In the Matter of Debera Anne Ebbett

Case Number:	SCT/76
Date of Hearing:	6 & 7 August 2002 and 10 September 2002
Appearing Before:	Mr P Mullins (Presiding Member/Practitioner Member) Ms B Reaston (Practitioner Member) Ms E Jordan (Lay Member)
Penalty:	Struck Off

Charge 1

The practitioner failed to make full and frank disclosure to the Supreme Court of all facts material to the determination of an ex parte application brought by the practitioner for an interim injunction in the matter of *SH Pty Ltd v. OSD Pty Ltd*.

Particulars

(a) At all material times the practitioner acted for, and was a director of, SH Pty Ltd (as trustee for the MFE Trust trading as XXX) ("the applicant") in Supreme Court matter number S1639 of 2001.

(b) On 16 February 2001 the practitioner made an ex parte application to the Honourable Justice Atkinson of the Supreme Court on behalf of the applicant, for the granting of an interim injunction.

(c) The application was supported by:

(i) a facsimile letter dated 16 February 2001 by the practitioner to the Associate to the Honourable Justice White, together with enclosures thereto; and

(ii) the practitioner's oral submissions to Justice Atkinson on 16 February 2001.

(d) The practitioner failed, during the hearing of the said application, to bring to the notice of the Court any of the following matters:

(i) any of the history of the dealings between the parties during the period May 2000 to November 2000 pertaining to delays in the payment of rent by the applicant;

(ii) any of the dealings between the parties in December 2000, including the agreement entered into between the parties on 22 December 2000 pertaining to the terms of the applicant's ongoing tenancy of the respondent's property;

(iii) any of the dealings between the parties in January 2001 pertaining to the applicant's delay in the payment of rent;

(iv) the following dealings between the parties in February 2001:

A. a facsimile by the practitioner to the respondent dated 5 February 2001;

B. a facsimile by the respondent to the practitioner dated 5 February 2001;

C. a facsimile by the respondent to the practitioner dated 7 February 2001;

D. a facsimile by the practitioner to the respondent dated 8 February 2001;

E. a facsimile by the respondent to the practitioner dated 14 February 2001;

F. a facsimile by the practitioner to the respondent dated 14 February 2001;

G. a facsimile by HG (solicitors for the respondent) to the practitioner dated 15 February 2001.

Charge 2

The practitioner relied upon the contents of a facsimile to the Supreme Court dated 16 February 2001 in support of an ex parte application before the Honourable Justice Atkinson of the Supreme Court for an interim injunction, in circumstances where the practitioner well knew that reliance upon the contents of the facsimile would mislead, or be likely to mislead, the Court.

Particulars

(a) The practitioner acted for, and was a director of, the applicant, SH Pty Ltd in an ex parte application for an interim injunction heard by the Honourable Justice Atkinson of the Supreme Court on 16 February 2001.

During the hearing of the application, the practitioner relied on a facsimile letter from the practitioner to the Honourable Justice White of the Supreme Court dated 16 February 2001, together with the enclosures thereto.

(b) The said letter of 16 February 2001 contended:

> *"The landlord has claimed a failure to pay rent, however such is denied by the applicant Tennant* (sic) *and copies of correspondence are attached confirming payment of rent and discussions in this regard."*

(c) The attached correspondence included a letter signed by the practitioner on behalf of the applicant to the respondent dated 9 February 2001 advising payment of rent to the respondent's bank account and attaching a deposit slip in respect of such payment.

(d) The circumstances in which the practitioner presented and relied upon the contents of the said letter of 16 February 2001 and its attachments represented to the Court that the rent the subject of the proceedings had been paid and that a deposit slip was produced in support of such payment.

(e) As at 16 February 2001, the true position, as the practitioner knew, was that:

(i) the rent the subject of the proceedings, had not been paid;

(ii) the deposit slip attached to the letter to the respondent dated 9 February 2001 did not relate to the payment of the rent, the subject of the proceedings.

(f) At the hearing on 16 February 2001 the practitioner failed to inform Justice Atkinson of the matters referred to in paragraph 2(f) above. The reliance by the practitioner upon the said letter and its attachments would, as the practitioner well knew, mislead, or be likely to mislead the Court.

Charge 3

The practitioner made oral submissions to the Honourable Justice Atkinson of the Supreme Court during the course of the hearing of an ex parte application for an interim injunction in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which submissions were, as the practitioner well knew, false or misleading.

Particulars

(a) During the course of submissions the following exchange occurred:

"HER HONOUR: *Now, tell me why you haven't served the other side? Have your informed them at all that you would be coming to court today?*

PRACTITIONER: *Yes, Your Honour."*

(b) The practitioner's statement was false or misleading in that the practitioner knew, at the time of her statement, that she had not informed the other side that she would be coming to court that day.

(c) During the course of submissions, the following exchange occurred:

"HER HONOUR: *Well, was only rent for February unpaid?*

PRACTITIONER: *Yes, that's correct.*

HER HONOUR: *When was it due?*

PRACTITIONER: *It's due on the first.*

HER HONOUR: *Yes.*

PRACTITIONER: *And it was paid on 2 February...*

HER HONOUR: *Well, what proof is there it was paid on 2 February?...*

PRACTITIONER: *On the letter which Your Honour should have a copy of which was attached to the facts* (sic) *I sent in to her Honour Justice White's associate, there's a letter of 9 February...*

HER HONOUR: *Yes.*

PRACTITIONER: *... and on that letter is – annexed to the bottom of that is a copy of the deposit slip.*

HER HONOUR: *Oh, it's cut off on my copy."*

(d) The practitioner's statements were false or misleading in that the practitioner knew, at the time of her statements, that:

(i) the rent for February had not been on 2 February 2001;

(ii) the rent not having been paid, the partial copy deposit slip attached to the letter of 9 February 2001 did not relate to the payment of rent on 2 February 2001.

(e) During the course of submissions the following exchange occurred:

"HER HONOUR: *Well, do you have a copy of – do you have that deposit slip with you?*

PRACTITIONER: *No, that original slip was then posted to the landlords. The only thing we have is that copy.*

HER HONOUR: *This little copy of half of it?*

PRACTITIONER: *Yes. It does indicate on there the amount, the account name which is the respondent's account, the account number and it does, on the side, just indicate the National Australia Bank stamp confirming that it has been deposited."*

And, later in the proceedings:

> "HER HONOUR: *I'm still very confused. The letter of 9 February was faxed.*
>
> PRACTITIONER: *Yes.*
>
> HER HONOUR: *So that – so that must mean you must still have the original of the deposit slip... because it was only faxed.*
>
> PRACTITIONER: *... the secretary had been directed to deposit the funds on the second. As I had Court matters that day and couldn't attend to it. She deposited those funds. She was also directed to fax a copy to the landlords which she didn't, in fact, do.*
>
> HER HONOUR: *Mmm.*
>
> PRACTITIONER: *They had then, by their letter of the seventh, indicated that they had no confirmation of payment of the rent. So the secretary was then directed to fax or forward to them a copy of the deposit slip. Now, she mistook that from me to mean to fax it to them and then also send them the letter with the original deposit slip stapled to the bottom of it to them. So that letter was forwarded to the landlords in respect of that."*

(f) The practitioner's statements were false or misleading, in that the practitioner knew at the time of her statements that:

(i) the rent for February had not been paid on 2 February 2001;

(ii) the rent not having been paid, the partial copy deposit slip attached to the facsimile of 9 February 2001 to the landlord did not relate to the payment of rent on 2 February 2001;

(iii) the original deposit slip, pertaining to the purported deposit on 2 February 2001 had not been posted or sent to the landlord.

(g) During the course of the hearing, the practitioner made the following submissions:

> "PRACTITIONER: *There was then – no further comment or concern was then raised by the landlords and then a further fax was sent which is dated 14 February which is annexed to the letter which indicates that we hadn't heard anything and presumed then that they had confirmed that the rent had been deposited to their account. Again there was no response to that..."*

And later in the proceedings:

> "PRACTITIONER: *Now, there was then, as I indicated, no further comment from the landlords which prompted the letter of 14 February just simply confirming that we presumed they had, in fact, the deposit of the rent and still no response to that correspondence until 15 February..."*

(h) The practitioner's statements were false or misleading in that the practitioner knew at the time of her statements that:

(i) her letter of 14 February to the landlord referred to in the submissions in paragraph 3(g) above had been sent by facsimile at about 9.00 am that day;

(ii) she had received a reply to that letter from the landlord by facsimile at about 2.00 pm on 14 February 2001;

(iii) she had sent a further letter to the landlord in reply to the letter referred to in paragraph (ii) above by facsimile at about 2.45 pm on 14 February 2001.

(i) During the course of submissions the following exchange occurred:

> "HER HONOUR: *We're actually doing, at the legal symposium in a couple of weeks time, Ms E... an example of what a solicitor shouldn't do, which is bring an ex parte application without notice without any formal documents but having had time to prepare a draft order.*
>
> PRACTITIONER: *I did attend at the office this morning, Your Honour. Unfortunately my secretary had called in ill. I had intended to attempt to draft a very urgent application and a short form affidavit, however, in noting the time and that it's an hour and half's travel from Beaudesert to here I had time to complete a quick draft order to assist Your Honour but because of the lack of a secretary, was unable to prepare documentation."*

(j) The practitioner's response to Her Honour was such as to represent to the Court that the practitioner's secretary had not been in attendance at the practitioner's office on 16 February 2001, having called in ill, and because of the absence of her secretary, the practitioner had been unable to prepare the usual material in support of the injunction application prior to departing from her office for court.

(k) The practitioner's statements were false or misleading in that the practitioner knew at the time of her statements that her secretary:

(i) had not called in ill;

(ii) had been in attendance at the practitioner's office on the morning of 16 February 2001 when the practitioner herself attended at the office;

(iii) had assisted the practitioner in her preparation for the pending application.

Charge 4

In the alternative to Charge number 3, the practitioner made oral submissions to the Honourable Justice Atkinson of the Supreme Court of Queensland during the course of the hearing of an ex parte application in the matter of *SH Pty Ltd v. OSD Pty Ltd* which submissions were made recklessly, not caring whether the submissions were true or false.

Particulars

(a) The Society repeats and relies on the submissions of the practitioner as particularised in paragraphs 3(a) to 3(b) of Charge number 3.

(b) At the time at which each of the said submissions were made, the practitioner had no reasonable grounds for making the submissions.

Charge 5

The practitioner produced an affidavit to be filed and read in the matter of *SH Pty Ltd v. OSD Pty Ltd* in which the practitioner affirmed certain matters that were, as the practitioner well knew, false or misleading.

Particulars

(a) The practitioner at all material times acted for, and was a director of, SH Pty Ltd, the applicant in Supreme Court matter number S1639 of 2001.

(b) On 19 February 2001, the practitioner produced an affidavit on affirmation, which affidavit was filed on 20 February 2001 and read at the hearing of the application on 21 February 2001.

