IN THE COURT OF APPEAL [1998] QCA 089

SUPREME COURT OF QUEENSLAND

Appeal No. 7088 of 1997.

Brisbane

[QLS v. Bax]

BETWEEN:

THE QUEENSLAND LAW SOCIETY INCORPORATED
(Defendant) Appellant

AND:

CRAIG STEPHEN BAX
(Plaintiff) Respondent

Appeal No. 7423 of 1997.

[Minister for Justice & A-G v. Bax]

BETWEEN:

THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL
Appellant

AND:

CRAIG STEPHEN BAX
Respondent

McPherson J.A.
Pincus J.A.
Shepherdson J.

Judgment delivered 12 May 1998

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

---

1. APPEALS BY THE QUEENSLAND LAW SOCIETY INCORPORATED AND BY THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL ALLOWED.

2. THE ORDER OF THE STATUTORY COMMITTEE MADE ON 29 JULY 1997 THAT THE RESPONDENT BE FINED THE SUM OF $15,000 SET ASIDE.

3. ORDER IN LIEU THAT THE NAME OF THE RESPONDENT BE STRUCK OFF THE ROLL OF SOLICITORS.

4. ORDER THAT THE RESPONDENT PAY THE COSTS OF THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL RELATING TO HIS APPEAL, TO BE TAXED, AND PAY THE COSTS OF THE QUEENSLAND LAW SOCIETY INCORPORATED RELATING TO THE APPEAL, FIXED AT THE SUM OF $2,000.

CATCHWORDS: **SOLICITORS - professional misconduct - appeal seeking variation of Statutory Committee order - solicitor backdated a deed of loan and a second mortgage and misinformed a creditors' meeting about the date of execution of the mortgage - where solicitor gave different explanations - whether solicitor's conduct was honest but mistaken or serious misconduct - whether solicitor should be struck off - where persistent dishonest conduct over a substantial period - circumstances in which a suspension order can be imposed - whether conduct of solicitor demonstrated that he should no longer be held out as fit to practice as a solicitor.**

Minister for Justice and Attorney-General v. Anthony Talbot Brown (Appeal No. 241 of 1992, 11 June 1993)
Mellifont v. The Queensland Law Society Incorporated [1981] Qd.R. 17
Ziems v. The Prothonotary of the Supreme Court of NSW (1957) 97 C.L.R. 279

Counsel: Mr P A Keane Q.C. with him Mr R W Campbell for the appellant in Appeal No. 7423 of 1997.
Mr D Clothier for the appellant in Appeal No. 7088 of 1997.
Mr C Hampson Q.C. with him Mr P Favell for the respondent.

Solicitors: Crown Solicitor for the appellant in Appeal No. 7423 of 1997.
Corrs Chambers Westgarth for the appellant in Appeal No. 7088 of 1997.
Baker Johnson for the respondent.

Hearing date: 1April1998.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 7088 of 1997

Brisbane

Before McPherson J.A.
Pincus J.A.
Shepherdson J.

[Queensland Law Society Inc. v. Bax]

BETWEEN:

THE QUEENSLAND LAW SOCIETY INCORPORATED
(Defendant) Appellant

AND:

CRAIG STEPHEN BAX
(Plaintiff) Respondent

Appeal No. 7423 of 1997

[Minister for Justice & A-G v. Bax]

BETWEEN:

THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL

Appellant

AND:

CRAIG STEPHEN BAX

Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 12 May 1998

I have read and I agree with the reasons of Pincus J.A. for the orders he proposes for disposing of these appeals. His Honour has dealt with the issues so fully in his reasons that only a few additional remarks are justified on my part.

The first is that the act of falsely "backdating" documents is plainly a serious matter. The ordinary presumption is that, unless there is affirmative evidence to the contrary, a document is taken to have been executed on the date it bears. Such evidence is often difficult to obtain particularly after a lapse of some time from the event. The presumption is therefore one on which business is habitually conducted and for that reason, among others, it is plainly important to maintain its integrity so far as possible. The date on a document is often critical in a number of ways. In the case of insolvency, it is capable of determining whether the transaction recorded or given effect in the instrument is liable to be set aside. It may also, as the Statutory Committee in this case noticed, affect rights of creditors to priority in equity. Such a priority may impinge on the rights of creditors against each other, or it may, for reasons explained in *Burns v. Stapleton* (1959) 102 C.L.R. 97, defeat, wholly or in part, the claim of a trustee in bankruptcy or a liquidator to invalidate a security asserted over the assets of the insolvent.

