SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the Queensland Law Society Inc v Cummings; ex parte A-G (Qld) & Minister for Justice* [2004] QCA 138
PARTIES:	**COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED** (applicant) **v** **GARY CUMMINGS** (respondent/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND & MINISTER FOR JUSTICE** (appellant)
FILE NO/S:	Appeal No 11043 of 2003 Solicitors Complaints Tribunal Charge No 115
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Solicitors Complaints Tribunal
DELIVERED ON:	30 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2004
JUDGES:	McMurdo P, Davies JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – SUSPENSION – where respondent solicitor admitted to breaches of the *Trust Accounts Act* and *Trust Accounts Regulation* – where found guilty by Solicitors Complaints Tribunal of professional misconduct – where respondent had held practising certificate for 33 years – where no finding of dishonesty – where respondent suspended from practice for 12 months – where respondent gave undertaking to restore trust account deficiency – where respondent gave undertaking not to seek principal level practising certificate in the future – whether respondent should have been struck from the roll *Trust Accounts Act* 1973 (Qld), s 7, s 8, s 16 *Queensland Law Society Act* 1952 (Qld), s 6R, s 6Z, s 40(1)(a), s 41(1)(g)

Trust Accounts Regulation 1999 (Qld), s 10, s 11, s 12

Re A Practitioner (1984) 36 SASR 590, applied
Attorney-General (Qld) v Bax [1999] 2 Qd R 9, distinguished
Attorney-General (Qld) & Minister for Justice v Priddle [2002] QCA 297; Appeal No 10905 of 2001, 16 August 2002, applied
Council of the Queensland Law Society Inc v Wakeling [2004] QCA 42; Appeal No 8391 of 2003, 27 February 2004, distinguished
Law Society of New South Wales v Jones, Unreported, NSWCA, CA 333 of 1997, 27 July 1978, considered
Law Society of New South Wales v McNamara (1980) 47 NSWLR 72, considered
Mellifont v Queensland Law Society Inc [1981] Qd R 17, distinguished

COUNSEL: P A Keane QC with G R Cooper for the appellant
N M Cooke QC for the respondent

SOLICITORS: Crown Law for the appellant
Cranston McEachern for the respondent

[1] **McMURDO P:** The respondent, a solicitor, admitted his guilt to eight charges before the Solicitors Complaints Tribunal ("the Tribunal") on 21 October 2003. The Tribunal found the respondent guilty of professional misconduct; accepted his undertakings that he will not seek a principal level practising certificate and that he will restore, in relation to charges 3 and 5, the deficiency of $19,894.61 and, in relation to charges 6 and 7, the deficiency of $914.13 within 12 months and ordered him to undertake the Trust Account module of the Practice Management Course[1] prior to him seeking an employee level practising certificate; that he be suspended from practice for 12 months effective immediately; that he pay a penalty to the Fund of $2,000 within 12 months and that he pay the costs of the Queensland Law Society Inc ("the Society") to be agreed or assessed.

[2] The appellant, the Attorney-General and Minister for Justice, appeals against part of those orders,[2] contending that the Tribunal erred in merely suspending the respondent; it should have concluded that the respondent is not a fit and proper person to remain on the Roll of Solicitors of the Supreme Court of Queensland.

The offences

[3] Count 1 was an offence under s 16(1) *Trust Accounts Act* 1973 (Qld) ("the *Trust Accounts Act*") in that the respondent failed to ensure that his trust account was audited and that an audit report be supplied to Queensland Law Society Inc within two months of 31 March 2001.[3]

[4] Count 2 was constituted by the respondent committing ten offences under s 12(1) of the *Trust Accounts Regulation* 1999 ("the *Regulation*") by failing to undertake

---

1 Such an order is open under s 6R(1)(i)(iii) *Queensland Law Society Act* 1952 (Qld).

2 See s 6Z, *Queensland Law Society Act* 1952 (Qld).

3 The maximum penalty for the offence is a fine of $15,000; s 5, *Penalties & Sentences Act* 1992 (Qld).

monthly trust account reconciliations as soon as practicable after the end of each month for ten consecutive months.[4]

