

## Reasons

The practitioner was charged with appropriating to his own use, the funds totalling \$6,250.00 collected by way of penalty interest which were properly accountable to the original and replacement investors.

AB Pty Ltd, the nominee mortgage company of the practitioner, entered into an agreement with CC Pty Ltd in relation to the mortgage relevant to these proceedings, whereby CC Pty Ltd was assigned all rights to penalty interest in exchange for an interest guarantee. CC Pty Ltd's rights to the penalty interest does not appear to have been challenged during the time in question.

The payments in question were made from the cash management account referred to in evidence. The trusts on which these funds were held is central to this case. There is a paucity of evidence and we think it most likely that the funds belonged to the borrower. The title to the account indicates this. The funds were paid from it at the request of the borrower's solicitors.

Default having been made, the funds necessary to make the payments of interest were withdrawn and paid to the manager for distribution. The practitioner believed the guarantor became entitled to the default interest. On the material before us, this is a reasonable view.

CC Pty Ltd gave the penalty interest to the practitioner. This is the practitioner's explanation. It is an explanation that was provided late. Much of the work undertaken in this matter was undertaken by subordinate staff, one of whom has now left his employ. He gave his evidence candidly to the best of his recollection.

The tribunal found the society had not proved its case on the Briginshaw test. The tribunal dismissed the charge.

The tribunal was concerned that the practitioner's explanation was late. The tribunal took the view that much of the need for these proceedings, was generated by material that showed a lack of proper recording of transactions and a lack of effective supervision of subordinate staff.

## The Solicitors Complaints Tribunal

# In the Matter of Practitioner X

**Case No:** SCT/22  
**Date of Hearing:** 1 August, 2000  
**Appearing Before:** Mr G C Fox (Chairperson)  
Mr P Martinez  
Ms M Green (Lay Member)  
**Penalty:** Fined \$5,000.00

## Charges

1. That the practitioner is guilty of professional misconduct or alternatively unprofessional conduct or practice, in that, in breach of his duty as a solicitor, he acted for other persons against the interests of H and/or her husband W in respect of the very transaction and period in which he had acted for H and/or W.

### Particulars

- 1.1. In June 1995, H entered into a contract for

the purchase of certain land from NCPL, for a consideration of \$250,000.00.

- 1.2. The land comprised part of a parcel of land which NCPL had contracted to purchase from C pursuant to a contract dated 28 February 1994. As at June 1995, the transfer of the title of the land from C to NCPL had not registered.
- 1.3. By facsimile dated 17 June 1995, DN, the principal and director of NCPL provided to the practitioner a copy of a contract referred to in paragraph 1 naming the practitioner as the purchaser's solicitor and advised the practitioner as follows:

"H is W's wife.

Would you please confirm with H by fax today that you have everything under control."

- 1.4. The practitioner had previously acted for DN and/or his corporation, NCPL.

#### Particulars

The best particulars which the Council can provide of the circumstances in which the practitioner had previously acted for DN is to say that that conclusion is an inference to be drawn from the terms of the following documents:

- (a) Barcode BCK000440: Advice from QC to X;
- (b) Barcode BCK000441: Advice from QC to X;
- (c) Barcode BCK000480: Letter from S (X) to DN 22/6/95;
- (d) Barcode BCK000476: Trust structure 29/6/95 NCPL;
- (e) Barcode BCK000475: Trust structure;
- (f) Barcode BCK000468: Letter from S (X) to SKM;
- (g) Barcode BCK000481: Hand written file notes by X 28/6/95;
- (h) Barcode BCK000474: Letter from S (X) to DN 29/6/95;
- (i) Barcode BCK000477: Letter from S (X) to DN 29/6/95;
- (j) Barcode BCK000472: Letter from S (X) to DN 16/6/95;
- (k) Barcode BCK000478: Hand written file notes by X 26/5/95;
- (l) Barcode BCK000321: Fax from DN to S 21/5/95 (SB);
- (m) Barcode BCK000326: Letter from S (X) to DN 16/6/95;
- (n) Barcode BCK000323: Fax from DN to MR 17/5/95;
- (o) Barcode BCK000322: Fax from S to K 17/5/95;
- (p) Barcode BCK000325: Hand written file notes by X 25/5/95;
- (q) Barcode BCK000319: Letter from S (X) to DN 11/4/95;
- (r) Barcode BCK000318: Hand written file notes by X 6/4/95.