In the present case the solicitor's action in backdating documents was compounded by his announcement at the meeting of creditors in May 1994 that the bill of mortgage was executed in (or "on") March 1993. The spectacle of a solicitor, who was chairman of the meeting, falsely asserting a date for the execution of an instrument is one that is not likely to be readily forgotten by the large number of business people who were present on that occasion. It conveys a very poor image of the honesty and integrity of solicitors and so tends to bring the whole profession and its standards into disrepute. It cannot in my opinion be excused by resorting to the explanation that the solicitor in this appeal was young and, it was said, inexperienced. In a matter like this, and perhaps in most others, basic honesty is not a quality that is ordinarily acquired through experience, or by lengthy practice of trying one's best to be honest.

All of this tends to show, in my opinion, that counsel for the Attorney-General is correct in submitting that the solicitor here is not fit for practice. It was suggested on his behalf that, once his own explanation of his actions was rejected by the Statutory Committee, it was impossible to say what his real motivation was for backdating the instruments and misleading the creditors about the true date of mortgage. But the explanation or explanations he gave for it at various times at and before the hearing were thoroughly unconvincing and, in the absence of something more persuasive, the Statutory Committee were entitled if not bound to conclude that the solicitor's motives were discreditable to him and to the profession as a whole.

As in all matters of this character, full disclosure and genuine remorse might have gone some way to diminishing the penalty to be imposed. It is, however, impossible to extend that benefit to the solicitor in this instance. The deception here was, as Pincus J.A. has pointed out, persistent. It is true that, very shortly before the matter was heard in this Court, the solicitor abandoned his appeal against the finding of misconduct and confined his appeal to the penalty imposed; but, in doing so, he continued, through his counsel, to maintain that he was guilty only of ignorance of proper conveyancing practice, or that at the time he was "confused" about what he was doing. That comes close to denying that there was any misconduct at all, and so manifests a lack of remorse on his part for what was correctly found by the Statutory Committee to be conduct undertaken with an intention on his part to mislead.

In these circumstances, but specifically for the reasons given by Pincus J.A., I consider that the orders which his Honour proposes ought to be made in this case.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 7088 of 1997.

Brisbane

Before McPherson J.A.
Pincus J.A.
Shepherdson J.

[QLS v. Bax]

BETWEEN:

THE QUEENSLAND LAW SOCIETY INCORPORATED
(Defendant) Appellant

AND:

CRAIG STEPHEN BAX
(Plaintiff) Respondent

Appeal No. 7423 of 1997.

[Minister for Justice & A-G v. Bax]

BETWEEN:

THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL
Appellant

AND:

CRAIG STEPHEN BAX
Respondent

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 12 May 1998

There are two appeals to be considered, one by the Queensland Law Society Incorporated and the other by the Minister for Justice and Attorney-General, each seeking a variation of an order made

by the Statutory Committee of the Society in relation to the respondent solicitor. On 29 July 1997 the Statutory Committee considered charges brought by the Council of the Society against the solicitor, found them proven and found them to constitute professional misconduct; accordingly, the statutory committee found the solicitor guilty of professional misconduct.

Although until a time close to the hearing in this Court, the solicitor sought to challenge the findings I have mentioned, that has not been pursued and accordingly documents filed on behalf of the solicitor headed "Notice of Cross-Appeal" and "Notice of Intention" were both struck out. The only question before us is whether the penalty imposed by the Statutory Committee upon the solicitor, a fine of $15,000, is adequate. The Minister for Justice and Attorney-General asks that the solicitor be struck off the roll and the Society submits that he should be suspended from practice.

The essence of the case against the solicitor before the Statutory Committee was that he backdated a deed of loan and a second mortgage and misinformed a creditors' meeting about the date of execution of the mortgage, with intention to mislead. The appellants argue by Mr Keane Q.C. S.G., who led Mr R W Campbell on behalf of the Minister for Justice and Attorney-General, and by Mr Clothier for the Society, that the fine imposed did not adequately reflect the seriousness of the solicitor's conduct. Mr Hampson Q.C., who led Mr Favell for the solicitor, argued on the other hand that the fine was if anything too heavy a penalty; he contended that the Statutory Committee had come to mistaken conclusions as to the solicitor's purpose in behaving as he did, i.e. backdating the documents and misinforming the creditors' meeting.

The establishment and functions of the Statutory Committee were dealt with in s. 6 of the *Queensland Law Society Act* 1952. The provisions of s. 6 relating to the Statutory Committee were omitted, with effect from 3 November 1997, by s. 9 of the *Queensland Law Society Legislation Amendment Act* 1997.