[5] Count 3 concerned the commission by the respondent of ten offences involving nine clients under either s 7(1) and (4) of the *Trust Accounts Act* by paying a total of $2,720 receipted to the trust account directly to the general account[5] or, alternatively under s 8(1) of the *Trust Accounts Act*, by transferring a total of $2,720 from the trust account to the general account without lawful authority.[6]

[6] Count 4 was constituted by the respondent's commission of more than 85 offences involving 78 clients under s 8(1) of the *Trust Accounts Act* by wrongfully drawing against or causing payments to be made totalling $19,575.80 from the trust account and transferring that amount to the general account or dispersing that amount to third parties, without lawful authority.[7] As noted above, the maximum penalty for each of these offences is $7,500 or one years imprisonment. Alternatively, the charge concerned the respondent's commission of 78 offences under s 10(1) of the *Regulation* by wrongfully drawing against or causing to be made payments totalling $19,575.80 from the trust account so that the withdrawal was more than the cleared funds available in the account for particular matters.[8]

[7] Count 5 concerned the respondent's commission of two offences under either s 8(1) of the *Trust Accounts Act* involving $4,421.92 paid from the trust account to the general account without lawful authority or, alternatively under s 15 of the *Regulation*, namely drawing against or causing payments to be made from the trust account to the general account in circumstances where the payments have not been posted to the trust ledger account for the person on whose behalf the moneys were paid.[9]

[8] Count 6 was the respondent's commission of three offences under s 7(1) and (4) of the *Trust Accounts Act* by paying trust moneys totalling $2,780.51 directly to his general account.

[9] Count 7 concerned the respondent's commission of three offences under s 8(1) *Trust Accounts Act* by paying trust moneys of $2,011.96 from the trust account to the credit of the general account without lawful authority.

[10] Count 8 was the respondent's failure to keep, operate and conduct his trust account in a proper professional manner with more than 150 particulars disclosing numerous offences under s 8(1) and s 12(1) of the *Trust Accounts Act* and s 10(1) and s 11(1) of the *Regulation*.

The submissions before the Tribunal

[11] The respondent is 63 years old and was admitted as a solicitor on 14 December 1966. He had held a practising certificate for 33 years until June 2002 when it was suspended. Until his current suspension, he has spent all his working life as a solicitor, generally self-employed, in south-east Queensland.

---

4 The maximum penalty for each offence is a fine of $750.
5 The maximum penalty for each offence is a fine of $3,750 if there is no intention to defraud.
6 The maximum penalty for each offence is a fine of $7,500 or one years imprisonment.
7 See fn 6.
8 The maximum penalty for each of these offences is a fine of $750.
9 The maximum penalty for this offence is a fine of $750.

[12] Mr Perrett, the solicitor appearing for the Society, contended before the Tribunal that because the respondent was currently working as a solicitor, suspension alone was not a sufficient deterrent punishment and that he should also be fined. The respondent pleaded guilty, accepting the correctness of the Society's audit report from an early stage of the investigation. The Society asked that the matter be treated as professional misconduct rather than, as the appellant's counsel submitted, unprofessional conduct, and that the respondent should be both suspended for at least six to twelve months and also fined, accepting that whilst the offences were serious trust account breaches committed against 85 different clients, they fell short of dishonesty. The offences demonstrated "extremely reckless management of the Trust Account, an extreme lack of diligence in attending to a wide series of matters over a long period of time." Had there been no offer to restore the deficiency of $19,894.61, Mr Perrett contended it would have been appropriate to strike off the respondent but the Tribunal could draw some comfort from the respondent's offer to make good the deficiency and, as a result, be satisfied that the respondent was in fact a fit and proper person to continue in practice at the end of a period of suspension.