- 1.5 On about 17 July 1995, the practitioner

accepted a retainer from H and further or alternatively W to act for H in the conveyance which was the subject of the contract provided to him by DN as referred to in paragraph 3 above and to advise H as to the use of a trust structure in relation to the purchase of the property the subject of that contract.

#### Particulars

That retainer is to be inferred from the terms of the facsimile from NCPL to the practitioner dated 17 June 1995 but apparently transmitted 17 July 1995 and from the practitioner's conduct referred to below.

- 1.6 H and W were foreign residents, being residents of Singapore.
- 1.7 To avoid the provisions of the Foreign Acquisitions & Takeovers Act 1975, the practitioner advised H in July 1995 that the land should be purchased by a trustee company, at least one of whose directors was an Australian resident and whose shareholders were Australian residents.

#### Particulars

The advice given by the practitioner was in writing and is contained in, evidenced by, or is to be inferred from the following documents:

- (a) Letter from the practitioner (then an associate of the firm S) dated 17 July 1995;
  - (b) Letter from the practitioner to H dated 25 July 1995;
  - (c) Letter from the practitioner to W dated 2 August 1995.
- 1.8 The practitioner advised H that he would set up the trustee company and the trust and that it would be necessary to terminate the existing contract and to enter into a new contract in the name of the trust for the purchase of the land from NCPL.

#### Particulars

The advice given by the practitioner was in writing and is contained in, evidenced by, or is to be inferred from the following documents:

- (a) Letter from the practitioner (then an associate of the firm S) dated 17 July 1995;
- (b) Letter from the practitioner to H dated 25

July 1995.

- 1.9 The practitioner proposed to H and/or W that the Australian director of the trustee company be TB, an accountant, well known to DN, the principal of NCPL.

**Particulars**

The proposal by the practitioner was contained in, evidenced by, or is to be inferred from the letter from the practitioner to H dated 25 July 1995.

- 1.10 The practitioner's advices were accepted and the practitioner was instructed by H and W in August 1995 to proceed with the implementation of the trust structure.

**Particulars**

- (a) The acceptance of the practitioner's advice is contained in, evidenced by, or is to be inferred from the following documents:

- (i) facsimile from W (on behalf of he and H) to the practitioner dated 17 August 1995;
- (ii) facsimile from H to the practitioner dated 30 August 1995.

- (b) The instructions to the practitioner were in writing and were contained in, evidenced by, or to be inferred from the documents referred to in the previous sub-paragraph.

- 1.11 The practitioner duly proceeded to establish the H trust in that he:

- (a) Prepared a trust deed executed by TB as settlor of the trust;
- (b) Acquired a shelf company known as MHPL to act as trustee of the trust;

**Particulars**

That the purpose of the acquisition of MHPL was that it be the company which would act as trustee of the trust is to be inferred from the terms of the practitioner's letter to H and the enclosed documents dated 7 September 1995 and the practitioner's letter to H of 8 September 1995.

- (c) Prepared a fresh contract for the purchase of the land by MHPL, which contract was duly executed by NCPL as vendor and submitted to W and H for execution;

**Particulars**

The contract was submitted for execution on 2 occasions, which submission is contained in, evidenced by, or is to be inferred from the letter from the practitioner to H dated 7 September 1995 and the further letter from the practitioner to H dated 4 January 1996.

- 1.12 B, W and H were appointed directors of MHPL and on 6 September 1995 it was resolved to allot 12 \$1.00 shares in the company, 6 to TB and 6 to CB.

- 1.13 In or about April 1996, W and H retained CK, solicitors, to act on their behalf in relation to the matter of the proposed purchase of the land, and on or about 4 April 1996 CK caused a caveat to be lodged over the title to the land on behalf of W as caveator.

**Particulars**

The best particulars that the Council can provide as to when W and H retained CK is to say that it occurred on or before 3 April 1996. That is an inference to be drawn from the fact that it was on that date that CK caused the caveat to be executed and lodged.