The appeals before us were brought under s. 6(4) of the *Queensland Law Society Act* 1952 which, together with the rest of the then s. 6, ceased to be law on 3 November 1997. However, the appeals were instituted in August 1997 and there is nothing in the 1997 Amendment Act to which I have referred to override s. 20 of the *Acts Interpretation Act* 1954, or to indicate an intention to deprive the appellants of the right of appeal vested in them, which is a right of a substantive kind: Colonial Sugar Refining Co. Ltd v. Irving [1905] A.C. 369.

It is convenient first to discuss the documents which were relied on to support the charges against the solicitor and then to come to his explanations relating to them, given at various stages.

First, there is a "note to file" made by the solicitor dated 20 August 1993 and headed "Re: Staples, B. Re: Advance from Doug Staples" to the effect that the solicitor's firm was to prepare a second bill of mortgage to be collateral to a deed of loan, also to be prepared by the firm, to secure a sum of about $500,000; the note mentioned, as an alternative to the possibility of a second mortgage, a consent caveat. After making that note, the solicitor prepared a mortgage in registrable form, in favour of Douglas Reginald Staples ("Douglas"), relating to the half interest of Douglas' son Bryan Douglas Staples ("Bryan") in certain land. The mortgage secured past and future advances. It was not dated

when executed but, according to the evidence, the date was inserted by the solicitor in April 1994, as 30 March 1993. About the same time the solicitor prepared a deed of loan which had its date typed in, "the 30th day of March 1993". The lender named in that document is Douglas and the borrowers are Bryan as well as Susan Janes (Sic) Staples ("Susan"). It recited an agreement on the part of the lender to lend $500,000 and included a promise on the part of the borrowers to give a mortgage over the property which was the subject of the bill of mortgage I have mentioned.

Both these documents were prepared and executed after the note to file dated 20 August 1993 and, according to the solicitor's evidence before the Statutory Committee, were executed between 20 September 1993 and 14 October 1993.

On various dates in May 1994 there was held a meeting of creditors of Bryan and Susan; the solicitor was elected chairman of the meeting; proofs of debt totalling amounts in excess of $1.1M had at that stage been lodged. The meeting considered and passed a resolution accepting a proposal that a sum of $60,000 be accepted in full and final satisfaction of all creditors' claims. During the meeting, the mortgages on the property mentioned above were discussed and Bryan was asked when the second mortgage in favour of his father, Douglas, was executed. The solicitor then said, according to the minutes, that the mortgage was executed "on March 1993". Whether the solicitor mentioned the month only or a particular date in the month is unclear; the Statutory Committee found that at the meeting the solicitor had the bill of mortgage before him "which he personally had dated only a month earlier", and that the answer given was false and intended to mislead.

It was not in issue, before the Statutory Committee, that the deed of loan and the bill of mortgage were backdated by the solicitor or at his direction so that they bore a date about 6 months earlier than their actual date of execution; the essential question discussed before the Statutory Committee and before us was why the solicitor had backdated the documents and why he misinformed the creditors' meeting about the date of execution of the bill of mortgage.

Putting the matter broadly, counsel for the solicitor contended before us that an explanation consistent with honest but mistaken conduct on the solicitor's part was available and that the Statutory Committee erred in treating the solicitor as having been guilty of serious misconduct. The opposing contention was to the effect that the solicitor backdated the documents and lied to the creditors' meeting for the purpose of increasing the prospect that the mortgage, executed about 6 months after 30 March 1993, would be treated as having been executed on the earlier date and thereby, in the event of bankruptcy, be less likely to be challenged as a preference under s. 122 of the *Bankruptcy Act* 1966.

The solicitor was asked to explain relevant events on three occasions: in evidence before the Federal Court on 9 July 1996, by a letter from the Society of 14 January 1997 and lastly in the proceedings before the Statutory Committee on 29 July 1997. In the Federal Court the solicitor was asked about the note to file dated 20 August 1993 and expressions used in it. His answer was:

> "Well it deals with a second mortgage. I would have thought something to do with advances from one to the other. There's from Doug Staples to Brian Staples, but I can only say that by reading the terms of the memo."

This suggests that he had no understanding of the matter, or recollection of it. Unless he were in the habit of backdating documents, one would expect that the circumstances would be familiar to him. When

asked whether Bryan was unable to tell him what the advance was for: "that is what sum it was for", the solicitor answered:

"Well I don't know. I can't remember."

When asked whether he personally prepared the mortgage and the deed the solicitor answered:

"Well I would have dictated them I would have thought. I didn't actually type them."

At that stage the judge by whom the proceedings were being heard mentioned the witness' right to object to answering questions which might tend to incriminate him. There followed a discussion between counsel and the judge, at the conclusion of which cross-examination of the witness continued. He was asked about instructions to prepare the bill of mortgage and the deed and about backdating of the document, but declined to answer those questions on the grounds that they might incriminate him.

