

## ***In the Matter of Ian Kenneth D'Arcy***

**Case No:** SC/392  
**Date of Hearing:** 4 September 1997  
**Appearing Before:** T M Treston (Acting  
Chairman)  
J S P O'Keefe  
C C Endicott  
**Penalty:** Suspended from 1  
November 1997 until 30  
September 1998.

### **Charges**

The allegations in the case formulated by the Council of the Queensland Law Society Incorporated are set out in paragraphs one to ten inclusive of the Application dated 7 May 1997 which states as follows:

1. In breach of Rule 82(2) and Rule 82(3), the practitioner failed to provide the Council of the Queensland Law Society Incorporated with a sufficient and satisfactory explanation in writing of the matters set further in a letter of complaint from solicitors on behalf of Mr C after being called upon by notice in writing under the hand of the Secretary of the Society ("the Secretary") pursuant to Rule 82(1)(a) of the Rules of the Queensland Law Society Incorporated, to do so.

### **Particulars**

- a) By letter dated 7 February 1996 from the Secretary to the practitioner, the Council called on the practitioner to provide a sufficient and satisfactory written explanation of a complaint dated 1 February 1996 received from the solicitors on behalf of Mr C within ten (10) days from the date of the letter.
- b) By letter dated 22 February 1996 from the Secretary to the practitioner, the Council again called on the practitioner to provide a sufficient and satisfactory written explanation of the complaint dated 1 February 1996 received from the solicitors on behalf of Mr C within seven (7) days from the date of the letter.
- c) By letter dated 5 March 1996 from the Secretary to the practitioner the Council again called on the practitioner to provide a sufficient and satisfactory written explanation of the complaint dated 1 February 1996 received from the solicitors on behalf of Mr C within ten (10) days from the date of that letter.
- d) An employee of the Queensland Law Society Incorporated telephoned the practitioner on 18 March 1996 and 21 March 1996, leaving messages for him to telephone on each occasion. No response was received from him.
- e) The practitioner failed within the time specified in the above letters to provide:

- (i) any response to the letters of 7 February 1996 and 22 February 1996;
  - (ii) a sufficient and satisfactory explanation of the matters contained in the complaint of 1 February 1996.
2. The practitioner failed for a period of fourteen (14) days from the date of his receiving a Notice pursuant to Rule 83(1) of the Rules of the Queensland Law Society Incorporated to provide the Council of the Queensland Law Society Incorporated with a sufficient and satisfactory explanation in writing of the matters set forth in a letter of complaint from the solicitors on behalf of Mr C after being called upon by notice in writing under the hand of the Secretary to do so.

### **Particulars**

- a) Notice under Rule 83 dated 26 March 1996 was forwarded to the practitioner that day.
- b) By letter dated 12 April 1996 the Secretary called on the practitioner to respond to the Notice.
- c) The practitioner failed within the times specified in that Notice and the further time called for in the above letter to provide:
  - (i) any response to the Notice;
  - (ii) a sufficient and satisfactory explanation of the matters contained in the complaint of the solicitors on behalf of Mr C and referred to in the letters from the Secretary to the practitioner of 7 February 1996, 22 February 1996 and 5 March 1996.
3. The practitioner failed to produce material as required by the Council within the time required after being called upon to do so pursuant to Rule 82(5) of the Rules of the Queensland Law Society Incorporated.

### **Particulars**

- (a) By letter dated 18 September 1995 from the Manager of Audits of the Queensland Law Society Incorporated, to the practitioner, the Society called on the practitioner to produce a report in relation to his progress in disbursing old trust account balances by 15 October 1995.
- (b) By letter dated 17 October 1995 from the Society to the practitioner, The Society again called on the practitioner to produce the said report within seven (7) days from the date of the letter.
- (c) By letter dated 25 October 1995 from the Society to the practitioner, The Society again called on the practitioner to produce the said report.
- (d) During a telephone conversation with an employee of the Queensland Law Society Incorporated, the practitioner said that he would forward the report by facsimile transmission on 17 November 1995.
- (e) By letter dated 21 November 1995 from The Society to the practitioner, the Society again called on the practitioner to produce the said report.