(c) By paragraph 5 of the said affidavit the practitioner said:

> *"The current tenancy is a monthly tenancy. Rent is payed* (sic) *monthly in the sum of $1,500.00 per month. There is no written agreement evidencing any terms of the tenancy."*

(d) The practitioner's statement was false or misleading in that the practitioner knew, at the time of her affidavit, that the terms of the tenancy were evidenced in a written agreement dated 22 December 2000.

(e) By paragraph 6 of the said affidavit the practitioner said:

> *"Rent for February 2001 had been paid on 2 February 2001."*

(f) The practitioner's statement was false or misleading in that the practitioner knew at the time of her affidavit that the rent had not been paid on 2 February 2001.

(g) By paragraph 6 of the said affidavit the practitioner further said:

> *"As a further confirmation of matters, a further facsimile was sent 9 February 2001 attaching a copy of the deposit slip."*

(h) The practitioner's statement was false or misleading in that the practitioner knew at the time of her affidavit that the deposit slip attached to the facsimile of 9 February 2001 did not relate to the payment of rent on 2 February 2001.

Charge 6

In the alternative to Charge number 5, the practitioner produced an affidavit to be filed and read in the matter of *SH Pty Ltd v. OSD Pty Ltd* in which the practitioner affirmed certain matters recklessly, not caring whether those matters were true or false.

Particulars

(a) The Society repeats and relies upon the matters affirmed by the practitioner as set out in paragraphs 5(a) to 5(h) of Charge number 5.

(b) At the time at which each of the said matters were affirmed by the practitioner, the practitioner had no reasonable grounds for affirming those matters.

Charge 7

The practitioner produced written submissions and made oral submissions to the Honourable Justice Atkinson of the Supreme Court during the course of the hearing of an application in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which submissions contained a statement that was, as the practitioner well knew, false or misleading.

Particulars

(a) On the hearing of an application before Justice Atkinson of the Supreme Court on 21 February 2001, the practitioner produced written submissions which contained the following statement:

> "THE LAW
>
> ...
>
> *14. There is no special condition in the agreement between the parties requiring payment of rent in advance."*

(b) During the course of the practitioner's submissions at the hearing on 21 February 2001, the practitioner submitted:

> "PRACTITIONER: *... Your Honour, the issue in respect of the application for the injunction is really twofold. One is if the respondent wishes to terminate the tenancy for the failure to pay rent then rent has to be due and payable for that period of time... It is my contention that, in fact, despite the issue of whether the rent was paid to their account and those issues aside, that in fact the rent for the period of February was not in fact due and payable until 1 March."*

(c) The said submissions were false or misleading in that as at 21 February 2001, the practitioner knew that under the agreement between the parties rent was payable monthly in advance:

(i) On 22 December 2000 the practitioner had signed an agreement on behalf of SH Pty Ltd with the respondent which contained the following term:

> *"Ongoing monthly rent payments are to be deposited to our account on 1st each month or following business day."*

(ii) On 16 February 2001, during the course of the practitioner's submissions to the Honourable Justice Atkinson on the hearing of an ex parte application for an interim injunction in the matter, the following exchange occurred:

> "HER HONOUR: *Well was only rent for February unpaid?*
>
> PRACTITIONER: *Yes, that's correct.*
>
> HER HONOUR: *When was it due?*
>
> PRACTITIONER: *It's due on the first.*
>
> HER HONOUR: *Yes.*
>
> PRACTITIONER: *And it was paid on 2 February."*

Charge 8

The practitioner gave evidence before, and made submissions to, the Honourable Justice Atkinson of the Supreme Court of Queensland, during the course of the hearing of a contested application in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which evidence and submissions were, as the practitioner well knew, false or misleading.

Particulars

(a) During the course of the hearing on 21 February 2001, the practitioner gave evidence pertaining to the matter of the payment of outstanding rent by the applicant on 2 February 2001 and the subsequent forwarding to the respondent of the deposit slip in respect of the payment:

> "HER HONOUR: *Is it true that you sent a coy of the letter of 9 February?*
>
> PRACTITIONER: *I am advised by my secretary that she did in fact send the letter with the original stapled to the letter."*

And later in the proceedings:

> "PRACTITIONER: *... Your Honour, the issue of the bank account, after being advised by the solicitor for the respondent that the account was incorrect and because the deposit slip which is shown on the letter of 9 February does exclude the last digit of the account number, enquiries have been made with the bank to ascertain...*
>
> HER HONOUR: *By?*
>
> PRACTITIONER: *By myself.*
>
> HER HONOUR: *Yes?*
>
> PRACTITIONER: *To ascertain whether there was a deposit to any account, any BNZ account number 68565252 and then any digit... from zero to nine on the end of that account on 2 February for a sum of $1,500. As yet, I haven't received a response to that given that that enquiry was only made yesterday following advices that it was the wrong account. Up until that stage, it was believed that it was in fact the correct account... However, I do accept, your Honour, that the respondent has provided both sworn evidence and documents to confirm that the sum hasn't been deposited to their account. Therefore, my submission is that – sorry, my evidence is that it has been deposited to an account."*

And later in the proceedings:

> "PRACTITIONER: *I continue to maintain, your Honour, that the bank stamp is in fact contained on that deposit slip. The only issue may be what account that has been deposited to."*

(b) The practitioner's evidence to the Court on 21 February 2001 was to the effect that a payment of $1,500 had been deposited on 2 February 2001 in respect of the applicant's unpaid rent either to the respondent's account, or, inadvertently, to a different account, and that a deposit slip containing a bank stamp had been produced relating to that deposit.

(c) The practitioner's evidence was false or misleading, in that the practitioner knew at the time of her evidence on 21 February 2001 that:

(i) the February 2001 rent had not been paid to either the respondent's account, or to any other account on 2 February 2001;

(ii) the rent not having been paid, the deposit slip attached to the letter of 9 February 2001, containing a bank stamp, did not relate to a deposit on 2 February 2001;

(iii) the original deposit slip pertaining to the purported deposit had not been sent to the respondent under cover of a letter dated 9 February 2001.

(d) During the course of the practitioner's evidence, the following exchange occurred:

"HER HONOUR: *... did you know that they had solicitors acting for them?*

PRACTITIONER: *No, your Honour. The letter which I have annexed to my material was sent after hours on the 15th which is why it's date stamped the 16th. The 16th is the day I was in Court, Your Honour. At that point I had no idea there were solicitors for the respondent."*

(e) During the course of her submissions, the practitioner also said:

"The letter of 16 February is annexed to Mr DB's affidavit and in relation to that it indicates that in obedience to the communications of 16 February the client has removed the locks and, 'could you please ensure that the application and affidavit in paragraph 4 of your letter is served on our office and not on our client.' Now, that was the first indication that I had of the involvement of solicitors in this matter."

(f) The practitioner's evidence and submissions were false or misleading in that the practitioner knew, at the time of her attendance at Court on 16 February 2001 that HG were acting for the respondent, having by then been aware of either, or each of, their facsimile letters to the practitioner dated 15 February 2001 and 16 February 2001 respectively.

(g) During the course of her evidence the practitioner said:

"PRACTITIONER: *The rent had always been paid by direct deposit into the account for the respondent and the deposit slip faxed. There is not only the letter of, I believe it was 12 January evidencing that, there would be numerous letters annexing deposit slips which would confirm that was the manner in which it was banked."*

And later in the proceedings:

"MR P: *Do you say that you copied the account number on that deposit slip from 12 January letter?*

PRACTITIONER: *I can't say whether I would have copied it from 12 January letter. I would have pulled a page from the file which had a deposit slip on it.*

MR P: *The most recent one was 12 January fax where you quite intentionally photocopied the deposit slip?*

PRACTITIONER: *I have always, as I indicated, always copied the deposit slip and forwarded those, but whether it is the January one... or some other one which I would have copied it off, I can't categorically say. They're all in the same file."*

(h) The practitioner's evidence was false or misleading in that the practitioner knew, at the time of her statements, that she had not in fact always faxed letters to the respondent annexing the deposit slips in respect of rent payments to the respondent's account.

(i) During the course of the hearing on 21 February 2001 the practitioner gave evidence concerning the matter of her secretary's attendance at the practitioner's office on Friday 16 February 2001 and concerning the forwarding of material to Justice White of the Supreme Court under cover of a facsimile letter dated 16 February 2001:

"MR P: *... Who sent the facsimiles to the Supreme Court on the Friday? You or your secretary?*

PRACTITIONER: *No, I sent them.*

MR P: *Right. And you sent them from your office?*

PRACTITIONER: *To the Supreme Court.*

MR P: *Yes, on Friday?*

PRACTITIONER: *Some – yes, yes. They would have been.*

MR P: *Right. Well, if you were in your office on Friday sending faxes to this Court, how is it that you're unaware of a fax from HG sent to your office on the previous evening?*

PRACTITIONER: *Because it wasn't on my desk on that day. All I did was I had to be in Court here by 10 o'clock. I went down to the office, my secretary was not there on Friday, as I'd indicated to the Court on Friday...*

MR P: *... You went in on the Friday morning to send a fax to this Court?*

PRACTITIONER: *I'm not sure what the time on the fax to the Court is – but it was about 10.30/11 o'clock I sent the fax and then immediately travelled to Court to attend Court.*

MR P: *And you say that notwithstanding attending your office to send these faxes to the Court, you were unaware of a fax sent to that same office on the previous evening?*

PRACTITIONER: *I made no checks of any faxes to the office on the previous evening. My secretary was not in attendance at the office when I went there, she had gone home sick.*

PRACTITIONER: *... As I have stated, my secretary was there early in the morning, she went home sick. When I attended at the office in the hope that I may have been able to prepare some material for the application to the Court which I had requested from her Honour, Justice White, my secretary was not available, she had gone home ill.*

MR P: *Right?*

PRACTITIONER: *All I did was quickly draft up a very short draft order and the letter to the Court and faxed it to the Court and then bolted in here to Court. It's an hour and a half travelling time from Beaudesert, it was lunchtime by the time I got in here."*

And later in the proceedings:

"HER HONOUR: *... Tell me the date of the letter and the addressee of the letter?*

PRACTITIONER: *The date of the letter is 16 February 2001. The addressee is her Honour, Justice White, Supreme Court via facsimile to attention her associate.*

HER HONOUR: *And that was sent from your office on the morning of the 16th, was it?*

PRACTITIONER: *Yes, at 11.37...*

HER HONOUR: *... were you there when that letter was sent?*

PRACTITIONER: *In the office?*

HER HONOUR: *Yes?*

PRACTITIONER: *Yes.*

HER HONOUR: *Was your secretary there?*

PRACTITIONER: *No, I don't believe she was at the time the letter was sent, your Honour.*

HER HONOUR: *Whose signature is that on the letter?*

PRACTITIONER: *No, that's not my signature.*

HER HONOUR: *Whose signature is it?*

PRACTITIONER: *I believe it's my secretary's signature.*

HER HONOUR: *Then how did she come to sign the letter if she wasn't there?*

PRACTITIONER: *I'm sure she wasn't there in the morning when I attended at the office..."*

