

some comprehension and recall problems.

The Tribunal accepted that Mr Clough genuinely attempted to provide honest answers and to give honest evidence on matters of fact. However, when it came to the matters of interpretation of Rule 149A and his obligation in preparing the answers to interrogatories, in particular, numbers 17 and 18, the Tribunal was satisfied that he exhibited a lack of understanding of the Rule and his obligation in preparing the answers.

The Tribunal was satisfied that Mr S was a self employed person after 1 July 1991 when he and his wife carried on the building partnership.

The Tribunal was satisfied that details of the income and expenses of that partnership from 1 July 1991 until 26 May 1992 should have been included in the first Rule 149A statement.

The Tribunal was satisfied that details of the income and expenses of that partnership from 1 July 1991 to 15 September 1992 should have been included when Mr Clough was preparing the plaintiff's answers to interrogatories.

The Tribunal was satisfied that details of the income and expenses of that partnership from 1 July 1991 to 5 April 1993, should have been included in the further amended Rule 149A statement.

The Tribunal was satisfied that it is unnecessary for the Society to prove intent in order to establish unfairness.

The Tribunal was satisfied that ignorance of the true and proper meaning and obligations of Rule 149A and of the obligations when preparing answers to interrogatories does not constitute an excuse to a solicitor.

Whilst Mr Bartley did not abandon the argument, he did not press the argument that the practitioner attempted to further Mr S's case by dishonest means.

The Tribunal considered all the authorities referred to it by Mr Bartley and the article in the QLS Journal referred to by Mr Campbell.

The Tribunal considered the submissions made by Mr Campbell and Mr Bartley. The Tribunal noted that the findings in each of the three cases – Brown, Bax and Gregory were of professional misconduct. The Tribunal also noted that the element of dishonesty was involved in all three cases.

The Tribunal found unprofessional conduct defined by Section 3B(1) of the Queensland Law Society Act as "failure to maintain a reasonable standard of competence". The Tribunal did not make any finding of dishonesty.

The Tribunal was satisfied that, at the present time, the practitioner is unfit to practise as, on his own evidence before the Tribunal, he has demonstrated a failure to maintain a reasonable standard of competence. However, the Tribunal was satisfied that at the termination of a period of suspension and subject to compliance with certain conditions, the practitioner will no longer be unfit to practise.

## Appeal

The practitioner has lodged an appeal against the severity of the penalty. He successfully sought a stay of the suspension as ordered by the Solicitors Complaints Tribunal until his appeal is heard. The Council of the Society has cross-appealed and the Attorney-General has appealed against the inadequacy of the penalty.

## Solicitors Complaints Tribunal

# In the Matter of Practitioner X

**Case No:** SCT/4 & 20  
**Date of Hearing:** 23 August 1999  
**Appearing Before:** Mr J S P O'Keeffe (Chairperson)  
Ms C C Endicott  
Ms M Green (Lay Member)  
**Penalty:** Fined \$12,000.00

## Charges

### SCT/4

1. That the practitioner, being a solicitor and trustee of property, namely clients' trust moneys, dealt with that property in breach of the terms of the trust and in breach of Section 7 of the Trust Accounts Act by, without authority, permitting the intermingling of the property with his own property and thereby applied the same to his own use and benefit, until such time as the moneys were restored to the trust account.

---

**Particulars**

- (a) (i) on 11 October 1996, trust moneys in the sum of \$5,651.58 were wrongfully paid directly into the practitioner's general account, in breach of the provisions of Section 7 of the Trust Accounts Act, and without the practitioner having any lawful entitlement thereto;
  - (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use until 18 April 1997 when the practitioner caused the trust deficiency to be restored.
  - (b) (i) on 1 November 1996, trust moneys in the sum of \$1,970.00 were wrongfully paid directly into the practitioner's general account, in breach of the provisions of Section 7 of the Trust Accounts Act, and without the practitioner having any lawful entitlement thereto;
  - (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use until 14 April 1997 when the practitioner caused the trust deficiency to be restored.
2. That the practitioner, being a solicitor and trustee of property, namely clients' trust moneys, dealt with that property in breach of the terms of the trust and in breach of Section 8 of the Trust Accounts Act by, without authority, intermingling the property with his own property and thereby applied the same to his own use and benefit, until such time as the moneys were restored to the trust account.