- 1.14 As at about 12 April 1996:

- (a) The practitioner knew that a deposit of \$50,000 for the purchase of the land had been paid to NCPL in or about June/July 1995;

**Particulars**

The practitioner's knowledge that the deposit had been so paid is to be inferred from the following documents:

- (i) letter from the practitioner to H dated 14 September 1995;
- (ii) facsimile from W to NCPL dated 29 September 1995;
- (iii) facsimile from DN of NCPL to W dated 30 September 1995;
- (iv) facsimile from NCPL to the practitioner dated 30 September 1995;

- (v) letter from the practitioner to W dated 12 December 1995, which refers to there being a balance of purchase price of \$200,000.00.
- (b) The practitioner knew that the balance purchase price of \$200,000 had been paid to NCPL in or about late December 1995;

#### Particulars

That the practitioner knew the balance purchase price had been paid is to be inferred from the following documents:

- (i) practitioner's diary note dated 2 January 1996;
  - (ii) the practitioner's typewritten notes produced to the tribunal by the ASIC and obtained by the ASIC upon execution of a search warrant;
  - (iii) the letter from the practitioner to H dated 4 January 1996 providing amended documents for settlement (requesting further funds only of the amount of \$9,672.00).
- (c) The practitioner knew that the transfer of title in the land from NCPL to MHPL, or to any other person or entity associated with the said clients, had not been effected, notwithstanding the payment of the purchase price in full to NCPL, and that the land remained registered in the names of C.

#### Particulars

That the practitioner knew the transfer had not been effected is to be inferred from:

- (i) the fact that the practitioner had not received any executed documents back from the purchasers; and that the receipt back of such documents was a condition precedent to the ability of the purchasers to settle;
- (ii) the terms of the letter from the practitioner to WW dated 29 February 1996; and
- (iii) the fact that the practitioner was told by DN on about 12 April 1996 that the purchase was not proceeding and that a caveat had been lodged. That the practitioner was so told is confirmed in writing by the practitioner's notes produced by the ASIC consequent upon

the execution of search warrants.

- (d) The practitioner knew that:
  - (i) by letter to the practitioner dated 30 August 1995, H had sought the advice of the practitioner whether there would be any legal problems associated with appointing TB as a director of the trust in light of the fact that he was an associate and friend of NCPL; and
  - (ii) by letter dated 8 September 1995, the practitioner had advised H that he did not consider that using TB created any problems.

#### Particulars

That the practitioner knew the facts referred to is to be inferred from the fact the practitioner received the letter from H dated 30 August 1995 and sent to H the letter dated 8 September 1995.

- (e) The practitioner had not received any notification from or on behalf of W or H that his retainer to act on their behalf had terminated.

1.15 After about 12 April 1996, the practitioner acted for other persons against the interests of H and/or W in the respects pleaded in the following paragraphs without obtaining the consent of either H or W to that course. The Council alleges that it is that course of conduct which amounts to professional misconduct or alternatively unprofessional conduct or practice.

#### Particulars

The other persons for whom the practitioner acted were:

- (a) NCPL;
- (b) DN;
- (c) CDPL.

1.16 At some time between 12 and 15 April 1996 the practitioner accepted instructions to act on behalf of NCPL in connection with the contract referred to in paragraph 11(c) and against the interests of H and/or W.

#### Particulars

That the practitioner accepted such instructions

is to be inferred from the following documents:

- (a) The practitioner's diary note dated 12 April 1996 recording details of calls to DN and QC; and
- (b) The letters referred to in the following three paragraphs.

1.17 By letter dated 15 April 1996, the practitioner wrote to QC in the following terms:

*RE NCPL and MHPL*

*I refer to the undated letter to NCPL by CK in which they state that they act for MHPL. It should be remembered that there are 3 directors in that company 2 of whom are W and H and the other is TB, the Australian resident. Importantly the shares in the company are owned by TB and his daughter and it is possible, therefore, to remove the offshore directors at any time. My present view is that this should not be done until they have served a Statement of Claim and we see what they say their case is.*

1.18 By letter dated 15 April 1996, the practitioner wrote to W care of C K lawyers advising that he acted for NCPL, and required W to commence a proceeding in the Supreme Court to establish the interest in the land claimed by W under the caveat lodged on his behalf on or about 4 April 1996, and advised W that he would accept service of such proceedings on behalf of NCPL.