(j) During the course of the hearing on 21 February 2001, the practitioner also made submissions concerning the matter of her secretary's attendance at the office on Friday 16 February 2001 and concerning the forwarding of material to Justice White under cover of a facsimile letter dated 16 February 2001:

"PRACTITIONER: *Your Honour, there was some issue raised by my learned friend in relation to that letter and the suggestion that, how could I have attended the office and not had a copy of the fax. The fax in the morning I can only presume would have been collected by my secretary, stamped and put into an in-tray for faxes. Now, I didn't, as I'd indicated in my evidence, I did not check any of that material. I simply attended at the office, prepared the letter to her Honour Justice White, faxed that on the machine and immediately raced into Court on the 16th.At the time when I got to the office, as I think I indicated to you in my evidence, my secretary had in fact gone home sick. There had been some comment by you about the proper procedure for the preparation of material for the application and that you felt that in the circumstances I should've had material prepared and I explained to you then that unfortunately my secretary had gone home ill, there was nobody in the office to prepare it and I had insufficient time to prepare it myself as well as attending in Court."*

(k) The practitioner's evidence and submissions were false or misleading, in that the practitioner knew at the time of her evidence and submissions on 21 February 2001 that:

(i) her secretary had prepared [that is, typed] the letter to Justice White of 16 February 2001;

(ii) her secretary had signed the letter to Justice White of 16 February 2001;

(iii) her secretary had sent the letter of 16 February 2001 to Justice White by facsimile;

(iv) she, the practitioner, had not prepared [that is, typed] the letter to Justice White of 16 February 2001;

(v) she, the practitioner, had not signed the letter to Justice White of 16 February 2001;

(vi) she, the practitioner, had not sent the letter of 16 February 2001 to Justice White by facsimile;

(vii) her secretary had been in attendance at the practitioner's office on the morning of 16 February 2001 when the practitioner herself attended at her office;

(viii) her secretary had been in attendance at the practitioner's office on 16 February 2001 at the time of preparation and forwarding the letter of 16 February 2001 to Justice White;

(ix) her secretary had not gone home sick at the time of the practitioner's attendance at her office on 16 February 2001.

Charge 9

In the alternative to Charge number 8, the practitioner gave evidence before and made submissions to, the Honourable Justice Atkinson of the Supreme Court during the course of the hearing of a contested application in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which evidence and submissions were given and made recklessly, not caring whether the evidence or submissions were true or false.

Particulars

(a) The Society repeats and relies upon the evidence and submissions of the practitioner as particularised in paragraphs 8(a) to 8(k) of Charge 8.

(b) At the time at which the said evidence was given and the said submissions were made, the practitioner had no reasonable grounds for giving the evidence and making the submissions.

Charge 10

The practitioner, as solicitor for SH Pty Ltd, wrote to HG, solicitors for OSD Pty Ltd, concerning the matter of *SH Pty Ltd v. OSD Pty Ltd*, which letter contained statements that were, as the practitioner well knew, false or misleading.

Particulars

(a) At about 6.20 pm on 15 February 2001 and again at about 9.15 am on 16 February 2001, HG, solicitors for the respondent, OSD Pty Ltd, sent letters by facsimile to the practitioner.

(b) On 19 February 2001 the practitioner wrote to HG in the following terms:

> *"We apologise for contacting your client, however, as your facsimiles were not forwarded until after 6.00 pm on Friday 15 February when our office is closed and our DE was in Court on Friday 16 February and did not attend at the office, they were not read by our DE until today."*

(c) The said statement was false or misleading, as in truth, as the practitioner knew at the time of her statement that she had attended her office on 16 February 2001.

(d) The said statement was also false or misleading as the practitioner knew, prior to her attendance at Court on 16 February 2001, that HG were acting for the respondent, having by then been aware of either, or each of, their letters of 15 February 2001 and 16 February 2001.

(e) The practitioner's said letter of 19 February 2001 further said:

(i) *"It is understood that the original deposit slip was inadvertently forwarded to your client attached to the original of the facsimile. Please have your client return such..."*

(ii) *"Our client's position remains as stated in correspondence of 9 February 2001, that the rent was payed* (sic) *to your client's account 68565255 and such is confirmed by the deposit slip attached."*

(f) The said statements were false or misleading, as the practitioner knew at the time of her statements that:

(i) the rent the subject of the correspondence had not been paid to HG's client's account;

(ii) the deposit slip attached to the practitioner's correspondence of 9 February 2001 did not relate to the payment of the said rent to HG client's account; and

(iii) the original deposit slip pertaining to the purported deposit of the rent had not been forwarded to HG's client.

Charge 11

In the alternative to Charge number 10, the practitioner, as solicitor for SH Pty Ltd, wrote to HG, solicitors for OSD Pty Ltd, concerning the matter of *SH Pty Ltd v. OSD Pty Ltd*, which letter contained statements that were made recklessly, not caring whether the statements were true or false.

Particulars

(a) The Society repeats and relies on the statements of the practitioner as particularised in paragraphs 10(a) to 10(f) of Charge number 10.

(b) At the time at which each of the said statements were made, the practitioner had no reasonable grounds for making the statements.

Charge 12

The practitioner wrote to the Queensland Law Society Incorporated ("the Society") concerning the matter of her appearances before the Honourable Justice Atkinson of the Supreme Court on 16 February 2001 and 21 February 2001, which letter contained representations that were, as the practitioner well knew, false or misleading.

Particulars

(a) On 9 May 2001 the Society wrote to the practitioner enclosing a copy of the judgment of the Honourable Justice Atkinson delivered in the matter of *SH Pty Ltd v. OSD Pty Ltd* on 21 March 2001, and requested the practitioner's response to a number of matters raised by the Society in its letter.

(b) By letter dated 25 June 2001 the practitioner replied to the Society. By her response to the Society the practitioner represented that:

(i) the rent the subject of the proceedings before Justice Atkinson had been paid to an account (being either the account of the respondent landlord or another account) in February 2001;

(ii) the copy partial deposit slip copied upon a letter of 9 February 2001 and produced by the practitioner to the Court on 16 February 2001 and 21 February 2001 related to such payment; and

(iii) the original deposit slip pertaining to such payment had been forwarded to the respondent landlord.

(c) The practitioner's response was false or misleading in that the practitioner knew, on 9 June 2001 that:

(i) the February 2001 rent the subject of the proceedings before Justice Atkinson had not been paid either to the respondent landlord's account, or to any other accounts;

(ii) the rent not having been paid, the copy partial deposit slip produced by the practitioner to the Court on 16 February 2001 and 21 February 2001 did not relate to the payment the subject of the proceedings before Justice Atkinson; and

(iii) the original deposit slip pertaining to the said payment had not been forwarded to the respondent landlord.

Charge 13

In the alternative to Charge 12, the practitioner wrote to the Queensland Law Society Incorporated ("the Society") concerning the matter of her appearances before the Honourable Justice Atkinson of the Supreme Court on 16 February 2001 and 21 February 2001, which letter contained representations that were made recklessly, not caring whether they were true or false.

Particulars

(a) The Society repeats and relies on the representations of the practitioner contained in paragraphs 12(a) to 12(c) of Charge number 12.

(b) At the time at which each of the representations were made, the practitioner had no reasonable grounds for making them.

Charge 14

That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, during the period November to December 2001, in breach of her duty as a solicitor, the practitioner, as solicitor for SEQCM, made various representations to her client concerning the matter of a debt recovery from X, which representations were, as the practitioner well knew, false or misleading.

Particulars

(a) On 13 November 2001, the practitioner wrote to her client, SEQCM concerning the status of the clients claim for recovery of certain overdue body corporate levies.

(b) By that letter the practitioner:

(i) provided her client with a trust ledger statement in relation to the matter, by which statement the practitioner represented that a trust account cheque had been drawn in the sum of $161.50 for filing and bailiff fees and debited to the clients trust ledger on 23 July 2001;

(ii) further represented, by the said trust ledger statement, that the said trust account cheque in the sum of $161.50 had been re-credited to the trust ledger on 7 November 2001;

(iii) represented to her client that as she (the practitioner) had received confirmation from the Ipswich Magistrates Court that a plaint forwarded to the Court for filing had not been received and filed in the Court, and hence had not been served, she had re-credited the filing fee to the client's trust ledger;

(iv) provided her client with a final memorandum of costs in relation to the matter by which the practitioner represented that work undertaken by her on behalf of her client included:

A. making a demand upon the debtor enclosing draft plaint;

B. writing a letter to court enclosing plaint for filing;

(c) The said representations were false or misleading, as the practitioner knew, at the time of her representations, that;

(i) she had not drawn a trust account cheque in the sum of $161.50 for filing and bailiff fees on 23 July 2001, or at any other time in relation to this matter;

(ii) she had not re-credited the said sum of $161.50 to the trust ledger on 7 November 2001, or at any other time in relation to this matter;

(iii) she had not made a demand on the debtor enclosing the draft plaint;

(iv) she had not written a letter to the Court enclosing the plaint for filing;

(v) she had not, at any time material to giving effect to her client's instructions, prepared a plaint in respect of her clients claim.

(d) On 4 December 2001, the practitioner's client collected its file from the practitioner. The practitioner represented, by reference to the contents of the said file, that:

(i) by letter dated 27 April 2001, she had made demand on the debtors, Ferdinand, enclosing a copy of the claim to be filed and served if the demand was not met;

(ii) by letter dated 19 July 2001 she had written to the Ipswich Magistrates Court enclosing the claim for filing and service.

(e) the said representations were false or misleading, as the practitioner knew, at the time of delivery up of the file to her client that:

(i) she had not made demand on the debtors by letter dated 27 April 2001, enclosing a copy of the claim to be filed and served if the demand was not met;

(ii) she had not written to the Ipswich Magistrates Court on 19 July 2001 enclosing the claim for filing and service;

(iii) she had not either, as at 27 April 2001, or as at 19 July 2001, prepared a plaint in respect of her client's claim.

Charge 15

In the alternative to charge 14, during the period November to December 2001, the practitioner, as solicitor for SEQCM, made various representations to her client concerning the matter of a debt recovery from X, which representations were made recklessly, not caring whether they were true or false.

Particulars

(a) The Society repeats and relies upon the representations of the practitioner contained in paragraphs 14(a) to 14(e) of charge number 14.

(b) At the time at which each the representations were made, the practitioner had no reasonable grounds for making them.

Charge 16

During the period October to November 2001, the practitioner made various representations and statements to the Queensland Law Society Incorporated ("the Society") during the course of the Society's investigation of the matter of a complaint against the practitioner by MM on behalf of SEQCM, which representations or statements were, as the practitioner well knew, false or misleading.