**Particulars**

- (a) (i) on 31 October 1996, the practitioner withdrew the sum of \$5,000.00, the property of the Estate of WLB, from the trust account to the general account without having any lawful entitlement thereto;
- (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use. The said trust deficiency has not been restored.
- (b) (i) on 26 November 1996, the practitioner withdrew the sum of \$2,989.50, the property of his clients N & P Q, from the trust account to the general account without any lawful entitlement thereto;

- (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use until 20 January 1997 when the practitioner caused the trust deficiency to be restored.
- (c) (i) on 3 April 1997, the practitioner withdrew the sum of \$750.00, the property of his client KMA, from the trust account to the general account without having any lawful entitlement thereto;
- (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use. The said trust deficiency has not been restored.
- (d) (i) on 3 April 1997, the practitioner withdrew the sum of \$300.00, the property of his client KMA, from the trust account to the general account without having any lawful entitlement thereto;
- (ii) the said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use. The said trust deficiency has not been restored.

3. That the practitioner, being a solicitor and trustee of property, namely clients' trust moneys, dealt with that property in breach of the terms of the trust and in breach of Regulation 5(d) of the Trust Accounts Regulations by withdrawing moneys from his trust account in circumstances where, before such withdrawal, the practitioner failed to ensure that sufficient trust funds were held on behalf of the client in question and that the amount of the withdrawal from the trust account was no more than the amount of such trust moneys.

**Particulars**

- (a) on 20 January 1997, the practitioner withdrew the sum of \$2,989.50 from his trust account in relation to the matter of BEA & AMA at a time when he held no money in his trust account on behalf of the said client;
- (b) the said moneys, being trust property held by the practitioner on behalf of other persons, were applied to the practitioner's own use and benefit, in that they were deposited to the credit of the trust ledger of clients, N & P Q, for the purpose of restoring the trust deficiency particularised in Charge 2(b) above;
- (c) the said trust deficiency was restored by the practitioner on 3 February 1997 by the deposit of \$2,989.50 from the general account to the

trust account.

4. Withdrawn.
5. That the practitioner, between the period 29 October 1996 and 28 April 1997, failed to restore to his trust account trust moneys that the practitioner knew or ought reasonably to have known had been paid to the general account in breach of the terms of the trust and in breach of the Trust Accounts Act, in circumstances where to restore such trust deficiencies would have caused the general account to be overdrawn and the practitioner to be in breach of his overdraft facility arrangements with his general account bankers. The said trust moneys were thereby retained in the general account and applied as working capital, or otherwise applied to the practitioner's own use and benefit throughout the said period.

#### **Particulars**

- (a) at all material times, the practitioner conducted his general account with Westpac Banking Corporation and with St George Bank Limited;
- (b) the Westpac account was actively conducted until in or about January 1997 and the St George account was actively conducted from in or about February 1997;
- (c) the practitioner had no overdraft arrangement with either bank during the period from October 1996 to April 1997;
- (d) during the aforesaid period, trust moneys were paid to the practitioner's general account in breach of the terms of trust and in breach of the Trust Accounts Act as particularised in Charges 1 – 3 hereof;
- (e) in consequence of the payment of trust moneys to the general account, the general account balances during the relevant period generally remained in credit, in accordance with the practitioner's arrangements with his general account bankers;
- (f) in the event that the practitioner had restored the trust deficiencies from the general account to the trust account during the said period, the relevant general accounts would, for the period, have recorded a debit balance, in breach of the practitioner's arrangements with his general account bankers, and in consequence whereof the general account banker would have been entitled to dishonour the practitioner's general account cheques;

(g) further particulars of the general account bank balances for the period from 29 October 1996 to 28 April 1997, identifying the effect upon those balances of the failure to restore trust deficiencies, are set out in the affidavit of David John Franklin filed in these proceedings.