[13] The respondent had previous Trust Account breaches in April 1979 for which he was fined $1,000. Those offences concerned the banking of cheques to his general account instead of his trust account and did not involve dishonesty. Since the 1979 breach, the respondent had been subject to several trust account audits, each of which was clear until the discovery of his current breaches. Mr Perrett conceded that these offences were too old to rely upon as a circumstance of aggravation.

[14] Through his counsel, Mr Griffin QC, who appeared pro bono before the Tribunal, the respondent accepted personal responsibility for the matters the subject of the charges, although he emphasised the breaches were not his personal breaches. Having been bankrupt in the mid-1990s over a personal guarantee on a real estate transaction, the respondent had worked as an employed solicitor and in 2000 took over the practice of what had formerly been the firm of Killen Richardson & Gardiner at Southport on 21 April 2000. That practice had a large conveyancing section which employed two solicitors and ten additional employees and was managed by Ian Richardson, an experienced former solicitor, and his son, Lucas, who had been a bank manager. The respondent submitted that he was mainly engaged in other areas of the practice and foolishly accepted the assurances of others that they were meeting all relevant trust account requirements. His supervision of the conveyancing matters was limited to the transactions; he failed to personally ensure, as he was required, that the provisions of the *Trust Accounts Act* were satisfied. The March 2001 audit of his trust account was generally clear and made him feel comfortable in continuing to assume that the conveyancing section was adequately dealing with the trust account.

[15] On 1 December 2001, Mr Beckett, a solicitor, joined the practice and took over as principal of the firm, including the conveyancing section; the respondent resigned as principal of the firm, although he continued to be trustee of the trust account, with all the ensuing obligations, until 18 March 2002. Mr Griffin submitted that Mr Beckett and Mr Richardson had made some repayments to the trust account and this indicated their culpability. He emphasised the respondent accepted personal responsibility but there was no fraud or dishonesty of any kind on his part; his fault was in failing to adequately supervise others. In April 2002, the respondent asked the Society to take over the trust account and on 23 June 2002 his practising

certificate was suspended. He suffered a net loss from his involvement with the practice and has worked since then as a tradesman in the painting and decorating area. He has no savings and does not own a car.

[16] The respondent nevertheless undertook to restore the trust account deficiencies of $19,894.41 and $914.13, although he pointed out that $9,478.18 of this occurred after 1 December 2001 when Mr Beckett became the principal and he hoped that the Society would call on Mr Beckett for that amount. Other amounts may be able to be recouped from clients who had wrongly received credit. He could make the payment within 12 months and this would be more realistic if he were able to work as an employed solicitor under supervision of the Society; a fine would only exacerbate his current financial problems; he has no intention to ever again be a self-employed solicitor.

[17] The Tribunal was concerned as to the respondent's ability to repay the deficiency. He gave evidence to the effect that it was very likely his wife, who owned the family home and worked as a registered nurse, would assist him, if necessary, in making the repayments. The respondent gave an undertaking to the Tribunal not to seek a principal level practising certificate.

The Tribunal's findings

[18] The Tribunal's findings are brief and it is convenient to set them out in full.

> "In arriving at its findings, the Tribunal has taken into account the plea of guilty of the practitioner, the fact that the practitioner has co-operated with the Society, that there has been no evidence or allegation of fraud or dishonesty by the practitioner, the evidence given by the practitioner from the witness box, the acceptance by the practitioner of the personal responsibility which has resulted in a saving of time and costs, the submissions made on behalf of the practitioner, and that the practitioner does not appear to have directly benefited from the improper transfer of funds from the Trust Account to the General Account.
>
> There have been substantial numbers of breaches of the Trust Account [Act] and its regulations. The Tribunal accepts the submission made by the Society, but the Tribunal wishes to read into the evidence some of the material, which is as follows:
>
> * the failure to undertake the 2001 Trust Account audit;
> * failure to undertake Trust Account reconciliations in a timely or a proper fashion;
> * trust monies were improperly received directly into the General Account, which is a breach of s. 7 of the Trust Accounts Act, these dealings resulting in a Trust deficit of $2,720, which has subsequently been reduced to $1800;
> * a multitude, in fact, 78 of overdrawn Trust Ledgers during the period of March 2001 to April 2002, these overdrawings resulting in a Trust deficiency of $19,575.80, subsequently reduced to $13,672.69;
> * unallocated transfers of Trust funds to the General Account for costs and outlays;
> * the total of unrestored Trust deficiencies, the subject of Charges 3 and 5, is $19,894.61.