1.19 By letter dated 15 April 1996, the practitioner wrote to the Registrar of Titles regarding the caveat referred to in his letter to W stating:

*I act for the caveatee, NCPL. Pursuant to section 126(2) the caveatee has today given the caveator, W, notice requiring the caveator to start a proceeding in the Supreme Court to establish the interest claimed under the caveat.*

1.20 At some time subsequent to 15 April 1996 and before about 16 May 1996, the practitioner accepted instructions to act for DN in the incorporation, on or about 16 May 1996, of CDPL, a company of which DN was the company secretary and sole director.

#### **Particulars**

It does not form part of the Council's case to identify precisely how and when the practitioner

first acted for DN in respect to the matter alleged. That the practitioner accepted such instructions is to be inferred from the terms of the company order form referring to a required transfer date in relation to a company required to be named CDPL as 16 May 1996 and a required delivery date of 20 May 1996.

1.21. On or about 17 July 1996, the practitioner advised TB to withdraw his resignation as a director of MHPL, which resignation had earlier on 17 July 1996 been executed by TB during the course of a meeting between TB and a solicitor from CK, representing H and/or W.

#### **Particulars**

(a) The meeting between TB and the solicitor from CK occurred between about 11.40am and 12.05pm on 17 July 1996 at the offices of TB. The solicitor from CK concerned was HS and the Council relies on his file note dated 18 July 1996.

(b) The practitioner's advice to TB occurred on 17 July 1996 at some time after the meeting between TB and CK's representative.

(c) The Council says the content of the advice is contained in, evidenced by, or is to be inferred from the following documents:

(i) the practitioner's diary note dated 17 July 1996 headed "TB phone";

(ii) the practitioner's further diary note dated 17 July 1996 headed "Wants DN's number";

(iii) the typewritten withdrawal of resignation faxed by the practitioner to TB and subsequently signed by TB dated 17 July 1996.

(d) That the practitioner gave TB advice to the effect pleaded is also to be inferred from the letter from TB to CK dated 17 July 1996 which said as follows:

*Re: MHPL*

*With reference to the visit today by your HS to our office regarding the above company please be advised that, based on legal advice, I, TB, withdraw my*

*resignation as director of the above company effective immediately.*

*I also withdraw the transfer of my shareholding in the above company until further notice.*

*I am not happy with the manner in which the business has been conducted, ie lack of consultation by yourselves or the other directors.*

- 1.22 The practitioner acted for NCPL in relation to the transfer of the land from C to NCPL, for a consideration of \$60,000, which transfer was executed by C as transferors on 6 August 1996, and by NCPL as transferee on 2 September 1996.

#### **Particulars**

It is not material to the Council's case to identify how and when the practitioner first acted for NCPL. It is only material to allege that as at 2 September 1996 the practitioner acted for NCPL. That fact is an inference to be drawn from the transfer dated 2 September 1996 which the practitioner subsequently produced to Ks as an annexure to his letter to Ks dated 22 November 1996.

- 1.23 The practitioner acted for CDPL and for NCPL in relation to the transfer of the land from NCPL to CDPL for an unstated consideration, which transfer was executed by each of NCPL as transferor and CDPL as transferee on 2 September 1996.

#### **Particulars**

It is not material to the Council's case to identify how and when the practitioner first acted for CDPL and NCPL. It is only material to allege that as at 2 September 1996 the practitioner acted on behalf of both companies. That fact is an inference to be drawn from the transfers dated 2 September 1996 which the practitioner subsequently produced to Ks as an annexure to his letter to Ks dated 22 November 1996.

- 1.24 The practitioner acted for CDPL and for NCPL in relation to the provision on 2 September 1996 by NCPL to CDPL of a fixed and floating charge over the assets and undertaking of NCPL.

#### **Particulars**

It is not material to the Council's case to identify how and when the practitioner first acted for

CDPL and NCPL in respect of the matter therein alleged. What is material is that as at 2 September 1996 the practitioner acted on behalf of both companies. That fact is an inference to be drawn from the identification of the practitioner as the solicitor for both companies on the face of the fixed and floating charge dated 2 September 1996.

- 1.25 The practitioner acted for CDPL in relation to a contract dated 9 October 1996 for the sale of the land by CDPL to GPL for a consideration of \$330,000.