6. That the practitioner has, in various respects particularised hereunder, breached the requirements of the Trust Accounts Regulations:

(a) In breach of Regulation 5(c) of the Trust Accounts Regulations 1973, the practitioner failed, at the end of every month, to reconcile the trust account cash book with the bank balance and the trust account ledger.

#### **Particulars**

- (i) the practitioner practised as a sole practitioner from 1990, operating a trust bank account with Westpac Banking Corporation;
  - (ii) the trust account cash book was not balanced and reconciled with the bank balance and the trust account ledger for the month of September 1996 until in or about January 1997;
  - (iii) the trust account cash book was not balanced and reconciled with the bank balance and trust account ledger for the months from October to December 1996 until in or about February 1997.
- (b) In breach of Regulation 5(d) of the Trust Accounts Regulations 1973, the practitioner failed to post forthwith to a trust account ledger all entries made in the trust account cash book.

#### **Particulars**

- (i) a trust account cheque in the sum of \$4,062.72 drawn in favour of the practitioner's general account and paid on or about 6 September 1996, in relation to the matter of Estate of WLB was not posted to the trust account ledger until on or about 20 January 1997;
- (ii) a trust account cheque in the sum of \$5,000.00 drawn in favour of N Lawyers and paid on or about 6 September 1996 in relation to the matter of Estate of WLB was not posted to the trust account ledger until on or about 20 January 1997;

(iii) trust account cheque number 402413 in the sum of \$2,200.00 drawn and paid on or about 17 December 1996 in relation to the matter of BEA & AMA was not posted to the trust account ledger until on or about 31 January 1997;

(iv) trust account cheque number 402414 in the sum of \$800.00 drawn and paid on or about 17 December 1996 in relation to the matter of BEA & AMA was not posted to the trust account ledger until on or about 31 January 1997.

7. That the practitioner did, by letter dated 11 June 1997, write to his client, HD, in relation to the matter of fees for professional services rendered during the administration of the Estates of HEB and WLB, which letter was false and misleading and contained representations which were recklessly made and the practitioner was careless as to the accuracy of those representations.

#### Particulars

(a) during the period from 19 to 21 May 1997, Mr Grenville Hughes, accountant in the employ of the Queensland Law Society Incorporated, conducted an examination of the accounts of the practitioner pursuant to Section 31 of the Queensland Law Society Act 1952 (as amended);

(b) during the course of Mr Hughes' examination of the file of HD – Administration of Estate of WLB, Mr Hughes advised the practitioner that an amount of \$5,000.00 paid by the practitioner from his trust account to his general account on 31 October 1996 as balance costs and outlays in respect of invoice number 96712 dated 6 September 1996 was required to be refunded to the credit of the client HD as the account had been paid in full on 6 September 1996;

(c) by letter dated 11 June 1996, the practitioner wrote to HD for the purpose of obtaining her authorisation in respect of all moneys previously transferred by the practitioner from his trust account to his general account, including the transfer of \$5,000.00 on 31 October 1996;

(d) by that letter:

(i) the practitioner represented that a transfer of \$5,000.00 was made to the general account on 20 January 1997, when in truth, no such transfer was made;

(ii) the practitioner represented that a sum of

\$2,480.00 remained unpaid on invoice number 96712 when in truth, the invoice had been paid in full on 6 September 1996 and overpaid by an additional sum of \$5,000.00 on 31 October 1996;

(iii) the practitioner failed to inform HD, as was the case, of the overpayment of \$5,000.00 on 31 October 1996;

(iv) the practitioner advised HD of the necessity for him to clearly state the total costs and outlays paid by her for work undertaken on her instructions, but failed to do so;