Particulars

(a) By letter dated 15 October 2001, the Society wrote to the practitioner, enclosing a copy of a letter of complaint dated 11 October 2001 from MM to the Society, and asked the practitioner to comment on the concerns raised in the letter;

(b) A concern of MM raised in the said letter of complaint was the practitioners failure to reply to a letter by MM to the practitioner dated 11 September 2001 by which MM had requested the practitioner to close her file in the matter, forward MM copies of any correspondence and documents in respect of the matter, as well as an itemised account and refund of monies paid into the trust account;

(c) By letter to the Society dated 24 October 2001, the practitioner represented, *inter alia*:

> *"In any case in relation to MM's matter, the only contact I have had recently from MM in relation to her dispute as to outstanding Body Corporate fees was a message to indicate that the relevant party had declared bankruptcy and therefore to do nothing further on the file. Such notification was by way of telephone message not any correspondence requesting documentation or file material or seeking any balance funds held in trust.*

(c) The said representation was false or misleading, as the practitioner knew that she had received the client's said letter of 11 September 2001 at the time of her letter to the Society of 24 October 2001;

(d) On or about 23 November 2001, the practitioner informed an officer of the Society who had undertaken an inspection of, and obtained a copy of, the transaction file, that a copy of the plaint in relation to the matter was not available, as the practitioner had forwarded it to her client;

(e) The said statement was false or misleading as the practitioner knew at the time of the Society's inspection:

- that she had not forwarded a copy of the plaint to her client;
- that she had not prepared a plaint in respect of her clients claim.

Charge 17

In the alternative to charge 16, during October to November 2001, the practitioner made various representations and statements to the Queensland Law Society Incorporated ("the Society") during the course of the Society's investigation of a matter of a complaint against the practitioner by Ms MM on behalf of SEQCM, which representations or statements were made recklessly, not caring whether they were true or false.

Particulars

(a) The Society repeats and relies on the representations and statements of the practitioner contained in paragraphs 16(a) to 16(f) of charge number 16.

(b) At the time at which each of these representations or statements were made, the practitioner had no reasonable grounds for making them.

Charge 18

That the practitioner is guilty of unprofessional conduct or practice, in that, in relation to the conduct of her practice:

(i) She has been guilty of undue delay; and/or

(ii) She has been guilty of a failure to maintain reasonable standards of competence or diligence.

Particulars

(a) In the matter of a complaint by MM on behalf of SEQCM, the practitioner:

(i) was responsible for undue delay in acting upon the clients instructions from time to time in relation to the matter;

(ii) failed to respond to telephone calls received from her client and otherwise failed to keep her client sufficiently informed in relation to the conduct of the matter.

Appearances

(a) For the Council of the Queensland Law Society:
Mr Tony Rafter of Counsel instructed by Clayton Utz, Solicitors

(b) For the practitioner:
Mr Wilson of Counsel

Findings and Orders

The Tribunal orders that paragraphs 8(k)(i) and (iv) of the Notice of Charge be struck out.

The Tribunal finds the following charges proved:

Charge 1 (in respect of all matters particularised except 1(d)(iv)(G)

Charge 2

Charge 3 (in respect of all matters particularised except those particularised in 3(j) & 3(k))

Charge 4 (but only in respect of the matters particularised in paragraphs 3(i), 3(j) & 3(k))

Charge 5

Charge 7

Charge 8 (but only in respect of the matters particularised in 8(a), 8(b) & 8(c) of the particulars to that Charge)

Charge 9 (but only in respect of the matters as particularised in paragraphs 8(f), 8(h) & 8(k))

Charge 10 (but only in respect of the matters particularised in paragraph 10(f))

Charge 11 (but only in respect of the matters particularised in paragraphs 10(c) and 10(d))

Charge 12

Charge 15

Charge 17

Charge 18

The Tribunal dismisses Charges 6, 13, 14 and 16.

The Tribunal finds that those charges set out in the Tribunal's reasons below constitute both professional misconduct and unprofessional conduct or practice.

The Tribunal has found that Charges 1, 2, 3, 5, 7, 8, 10, and 12 constitute professional misconduct and the balance of charges found against the Practitioner amount to unprofessional conduct or practice.

The Tribunal Orders that the name of the Practitioner be struck from the Roll of Solicitors kept by the Registrar of the Supreme Court of Queensland.

The Tribunal further orders that the Practitioner pay the costs of the Queensland Law Society Incorporated of these proceedings, including the costs of the recorder and of the Clerk, as assessed by Hickey & Garrett Cost Assessors within a period one month from the date the assessment is provided to the Practitioner.

Reasons

The Nature of the Proceedings

1. This disciplinary proceeding is not litigation between parties in the ordinary sense. The Tribunal is a statutory Tribunal with an important public function to perform. It has a statutory obligation to state its findings on material facts.

2. The Courts have recognised that the end objective of the disciplinary system of which the Tribunal is an integral part is not punishment of the Practitioner but the protection of the public. Lengthy reasons are not necessary, but it is appropriate that the Tribunal express the reasons for its findings of fact.

Onus of Proof

3. Unprofessional conduct or practice is described at section 3(b) of the *Queensland Law Society Act* 1952 as being serious neglect or undue delay or failure to maintain reasonable standards of competence or diligence. Professional misconduct is conduct that would be reasonably be regarded as disgraceful.

4. A finding of professional misconduct has potentially very serious consequences for a Practitioner. For that reason we should adopt a higher standard of proof than the ordinary civil standard. We will adopt the standard established by the *Brigginshaw* test, in respect of the charges of professional misconduct.

5. Unprofessional conduct or practice is less serious, but still involves a finding of a failure to meet the quite high professional standards expected of a solicitor. A finding of unprofessional conduct or practice also has potentially very serious consequences for a Practitioner. We will adopt the standard established by the *Brigginshaw* test, in respect of the charges of unprofessional conduct or practice.

Credit Issues

6. There were 16 charges brought against the Practitioner. Before addressing each of the charges in turn it is appropriate that the Tribunal make some findings in relation to credit so far as the Practitioner is concerned. Mr Rafter of Counsel on behalf of the Society submitted to the Tribunal that this was a matter in which credibility issues loom large. Mr Wilson of Counsel on behalf of the Practitioner urged us not to fall into the trap of adopting findings on credit made by the Honourable Justice Atkinson in the proceedings before the Supreme Court in respect of which many of the charges relate. We propose to make our own determination on questions of credit which we think arise on the evidence which was adduced before the Tribunal.

7. The Practitioner affirmed an affidavit which was received in evidence before us and the Practitioner was cross examined by Mr Rafter. Other witnesses gave evidence which is relevant to a determination of the Practitioner's credit.

Evidence of Other Witnesses

8. JE in her evidence (when referred to the letter addressed to the Supreme Court on 16 February 2001) stated that if she was not directed specifically to fax that letter and its enclosures, she would not have faxed them. She would need to check whether it was a first draft.

9. Her evidence was that had she seen the letter near the fax machine she would have looked at it, questioned "What is this?" and left it there or put it on her desk and waited until the "owner" instructed her to do something. She would not sign and fax off documents, if not specifically asked to do so.

10. Her evidence was that she did not type the letter of 9 February 2001 and she explained in considerable detail the difference between her typing and the typing of the Practitioner.

11. Her evidence was that if she was given $1,500.00 (which was a lot of money), she would have preferred to count it at the office first. If she was asked to bank it, she would have banked it and brought the receipt back to the office. Even if the respondent was on the phone she would slip in quietly and pop the receipt on her desk.

12. If the respondent was not in the office, she would place it in the "in" tray at the front reception office. JE presented to the Tribunal as an honest witness.

13. She stated that her employer was quite generous in allowing time off and when questioned about her whereabouts on 16 February, JE readily gave evidence that as she was the only secretary, she would collect mail.

14. During the time of her pregnancy she was hungry all the time and she would pop out to get something to eat or she would have doctors' appointments or she was ill from time to time but she maintained that she would not have sent the material to the Supreme Court unless requested to do so.

15. She firmly indicated that she did not take the $1,500.00 when asked under cross-examination by Mr Wilson.

16. She admitted in evidence that she believed that she was invading the respondent's privacy when she read the judgment of Her Honour and she said "I didn't want her to know that I had been so rude." She was asked in cross-examination why she had left her previous employment in the bank and her answer was that "she was treated as a number" and wanted to change her career.

17. Her evidence was that honesty was a big issue for her. She liked being thought of as a trustworthy person. The respondent trusted her with cash.

18. She said that the Practitioner would fill out the deposit slips and give them to her. The Practitioner attended to the paperwork and she did the errand. She admitted that on 16 February she may not have been in attendance all day but she recalls (after reading the judgment) that she did not go home sick on 16 February. She did not specifically recall being in the office in the morning.

19. JE presented as a slightly nervous witness but this was understandable in the circumstances. However, she listened to the questions put to her by both Counsel and it was apparent to us that she was doing her very best to answer the questions of both Counsel as honestly as she could. We accept her evidence as truthful.

20. The evidence of AJR, the bank officer, was important. She was absolutely confident that the sum of $1,500.00 did not go into any of the bank accounts nor was there a deposit of that sum that went elsewhere. She gave detailed evidence as to enquiries that were made at the Enquiry Centre and that all of the vouchers were physically checked. AJR presented as a competent bank officer. Her manner in the witness box was straightforward, direct and confident. She presented as a witness of truth.

Tribunal's Findings on the Credit of the Practitioner

21. Mr Rafter suggested in his submissions that there were a number of pointers for the Tribunal in determining the issues of credit.

22. The first issue raised by Mr Rafter was in relation to the facsimile of 9 February 2002 which was the document at page 289 of the materials bundle which was provided to us at the outset of the hearing. Mr Rafter suggested that evidence on the first day of the Tribunal hearing showed up the Practitioner as unreliable in relation to this issue.

23. The Practitioner's evidence was that JE had typed up that document and signed it. It was part of the Practitioner's case that JE had created the receipt at the foot of the page. This would have involved a very deliberate and cunning act on JE's part.

24. JE was subsequently recalled and in cross-examination gave explanation to the Tribunal about photocopying receipts. The receipt being placed on the glass and the letterhead to the side of the photocopier and that the machine took in the letterhead manually and the receipt was transposed onto the letterhead. She said she would always check if it photocopied correctly. When shown a copy of the partial receipt shown at page 57 of the materials bundle, JE responded, "I have never produced a receipt like that." The evidence given by JE is plausible, and we accept it as true.

25. The evidence of the respondent was that she did not speak to JE about the fact that W Group were saying they did not receive the payment. She said that there was a message left that they had received payment. The respondent said it was a written message on phone messages four to a sheet which are perforated. The respondent's evidence was that JE had indicated that the rent had been received. Mr A in evidence said that he did not leave that message. The respondent said that the message was torn off and put on a spike in the general system. The respondent gave evidence, "I do not recall ever seeing the receipt of the 2 February." The Tribunal's finding is that there never was an original receipt dated 2 February 01 for $1,500.00. We reject the Practitioner's evidence to the contrary.

26. However evidence before the Tribunal clearly establishes that the facsimile of 9 February 2002 was sent from the Practitioner's home facsimile machine at 9.18am on that morning. The Practitioner was unable to explain why the letter of 9 February 2001 had been faxed from her home. On the Practitioner's account then it would have been necessary for the Practitioner to have gone into her office that morning, asked JE to make up the facsimile, obtain it from JE then go home to her home and fax the document from there without noticing that the made up receipt had not been properly copied on the facsimile document, and that the date of the receipt which would have been quite crucial was incomplete and incomprehensible.