The solicitor was of course entitled to take the objections I have mentioned. Nevertheless, the fact that the innocent explanations for the solicitor's conduct subsequently put forward were not advanced on that occasion is material. There was no suggestion in the Federal Court that the mortgage was prepared for the purpose of carrying out instructions to put any previous document in registrable form.

The Law Society's letter seeking explanations, dated 14 January 1997, was answered by Messrs Ebsworth and Ebsworth on the solicitor's behalf on 24 February 1997. The substance of the explanation for the backdating then given appears from the following extracts -

> "As is apparent from the Statutory Declaration of Mr D Staples, he and Bryan Staples executed an agreement on 22 February 1993 regarding certain loans made between them . . .
> When the Staples consulted Mr Bax in late 1993, he advised them that the charge

> created by the February documents was not in registrable form. The purpose of the documents then prepared was to effect that. There were also some obvious deficiencies with the February document. For example, it did not record the question of repayment.
>
> . . .
>
> On our instructions, the reason the documents executed in September 1993 were dated earlier was to reflect the fact that the original creation of the charge was earlier. We are instructed that the documents ought properly have been dated 22 February 1993, the same as the original document. Mr Bax is unable to now say, particularly without reviewing the file(s), why the date 30 March 1993 was inserted rather than 22 February 1993. The fact though that there was nothing irregular intended by this is amply demonstrated by the fact that Mr Bax's file, including the file note of 20 August 1993 and, it seems, some of the correspondence, makes it clear that the documents were not actually prepared and signed until August or September 1993".

The essence of this is that Ebsworth and Ebsworth were instructed that the backdated documents "ought properly have been dated" the same as the document of 22 February 1993 rather than the date in fact used, 30 March 1993, and that "nothing irregular" was intended. As to the misleading of the meeting of creditors, an explanation consonant with that just quoted was given, to the effect that the solicitor "would have been referring to the original document creating the charge", meaning the document of 22 February 1993; this document is in the record. The signatures on it are not witnessed; it is a brief and informal charge to secure certain debts stated in it.

At the hearing before the Statutory Committee, then counsel for the solicitor produced a document headed "Admitted Facts" as expressing the solicitor's position; it emerged that the Society had not in fact made an admission. The document produced said among other things that:

> "On or about 19th August 1993, the practitioner was provided with a copy of that agreement and instructed to put it into registerable (sic) form".

The expression "that agreement" referred to the document of 22 February 1993. In his evidence, the

solicitor said that he "would assume" the date on the deed of loan was put in because he believed it was "the date of the equitable mortgage I was trying to put in registrable form". He said he did not know where the date 30 March 1993 came from.

Some of the submissions on behalf of the solicitor before us seemed to suggest that we should disagree with, or at least doubt the correctness of, the Statutory Committee's view, which was that it did not believe that the backdating of the mortgage and the deed of loan had to do with instructions to put the 22 February 1993 document in registrable form.

There is a number of reasons for thinking that this Court should act on the basis of the Statutory Committee's opinion on the point. Of these the simplest is that the note to file of 20 August 1993 does not accord with the instructions which the solicitor says he was given. It makes no mention, express or implicit, of the document of 22 February 1993, whose terms do not accord with those of the mortgage. The document of 22 February 1993 charges Bryan's share in the relevant property to secure identified debts, but the mortgage mentions no amount and relates to both past and future advances. Then the deed of loan, which does mention an amount ($500,000) does not in that respect accord with the document of 22 February 1993 and it provides for payment of interest, which the document of 22 February 1993 does not. When asked (by Mr Fox) whether the document of 22 February 1993 was available to the solicitor's office at the time of preparation of the deed of loan and mortgage, the solicitor gave an answer which appears to be somewhat evasive:

> "What actually happened was the clients came to see me and they gave me instructions. I did a note and when that note was typed and came back, I then prepared the documentation without precedence, which may explain some of why the wording in relation to what Mr Bartley was talking about - talking about the wording in the Deed

> of Loan. I don't know and can't recall whether I actually had a copy of the February document in my hands at the time that I dictated or played with the precedent and filled in the blanks."

One would expect that, if it were true that the instructions were to put the terms of an existing document in registrable form, the solicitor receiving the instructions would hold and peruse the existing document. When this subject was discussed by the solicitor in evidence before the Federal Court, he made no attempt to suggest that the note to file recording his instructions was defective in omitting any reference to the document of 22 February 1993.