(v) the practitioner failed to inform HD, as was the case, that on 30 January 1997, the practitioner had raised final bills of costs on the matters of the Estate of WLB and the Estate of HEB in the total sum of \$603.70 and had, on 30 January 1997, transferred trust funds of \$1,802.36 comprising payment of the sum of \$603.70 together with a further sum of \$1,198.66 from the trust account to the general account "in full payment of all invoices on all files";

(vi) the practitioner failed to inform HD, as was the case, that on 30 January 1997:

(A) HD had authorised the transfer of the sum of \$1,198.66 to the general account in "full payment of all invoices on all files"; and

(B) the practitioner had advised HD that he would not charge any more costs to finalise the files.

(vii) the practitioner represented to HD, either expressly or alternatively by necessary implication, that she remained indebted to the practitioner in respect of work undertaken on her instructions for a sum in excess of \$5,000.00 and that it was in her interests to authorise payment to the practitioner of that sum in full and final payment of all outstanding costs billed and unbilled, when in truth HD was not indebted to the practitioner in such sum.

8. Withdrawn.

9. That on or about 12 December 1995, the practitioner did borrow for his personal use the sum of \$10,000.00 from his clients, SM & SM:

(a) In breach of Rule 86 of the Rules of the

Queensland Law Society Incorporated.

**Particulars**

- (i) Rule 86 of the Rules provides that a practitioner shall not borrow money from a client save in certain excepted circumstances provided for therein;
  - (ii) the borrowing by the practitioner from his clients SM & SM was not within the excepted circumstances.
- (b) In breach of his duty as a solicitor.

**Particulars**

- (i) in breach of his duty to his clients SM & SM, the practitioner mixed the affairs of his clients with his own;
  - (ii) in breach of his duty to his clients SM & SM, the practitioner preferred his own interests to those of his clients;
  - (iii) in breach of his duty to his clients SM & SM, the practitioner acted in circumstances of conflict between the interests of his clients and himself;
  - (iv) in breach of his duty to his clients SM & SM, the practitioner failed to explain to his clients the existence and nature of the conflict of interest referred to in paragraph (iii) above;
  - (v) in breach of his duty to his clients SM & SM, the practitioner failed to advise his clients to obtain independent legal advice with respect to the transaction or alternatively, to insist that his clients obtain independent and informed advice;
  - (vi) in breach of his duty to his clients SM & SM, the practitioner failed to ensure that his clients were aware of every circumstance that was or might be relevant to the decision to lend;
  - (vii) in breach of his duty to his clients SM & SM, the practitioner failed to take any step or steps to secure the repayment of the said loan by him to his clients whether by mortgage, caveat or otherwise howsoever.
10. That on or about 25 February 1997, the practitioner did borrow for his personal use the sum of \$5,000.00 from his clients SM & SM:
- (a) In breach of Rule 86 of the Rules of the Queensland Law Society Incorporated.

**Particulars**

- (i) the Society repeats and relies upon the particulars set out in support of Charge No. 9(a) above.
- (b) In breach of his duty as a solicitor.

**Particulars**

- (i) the Society repeats and relies upon the particulars set out in support of Charge No. 9(b) above.

**SCT/20**

1. That the practitioner, in breach of his duty as a solicitor, failed to honour an undertaking given by him, through his counsel, to the Solicitors Complaints Tribunal on 19 May 1998.