* various individual transaction files in respect of which Trust funds were deposited directly into the General Account in breach of s. 7;
* trust funds were transferred from Trust Account to General Account in breach of s. 8(1), and there are certain deficiencies evidenced by these transactions which have not been restored or regularised, the total for the deficiencies for the Charges 6 and 7 being $914.13.

Many of the irregularities still remain unexplained.

On the orders that this Tribunal makes, the Tribunal is reasonably satisfied that the practitioner will be a fit and proper person to practise after the period of suspension."

The appellant's contention

[19] The appellant contends that the Tribunal's finding of professional misconduct is a finding that the respondent acted in a way which could reasonably be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency.[10] The respondent's failure as an experienced practitioner to supervise and control his staff to ensure that he met his obligations under the *Trust Accounts Act* means that he is not a fit and proper person to be entrusted with the responsibilities of a solicitor: cf *Jauncey v Law Society of New South Wales*[11] and *Law Society of New South Wales v Jones*[12] where Street CJ, with whom Reynolds JA and Samuels JA agreed, observed:

> "Reliability and integrity in the handling of trust funds are fundamental prerequisites in determining whether an individual is a fit and proper person to be entrusted with the responsibilities belonging to a solicitor. Members of the public, many of them wholly inexperienced and unskilled in matters of business or of law, inevitably must put great faith and trust in the honesty of solicitors in the handling of moneys on their behalf. The Court must ensure that this trust is not misplaced."

[20] The appellant also relies on observations of Andrews J (as he then was) in *Mellifont v Queensland Law Society Inc*[13] referring to *Law Society of New South Wales v McNamara*[14] where Reynolds JA stated:

> "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
>
> This 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

---

10 *Re B, a Solicitor* [1938] StRQd 361, 364-365.
11 Unreported, NSWCA, 1 February 1989, Hope, McHugh and Clarke JJA at 12, McHugh JA (as he then was) dissenting.
12 Unreported, NSWCA, CA No 333 of 1977, 27 July 1978, 10.
13 [1981] QdR 17, 30-31.
14 (1980) 47 NSWLR 72, 76.

> or more years the person presently unfit to practice will be fit. The use of the power to suspend is valuable as a punitive measure but needs cautious application where fitness and the Court's protective function is involved."

[21] The appellant contends that it can be inferred from the Tribunal's brief reasons that it regarded the respondent as presently unfit to practice and its conclusion that it was "reasonably satisfied that the practitioner will be a fit and proper person to practice after the period of the suspension" is not justified. The appellant emphasises that the respondent has not sought to explain how the trust account irregularities came about, distinguishing this case from *Attorney-General (Qld) & Minister for Justice v Priddle*.[15] There was nothing before the Tribunal to lead it to conclude that retraining would assist this very experienced practitioner. The Tribunal could not be confident that a practitioner, who was so irresponsible in the discharge of his Trust Account obligations, would not also be irresponsible in his other professional obligations to clients and the public. Section 6R of the *Queensland Law Society Act* 1952 (Qld) does not allow the Tribunal to order that a practitioner only hold a limited practising certificate and s 40 of that Act envisages that employee level practising certificates are issued only to inexperienced practitioners. The cases of *Mellifont*, *Attorney-General v Bax*[16] and *Council of the Queensland Law Society Inc v Wakeling*[17] demonstrate that the order which should have been made was one striking the respondent's name from the Roll of Solicitors.