- (f) By letter dated 18 December 1995 from the Deputy Secretary of the Council to the practitioner, the Deputy Secretary informed the practitioner that his failure to reply to the Society's letters dated 18 September 1995, 17 October 1995, 25 October 1995 and 21 November 1995 was referred to the Council on 14 December 1995. The Council resolved that the practitioner would be required, pursuant to Rule 82 of the Rules of the Queensland Law Society Incorporated to provide a sufficient and satisfactory response within ten (10) days. Notice was given to the practitioner that if he failed to provide same within that time, a Notice would be sent to him pursuant to Rule 83 of the Rules of the Queensland Law Society Incorporated.
4. The practitioner failed for a period of fourteen (14) days from the date of receiving a Notice pursuant to Rule 83(1) of the Rules of the Queensland Law Society Incorporated to provide Council of the Queensland Law Society Incorporated with sufficient and satisfactory explanation in writing of the matters referred to in the Society's letters to him dated 18 September 1995, 17 October 1995, 25 October 1995, 21 November 1995 and 18 December 1995 after being called upon by notice in writing under the hand of the Secretary to do so.

#### Particulars

- (a) Notice under Rule 83 dated 8 January 1996 was forwarded to the practitioner on that day.
- (b) A reply dated 16 February 1996 was received from the practitioner which revealed that no trust balances had been disbursed. The practitioner advised that he proposed to fully brief himself as to the position with the trust account balances over the forthcoming weekend and that he would provide a further report following his review of the matters.
- (c) By letter dated 19 February 1996 from The Society to the practitioner, The Society advised that if a further report was not received within fourteen days, the matter would be referred to the Professional Standards Committee on 28 March 1996. The practitioner failed to reply to that letter.
- (d) By letter dated 7 March 1996 from The Society to the practitioner, The Society again advised that the matter would be referred to the Professional Standards Committee on 28 March 1996.
- (e) By letter dated 12 March 1996, the practitioner enclosed a Schedule of Trust Ledger Balances and advised that he proposed submitting a further report to the Society on or before 22 March 1996. That report was not provided.
- (f) By letter dated 4 April 1996 from The Society to the practitioner, The Society advised that if it did not receive a further report by 12 April 1996, the matter would be referred to the next meeting of the Professional Standards Committee. The practitioner failed to respond to that letter.

- (g) By letter dated 3 June 1996 the Deputy Secretary of the Society advised the practitioner that in view of the practitioner's failure to reply to correspondence and the Rule 83 Notice forwarded to him the matter would be considered further by the Professional Standards Committee on 13 June 1996. The practitioner was invited to show cause by 7 June 1996 as to why he should not be charged.
5. The practitioner breached an undertaking given on the 6th of February 1996 by him to the Manager of Audits of the Queensland Law Society. Particulars
- a) On the 6th of February 1996 the Manager of Audits telephoned the practitioner in relation to the outstanding matters referred to in the Society's previous correspondence and also in the Rule 83 Notice dated 8 January 1996.
- b) The practitioner orally gave an undertaking to The Society to deliver a reply to the Society's letters by 8 February 1996.
- c) No reply was received.
6. The practitioner was guilty of professional misconduct to the detriment of Mr B in that he falsely informed Mr B that he had commenced proceedings against N.Q. R R Pty Ltd and/or T B O Pty Ltd claiming damages for breach of contract, and further, that the action was set down for trial on the 29th day of July 1996, and further that the trial date had been vacated when to his knowledge, no such action had been commenced, and no trial date had been allocated or vacated.