With respect to misleading the creditors' meeting, the evidence the solicitor gave before the Statutory Committee manifested two difficulties. One was that he said, in effect, that he did not know whether the minutes of the meeting, in so far as they recorded what he said as chairman about the date of execution of the mortgage, were accurate, whereas in the "Admitted Facts" document it was stated that he "advised the meeting of creditors **. . .** that the mortgage was executed in March 1993". Secondly, he admitted before the Statutory Committee that the document he was talking about when he made the statement at the meeting was the bill of mortgage, whereas the letter from Messrs Ebsworth and Ebsworth written on his instructions said, as I have mentioned, that he would have been referring to "the original document creating the charge". The solicitor explained that this discrepancy was due to a misunderstanding.

Counsel for the solicitor before us submitted that the rejection of the solicitor's evidence about the backdating of the documents and the statement to the creditors meeting did not necessarily justify

the inferences which the Statutory Committee drew against the solicitor. On the face of the documents, an inference was open that in anticipation of insolvency proceedings the solicitor backdated the mortgage by about 6 months and lied to the creditors' meeting about that, expecting or at least hoping that by these means the giving of security by an insolvent client to his father would keep the general body of creditors from having access to his interest in the mortgaged property. The only competing conclusion was that which has been discussed above, namely that the backdating was innocent, being done mistakenly but not dishonestly, under the misapprehension that this was the proper way of carrying out the instructions received to put the document of 22 February 1993 in registrable form. Having declined to accept the solicitor's explanation, the Statutory Committee was in my view entitled to adopt the view that the motive or reason for backdating of the documents was an improper one, rejecting, to use the Statutory Committee's language, that "the falsity of the date of those documents was unintended and made without knowledge of its potential consequences".

An aspect of the deed of loan which was much discussed before us is that it covers only future advances. The solicitor said in effect that this was a mistake and did not accord with his intention. The Statutory Committee said that they were satisfied -

> "**. . .** that the purported effect of the mortgage and the Deed of Loan was to provide priority over unsecured creditors and later equities for advances to be made pursuant to those documents after their date."

Insofar as that suggests that the mortgage had effect only in respect of future advances it is inaccurate, but it does not appear to me that the inaccuracy vitiates the substance of the Statutory Committee's reasoning. The real question they had to consider was whether the backdating of the documents and the lie to the creditors was done with the intention - however likely or not to be fulfilled - of keeping

property which would otherwise be available for distribution to the general body of creditors secure from that fate. The general effect of s. 122 of the *Bankruptcy Act* 1966, as rendering vulnerable certain transactions of this sort effected within a period of 6 months before presentation of a creditors' petition, is well known to lawyers. The solicitor gave evidence to the effect that the events in question occurred at the start of his insolvency practice; but he did not suggest that he was unaware of the significance of the desirability of a 6 month gap between the execution of such a mortgage as is in question and the issue of a bankruptcy petition. And s. 122 was not the only possible basis for an attack on the mortgage on behalf of creditors. Section 121, in the form it had at relevant times, made certain dispositions of property "with intent to defraud creditors" void against the trustee in bankruptcy; the provision had no time limit. If s. 121 was thought of, then an assumption might well have been that a mortgage made in favour of an insolvent's father to secure old debts might seem an attractive target for a trustee using s. 121, if the mortgage was executed when bankruptcy loomed near.

Suspension

Mr Hampson put forward as one branch of his argument contentions to the effect that what the solicitor did was merely to adopt an incorrect method, rather than a correct one, to carry out his instructions to put the document of 22 February 1993 in registrable form; that applied, as I understood the argument, to the backdating of the documents rather than the lie to the creditors. If it were so, then there could be no question of increasing the penalty in respect of the backdating; indeed it would be doubtful, then, if the conclusion that there was professional misconduct in those respects could be sustained. It appears, however, that the general thrust of the Statutory Committee's inference, that what was done was dishonest and its purpose was to preserve property from creditors' reach in the event of

bankruptcy must be accepted.

It is not, in my opinion, every proved act of dishonesty on the part of a practitioner which justifies a substantial penalty; dishonesty, like other forms of misbehaviour, has grades of seriousness. The present is by no means the worst imaginable case; it appears that what the solicitor did was unwisely to succumb to the temptation to assist, by fraudulent means, a client facing bankruptcy. It was not suggested against him that he derived any personal benefit - except such general benefit as may be obtained from achieving a satisfactory result for a client. On the other hand, there are aspects of the matter which justify the view that what was done was rather serious. The amounts of money involved were considerable; that is so, although on the figures presented to the creditors' meeting, it seems that the value of Bryan's equity in the mortgaged property was much less than the amount secured by the second mortgage. Then it must be said against the solicitor that, when what had occurred was revealed, he did not attempt to assist the Federal Court towards discovery of the whole truth. Further, his equivocation about the matter continued, in my opinion, as reflected in the letter his solicitors Messrs Ebsworth and Ebsworth wrote on his instructions, and in the evidence he gave before the Statutory Committee.