Conclusion

[22] The appellant has the onus of establishing that the penalty imposed by the Tribunal was manifestly inadequate: *Attorney-General (Qld) & Minister for Justice v Priddle*.[18] The respondent's admitted but unexplained failure to properly supervise his staff to ensure that he met his obligations under the *Trust Accounts Act* was a serious breach of professional standards constituting professional misconduct. Where a practitioner is found to be unfit to practice, striking off, rather than a period of suspension, is generally appropriate: *Attorney-General v Bax*.[19] Breaches of trust account obligations can result in the practitioner being struck from the Roll of Solicitors, especially in cases of dishonesty, such as *Bax*, *Mellifont* and *Wakeling*. Not all such breaches amounting to professional misconduct will justify a finding of unfitness to practice requiring striking off and the question of fitness to practice is to be decided at the time of the hearing: *A Solicitor v Council of Law Society (New South Wales)*.[20] The primary role of disciplinary proceedings under the *Queensland Law Society Act* 1952 (Qld) is to protect the public from those unfit to be held out as officers of the court, not to punish the solicitor whose conduct the court finds to be in breach of those professional standards, although an order of the Tribunal should also provide an appropriate general and specific deterrent. A suspension rather than a striking off is an appropriate order for offending practitioners whose conduct has fallen below the high standards expected of a practitioner but not so far below those standards as to indicate that the practitioner lacks the qualities of character and

---

15 [2002] QCA 297; Appeal No 10905 of 2001, 16 August 2002.
16 [1999] 2 QdR 9, 14, 20, 23.
17 [2004] QCA 42, Appeal No 8391 of 2003, 27 February 2004.
18 Above.
19 See fn 16, Pincus JA with whom McPherson JA and Shepherdson J agreed, at 20.
20 (2004) 78 ALJR 310, 316, [21].

trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner: *Re A Practitioner*.[21]

[23] Although the Tribunal stated its satisfaction at the time of the hearing that the practitioner would be a fit and proper person to practice after the period of suspension, it can be inferred from the Tribunal's reasons that it was also satisfied that he was then a fit and proper person to practice with an employee level practising certificate; the suspension and fine were necessary to deter him and others, not to provide public protection, which was ensured by the undertaking that he would not seek a principal practising certificate.

[24] Was the Tribunal entitled to make that finding? The respondent's undertaking to repay the deficiency despite his impecuniosity was a fact suggesting good character and some sense of honour, responsibility and commitment to his profession. The respondent's breaches related solely to his inability to adequately keep his trust account; there was no suggestion of dishonesty or personal gain or that these serious shortcomings otherwise affected his professional duties and obligations. Whilst these breaches were serious and conduct from which the public must be protected, the cases relied upon by the appellant of *Mellifont*, *Bax*, *Wakeling*, *Jauncey* and *McNamara* all involved dishonest practitioners, an important factor in the court determining those practitioners were not fit and proper persons to be entrusted with the responsibilities of a solicitor. Over his many years of practice as a solicitor, he has committed no other types of professional breaches; this suggests his shortcomings as a practitioner are limited to those of recklessness as a trustee under the *Trust Accounts Act*. He fully cooperated with the Society in its investigation. He gave no explanation for his misconduct but it seems unlikely that he would have known why others failed to meet their assurances to him in respect of the trust account. His undertaking that he would not in the future seek a principal practising certificate was very relevant to the Tribunal concluding that the practitioner was a fit and proper person to practice as an employed solicitor. The Council of the Queensland Law Society Inc presently has the power by resolution under its Rules to provide for different levels of practicing certificates and to decide on the conditions imposed under those certificates regardless of the experience of the solicitor: s 40(1)(a) *Queensland Law Society Act* 1952 (Qld). When a solicitor has been dealt with by the Tribunal and has given such an undertaking, the practitioner cannot be issued with a principal level practising certificate for the Tribunal's order is subject to that undertaking: see s 41(1)(g) *Queensland Law Society Act* 1952 (Qld). Breach of such undertakings has itself been held to be professional misconduct.[22]

[25] In the context of the respondent's undertaking not to seek a principal level practising certificate, the order adequately ensures public protection. The respondent's serious shortcomings as a practitioner were not such as to require the Tribunal to conclude that he was so lacking in character and trustworthiness that he did not have the necessary attributes to be a responsible legal practitioner operating under an employee level practising certificate without the responsibilities of a trustee under the *Trust Accounts Act*.[23] The Tribunal was not required to remove the respondent's name from the Roll of Solicitors.