#### Particulars

- a) In February 1994 Mr B engaged the practitioner to act on his behalf to commence proceedings claiming damages against two companies for their refusal to pay to Mr B contract variations.
- b) As Mr B then lived in Townsville, and continues to do so, he despatched material to the practitioner in February 1994 by TNT Air Express. Mr B then telephoned the practitioner to confirm that the material had arrived safely and in good order.
- c) The practitioner requested Mr B to pay to him the sum of \$250 for Court filing fees and associated expenses. That sum was paid to the practitioner on 14 June 1995.
- d) During the months of March, April and May, 1994 Mr B telephoned the practitioner on numerous occasions to ascertain progress of his action. Mr B requested the practitioner to provide him with a copy of the Plaintiff and of the Defence. The practitioner did not provide either of these documents.
- e) Between the months of June/July 1994 and October 1995 Mr B telephoned the practitioner on a number of occasions in an endeavour to ascertain information about the progress of the action. The practitioner informed Mr B that he had obtained advice from a Barrister and that the case was a straight forward claim for breach of contract.

- f) Between October 1995 and December 1996 Mr B telephoned the practitioner on numerous occasions and faxed letters to the practitioner on the following dates; 17 April 1996, 19 April 1996, 23 July, 1996
  - g) The practitioner informed Mr B that the action had been set down for trial in the District Court on 29 July 1996.
  - h) When Mr B wrote to the practitioner inquiring about preparation for trial, including travel arrangements, the practitioner informed Mr B that the trial date had been vacated.
  - i) On 30 August 1996, Mr B attended the practitioner's office at East Brisbane. The practitioner informed Mr B that a District Court Complaint bearing No. 2486/1994 had been issued on his behalf and that the claim for damages was about \$121,000.
  - j) At no time did the practitioner institute proceedings on behalf of Mr B.
  - k) At no time was any action on behalf of Mr B set down for Trial.
  - l) At no time was any trial date vacated.
7. That in breach of Rule 83(2) of the Rules of the Society, the practitioner failed for a period of 14 days from the date of his receiving a notice pursuant to Rule 83(1) of the Rules of the Queensland Law Society Incorporated to provide the Council of the Queensland Law Society Incorporated with a sufficient and satisfactory explanation in writing of the matters set forth in a letter of complaint from the solicitors on behalf of Mr B after being called upon by Notice in writing under the hand of the Secretary to do so.

#### Particulars

- (a) By letter dated 8 October 1996 from the Secretary to the practitioner the Council called on the practitioner to provide a sufficient and satisfactory explanation of a complaint dated 27 September 1996 received from the solicitors on behalf of Mr B, within 14 days from the date of the letter.
- (b) By letter dated 24 October 1996 from the Secretary to the practitioner, the Council again called on the practitioner to provide a sufficient and satisfactory explanation of the complaint dated 27 September 1996 received from the solicitors on behalf of Mr B, within 7 days from the date of the letter.
- (c) By letter dated 5 November 1996, from the Secretary to the practitioner the Council again called on the practitioner to provide a response within 10 days of the date of the letter, failing which a Rule 83 Notice would be served.
- (d) Notice under Rule 83 dated 19 November 1996 was forwarded to the practitioner that day.
- (e) By letter dated 25 February 1997 from the Secretary to the practitioner, the Secretary noted that the practitioner was in breach of Rule 83 by failing to provide any response to the complaint dated 27 September 1996 from the solicitors on behalf of Mr B.

- (f) The practitioner failed within the time specified in the Notice to provide:
    - (i) any response to the Notice;
    - (ii) a sufficient and satisfactory explanation of the matters contained in the complaint of the solicitors on behalf of Mr B and referred to in the letters from the Secretary to the practitioner of 8 October 1996, 24 October 1996, 5 November 1996 and 25 February 1997.
8. In breach of Rule 82(2) and 82(3) the practitioner failed to provide the Council of the Queensland Law Society with a sufficient and satisfactory explanation in writing of the matters set forth in a letter of complaint from the accountants on behalf of M I Pty Ltd after being called upon by notice in writing under the hand of the Secretary of the Society ("the Secretary") pursuant to Rule 82(1)(a) of the Rules of the Society to do so.