**Particulars**

- (a) on 19 May 1998, the Solicitors Complaints Tribunal dismissed an application on behalf of the practitioner under Section 6L of the Queensland Law Society Act 1952 (the Tribunal's Order);
- (b) in reliance upon the undertaking given by the practitioner through his counsel that a Notice of Appeal against the Tribunal's order be filed by 2 June 1998 and that the appeal will be prosecuted diligently, the Tribunal further ordered that the hearing of the charges against the practitioner be adjourned until such time as the practitioner's appeal had been disposed of;
- (c) in breach of his undertaking to the Tribunal, the practitioner failed to diligently prosecute the appeal in that:
  - (i) the practitioner failed to deliver his outline of submissions on or before the due date therefore, and required a three (3) week extension of time from the Court of Appeal for the delivery of same;
  - (ii) the practitioner failed to act diligently in the preparation of the appeal record book;
  - (iii) the practitioner failed or refused to accept dates of 29 September 1998 and 19 October 1998 for the hearing of the appeal, notwithstanding such dates having been offered by the Deputy Registrar of the Court of Appeal and notwithstanding the Society having agreed to the appeal being heard on such dates.

---

## Appearances

- (a) For the Council of the Queensland Law Society Incorporated:  
Mr R G Perrett, solicitor of Clayton Utz, Solicitors.
- (b) For the practitioner:  
Mr I Dearden, solicitor of Deardens Lawyers.

## Findings and Orders

1. The Tribunal dismisses the preliminary applications 1 and 2 made on behalf of the practitioner seeking that the hearing take place in private, or alternatively, that the names of the practitioner's wife, children, clients and medical practitioners be suppressed.
2. The Tribunal dismisses preliminary application 3, which sought to suppress the name of the practitioner and his clients in the final Findings & Orders.
3. The Tribunal finds the practitioner guilty of Charges 1, 2, 3, 5, 6, 7, 9 and 10 in Notice of Charge No. 4 and Charge No. 1 in Notice of Charge No. 20.
4. The Tribunal finds the practitioner guilty of professional misconduct.
5. The Tribunal orders that the practitioner pay a penalty of \$12,000.00 by equal consecutive calendar monthly instalments of \$1,000.00, the first of which will be due and payable on 31 October 1999. Default of payment of any instalment, which continues for more than seven (7) days (unless extensions are granted by the Queensland Law Society Inc) will result in the balance then outstanding becoming immediately due and payable.
6. The Tribunal further orders that the practitioner be suspended from practice for a period of two (2) years, but this suspension will not become operative unless and until the practitioner defaults in the payment of the penalty of \$12,000.00 or any part thereof, and such default continues for seven (7) days, or the practitioner breaches any of the undertakings which he has given to the Tribunal at this hearing.
7. The Tribunal orders that the practitioner pay to the Queensland Law Society Incorporated the amount of its costs including all reserved costs fixed by Messrs Hickey & Garrett or as agreed upon.
8. The Tribunal orders by consent that the practitioner pay the costs as fixed or agreed upon by no later than 23 August 2001.

## Undertakings given by the Practitioner

1. That the existing arrangements for the appointment of co-signatories to the practitioner's trust account pursuant to Section 10 of the Queensland Law Society Act will continue and be adhered to by the practitioner until such time as those arrangements are terminated by resolution of the Council of the Society.
2. That the practitioner will avail himself of the services of SR in the capacity as supervising solicitor/senior councillor in respect of any professional practice, trust account or practice management issues as and when may be reasonably required by the practitioner, for a period of two (2) years, or until earlier release from this undertaking by resolution of the Council of the Society.
3. That the practitioner will continue regular monthly counselling and treatment with IG, psychologist, or by such alternative psychologist or psychiatrist in lieu of IG as may be agreed with by the Council of the Society, and irrevocably authorises such psychologist or psychiatrist to provide a six (6) monthly written report to the Council of the Society with respect to the practitioner's ongoing treatment, condition and medical fitness to practise law as a principal in private practice, for a period of two (2) years or until earlier release from this undertaking by resolution of the Council of the Society.
4. That the practitioner will for a period of two (2) years, or until earlier release from this undertaking, confine his practice to conveyancing, sales and purchases of businesses, property matters, wills, powers of attorney and estates (the said categories) and will take all necessary steps within two (2) months from the date hereof to refer any other files currently held by him which do not fall within the said categories, to another law firm. The litigation file being currently undertaken for the client, Mrs R, is specifically exempted from this undertaking, provided the finalisation of that litigation on behalf of Mrs R is undertaken by the practitioner in consultation with Mr DM of Counsel, or such other Counsel experienced in the conduct of litigation matters as may be instructed in lieu of DM.
5. That the practitioner will undertake the trust accounting module of the Queensland Law Society Practice Management Course commencing in or about February 2000.
6. That the practitioner will repay HD the sum of \$5,000.00 together with interest thereon at a rate of 6% per annum from 31 October 1996 until the date of repayment, within two (2) months of the date hereof, under cover of a letter in terms of the draft annexed to these

undertakings.