#### **Particulars**

It is not material to the Council's case to identify how and when the practitioner first acted for CDPL in respect of the matter therein alleged. What is material is that the practitioner is identified as the solicitor for CDPL on the face of the contract dated 9 October 1996 therein referred to.

- 1.26 The practitioner facilitated:
- (a) the resignation in September 1996 of TB as a director of MHPL;
  - (b) the removal by shareholders resolution in September 1996 of H and W as directors of MHPL and the appointment of EN and Z as new directors ("the new directors") of that company; and
  - (c) the execution of share transfers on 8 October 1996, by CB and TB, transferring their 6 shares each in MHPL to EN and Z respectively.

#### **Particulars**

The Council relies on an inference to be drawn from the following overt acts:

- (a) the conversation with QC referred to in paragraph 17 above.
- (b) the advice to TB referred to in paragraph 21 above.
- (c) the diary notes produced in the practitioner's handwriting of conversations with DN and TB dated 15 September 1996.
- (d) the request by the practitioner for a company search in respect of MHPL dated 16 September 1996.
- (e) the practitioner's diary note regarding a

- conversation with QC dated 17 September 1996.
- (f) the practitioner's diary note dated 25 September 1996 concerning the involvement of M solicitor.
  - (g) the practitioner's further diary note dated 25 September 1996 concerning a conversation with M solicitor.
  - (h) the resolution by TB and CB dated 18 September 1996.
  - (i) the resignation by TB from his position as director of MHPL dated 25 September 1996.
  - (j) the facsimile from DN to the practitioner dated 25 September 1996 on the facsimile letterhead of CDPL providing the proof of lodgment of the notification of change of office holders in relation to MHPL.
  - (k) the share transfers executed on 8 October 1996.
- 1.27 The practitioner facilitated MHPL to abandon certain litigation which it had commenced when H and W were directors as follows:
- (a) The practitioner facilitated MHPL by its new directors, on 2 October 1996 to resolve that the company discontinue the writ against the practitioner, being a writ issued by CK on 8 August 1996 on the instructions of MHPL as plaintiff against NCPL as first defendant, DN as second defendant and the practitioner as third defendant, concerning the interests of MHPL in the land and in the sum of \$250,000 paid to NCPL for the purchase thereof;
  - (b) The practitioner facilitated M solicitor to prepare and file with the Supreme Court of Queensland on or about 3 October 1996 a notice of discontinuance of writ by MHPL against the practitioner;
  - (c) The practitioner facilitated MHPL, by its new directors, on 2 October 1996, to resolve that the company execute a deed of release, whereby, inter alia, MHPL released and discharged the practitioner from all actions, proceedings, claims and demands of every description or nature that MHPL or any person entitled to claim through it may have or claim to have against the practitioner in respect of the

matters the subject of the writ.

- (d) The practitioner facilitated MHPL, by its new directors, to execute the said deed of release on 2 October 1996; and
- (e) The practitioner facilitated M solicitor, to prepare and file on or about 2 October 1996 a notice of change of solicitors for the plaintiff, MHPL, in the writ, whereby M solicitor replaced CK as solicitors for MHPL.

#### Particulars

The Council relies on an inference to be drawn from the following overt acts:

- (i) the fact of the acts of which the Council alleges the practitioner facilitated having actually occurred as the Council alleges;
- (ii) the contents of the practitioner's diary note dated 27 September 1996 recording details of a call with M solicitor;
- (iii) the handwritten facsimile from the practitioner to QC requesting QC to check the draft deed of release including handwritten diary notes on the face of that facsimile recording the content of QC's subsequent telephone call;
- (iv) the practitioner's diary note dated 30 September 1996 recording the content of the conversation between QC and the solicitor regarding the deed of release;
- (v) the practitioner's letter to Law Claims dated 3 October 1996 recording the fact of a writ of summons having been served on the practitioner on 26 September 1996 but that the practitioner "...did not send it earlier as I was anticipating the discontinuance".

- 1.28 The practitioner facilitated MHPL, by its new directors, on 10 October 1996, to execute a notice of withdrawal of the caveat lodged by CK over the land on 3 October 1996 as solicitors for MHPL as caveator.