27. We think it most unlikely that the events would have occurred in this fashion and we agree with Mr Rafter's submission that the Practitioner's evidence on this issue shows up the Practitioner as an unreliable witness who was more intent on giving evidence to this Tribunal which favoured her position rather than on concentrating telling the truth.

28. The second issue raised by Mr Rafter was that it was a remarkable coincidence that so many important documents seemed to go missing and that there were various documents which the Practitioner sent which did not arrive at their destination and various documents which were sent to the Practitioner that likewise did not make it to their destination. Examples were the deposit slip of 1 August 2000 which Mr A said in evidence had not arrived, the deposit slip of 2 November 2000 which likewise had not turned up at the W Group office according to Mr A. A further example was the letter of 5 December 2000 from W Group to the Practitioner which the Practitioner said she did not receive and a further letter of 8 December 2000 which the Practitioner would have us believe was not received by her.

29. Then of course there was the $1,500.00 cash which went missing. The Practitioner was at pains to point out to the Tribunal that she collected the cash from takings of her other business, the stock feed business, over a period of time.

30. On further cross-examination the Practitioner was questioned about $1,500.00 cash and what denominations they were in. Her response was she did not know. She said that in the shop they took relatively small transactions of $50.00 and it was very likely that it was mixture of $50s and $100s, $20s and $10s. "Some days when I went to pick up the takings there were $100.00 notes other days there were a lot of $5.00 notes." Her evidence was that she had placed a rubber band around the sum of money with the deposit slip and that she had been carrying around that sum of money with the deposit slip for a couple of days. It would have been a substantial wad of cash that the Practitioner was carrying around with her. We reject as untruthful the assertion of the Practitioner that she carried around with her that wad of cash.

31. Then there was the letter of 9 February 2001 which Mr A said had not been received by W Group. Then there was the deposit slip with that letter which had not been received by W Group. Further there were the faxes from HG which the Practitioner accepted had come into the office but which she had not seen until later. Then there was correspondence from MM, namely the Practitioner's letter of 18 February 2001 to MM and the letter to the Magistrates Court which apparently did not arrive there and MM's letter to the Practitioner. Mr Rafter submitted that there were just too many coincidences and that this number of coincidences was inexplicable and tendered to suggest that the Tribunal could not rely on the Practitioner's evidence.

32. We are prepared to accept that the Practitioner was truthful in her evidence about the faxes from HG, that is they may well have come into the office and she may well not have seen them before making her submissions to Justice Atkinson on the issue, but we find that there was simply too many instances of documents going missing as referred to in the submissions of Mr Rafter and which have been summarised here. Not only were documents apparently sent but not received from the Practitioner's office, but there were documents that the Practitioner apparently did not receive. In the circumstances these unexplained matters leave us in serious doubt about the truthfulness of the evidence given by the Practitioner on these issues. Then there was the issue of the fax to the Court. The Practitioner's evidence was that JE would have found the document left near the fax machine or on the fax machine, sign it, put all the various odds and ends necessary in terms of the enclosures and find them and fax them off to the Court without specific instructions to do so from the Practitioner. However there was evidence from the Practitioner that the system was that JE would simply fax off anything that was left there on a fax header apparently ready to be sent, and so we cannot place any reliance on this issue in determining the credit of the Practitioner.

33. Mr Rafter submitted that the Practitioner's failure to chase up JE on an on-going basis about the deposit having been made and the deposit slip indicates that her evidence was simply not truthful. Mr Rafter submitted that it would have been a logical first point of call to make an enquiry of JE but for the Practitioner Mr Wilson submitted that at that stage of events the Practitioner did not suspect JE of stealing the money and so it is totally explicable as to why that question was not asked. Mr Rafter suggested that the only reason the Practitioner did not ask the question was that she knew that she never gave JE the money in the first place. The respondent was asked in cross-examination "When by 14 February the W Group was still claiming they had not got the money, why had you not followed it up with JE?" and the response was "I had no reason to speak to JE." She was asked further "What about the receipt?". Her answer "No, I was satisfied that it had been sent. I trusted JE she had larger sums of money than that previously." In truth the real reason why she did not chase up JE was because she never gave JE the money at all.

34. Mr Rafter submitted that on the day the Practitioner was in Court she was there until 4.30. It was unlikely that she could have got back to Beaudesert and expect JE to be waiting there with the receipt for $1,500.00. We do not think that this is determinative of the credit of the Practitioner. The Practitioner gave some evidence in relation to the letter to HG of 19 February 2001 which was page 332 of the record before us. She there apologised for contacting HG's client directly and said that she had not "attended at the office" until the 19th of that month. The Practitioner in her evidence before us gave a definition of what she meant by the word "attend". In fact she accepted that she had been there on that morning at the office but that she had not "attended" at the office. We think the only explanation for that rather forced definition of the word "attend" was that the Practitioner was attempting to protect her position in the evidence she was giving, rather than in concentrating on telling the truth. Her evidence on that issue convinces us that we cannot rely on her evidence as truthful. Mr Rafter submitted that in the Practitioner's evidence and submissions to the Supreme Court (see her affidavit paragraph 6(i)) show her up as an untruthful witness. Again we are not convinced that her evidence on that issue shows her up as an untruthful witness alone.

35. The most damning evidence given by the Practitioner before this Tribunal was her evidence in relation to her visits to the National Australia Bank branch in the Queen Street Mall near David Jones. On the first day of her evidence before us the Practitioner gave evidence that in the week leading up to the date of her alleged handing of the money to JE she had been carrying the cash around with her. Her evidence was that in some days earlier in that week she had attended at a Court hearing in Brisbane (she could not recall any other details of the Court at which she had been appearing) and on one of those days during an adjournment she had walked down to the Queen Street Mall, gone into the bank branch in an attempt to pay the monies into the W Group account but that she had been dissuaded by the length of the queues at the bank and could not pay the money into the bank account in the time available and that she had returned to Court. In his submissions Mr Rafter described that evidence as a "telling lie". Ms B's evidence shows that at the time when the Practitioner allegedly went to the bank to attempt to make the deposit the branch had closed and was no longer a National Bank branch and that it was in fact a Country Road store.

36. In her evidence before us on the second day of the hearing the Practitioner indicated that she had been down to check the National Australia Bank branch in the Mall next to David Jones and that it was still functioning as a bank branch. Her evidence was that she had checked that morning, that is the morning of her second day of evidence. Ms B's evidence is at direct odds with that evidence. The only explanation is that the claimant was untruthful in her evidence to us that she had been there that morning and seen that it was still operating as a bank branch. In the ultimate, after counsel for both parties checked, we understood to be common ground that although there was an automatic teller machine and a National Bank sign on the outside of the premises that the premises were in fact a Country Road store and not a bank branch. We are firmly of the view that on this issue of her attendance in the Mall during 2001 and in respect of her evidence about her attendance there on the morning of the second day of the hearing before us, the Practitioner has given deliberately false evidence. The only explanation is that she has done so in an attempt to protect her own position but by doing so she has achieved the opposite. On this evidence the Practitioner has been shown to be a person who is prepared to knowingly give false evidence on affirmation.

37. Mr Rafter suggested in relation to the letter of 5 December 2000 which is in the record at page 257 and which was before us as exhibit 6 also demonstrates her unreliability as a witness. We are not prepared to make a finding on credit based on that issue alone.

38. Mr Rafter submitted that the Practitioner's evidence was shown to be unreliable in relation to the issue of whether Mr N sent his own faxes. The respondent's position shifts. There is a lack of reliability in her evidence. Mr N does not send faxes and the transaction report of 16 February 01, the orthopaedic specialist, is tended as Exhibit 8 and it may be he did on his personal injury files. It is also conceded that most likely it may have been the secretary and the evidence before the Supreme Court was not in the office on the morning of 16 February. Mr Rafter also refers to the Practitioner's apparently shifting positions in her first appearance before Justice Atkinson.

39. The evidence given by the respondent in the transcript between herself and Her Honour Justice Atkinson and her letter to the Law Society and the evidence at the Tribunal in relation to whether her secretary was at the office or not on 16 February was inconsistent and her position kept changing. On recanting, the respondent seemed to embrace her comments made in the letter to the Law Society that the secretary was there. In the transcript before Her Honour, "I don't recall seeing her."

40. During further cross-examination, Exhibit 8 being a transaction report was presented to the respondent. It showed that at 9.03 am on 16 February 2001 a facsimile had been forwarded from her office to a number. The respondent had given evidence earlier that the "Secretary would do the faxing. She would do the large majority." When she was asked whether Mr N did faxing her response was, "I did not ask him to do any faxing. He was not engaged to do faxing. He had small debt matters, settlement conferences or do some research." Exhibit 8 being the transaction report showed that someone sent the fax at 9.03 am on 16 February 2002 and the respondent was asked it may be an indication that JE was in the office that morning. The respondent's answer was, "Mr N had some PI files and he was doing work on them. He might send a letter to the doctors for appointments."

41. It was suggested that the respondent may have sent the fax and when she went to the fax machine she would have become aware of the fax from HG. Exhibit 9 were the two letters from HG dated 15 February and 16 February showing the date stamp of 16 February. The respondent in her evidence indicated that it did not state the time. There is evidence in the Supreme Court that the Practitioner gave that she signed the letter to the court on 16 February. Clearly that was not the position as was borne out by the transcript.

42. There were shifting positions throughout her submissions in the Supreme Court when Her Honour asked her had she served the other side. Her answer, "Yes, your Honour." The position moved to reference to being an immediate injunction and the evidence of Mr A is that there was no indication that the matter was going to court that day. The respondent had spoken to Mr A that very morning and did not tell him.

43. Mr Wilson on behalf of the Practitioner submitted on these issues of credit the Practitioner was probably guilty of using language somewhat loosely but he submitted that her evidence was on some occasions was honest but may be wrong.

44. For the reasons stated, we have determined that the Practitioner cannot be accepted as a witness of truth. In those circumstances where there is a conflict between the Practitioner's evidence and the evidence of other witnesses we propose to accept the evidence of those other witnesses and to reject the evidence of the claimant. We now turn to the various charges.

Reasons for Decision – Charge 1

45. Justice Atkinson in her judgment delivered on 21 March 2001 stated "An injunction may be granted on an ex parte application in circumstances of urgency which require immediate action, where service on the respondent, or even notice of the application is impossible or impractical. In such circumstances, an applicant bears what was referred to by Byrne J. in *Re Griffiths* as a "substantial burden". In that case His Honour held:

> *"An Applicant who proceeds ex parte bears a substantial burden in South Downs Packers, Connolly J, Campbell CJ agreeing, said at 565-566, "It is the duty of a party asking for an injunction or indeed for any order ex parte to bring under the notice of the court all facts material to the determination of his right to that relief..." Uberrima Fides is required and the party inducing the court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts informing its judgment is unfulfilled and the order so obtained must almost invariably fall."*

This is a demanding responsibility. An applicant may be unwilling to accept a duty to make full and frank disclosure of the material facts. The duty is not restricted merely to facts actually known. In *Brinks Mat Ltd v. Elcombe* (1998) 1 WLR 1350, Ralph Gibson LJ said at 1356:

> *"The applicant must make proper enquiries: The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries."*

46. The respondent, in this case, only provided to the court her own correspondence being the letter dated 9 February 2001 addressed to the W Group. The letter of 14 February 2001 addressed to the W Group of Companies and her letter of 15 February 2001 addressed to the W Group of Companies.