### Draft Letter to HD

"On review of my files, and in further reference to my letter to you of 11 June 1997, with regard to the Estate of WLB, it is clear that I should not have charged you the further sum of \$5,000.00 on that file.

I now enclose a cheque payable to you, as the sole beneficiary of the estate, in the amount of \$5,000.00, plus interest at the rate of 6%, a total of \$\_\_\_\_\_.

I confirm I have received payment in full from you for all legal work on both your mother and your father's estate files (i.e. Estate of HB and Estate of WLB)."

### Reasons

With respect to the preliminary applications 1 and 2 made by the solicitor for the practitioner, the Tribunal considered the submissions made by both parties and some of the authorities cited to it.

The Tribunal is not convinced that because of the confidential nature of evidence, or because of any other matter, the hearing should be heard in private.

With respect to the preliminary application number 3, the Tribunal is of the opinion that it does not have any jurisdiction to restrict the publication and filing of its final Order. The Tribunal is firmly of the opinion that Section 6L of the Queensland Law Society Act does not apply to its final Order.

The Tribunal granted leave to the Queensland Law Society Incorporated to withdraw from Notice of Charge No. 4, Charges numbered 4 and 8 and has allowed an amendment to Charge No. 7.

The practitioner has pleaded guilty to Charges 1, 2, 3, 5, 6, 7 (as amended), 9 and 10 in Notice of Charge No. 4 and to Charge No. 1 in Notice of Charge No. 20. He has admitted the facts alleged in the particulars supporting each of the charges. He has admitted that he is guilty of professional misconduct.

The facts supporting the charges include breaches of the Trust Accounts Act and Regulations, the writing of a letter containing false and misleading representations, borrowing funds from clients without compliance with Rule 86 of the Queensland Law Society, and breaching an undertaking given to this Tribunal.

All of the charges are serious, and collectively it is difficult not to order a suspension. However, the Tribunal has taken into account that for the practitioner, being a sole practitioner, a suspension even for a short period could well result in the loss of the practice.

The parties have by agreement tendered to the Tribunal undertakings, which would permit the practice to continue, but at the same time be conducted in a manner, which would protect the clients and the public.

The practitioner in his affidavit (paragraph 96) has sworn that he is prepared to consent to an order embracing these undertakings, and through his solicitor he has signed a copy of the undertakings (the signed copy of which will be held by the Tribunal).

### Solicitors Complaints Tribunal

## In the Matter of Practitioner X

**Case No:** SCT/18  
**Date of Hearing:** 8 September 1999  
**Appearing Before:** Mr J S P O'Keeffe (Chairperson)  
Mr T M Treston  
Ms D A Wilson (Lay Member)  
**Penalty:** Fined \$25,000.00

### Charges

1. That the practitioner did, in the matter of the Estate of EFW (deceased), charge excessive fees for the provision

of services in relation to the practitioner's practice.

### Particulars

- (a) in the matter of the said Estate, the practitioner, as solicitor for and executor of the estate, did, during the period 24 October 1996 to 24 April 1998, charge professional fees totalling the sum of \$39,260.00;
- (b) the practitioner caused the transfer of estate funds in the sum of \$39,260.00 from his trust account in payment of the said fees;
- (c) the said sum of \$39,260.00 was charged in circumstances where:
  - (i) a reasonable sum for professional fees for the services rendered by the practitioner in