The same theme - persistence in the deception - is seen in his, having initially misdated the deed of loan, following that up by misdating the mortgage and misleading the creditors at the meeting some months later. A momentary or at least temporary lapse from proper standards of honest behaviour is one thing; persistence in such conduct over a substantial period is another.

We have been referred to a number of authorities relevant to the question of the proper penalty to be imposed and I shall refer in some detail to three of them. The essence of the problem of penalty

appears to me to be this: that imposed by the Statutory Committee implies that such misconduct as was proved against the solicitor did not demonstrate that he should no longer be held out as fit to practise as a solicitor. If that is rejected, then the question arises whether the solicitor should be suspended; but there is authority to the effect that suspension is not ordinarily an appropriate order when a practitioner is found to be unfit to practise.

In Minister for Justice and Attorney-General v. Anthony Talbot Brown (Appeal No. 241 of 1992, 11 June 1993) (in which the solicitor was struck off) a company was being sued in the Supreme Court of Queensland, and in anticipation of its unsuccess, it engaged the respondent solicitor to prepare documents whose purpose was to remove the company's assets, by deception, from the reach of the opposing party in the action. The solicitor in that case did not devise the scheme but knowingly participated in it.

In the present case, it does not appear whose idea it was to pretend that the mortgage and the deed of loan were entered into about 6 months before their real date of execution; but it is difficult to see why an inference, on that aspect of the matter, should be drawn in favour of the solicitor, to the effect that he merely carried out a plan devised by some other, unidentified, person. It was argued on his behalf, before us, that the facts of the case are easily distinguishable from Brown, but the general purpose of what was done is quite similar to that which was shown here. In Brown, as here, a solicitor persisted in his dishonesty. In Brown the evidence showed that proceedings were brought to set aside the transaction as a preference and also on the ground that it was entered into with intention to defeat or defraud a creditor. In those proceedings Brown prepared an affidavit falsely stating the date of execution

of the relevant document and associated documents and permitted the deponents to swear them. In that respect, Brown's conduct went significantly beyond that of which the solicitor was guilty in the present case. Although as I have suggested, the solicitor's conduct in declining to give to the Federal Court a candid explanation of what had happened was not commendable, it was not alleged against him that he was a party to filing a false affidavit to further the deception. In discussing the solicitor's conduct in the case of Brown, this Court said:

> "The matters proved against the respondent involve a deliberate and sustained course of grave misconduct which, partially at least, was directly aimed at misleading the Court.
>
> Further, the respondent displayed absolutely no remorse. On the contrary, he gave evidence before the Statutory Committee which it did not accept, which attempted an elaborate explanation of what had occurred in an effort to diminish his culpability."

To some extent this passage applies to the solicitor in the present case, with the important difference to which I have referred.

Mellifont v. The Queensland Law Society Incorporated [1981] Qd.R. 17 is plainly distinguishable on the facts, as being a much worse case of misconduct. The relevance of the case for present purposes is that Andrews J, as his Honour then was, appeared to approve of and to apply views expressed in the New South Wales Court of Appeal, including the following:

> "An order for suspension must be based upon a view that at the termination of the period of suspension the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a practising certificate, his name will then be on the roll of solicitors and he may resume his practice.
>
> Thus stated, it will be seen that in cases of present unfitness an order for suspension will not frequently be appropriate because it is difficult for a tribunal to feel confident that at the expiration of one or more years a person presently unfit to practice will be fit."

Andrews J, with whom Connolly J. agreed, after criticising the conduct of the practitioner saying that he

thought the ordering of payment of a fine quite inappropriate, went on:

> "I am of the view that the practitioner is unfit to practice as a solicitor. I am quite unable to say that he would not remain unfit upon the termination of some period of suspension."

Ziems v. The Prothonotary of the Supreme Court of N.S.W. (1957) 97 C.L.R. 279 was a case concerning the disbarment of a barrister: suspension was ordered in lieu. An examination of the reasons shows that a majority of the Court was against an order for suspension, Kitto J being opposed to that course on the ground that if the circumstances were -

> ". . . held not to disqualify him from the Bar, it seems to me, with respect, that logically that should be the end of the case." (300)

The other two judges who were against an order for suspension were Dixon CJ and McTiernan J. The reason given by Dixon CJ has some resemblance to that adopted in Mellifont:

> "I may add, too, that I think that it is open to the Supreme Court to suspend a barrister from practice . . . But, even so, it is probably a better course in most cases where room exists for the belief that time may give the barrister a title to resume his place at the Bar to allow him to re-apply at a subsequent time and offer positive evidence of the grounds upon which he then claims to be re-admitted." (286)

McTiernan J said he did not decide that the circumstances ought to be a permanent obstacle to the appellant applying on a future occasion to be called again to the bar, "provided that in the meantime his good fame and worthiness to be a barrister have been re-established" (287).