---

21 (1984) 36 SASR 590, 593.

22 *Re R B R Nettleton*, SCT/42, 21 November 2000.

23 See definition of "trustee" under s 4 of that Act.

[26] The penalty imposed by the Tribunal was also an adequate deterrent both to the respondent and to others who might be so recklessly cavalier about their trust account responsibilities; when read as a whole and in the context of the undertakings, the Tribunal's orders sensibly and sufficiently protect the public from the possibility of the respondent acting in such a manner in the future. The appellant has not established the Tribunal's orders were in any way flawed or inadequate.

[27] The appeal should be dismissed with costs to be assessed.

[28] **DAVIES JA:** I agree with the reasons for judgment of McMurdo P and with the orders she proposes.

[29] **FRYBERG J:** I agree with the President. I add two points.

[30] For the appellant Mr Keane QC submitted, "No one would suggest having regard to the acceptance of the Law Society's submissions that the recklessness involved here does not involve a lack of ethical probity." I think that submission was unfair to the respondent. There was no allegation or evidence of fraud or dishonesty and no attack on the respondent's probity. Although the sting of the submission was mitigated by the explanation that "probity" was used in the sense of "diligent attention to one's duties", it should be explicitly rejected.

[31] Second, the appellant placed considerable weight on a submission that the respondent had pleaded guilty "without any disclosure of the circumstances that led to the professional misconduct". He observed that the Tribunal found many of the irregularities remained unexplained and submitted that it failed to appreciate the significance of the circumstance that the respondent did not seek to explain them. The culpable failure included both the omission to explain how the irregularities came about in terms of his own lack of supervision and also the failure to explain what his former employees did to cause the irregularities.

[32] If this were truly a case of a plea of guilty without a full disclosure of the relevant circumstances, I would have grave doubts about the appropriateness of the Tribunal's order. As the President has observed, the primary role of disciplinary proceedings under the *Queensland Law Society Act 1952* is to protect the public. The Tribunal's performance of that role is not to be inhibited by a practitioner's lack of frankness. In such a case the Tribunal is entitled to assume the worst. To some extent that seems to have happened in the present case. The Law Society submitted:

> "The circumstances giving rise to those deficiencies have not been explained. There is no affidavit material filed in response to the matter, so we can only assume that they involve extremely reckless management of the trust account, an extreme lack and diligence in attending to a wide series of matters over a long period of time."

In its findings, the Tribunal stated, "The Tribunal accepts that submission made by the Society."

[33] The respondent might have led evidence of the factors which brought about his extreme recklessness, and he might have led evidence of precisely what his former employees did or failed to do to cause the various breaches of the rules relating to trust accounts. However his counsel may well have thought that nothing that he

could say would suggest a different characterisation of his conduct and any move to detail it further might be perceived as a misguided attempt to excuse it. As to the mechanics of the breaches there is no reason to suppose that the practitioner had any personal knowledge of what his employees did. He might perhaps have hired a private detective to try to find out what occurred, but the appellant disclaimed reliance on that proposition. In any event it is doubtful whether a further investigation would have found out much more than was discovered by the investigating accountant whose evidence was led on behalf of the Law Society. He might have applied for an attendance notice to be issued requiring the former employees to give evidence before the Tribunal, but it is doubtful whether such evidence would have advanced the position.

[34] More importantly, these questions were not live at the hearing below. No one was interested in them. The respondent gave oral evidence on oath. No one asked him anything about them. He was not cross-examined. His omission to provide further information was not criticised at a time when he could have provided it. This was not a case of a glaring omission which called for explanation. The missing information might well have done nothing to assist the Tribunal, and the parties may well have known that. The Tribunal made findings and an order in accordance with the submissions of the Law Society. In the circumstances it was not wrong to do so.