#### Particulars

The Council relies on an inference to be drawn from the following overt acts:

- (a) The practitioner's diary note of 9 October 1996 recording the content of a discussion with QC regarding the caveat which had been lodged over the land.

(b) The practitioner's fax to M solicitor dated 10 October 1996 enclosing the caveat and suggesting "I have checked the lands office and the caveat is in abeyance. The lands office said to follow the withdrawal provisions".

1.29 The practitioner acted for CDPL as first defendant and for DN as third defendant in the Supreme Court writ, commenced by W on 11 December 1996, concerning the interests of W in the land and in the sum of \$250,000 paid to NCPL for the purchase thereof.

1.30 The practitioner acted for CDPL in the Supreme Court writ, commenced on 19 August 1997 seeking the removal of the caveat lodged by CK over the land on 21 October 1996 as solicitors for W.

2. Charge 2 was withdrawn.

3. That the practitioner is guilty of professional misconduct or alternatively unprofessional conduct or practice, in that, in breach of his duty as a solicitor, he acted for other persons against the interests of P and R in respect of the very transaction and period in which he had acted for P and R.

#### Particulars

3.1 In November 1995 P and R entered into a contract for the purchase of certain land from DPL as trustee of the NFT for a consideration of A\$250,000.00 (Sing\$262,500.00).

3.2 In November 1995 prior to 21 November 1995 the practitioner accepted a retainer from P and R to act for them in the conveyance which was the subject of the contract referred to in paragraph 1 above.

#### Particulars

(a) That retainer was partly in writing and partly by conduct.

(b) Insofar as it was in writing, it was contained in, evidenced by, or is to be inferred from the following documents:

(i) letter from the practitioner to the purchasers' agent BH dated 6 November 1995 providing his trust account details;

(ii) letter from the practitioner to P and R dated 21 November 1995 acknowledging receipt of a copy of the contract and thanking them for

their instructions.

(c) Insofar as the retainer was made by conduct, the conduct consists of the actions by the practitioner in providing to the purchasers' agent details of his trust account; and his receipt from the purchasers' agent and holding in trust pending completion of the transaction of the amount of S\$105,000.00.

3.3 DN, with whom the practitioner had an existing association and for whom the practitioner had acted, was a director of DPL.

#### Particulars

The best particulars which the Council can provide of the circumstances in which the practitioner had previously acted for DN is to say that that conclusion is an inference to be drawn from the terms of the documents particularised in paragraph 5 of the particulars to charge 1.

3.4 The contract provided for an initial payment of Sing\$131,250.00 (representing 50% of the purchase price) which sum was paid by the purchasers shortly after entering into the contract, and was due for completion (but did not complete) on 19 December 1995.

3.5 The practitioner acted for the said clients in relation to a variation of the contract on or about 5 January 1996, which variation provided for the balance purchase price of Sing\$131,250 to be secured by a mortgage in favour of the vendor, DPL, and to be paid by the purchasers by 6 monthly instalments, commencing on 19 January 1996.

#### Particulars

(a) The practitioner sent a letter dated 2 January 1996 to BH (the stakeholder named in the contract) concerning his understanding of an agreement between the vendor and the purchasers for a variation of the contract.

(b) The practitioner received the letter from BH dated 3 January 1996 together with copies of letters from P and R which were enclosed therein.

(c) The practitioner received the facsimile message from DN dated 4 January 1996 attaching an agreement signed on behalf of DPL varying the contract between P, R

