to hold 35 per cent of the shares in Pan Pacific, and Abbey Glen was to take a 15 per cent interest in Pearl Delta.

[63] Mr Podmore offered to sell Mr Eshchenko one-third of Abbey Glen's proposed interest in Pearl Delta for the sum of $400,000. In the course of their discussions, Mr Podmore spoke of potentially enormous profits to accrue following the listing of the companies. Mr Podmore suggested the $400,000 would represent only about one-tenth of the value of the shares Mr Eshchenko would be purchasing, once the companies were listed.

[64] Mr Eshchenko agreed to pay Abbey Glen $40,000 at once, with the balance of $360,000 to be paid when Pan Pacific was listed. Mr Podmore drew up an agreement, a copy of which appears at page 134 of the record.

[65] Mr Eshchenko paid the sum of $40,000, and I accept his evidence that he paid a further $15,000 shortly thereafter. In addition, Mr Podmore diverted further sums due to Mr Eshchenko from sums paid in respect of property sales, by Primeline Properties Pty Ltd to Baronsun. That related to the development at Nerang, referred to in my treatment of charge 7. Although Mr Eshchenko signed an authority for the diversion of those sums from Primeline to Abbey Glen, his evidence, which I accepted, was that he was not aware, or made aware, of the redirection of the funds he was authorizing. This was another example of Mr Podmore's unscrupulously exploiting his client, vulnerable for his lack of comprehension of English.

[66] That diversion of funds involved a payment of $20,000 on 27 April 2000, and the payment of an amount of $10,000 on each of 27, 28, 29 and 30 April. Adding those amounts to the sums of $40,000 and $15,000, produces a total of $115,000.

[67] Neither Pan Pacific, nor Pearl Delta, was ever established. Unsurprisingly, Mr Eshchenko sought repayment of the sum of $115,000. Repayment was not forthcoming. Default judgment was eventually obtained against Mr Podmore, for the sum of $145,853.62.

[68] Mr Podmore at least countenanced, but I find went beyond that and actively encouraged, Mr Eshchenko's entry into what was plainly an extremely risky investment. I find that he did so without ensuring Mr Eshchenko obtained independent advice (p 184, ll 9-48). Mr Lewis referred in that regard to para 118 of the respondent's affidavit. The respondent's evidence at p 184 was so unsatisfactory, I reject the claim in para 118.

[69] Mr Podmore claimed that Mr Eshchenko insisted on paying the sum of $40,000, and that it was Mr Eshchenko who instigated the agreement (p 185, l 25). That evidence did not however sit comfortably with Ex 3, a document in Mr Podmore's handwriting which first emerged during the cross-examination of Mr Podmore, and which records a request for payment of $40,000 "now". Having regard to his presentation during cross-examination, I reached the view Mr Podmore should not in this area be accepted as a creditable witness.

[70] I also rejected some incidental evidence given by Mr Podmore, which was that Mr Eshchenko accepted Abbey Glen's transfer to Baronsun of Abbey Glen's shareholding in Indura Bay as discharging Abbey Glen's obligation to repay the sum of $60,000 referred to above (the aggregation of the sum of $20,000 and the four amounts each of $10,000). Other discrepancies aside, that claim was glaringly inconsistent with other evidence from Mr Podmore, that Abbey Glen had held the shares entirely at Mr Eshchenko's direction (p 151, l 1).

[71] I find this charge established, and that it involved professional misconduct of serious proportion.

Charge 9

"9. On 30 July 2003, the respondent knowingly and falsely, alternatively recklessly, swore to certain facts contained in an affidavit which he provided to the Queensland Law Society ("Society").

Particulars

9.1 In or about August 2003, the respondent provided an affidavit dated 30 July 2003 ("affidavit") to the Society for the purpose of informing the Society of the circumstances of his bankruptcy referred to in particular 8.7 above.

9.2 At paragraph 26 of the affidavit, the respondent represented to the Society that he had been offered witness protection by a Federal Police agent, which offer he then declined.

9.3 At paragraph 30 of the affidavit, the respondent represented to the Society that the Federal Police had issued summons' against Eshchenko, his solicitor, Bernard Ponting, and other persons in relation to various matters he previously referred to in the affidavit.