47. The respondent did not place before the court any of the correspondence that she had received from the other side. Some of that correspondence was critical. There was the letter from the W Group of Companies to the Practitioner dated 5 February 2001 which advised that they had not received payment to the bank account. There was a further letter from the W Group of Companies addressed to the Practitioner dated 7 February 2001 which read:

> *"Dear D,*
>
> *Rent for the month of February 2001 has not been deposited to our account by the due date. We hereby terminate your tenancy in respect of the premises. We require vacant possession on 15 February 2001.*
>
> *Yours faithfully,*
> *Mr A... On behalf of OSD Pty Limited."*

48. There was a further letter from W Group to the Practitioner dated 14 February 2001 which read:

> *"Dear D,*
>
> *I refer to your fax dated 14 February 2001 and advise that rent for the month of February 2001 has not been deposited to our account. In any event we have set out our position in our letter dated 7 February 2001.*
>
> *Yours faithfully,*
> *Mr A... On behalf of OSD Pty Limited."*

49. Initially in her evidence the respondent denied receiving the correspondence dated 14 February 2001 from the W Group of Companies but after cross-examination conceded that her letter dated 14 February 2001 and written on letterhead, DRE & Associates addressed to the W Group and sent by facsimile was sent at approximately 2.43 pm and the facsimile was received from OSD Pty Ltd at 2.15 pm.

50. In earlier evidence, the respondent stated that she had not sighted the letter of 14 February from the W Group and that it must have came into her store. Exhibit 7 was the letter from W Group to the Practitioner and showing the facsimile report.

51. When it was suggested to the respondent that her facsimile of 14 February sent at 2.43 pm to the W Group was in immediate response to the letter that she received from the W Group forwarded by facsimile and dated 14 February 2001 showing from the facsimile report that it was faxed at 2.15 pm. Her response was that she was not positive if it was an immediate response.

52. The respondent had also stated in evidence that she had not seen the letter from the W Group of Companies addressed to her and dated 5 December 2000 which was tended as Exhibit 6 which stated *inter alia*, paragraph 2:

> *"We hereby advise that we now wish to terminate this monthly arrangement and such we are giving one (1) month's notice for you to vacate the premises. We require vacant possession 5 January 2001..."*

53. Towards the conclusion of day one of the hearing the respondent produced her file and this letter was tended as Exhibit 6 on day two of the hearing. The respondent maintained that at the time that she wrote her letter on 19 December, she had not seen that letter from the W Group dated 5 December 2000.

54. The respondent admitted the particulars set out in paragraphs 1(a), 1(b) & 1(c) and admitted that she had not brought the court's attention to the history of the dealings between the parties other than produce her three letters and maintained that it was not relevant for the Judge to be aware of those transactions on granting the injunction. That is not accepted by the Tribunal.

55. The applicant in the application before Justice Atkinson was the Practitioner's own company. We are satisfied (on the *Brigginshaw* test) that the Practitioner deliberately kept from the Court material facts that she had a duty as solicitor to make known to the Court. These are the facts referred to in paragraphs 1(d)(i), (ii), (iii) & (iv)A, B, C, D, E & F of the Notice of Charge. By deliberately keeping those matters from the Court, the Practitioner sought to unfairly advantage the position of her own company which was the applicant before Justice Atkinson.

56. The Tribunal was satisfied that the respondent may not have had the opportunity of reading the facsimile from HG to the Practitioner dated 15 February 2001 (that is the document referred to in paragraph 1(d)(iv)(G) of the Notice of Charge) and thereby is not guilty of bringing that correspondence to the notice of the court.

Findings of the Tribunal – Charge 1

57. We find that in the respect referred to, the Society has proved the charge against the Practitioner that on 16 February 2001, in breach of her duty as a solicitor, the Practitioner failed to make a full and frank disclosure to the Supreme Court of all facts material to the determination of an ex parte application brought by the Practitioner for an interim injunction in the matter of *SH Pty Ltd v. OSD Pty Ltd*. Given the circumstance as we have found them, the conduct amounts to professional misconduct.

Reasons of the Tribunal – Charge 2

58. The Practitioner admitted the truth of the matters set out in particulars 2(a) to 2(e) of the charge, but denied the matters set out in particulars 2(f) & 2(g).

59. She denied, therefore, before us that when she appeared before Justice Atkinson she knew that the rent had not been paid and that the deposit slip attached to the letter of 9 February 2001 did not relate to the payment of rent the subject of the application.

60. She also denied before us that her actions have misled the Court or be likely to have misled the Court.

61. The respondent's case is that there was theft by her former employee. The respondent's case is that the employee stole the money, created the deposit slip, disposed of the fax sheet, falsely wrote out the message with words to the effect that the rent had been paid and the Practitioner in her letter dated 8 February 2001 and written on the letterhead for XXX and faxed to the W Group she states *inter alia*: "The rent was paid, you even left a message on Tuesday confirming rent received."

62. The Tribunal is of the view that the Practitioner's evidence is unreliable. The Tribunal accepts the evidence of JE that she did not steal the money. The letter dated 9 February 2001 and on the letterhead for XXX forwarded by facsimile to the W Group which has the attached deposit slip was faxed to the W Group at 9.18 am on 9 February 2001 from the facsimile number... which in evidence, the respondent stated was her home facsimile number.

63. The Practitioner failed to notice the partial document and has not given a satisfactory explanation as to why she returned home to fax the letter and the partial deposit slip as opposed to why not fax it from the office itself.

64. The evidence from the Practitioner is the fax to the Supreme Court dated 16 February 2001 was signed and faxed to the court by the secretary and that she did so without specifically being asked to do so. The secretary gathered together the enclosures, faxed the enclosures to the Supreme Court with the letter dated 16 February 2001.

65. The Practitioner in her letter to the Queensland Law Society dated 25 June 2001 states: "I was sure in the rush I had signed the letter and put it on the fax to Justice White, however it was not until later in court on 21 February that I realised that the secretary had signed and hence would have faxed the letter to the court. I honestly do not remember speaking to her until late in the afternoon on the 16th when I rang to have someone send a letter to the landlord and she answered the phone. After the hearing on 21 February I was confused myself as to her signature on the letter to the court and asked her about it. She said she had come in late. I do not recall whether she had said that she was ill or had been at the doctor's for a checkup. I had come running around to the mail room to fax the letter in a fluster and had just thrown it at her and asked her to fax it, ran back in and grabbed the draft order, back to grab the fax and out the door with a message to cancel all appointments and reschedule."

66. The Tribunal accepts as a primary fact that it was the respondent who created the letter of 9 February 2001 and the partial receipt.

67. There is no other explanation for the Practitioner's production of those documents but that they were a deliberate attempt to mislead.

68. The Practitioner used those documents dishonestly produced by her as the basis of her ex parte application before Justice Atkinson.

69. When she relied on those documents before Justice Atkinson, the Practitioner knew that the subject rent had not been paid to the W Group.

70. The Practitioner's reliance on those documents before Justice Atkinson was a deliberate and highly improper attempt to mislead the Court into thinking that the subject rent had been paid to the W Group.

71. The Practitioner sought to mislead the Court into thinking that the applicant came to the Court seeking relief with clean hands, when the applicant well knew that the applicant (her own company) did not have clean hands.

72. We are entirely convinced on the standard of proof required in *Brigginshaw* that the Practitioner deliberately sought to mislead the Court by relying on her fax of 16 February 2001.

Finding of the Tribunal – Charge 2

73. The Practitioner is guilty in respect of charge 2 that on 16 February 2001, in breach of her duty as a solicitor, the Practitioner relied upon the contents of a facsimile to the Supreme court dated 16 February 2001 in support of an ex parte application before the Honourable Justice Atkinson of the Supreme Court for an interim injunction in circumstances where the Practitioner well knew that reliance upon the contents of the facsimile would mislead, or be likely to mislead the Court. This conduct amounts to professional misconduct.

Reasons of the Tribunal – Charge 3

74. As to particulars 3(a) and 3(b) of this charge, the Practitioner admits the exchange which took place between her and Justice Atkinson as set out in 3(a) of the Notice of Charge, but denies that her statement to the Court was false or misleading.

75. The Practitioner says that she went on beyond her "Yes, Your Honour" answer and explained more to the Court. She says she was cut off at times during the exchange. She claims the Judge's question was somewhat ambiguous and relies on the Judge's use of the words "at all".

76. The Practitioner's evidence before us was that she had informed the W Group via Mr A that her application would be "immediate".

77. Mr A conceded that the word "injunction" had been mentioned.

78. The Practitioner argued she did not state a date or time when the application would be made.

79. Mr A gave evidence before is to the effect that if he had been made aware that an application was to be brought that day he would have contacted the group's solicitor.

80. We find that the Practitioner did deliberately attempt to mislead Justice Atkinson into thinking that the Practitioner had notified the W Group of the hearing of the application.

81. We are so satisfied on the required standard established in *Brigginshaw*.

82. The Practitioner admits that the exchange quoted in paragraph 3(c) of the Notice of Charge took place. She denies that her statements to the Court to the effect that the rent had been paid on 2 February 2001 were false or misleading.

83. We are totally convinced on the standard required established in *Brigginshaw* that when the application submitted to Justice Atkinson that the rent had been paid on 2 February 2001, she well knew that that was not the case.

84. There is no other explanation, than that the Practitioner deliberately made a submission to the Court that she knew to be totally false.

85. The Practitioner admits that the exchange quoted in paragraph 3(e) of the charge took place.

86. She denies her statements to the Court were false or misleading.

87. At the time she made those submissions to the Court, the Practitioner knew the February rent had not been paid, she knew the partial deposit slip before the Court did not relate to the payment of the February rent and she knew that the original deposit slip allegedly relating to purposed rent payment had not been posted to the W Group.

88. We are satisfied of these matters on the standard required as established in *Brigginshaw*.

89. The Practitioner deliberately attempted to mislead Justice Atkinson on these issues.

90. The Practitioner admits that the exchange quoted in paragraph 3(g) of the Notice of Charge took place, however she denies that her statements were false or misleading.

91. The Practitioner sought to have the Court accept that there had been no further response from the W Group and that they had therefore accepted that the February rent had been paid.

92. The Tribunal finds that that statement was misleading and was not accurate. The evidence was that she had previous correspondence from W Group that she had not disclosed to the court. The letter from XXX dated 14 February 2001 and faxed to the W Group was misleading in that there had been correspondence from the W Group to the Practitioner.

93. When she made those submissions to the Court, she did know that the rent had not been paid and she knew that the further correspondence referred to in paragraphs 3(h)(i), (ii), & (iii) had passed between her and the landlord.