- and DPL.
- (d) The practitioner received the facsimile from DN dated 5 January 1996 providing a fully signed agreement for the settlement of the land apparently signed by P and R.
- (e) The practitioner sent the letter to BH dated 5 January 1996 stating as follows:
- I refer to your letter of the 3 January 1996. I understand that you now hold a copy of the revised agreement, which you prepared, signed by both the vendor and purchaser. Would you kindly confirm that the purchasers authorise me to deduct the stamp duty from the moneys in trust.*
- (f) The practitioner received a letter dated 4 January 1996 from BH enclosing instructions from P in both English and the Chinese language authorising the cost of stamp duty to be drawn from the deposit held in trust by the practitioner.
- (g) The practitioner received a letter from BH dated 5 January 1996.
- (h) The practitioner faxed a request to R dated 5 January 1996 to translate the Chinese language instructions which had been provided to him by P.
- (i) The practitioner obtained a translation from R of the said letters by facsimile dated 7 January 1996.
- 3.6 The said clients executed a mortgage on 13 January 1996 securing payment of the balance purchase price to DPL and thereafter proceeded to pay the monthly instalments in accordance with the terms of the contract as varied.
- 3.7 A transfer of the land to the said clients was executed by DPL as transferor on 19 March 1996 and by the practitioner as solicitor for the said clients as transferees on 22 April 1996.
- 3.8 On 18 April 1996 the practitioner executed a settlement notice as solicitor for the transferees and caused that settlement notice to be lodged that day with the Registrar of the Department of Lands.
- 3.9 On 22 April 1996 the practitioner forwarded to MR, the solicitors for DPL, the duly executed transfer, and on 24 April 1996 remitted to MR

trust account the balance purchase price which had been retained in the practitioner's trust account from the initial payment made by the said clients in November 1995. By letter dated 24 April 1996 to MR the practitioner confirmed that MR would register the transfer and the mortgage.

- 3.10 In or about late April 1996, the said clients retained CK to act on their behalf in relation to the purchase of the land.

#### **Particulars**

The best particulars that the Council can provide as to when P and R retained CK is to say that it occurred on or before 26 April 1996. That is an inference to be drawn from the fact that it was by facsimile dated 26 April 1996 that CK wrote to the practitioner.

- 3.11 By letter to the practitioner dated 26 April 1996 CK advised the practitioner as follows:

*We understand that you acted on behalf of P & R in relation to the abovementioned transaction.*

*We now act on behalf of P & R.*

*We understand that you presently hold at least \$131,250.00 in your trust account being the deposit moneys and other moneys paid by our clients in respect of their proposed purchase of the land.*

*We place you on notice that our clients have elected not to proceed with the purchase of the land on the basis that the terms of the proposed Contract were not accepted by R. We note that R has not signed the Contract.*

*Further, the nature and effect of the proposed Contract was fraudulently misrepresented to our clients by the Vendor. As you would be aware our clients do not speak or write any English. The moneys paid by our clients to your account was a direct result of fraudulent and unconscionable conduct by the Vendor in exploiting our clients' lack of English.*

*Our clients have instructed us to obtain from you the \$131,250.00 held in your trust account on their behalf. Please arrange for these funds to be immediately sent to us, together with a copy of your trust account statement*

*evidencing the monies received into and paid from your trust account.*

*We note that the Contract documentation prepared by the Vendor does not give the Vendor any rights in respect of the \$131,250.00 transferred to your trust account and that your firm is not the Stakeholder under the Contract. You hold the money in trust on behalf of our clients and to our clients' order pending completion of the proposed purchase.*

*Please arrange for your trust account cheque to be received by us by no later than Tuesday April 30, 1996.*

*Should you not be willing to return the funds to our client by forwarding the funds to us, please advise us of the reason for your refusal. In this event, we hereby give you notice that our client disputes the ownership of the moneys held by you.*

- 3.12 On 1 May 1996 the practitioner wrote to the said clients advising that the transaction was complete and that the transfer of the land into their names would be registered by DPL's solicitors when they registered the following mortgage. The practitioner forwarded to the said clients under cover of this letter his memorandum of costs and outlays dated 24 April 1996 for attending to all matters usual and necessary to complete the transaction on behalf of the said clients.

- 3.13 By letter to the practitioner dated 9 May 1996 P and R terminated the practitioner's retainer in the following terms:

*Please note that my wife and I no longer wish for you to act on our behalf.*

*We have appointed CK Lawyers to act for us.*

*Please note that CK's letter to you of April 26 1996 was in accordance with our instructions and authorised by us.*

*Please arrange for our file and all correspondence, documents, writings and materials held by you relating to our affairs to be immediately delivered to CK. Any delay in the delivery of this material may prejudice us and we reserve our rights in this regard.*

*Please also fax to CK your trust account statement detailing the receipt and payment of our money for our proposed purchase of the land.*

- 3.14 On 23 October 1996, CK lodged a caveat over the land on behalf of the said clients, claiming an estate or interest in fee simple as purchasers from DPL under a completed contract of sale.