9.4 On 29 June 2004, the respondent gave sworn evidence to proceedings (No 15884 of 2003) brought by the Commonwealth Director of Public Prosecutions against Baronsun and Eshchenko for breaches of the *Foreign Acquisitions and Takeovers Act* 1975.

9.5 In giving his sworn testimony to the proceedings, the respondent expressly stated:

(a) that he has never been offered witness protection as he represented in paragraph 26 of the affidavit, and

(b) that the matters sworn to in paragraph 30 of the affidavit were correct notwithstanding the submission made by Counsel appearing on behalf of the prosecution that the Federal Police has never issued any summons as referred to."

[72] In August 2003, the respondent provided the Queensland Law Society with an affidavit dated 30 July 2003 covering the circumstances of his bankruptcy. That bankruptcy occurred on 23 July 2003, following a sequestration order after his failure to satisfy the judgment to which I earlier referred.

[73] In para 26 of the affidavit, Mr Podmore swore that he had been offered witness protection by a Federal police agent, which he had declined. Later in the affidavit, he asserted the issue of a summons, by the Federal Police, against Mr Eshchenko and Mr Bernard Ponting and others.

[74] The Commonwealth Director of Public Prosecutions did in fact launch proceedings against Mr Eshchenko and Baronsun for alleged breaches of the *Foreign Acquisitions and Takeovers Act* 1975 (Cth). In sworn evidence given in those proceedings, Mr Podmore said he had never been offered witness protection as alleged in para 26 of his affidavit. While Mr Podmore swore that the summons referred to in that affidavit had been issued, that was denied by the Crown Prosecutor.

[75] I accept the Commissioner's characterization of this as an unfortunate, deliberate attempt on the part of Mr Podmore to sully the names and reputations of Mr Eshchenko and Mr Ponting, in some way to further his own interests. Mr Lewis submitted, as relevant, that the affidavit was prepared "with some urgency and little notice". Those features hardly explain, let alone excuse, what occurred here.

[76] This charge was established, and it involved professional misconduct.

Charge 11

> "11. The respondent engaged in conduct which resulted in him being bankrupted by Eshchenko and Baronsun.
>
> Particulars
>
> 11.1 On 19 May 2003 Eshchenko and Baronsun obtained a District Court judgement in the amount of $145,853.62 against the respondent.
>
> 11.2 On 28 May 2003 the respondent was served with a bankruptcy notice by Baronsun and Eshchenko.
>
> 11.3 The respondent is currently bankrupt."

[77] (Charge 10 was withdrawn.)

[78] On 19 May 2003 Mr Eshchenko and Baronsun obtained a District Court judgment against Mr Podmore in the amount of $145,853.62. They served a bankruptcy notice on Mr Podmore on 28 May 2003. Mr Podmore is currently bankrupt.

[79] That was Mr Podmore's second bankruptcy. This one arose as a result of his own clients' action taken in respect of issues involved in charge eight.

[80] This bankruptcy followed upon Mr Podmore's failure to satisfy the default judgment for $145,853.62 which was the culmination of the professional misconduct over the Pan Pacific matter. In allowing a situation to develop which

led to his clients' being driven to bankrupt him, the bankruptcy itself should be regarded as an instance of professional misconduct.

[81] The respondent says he "gave up", against "a ruthless, planned course of action", and that he was affected by other stressors. Yet the situation which ultimately overbore him was substantially of his own creation.

General

[82] Each of the above charges was established. Each involved professional misconduct.

[83] Mr Podmore, in summary, exploited Mr Eshchenko's vulnerability arising from limited comprehension of the English language, where Mr Eshchenko reposed substantial confidence in Mr Podmore, as his solicitor. Mr Podmore's motivation was to further his own financial interests. He created situations where his interests were in conflict, without disclosure to his uncomprehending client, and without counselling his client to seek independent legal advice. Even when problems came to light, he still preferred his own interests over those of Mr Eshchenko.

[84] The aggregation of his misconduct, through a substantial number of transactions over a period of years, represents professional misconduct of serious proportion.

[85] In addition, as follows from my treatment of his evidence above, he was not forthcoming in his evidence, and betrayed a lack of appreciation of the ethical duty which lies at the heart of legal practice.

[86] I will hear submissions in relation to the orders which should consequently be made.