94. The respondent's answer to the particulars as set out in 3(h) was that at the hearing in the Tribunal she accepted that she had sent and received the correspondence particularised but that in her view, it did not change the position of the parties and therefore it was not necessary to place all of that information before Her Honour. The Tribunal does not accept her explanation.

95. Earlier in her evidence the respondent stated that the letter from the W Group of Companies dated 14 February 2001 and addressed to her went to the store and that she did not receive it by facsimile but later conceded in the facsimile report was presented to her that it had been sent at 2.15 pm and that her response on that same day was sent by facsimile to W Group at 2.43 pm.

96. There was a deliberate attempt to mislead the Court to the contrary. We are so satisfied on the *Brigginshaw* test.

97. The Practitioner accepts that the exchange quoted in paragraph 3(i) took place; she also admits the particulars set out in paragraph 3(j).

98. The Practitioner suggests her exchange with Justice Atkinson on this issue was "banter" and that the discussion was not material to the application at that time. There is a strong indication that JE was in the office that morning. JE is not entirely sure. Nor can we be.

99. The correspondence from HG dated 15 February 2001 and 16 February 2001 were dated stamped as being received on 16 February 2001. The letter to the Court on 16 February 2001 was signed by JE, and the Practitioner in her letter to the Law Society acknowledged that JE may have been there.

100. The Practitioner's evidence is that she rang from home on the morning on 16 February 201 and was advised by Mr N that JE was sick and not in. Counsel for the Practitioner submitted that the Practitioner had nothing to gain by deliberately misleading the Court as to whether the secretary had called in sick and was not in or had come in later that day.

101. For the reasons expressed we cannot be satisfied that the Practitioner made the submissions to the Court set out in paragraphs 3(i) & 3(j) knowing them to be false, and so we would dismiss the charge as particularised in paragraphs 3(i), 3(j) & 3(k) of the Notice of Charge.

Findings of the Tribunal – Charge 3

102. The Tribunal finds the Practitioner guilty of professional misconduct in that on 16 February 2001 in breach of her duty as a solicitor, the Practitioner made oral submissions to the Honourable Justice Atkinson of the Supreme Court during the course of the hearing of an ex parte application for an interim injunction in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which submissions were, as the Practitioner well knew, false or misleading. The Tribunal finds that the charge is made out and that the actions of the respondent were quite deliberate and therefore the amount to professional misconduct.

103. Further as to charge 3, we dismiss the balance of the charge as particularised in paragraphs 3(i), 3(j) & 3(k) of the Notice of Charge.

Reasons of the Tribunal – Charge 4

104. We only need deal with charge 4 on the basis of the matters set out in paragraphs 3(i), 3(j) & 3(k) of the Notice of Charge.

105. We are satisfied (on the standard established in *Brigginshaw*) that when the statements were made by the Practitioner as solicitor set out in paragraphs 3(i) & 3(j) she did not know whether they were true or false.

106. In that sense, the statements were made recklessly and not caring whether they were true or false.

Findings of the Tribunal – Charge 4

107. In respect only of particulars paragraphs 3(i), 3(j) & 3(k) the Tribunal finds charge 4 proved and that the Practitioner is guilty of making the submissions referred to recklessly, not caring whether they were true or false. The Tribunal finds that conduct amounts to unprofessional conduct.

108. In all other respects, charge 4 is dismissed.

Reasons of the Tribunal – Charge 5

109. Paragraph five in the respondent's affidavit sworn on 19 February 2001, the respondent states *inter alia*:

> *"There is no written agreement evidencing any terms of the tenancy..."*

110. The Tribunal does not accept the explanation proffered by the respondent. The letter of 22 December 2000 has been signed by Mr A on behalf of OSD Pty Ltd and the Practitioner for and on behalf of SH Pty Ltd. It seems clear from the evidence that there had been negotiations between Mr A and the Practitioner about the rent and the terms of the tenancy given that there has been previous delays in paying the rent by the Practitioner. One of the paragraphs of the agreement is as follows:

> *"2. Ongoing monthly rent payments are to be deposited to our account on first each month or following business day. If rent are not received on the due dates, we will be entitled to terminate your tenancy and will require vacant possession within seven (7) days."*

111. The agreement is a month to month arrangement for which either party may give one month's written notice, although as mentioned above, if the rent is not paid on the due date paragraph two applies.

112. That document clearly sets out the consequences if rent is not paid on time. The respondent's evidence is that there was no written agreement and that this letter related to the payment of $4,500.00. Paragraph 6 of the respondent's affidavit sworn on 19 February 2001 states *inter alia*:

> *"6. Rent for February 2001 had been paid on 2 February 2001, although a copy of the deposit slip had not been initially forwarded to the respondent."*

113. Paragraph 9 of the same affidavit the respondent states:

> *"9. I then spoke to my secretary about the deposit slip so that enquiries could be made at the bank and she advised that she believed she had sent it to the respondent."*

114. During the cross-examination the respondent was asked when had she given the sum of $1,500.00 to the secretary. The respondent had answered that she was in court on 2 February 2002 and "I had given it to her in the afternoon before... to deposit into the bank the next day. It was $1,500.00 cash takings from the business. I can't recall the denomination amounts. I can't recall over what period of time I collected the $1,500.00. I don't have any accounting, it is with the liquidators. I don't have cheque butts..."

115. During the course of cross-examination the respondent had admitted that she borrowed the majority of funds to pay the arrears of rent of $4,500.00. She said, "The majority of funds came from funds I had borrowed: $4,000.00 I borrowed: $500.00 accumulated in the business at that time. That sum was paid on or about 12 January 2001. The respondent's evidence was that from that period of time until 1 February 2001 she had accumulated $1,500.00 from her business known as XXX. Her evidence was that over those last few months she had worked in cash.

116. The evidence was that on 2 February her court commitment was the continuation of the matter, which was a Family Court matter. She could not recall whether it was children or property. Her evidence was that that was on the Thursday and the next time she would be in the office would be the Monday. She said that on 1 February she gave $1,500.00 in cash to JE with the deposit slip and the fax header sheet.

117. Her evidence was that she had the money with her and had been trying to get to the bank as she had indicated in her correspondence to W Group. She believed that JE may have put the money in a safe as the rent was due to be paid on the 1st. She conceded in evidence that it was very important to be on time. It was asked in evidence why not give it to JE earlier and her response was that she had been trying to bank it.

118. She remembers one lunch time going down to the bank, having discussions with clients, only having half an hour left and that she went to the National Australia Bank branch in the middle of the Queen Street Mall and that there was a huge line-up and she would not have had time to be back in court at 2.00 pm and she described where the building of the National Australia Bank was.

119. That evidence given is contrary to and not consistent with there no being written tenancy agreement dated 22 December 2000. That agreement clearly sets out that the rent was to be paid on the first of each month. The Tribunal finds that the respondent deliberately misled the court in her affidavit. We are satisfied of that to the *Briginshaw* standard.

120. Before us, the respondent continued to maintain that she did not accept the letter as a tenancy agreement and relied on the case of *Coomber v. Howard* (1845) 1 CB 440) however her other evidence to which we have referred is inconsistent with that contention. The matters set out in 5(h) are consistent with our finding that it was not the secretary who stole the money and that in fact a deposit slip had been recreated, and that it was the Practitioner who recreated the deposit slip.

121 The respondent denies Charge number 5, but admits the particulars set out in paragraphs 5(a), 5(b), 5(c), 5(e) & 5(g). She denies the particulars set out in 5(d), 5(f) and 5(h). In submissions for the respondent, Mr Wilson stated that the Practitioner's affidavit was subject to challenge by cross examination at the time of that Court hearing, the other side was represented and that the Practitioner's view was very much that there was no written agreement and that the agreement on 22 December related to the payment of $4,500.00 and was not a lease agreement. For the reasons stated we reject that submission.

Findings of the Tribunal – Charge 5

122. The Tribunal finds that the Practitioner is guilty of professional misconduct in that on 19 February 2001, in breach of her duty as a solicitor, the Practitioner produced an affidavit to be filed and read in the matter of *SH Pty Ltd v. OSD Pty Ltd* in which the Practitioner affirmed certain matters that were, as the Practitioner well knew, false or misleading.

Reasons/Findings of the Tribunal – Charge 6

123. Charge number 6 is in the alternative to Charge number 5, the Tribunal has found that the particulars as set out in Charge number 5 have been proved. Charge number 6 is therefore dismissed.

Reasons/Findings of the Tribunal – Charge 7

124. This charge focuses on the written and oral submissions made by the respondent during those Supreme Court proceedings as set out in the charge. The particulars as set out in paragraph 7(b) fly in the face of submissions that the Practitioner made to Her Honour Justice Atkinson on 16 February 2001.

125. The respondent by her own evidence was in a remarkable hurry to pay the rent which she is now saying at 21 February 2001 was not due until March.

126. The respondent had not been honest with the court and the integrity of her affidavit was questioned by the Judge. Her Honour at line nine of the transcript states:

> *"Her Honour: That I'm also concerned about this letter of 9 February and clearly it's not with your client, Mr P, no."*

(Mr P was counsel on behalf of the other party).

127. Submissions by Mr Wilson on behalf of the Practitioner before us were that in relation to the matters the subject of Charge number 7 the claimant was simply putting a robust legal argument before the Court and that we would all be in dire peril if a Practitioner could not make robust submissions on the law. The difficulty we have with that submission is that whilst every Practitioner is fully entitled to robustly put legal argument before a Court, no Practitioner should put any legal argument to the Court if the Practitioner knows that the evidence on which that legal submission is based is false. Because of other findings we have already made and will make it is clear that when the exchange the subject of the particulars took place with Justice Atkinson on 16 February 2001 the Practitioner knew full well that the February rent had not been paid at all. We find that the Practitioner deliberately misled Justice Atkinson and put a submission to Justice Atkinson (which although it may have been a good argument in law) was not supported by the true facts which were well known to the Practitioner. We are satisfied of this on the *Brigginshaw* standard.

Reasons/Findings of the Tribunal

128. The Tribunal finds that the Practitioner is guilty of professional misconduct in that on 21 February 2001, in breach of her duty as a solicitor, the Practitioner produced written submissions and made oral submissions to the Honourable Justice Atkinson in the Supreme Court during the course of the hearing of an application in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which submissions contained a statement that was, as the Practitioner well knew, false or misleading.

Reasons/Findings of the Tribunal – Charge 8

129. The particulars as itemised in 8(k)(i) & (iv) were struck out during the course of the hearing.

130. The Practitioner's evidence is that it was her belief that her secretary had deposited the money. Her evidence was that she did not question JE but she trusted her and she accepted that she had acted on her instructions. She said in evidence that she asked JE what happened to the original of the receipt and JE informed her that she has posted the original.

131. The Practitioner accepts the particulars which set out the exchange during the hearing. The submissions made on behalf of the respondent is that she never saw the contents of the letters from HG on Thursday evening or the Friday morning and she had gone into the office with the particular intention to have the injunction heard urgently.

132. The evidence of JE and N that there was a rather relaxed atmosphere in the practice. The submission on behalf of the Practitioner was that it was a stressful day and that she had not seen nor read the facsimiles from HG.