To return to the basic question, it is my opinion, reached with some regret, that it would be inconsistent with this Court's duty as regards preservation of standards in the legal profession to hold that what has been found against the solicitor does not demonstrate unfitness to practise. Although I accept that the remedies of suspension or striking-off are not applied by way of punishment, but rather

for the protection of the public and of the profession's standing (cf. Clyne v. N.S.W. Bar Association (1960) 104 C.L.R. 186 at 202), there is also a deterrent element. Those practitioners minded to engage in or institute, in the course of their professional work, dishonest means designed to deprive people of their legal rights must appreciate that doing so is risky, from the point of view of professional discipline and sometimes that of the criminal law. At least where, as here, the dishonesty concerns a substantial rather than a trivial matter, and where, as here, it is not a casual act but carried on over a period of time, it is my view that such conduct is likely to indicate unfitness to practise at the time at which it is engaged in; whether it does so will depend on all the circumstances. Among the circumstances which are presently relevant, I feel obliged to say, is that at none of the stages (up to and including the hearing in this Court) at which the solicitor might have chosen to give, or have given on his behalf, a candid explanation of what he had done did he take that course; as explained above, he was unco-operative when the matter was before the Federal Court, and subsequently relied principally upon the story that all he was endeavouring to do was to carry out instructions supposedly given to him to put the document of 22 February 1993 in registrable form; the Statutory Committee, correctly in my view, regarded that as untrue.

The decision of this Court in Re Taylor [1997] 1 Qd.R. 533, demonstrates that practitioners who have been struck off, even after criminal dishonesty has been proved against them, have some hope of readmission on establishing fitness to practise. It appears to me that, although the circumstances of the present case are not as bad as that of Brown, referred to above, the case is of sufficient gravity to warrant the solicitor's removal from the roll of practitioners. Further, it is my opinion that the attitude of the solicitor towards the matter, as demonstrated on the occasions discussed above, is not such as

to suggest that suspension rather than striking off is the proper remedy.

There was some discussion about the Society's costs. The submission on its behalf below was that there should be a heavy fine or a suspension order; it appealed on the basis that nothing less than the latter penalty would do. Without suggesting any criticism of this change of attitude, I express the view that only a limited order for costs should, in the circumstances, be made in its favour.

The orders are therefore -

1. Allow appeals by the Queensland Law Society Incorporated and by the Minister for Justice and Attorney-General.
2. Set aside the order of the statutory committee made on 29 July 1997 that the respondent be fined the sum of $15,000.
3. Order in lieu that the name of the respondent be struck off the roll of solicitors.
4. Order that the respondent pay the costs of the Minister for Justice and Attorney-General relating to his appeal, to be taxed, and pay the costs of the Queensland Law Society Incorporated relating to the appeal, fixed at the sum of $2,000.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Brisbane — Appeal No. 7088 of 1997.

Before McPherson J.A.
Pincus J.A.
Shepherdson J.

[QLS v. Bax]

BETWEEN:

THE QUEENSLAND LAW SOCIETY INCORPORATED
(Defendant) — Appellant

AND:

CRAIG STEPHEN BAX
(Plaintiff) — Respondent

Appeal No. 7423 of 1997.

[Minister for Justice & A-G v. Bax]

BETWEEN:

THE MINISTER FOR JUSTICE AND ATTORNEY-GENERAL

Appellant

AND:

CRAIG STEPHEN BAX

Respondent

REASONS FOR JUDGMENT - SHEPHERDSON J.

Judgment delivered 12 May 1998

I have read the separate reasons for judgment prepared by Pincus JA and McPherson JA.

I agree with the orders proposed by Pincus JA and his reasons for those orders. I agree also with what has been said by McPherson JA.

There is one aspect of the reasons of McPherson JA on which I wish to comment. That is the aspect of full disclosure by the respondent and remorse.

The attitudes taken and persisted in by the respondent have evinced an unwillingness to make full disclosure as well as lack of remorse, despite his comparative youth and inexperience - he had been admitted as a solicitor in 1989 and been a partner with Baker Johnson since 1993.