- 3.15 After 23 October 1996, the practitioner acted for other persons against the interests of P and R in the respects pleaded in the following subparagraphs without obtaining the consent of either P or R to that course. The Council alleges that it is that course of conduct which amounts to professional misconduct or alternatively unprofessional conduct or practice:

- (a) The practitioner, on 27 November 1996, wrote to CK as solicitors for P and R, advising that he acted for DPL and requiring the commencement of proceedings in the Supreme Court to establish the interest in the land claimed by the said clients under the caveat.
- (b) The practitioner acted for DPL as first defendant and DN as third defendant in a Supreme Court writ commenced by the said clients on 11 December 1996, concerning their entitlement to be registered as proprietors of the land and their interests otherwise in the land, and in the sum of \$208,333 paid by them in respect of the purchase of the said land;
- (c) The practitioner acted for DPL in relation to a contract for the sale of the land by DPL to BPL, the best particulars of which the Council can provide is to say that the practitioner was identified as DPL's solicitor on the face of the undated contract between DPL and BPL and that the practitioner communicated with the solicitors for BPL (HA) subsequent to October 1996 in relation to the question of caveats upon the title which was subject to the contract.

### **Appearances**

- (a) For the Council of the Queensland Law Society Incorporated:  
Mr J Bond of Counsel instructed by Clayton Utz, solicitors.

- (b) For the practitioner:  
Mr W Francis of Counsel instructed by the practitioner.

### Findings and Orders

3. The tribunal finds charges 1 and 3 proved and finds the practitioner guilty of professional misconduct, as admitted by the practitioner.
4. The tribunal orders that the practitioner pay a penalty of \$5,000.00 to the Fund.
5. The tribunal further orders that the practitioner pay the costs of the Queensland Law Society Incorporated of the proceedings including reserved costs, save for:
  - (a) the cost of drawing and engrossing the original notice of charge dated 22 June 1999; and
  - (b) the reserved costs of the tribunal hearings of 17

November 1999 and 29 March 2000;

such costs to be agreed, or in the absence of agreement, to be assessed by Hickey & Garrett, with the parties having the right to make written submissions to the assessors in relation to the assessment.

4. The tribunal further orders that the penalty be paid first at the rate of \$1,000.00 per month and that costs be then paid off at the rate of \$1,000.00 per month thereafter once they have been determined.

### Reasons

The practitioner admits charges 1 and 3, and admits he is guilty of professional misconduct.

The tribunal finds these charges proved and finds the practitioner guilty of professional misconduct.

## The Solicitors Complaints Tribunal

# In the Matter of Robert Bruce Richard Nettleton

**Case No:** SCT/42  
**Date Of Hearing:** 21 November 2000  
**Appearing Before:** Mr T M Treston (Chairperson)  
Ms G C Fox  
Mrs M Green (Lay member)  
**Penalty:** Suspended.

### Charge

That the practitioner is guilty of professional misconduct or alternatively, unprofessional conduct or practice in that, in breach of his duty as a solicitor, he has failed to honour undertakings given by him, through his Counsel, to the Solicitors Complaints Tribunal on 8 September 1999.

#### Particulars

- (a) On 8 September 1999, on the hearing of Charge No. 18 concerning certain conduct on the part of the practitioner, the Solicitors Complaints Tribunal ("the tribunal") found the practitioner guilty of professional misconduct.

- (b) The practitioner, through his Counsel, offered certain undertakings, which undertakings were accepted by the tribunal, including, inter alia:
  1. The practitioner undertakes to refund the following amounts by 8 June 2000:
    - (i) \$25,000.00 to the Estate of EFW.
    - (ii) \$18,500.00 to HFV.
    - (iii) \$2,920.00 to the estate of RV ("underaking no.1")
- (c) Upon reliance on the undertakings given by the practitioner, including those set out in particular (b) above, the tribunal ordered that the practitioner pay a monetary penalty, rather than order a period of suspension, which, the tribunal said, in normal circumstances it would be inclined to order.
- (d) In breach of his undertaking to the tribunal, the practitioner failed to refund the amounts referred to in undertaking no. 1 by 8 June 2000, or at all.

The Council alleges that the charge constitutes professional misconduct or unprofessional