#### Particulars

- (a) By letter dated 11 December 1996 from the Secretary to the practitioner, the Council called on the practitioner to provide a sufficient and satisfactory explanation of a complaint dated 29 November 1996 received from the accountants on behalf of M I Pty Ltd within 10 days from the date of the letter.
  - (b) By letter dated 20 January 1997 from the Secretary to the practitioner, the Council again called on the practitioner to provide a sufficient and satisfactory explanation of the complaint dated 29 November 1996 from the accountants on behalf of M I Pty Ltd within 10 days from the date of the letter.
  - (c) The practitioner failed within the time specified in the above letters to provide:
    - (i) Any response to the letters of 11 December 1996 and 20 January 1997.
    - (ii) A sufficient and satisfactory explanation of the matters contained in the complaint dated 29 November 1996.
9. In breach of Rule 83(2) of the Rules of the Society, the practitioner failed for a period of 14 days from the date of his receiving a Notice pursuant to Rule 83(1) of the Rules of the Society to provide the Council of the Queensland Law Society Incorporated with a sufficient and satisfactory explanation in writing of the matters set forth in a letter of complaint from The accountants on behalf of M I Pty Ltd after being called upon by notice in writing under the hand of the Secretary to do so.

#### Particulars

- (a) Notice under Rule 83 dated 6 February 1996 was forwarded to the practitioner that day.
- (b) The practitioner failed within the time specified in that Notice to provide:
  - (i) Any response to the Notice;
  - (ii) A sufficient and satisfactory explanation of the matters contained in the complaint of the accountants on behalf of M I Pty Ltd.

10. In breach of Rule 83(?) of the Rules of the Society, the practitioner failed to furnish to the Council a sufficient and satisfactory explanation in writing in relation to certain matters referred to in a complaint made to the Society on behalf of Mr H, which failure continued for a period of 14 days from the date of his receiving notification from the Secretary that if his failure did continue for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct.

#### Particulars

- (a) By letter dated 4 November 1996 signed by the Deputy Secretary of the Society the practitioner was requested to provide, within 14 days, a sufficient and satisfactory written explanation of the matters referred to in a letter of complaint from Mr H.
- (b) The practitioner did not reply to that letter;
- (c) By letter dated 20 November 1996 signed by the Secretary of the Society, the practitioner was requested to respond to the letter dated 4 November 1996 within 10 days and advised that a Rule 83 Notice would be served on the practitioner if he failed to so respond;
- (d) The practitioner did not reply to that letter;
- (e) By letter dated 4 December 1996 signed by the Secretary of the Society, the practitioner was notified by mail and by facsimile, pursuant to Rule 83 of the Rules of the Society, that if his failure continued for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct;
- (f) In breach of Rule 83(2) of the Rules of the Society the practitioner failed to respond to such notice and failed to furnish a sufficient and satisfactory reply in writing."

On the 4th day of September 1997 the matter came on for hearing before the Statutory Committee.

Ms J-A Schafer, Solicitor, of Messrs Thynne & Macartney Solicitors appeared for the Queensland Law Society Incorporated.

Mr T P O'Gorman, Solicitor, of Messrs Robertson O'Gorman Solicitors appeared for the practitioner.

Mr O'Gorman stated that the practitioner pleaded guilty to the charges and allegations contained in the Application of the Queensland Law Society Incorporated dated the 7th day of May 1997.

No oral evidence was called in respect of the charges.

#### Submissions

##### **The Society's solicitor submitted as follows:**

The Committee has two tasks, firstly to determine whether the charges which have been admitted constitute professional misconduct or unprofessional conduct and secondly, to determine the penalty. The well known authorities are *Alinson v The General Medical Council* (1894) 1 QB page 750, *Adamson v The Queensland Law Society* (1990) 1 Qld Reports and *The Medical Board of Queensland v Cook* (1992) 2 Qld Reports, page 608.

In *Adamson* the Court said:

'The test of professional misconduct is whether the conduct violated or fell short or to a substantial degree the standard of professional conduct observed or approved by members of the profession of good repute and competency.'

Professional misconduct is a large deviation from the norm, whereas, unprofessional conduct is a smaller deviation from what the main stream of practitioners would regard as reasonable and competent.