The respondent's attitudes when giving evidence in the Federal Court proceedings and later before the Statutory Committee were, in the long run, held against him. The reasons of Pincus JA refer to variations in those attitudes including a letter written by the respondent's solicitors on the respondent's instructions.

This case holds a salutary lesson for legal practitioners - and also other professional persons - charged with professional or other types of misconduct. Depending on the circumstances of a particular charge, a plea of guilty with acknowledged genuine remorse may achieve, so far as penalty is concerned, a less severe result for the practitioner than does a plea of not guilty accompanied by sworn denials. An illustration of this was afforded in re H.M. Iles A Solicitor (1922) reported in Volume 66 the Solicitors' Journal & Weekly Reporter at pp.297 and 298. The Privy Council had before it an appeal from the Supreme Court of Trinidad and Tobago striking the appellant off the Rolls. The appellant admitted that he had altered the date of a deed the result being that the penalty for stamping the deed out of time was evaded. In a short judgment which I shall set out in full Lord Sumner in delivering the judgment of the Judicial Committee of the Privy Council said:-

"A solicitor of over twenty years' standing has been struck off the Rolls for a matter of a payment of 15s. which he is said to have evaded fifteen years ago. There are two questions to be considered; (1) Was the appellant guilty of dishonesty in a matter of professional conduct? (2) Was the course taken of striking him off the Rolls one of excessive severity under the circumstances? The case was very different from Renner v. Justices of Gold Coast (1897, A.C. 218). It was said that the 15s. which he might have charged to his client would not furnish a sufficient motive, but it was not shown that he was in a position to charge the penalty to his client, and wrong things were sometimes done for very paltry advantages. It was said that if the act were dishonest it was a very small one, but in a solicitor's practice there should be no small dishonesties. True it was that the act was done long ago, and that the record disclosed no other delinquency either before or after. But the court was entitled to reflect that the fact had become known in spite of the appellant, in circumstances of some notoriety in which any leniency might have grave consequences, and that it had been established in spite of an ingenious but somewhat audacious attempt to conceal it by discreditable denials. The appellant might have pleaded that he had long forgotten the circumstances, that he had never recalled the act without regret, and that he had atoned for a single fault by years of unblemished professional conduct. Had he done so, no doubt a different complexion would have been put upon the matter, but he staked all on his affidavit and his affidavit was not accepted. In an appeal relating to the conduct of a solicitor in such a community as Port of Spain it was necessary to bear in mind how greatly the conditions differed from those which prevailed in this country. A small community was one in which a solicitor was relatively a conspicuous person, in which the professional body was limited in number, and was therefore less able to overbear by the sheer weight of its probity the misdoings of a single member. The public benefits by the steady pressure of authority in keeping its legal advisers to the line of their duty, and the court which exercises that authority must largely depend on the high standard observed by its officers, not being assisted by the presence of the powerful professional organisation which exists in this country. It is for the court in the first instance to consider the form in which they ought to assert their disciplinary powers as it is also to consider the circumstances under which to exercise the power of re-admitting a repentant offender, which their lordships were glad to be informed that they possessed. It followed that English analogies were not always closely applicable in such cases, and they must rely on the judicial discretion of the court whose order was under appeal. It was not the interest of the appellant alone that had to be considered, nor was the absence of complaint from any individual who had been aggrieved of great importance in his favour. The profession to which he belonged, the community which it had been his duty to serve, and the Government to whose revenue ordinances he owed obedience, had all to be considered. The alteration of a deed after execution was never a thing to be lightly regarded. Honesty of purpose without due knowledge of the law would not save it from being in many cases a mischievous act. The appellant's case was that in this alteration his purpose was honest though his knowledge was defective. The effect of the decision below was that in truth the position was the other way about. His proceedings were pessimi exempli, and their lordships were not prepared to say that he had received harder measure than he deserved. The appeal would be dismissed with costs."

(The underlining is mine.)

Re H.M. Iles also illustrates the very high standards the Court expects from its officers. I note also that in The Minister for Justice and Attorney-General v Brown (Appeal No. 241 of 1992 - Judgment delivered 11 June 1993) a case in which the solicitor was struck off the roll of solicitors, the solicitor "displayed absolutely no remorse" and "on the contrary he gave evidence before the Statutory Committee which it did not accept, which attempted an elaborate explanation of what had occurred in an effort to diminish his culpability". Pincus J.A. has referred to this quotation in his reasons.

I should add that I am not to be taken as saying that had the respondent pleaded guilty and demonstrated genuine remorse and contrition the result would necessarily have been different. The lesson from this case is that in the long run a practitioner charged before a professional tribunal may in an appropriate case be better served by a plea of guilty rather than taking up an attitude which relies on testimony later rejected by the disciplinary tribunal.