In this case, the conduct of the practitioner fell a very long way short of what a practitioner of good repute would regard as acceptable and that conduct continued over a period of years. During the three years from 1994 to 1997, clients were frustrated and the professional body was frustrated.

Short of misappropriation of funds, it is difficult to imagine how the standards could fall any shorter than that which would be regarded by practitioners of good standing and repute to be acceptable.

The conduct was well beyond unprofessional conduct and constituted professional misconduct.

##### **The practitioner's solicitor submitted as follows:**

It was submitted that, though regrettable, it was common in these sorts of matters when practitioners received requests and then directions from the Society, practitioners simply put them to one side because they do not want to deal with them and then they develop a momentum of their own. In this instance, the practitioner developed a mental block and that was at the root of the practitioner's actions in relation to all of the charges. Whilst acknowledging clearly that the Committee exercises a protective jurisdiction in relation to clients, it must also be at least recognised by the Committee that far too often, practitioners develop mental blocks.

A circuit breaker is needed. There is a trend that emerges in matters before the Committee that those practitioners who fail to respond to directions from the Society almost inevitably come from sole practitioner firms. In larger firms there is supervision, an accountability structure in place whereby when letters from the Society come in, if the particular solicitor develops a mental block, then other solicitors of the firm become aware of the correspondence and act as a circuit breaker.

The practitioner was admitted in 1978 and shortly thereafter became a partner in a well known firm in Brisbane. He then established a practice on his own account in 1994. He encountered financial difficulties and staffing difficulties and from late 1995, suffered malaise and lethargy which resulted in his being unable to motivate himself. Prior to these charges, the practitioner had not had any problems with the Society and he was entitled to "pull in credits" of substantially good behaviour over a long period of time.

In formulating a penalty, the Committee should look at what is needed to protect the public from this type of behaviour against a background of many years of positively good behaviour. It was submitted that what was needed in this protective jurisdiction was that the practitioner should do something such as undertake a Practice Management Course to focus on the necessity of properly managing his practice and not to cause minor matters to get out of hand and not to allow a mental block to develop. Regard should be had to the precarious financial position of the practitioner who, together with his family, face financial ruin if he was to be suspended.

### **Finding and Orders**

**THE COMMITTEE ORDERED** as follows:

The Committee finds that the facts set out in paragraphs one to ten inclusive of the Application of the Queensland Law Society Incorporated filed 20 May 1997, as admitted by the practitioner, proved. The Committee finds all the circumstances of the charges collectively constitute professional misconduct. The Committee finds the practitioner guilty of professional misconduct.

The Committee ordered that the practitioner be suspended from practice as a solicitor of the Supreme Court of Queensland until 30 September 1998. The Committee further ordered that the coming into effect of the order for suspension be stayed until 1 November 1997 to enable the practitioner to dispose of his practice but conditional upon the practitioner's undertaking not to accept any new instructions from today.

In respect of the charges relating to trust account balances, The Committee ordered that the practitioner provide to the Queensland Law Society Incorporated, within seven days, evidence that he had dispatched to third parties the cheques to which they were entitled.

The Committee ordered that the practitioner would monthly thereafter report to the Queensland Law Society Incorporated as to the presentation of those cheques until such time as all the cheques have been presented.

The Committee ordered that the practitioner produce the M I Pty Ltd files that day.

The Committee ordered that the practitioner produce to the Queensland Law Society Incorporated by no later than Monday, 8 September 1997 the file of H re J.

In relation to four matters on the list of trust account matters where money was provided by M solicitors to the practitioner on the basis of an authority the practitioner provided as a director of the company, The Committee ordered that the practitioner provide appropriate accounting in respect of those four matters.

The Committee further ordered that the practitioner pay the costs of the Queensland Law Society Incorporated of and incidental to this Application, the costs of the Clerk to the Statutory Committee and the shorthand writer to be assessed or taxed and the Committee directed that the Clerk to the Statutory Committee shall be entitled to his costs as a Solicitor of perusing documents filed, and care and consideration.

The Committee allowed the practitioner until 4 June 1998 to pay the costs of the Queensland Law Society Incorporated as taxed or agreed.