133. She had recently had a heated conversation with Mr A about the locks and the disputed payment. The respondent believed that at the time of the submissions that she had signed the letter to the court and had faxed the letter to the court.

134. The evidence of the respondent was that as she was giving that evidence to the court, the letter was produced to her and she admitted that the signature on the letter was that of her secretary and that she was somewhat stunned by that.

135. The Practitioner admits the particulars of 8(a), 8(b) denies 8(c), admits 8(d) and 8(e), denies 8(f), admits 8(g), denies 8(h), admits 8(i) and 8(j), accepts 8(k)(ii), accepts 8(k)(iii) was possible, admitted 8(k)(v) as possible, accepts 8(k)(vi) and admits as likely 8(k)(vii) denies 8(k)(viii) and accepts 8(k)(ix) and that her secretary may not necessarily have gone home sick.

136. The Tribunal accepts that the secretary did not steal that $1,500.00. The Tribunal finds that the Practitioner did not give any money to the secretary and that the Practitioner reconstructed the deposit slip and that the original deposit slip pertaining to the purported deposit had not been sent to the W Group under cover of a letter dated 9 February 2001.

137. The Practitioner's evidence was unreliable in a number of respects. The Practitioner's evidence is that the secretary created the deposit very deliberately, very cunningly. However, under cross-examination, the Practitioner conceded that she had a facsimile machine at home and it was from that machine that the facsimile of 9 February 2001 was forwarded to the W Group. The evidence shows that the fax was faxed from the home fax at 9.18 am.

138. The respondent did not satisfy the Tribunal as to her reasons why the facsimile was not sent from the office and why the respondent failed to notice the particular document. The date was crucial on that deposit slip but it is not clear. It is more than coincidental that documents went missing.

139. The respondent was unable to produce documents such as the receipt of 2 November 2000, (the deposit slip of 2 November 2000). She said she had not received various letters from W Group and then on 2 February 2001, she would have us believe that, the sum of $1,500.00 went missing, such sum being in varying denominations. The Tribunal's finding is that that money was not deposited into the bank account.

140. The further finding of the Tribunal is that the original letter of 9 February 2001 was not received by W Group nor was the deposit slip sent to accompany that letter.

141. The matters set out in paragraph 8(c) are all made out and we are convinced of those matters to the required standard established in *Brigginshaw*.

142. In relation to the particulars set out in Charge number 8(f), the Tribunal finds that the Queensland Law Society has failed to discharge its onus of proof. The Practitioner may very well have not been aware of the facsimile letters from HG dated 15 February 2001 and 16 February 2001 at the time of her attendance at court on 16 February 2001.

143. The submissions on behalf of the Law Society are that the respondent has, to adopt the opening lines of Mr Rafter's submission, "tied her colours to the mast". However, on this particular issue the Tribunal is not satisfied that the particulars set out in Charge number 8(f) are proved.

144. As to particulars in 8(h) Mr A in his affidavit sworn on 5 August said he could identify four payments in the sum of $1,500.00 received by OSD Pty Ltd and that only the July and September payments, copies of the deposit slips, were received and that in the case of the August and November payments, no copies of the deposit slips were received.

145. The respondent's evidence is that she had always copied the deposit slips and forward to Mr A.

146. We view this, however, as an overstatement of the Practitioner's position or as embellishment or over-exaggeration. For that reason we are not convinced that the charge is made out in respect of paragraph 8(h).

147. As to paragraph 8(k), this revolves around whether JE was present in the office on 16 February 2001. It was in fact conceded by Mr Wilson that the Practitioner admitted as "likely" the contention in paragraph 8(k)(vii) that the secretary had been in attendance at the Practitioner's office on the morning of 16 February 2001 when the Practitioner herself attended at her office.

148. The evidence on the issue is not sufficiently certain for us to be satisfied to the required standard (*Brigginshaw*) that at the time of the Practitioner's evidence and submissions before Justice Atkinson on the issue, she knew that evidence and those submissions to be false or misleading.

Findings of the Tribunal – Charge 8

149. That the particulars set out in 8(a), 8(b) & 8(c) have been proved and that the Practitioner is guilty of professional misconduct in that on 21 February 2001 in breach of her duty as a solicitor, the Practitioner gave evidence before and made submissions to, the Honourable Justice Atkinson of the Supreme Court of Queensland, during the course of the hearing of a contested application in the matter of *SH Pty Ltd v. OSD Pty Ltd* which evidence and submissions were, as the Practitioner well knew, false of misleading.

150. The other operative provisions of the particulars were paragraphs 8(f), 8(g) & 8(k) of the particulars. For the reasons expressed above, we dismiss the charges as expressed in paragraphs 8(f), 8(h) & 8(k) of the particulars.

Reasons of the Tribunal – Charge 9

151. In respect of paragraphs 8(f) (the faxes from HG), 8(h) (whether the Practitioner always faxed the deposit slips) and 8(k) (whether the secretary was in attendance on 16 February 2001) we are satisfied that the Practitioner's evidence and submissions before Justice Atkinson were given and made by the Practitioner without thought as to whether they were true or false, but rather to advance her own position and that of her own company client. In that sense they were given or made recklessly. We are satisfied of this on the *Brigginshaw* test.

Findings of the Tribunal – Charge 9

152. For the reasons set out above we find the Practitioner guilty as charged, in respect of particulars 8(f), 8(h) and 8(k) of the Notice of Charge in that on 21 February 2001, in breach of her duty as a solicitor, the Practitioner gave evidence before and make submissions to, the Honourable Justice Atkinson of the Supreme Court during the course of the hearing of a contested application in the matter of *SH Pty Ltd v. OSD Pty Ltd*, which evidence and submissions were given and make recklessly, not caring whether the evidence or submissions were true or untrue. We consider the Practitioner's conduct amounts to unprofessional conduct.

Reasons/Findings of the Tribunal – Charge 10

153. The respondent admits that the faxes were sent, admits the particulars of paragraphs 10(a), 10(b), denies 10(c) and 10(d), admits 10(e), denies 10(f) and maintains that she believed at the time that the rent had been forwarded.

154. By way of explanation to the particulars set out in 10(c), the Practitioner stated that she was present at her office briefly on 16 February and that by being in attendance her understanding was being at the office all day.

155. We are not satisfied that the charge as set out in 10(c) is proved to the required standard (*Brigginshaw*). Likewise, with the particulars as set out in 10(d), these particulars are not made out. The particulars as set out in 10(d) will be dismissed.

156. The particulars as set out in 10(f) are of a different nature and the Tribunal's primary finding has been that the respondent well knew that the rent had not been paid.

157. The operative particulars of the charge are paragraphs 10(c), 10(d) and 10(f). As expressed we are not satisfied to the required standard of proof that the statements referred to in paragraph 10(b) were made by the Practitioner with the deliberate attempt to mislead or deceive, and so we would dismiss the charge as particularised in 10(c) and likewise as particularised in 10(d). However we find the charge as particularised in 10(f) to be proved to the required standard.

Findings of the Tribunal – Charge 10

158. We find that the Practitioner is guilty of professional misconduct or practice in that, on 19 February 1991 in breach of her duty as a solicitor, the Practitioner as solicitor for SH Pty Ltd wrote to Messrs HG, solicitors for OSD Pty Ltd concerning the matter of *SH Pty Ltd v. OSD Pty Ltd* which letter contacted statement that were as the Practitioner well knew false or misleading.

Reasons/Findings of the Tribunal – Charge 11

159. We only need to consider Charge 11 as it relates to paragraphs 10(c) and 10(d). In those respects we find that charge 11 proved to the required standard. This is because we are convinced that the statements set out in 10(b) were made in the letter to HG without the Practitioner turning her mind to whether those statements were true or false. In that sense they were made recklessly. We find the Practitioner guilty of unprofessional conduct in that on 19 February 2001, in breach of her duty as a solicitor, the Practitioner, as solicitor for SH Pty Ltd, wrote to Messrs HG solicitors for OSD Pty Ltd, concerning the matter of *SH Pty Ltd v. OSD Pty Ltd*, which letter contained statements that were made recklessly, not caring whether the statements were true or false. We otherwise dismiss Charge number 11.

Reasons/Findings of the Tribunal – Charge 12

160. The Practitioner admits the particulars set out in paragraph 12(a) but denies the particulars set out in paragraph 12(b) & 12(c).

161. The Tribunal finds that the original deposit slip pertaining to such payment was not forwarded to the respondent landlord and that the copy partial deposit slip copied upon a letter of 9 February 2001 did not relate to such payment and that the rent, the subject of the proceedings before Justice Atkinson, had not been paid into an account being either the account of the respondent landlord or another account in February 2001. We are not convinced by any evidence of the Practitioner to the contrary.

162. The Tribunal does not accept the respondent's explanation that she attended one day at the National Australia Bank to try to deposit the $1,500.00. The Practitioner's evidence is unreliable in relation to that whole issue of payment of the rent and the onforwarding the letter of 9 February. We find that it was the Practitioner who reconstructed the deposit slip and we accept the evidence of JE in preference to that of the respondent on these issues. We are satisfied of these matters to the required standard (*Briggінshaw*). The Tribunal is satisfied that the respondent deliberately tried to mislead or deceive in her correspondence to the Queensland Law Society in relation to the payment of the rent and reference to the partial deposit slip.

Findings of the Tribunal – Charge 12

163. The Tribunal finds that the Practitioner is guilty of professional misconduct or practice in that on 25 June 2001 in breach of her duty as a solicitor, the Practitioner wrote to the Queensland Law Society Incorporated ("the Society") concerning the matter of her appearances before the Honourable Justice Atkinson of the Supreme Court on 16 February 2001 and 21 February 2001 which letter contained representations that were, as the Practitioner well knew, false of misleading.

Reasons/Findings of the Tribunal – Charge 13

164. The Tribunal has found that the charge as set out in Charge number 12 has been proved so we dismiss Charge number 13.

Reasons of the Tribunal – Charge 14

165. This is very much a separate matter from the previous charges.

166. The Practitioner gives her explanation of the matters in her affidavit sworn 5 August 2002 in paragraphs 17, 18, 19, 20 and 21.

167. It is common ground that the trust account cheque was not drawn and therefore not re-credited to the trust ledger.

168. The respondent in cross-examination stated that the file was handed to the Society and that it only had their correspondence to the client which contained a couple of message slips and handwritten file notes. The file did not contain any of the documents as "they were with R".

169. The usual procedure was that the Practitioner would go through the file, take off personal notes, phone messages, take off the letters from "us" to the client and the client to "us" and the client would get the balance of the material. R was to photocopy the balance of the file and place that material back on the file and the respondent states that she said to the Society to check with R. It was the evidence of the Society's officer that there was no such plaint on the file nor draft plaint.

170. It was submitted on behalf of the Law Society that it was open to the Tribunal to find that the respondent never in fact sent the plaint at all and that it was curious that the plaint was never received by Ipswich Magistrates Court and that if the plaint existed it would have been produced to the Society when asking for the documents.

171. If the Tribunal was to accept this finding then the Tribunal would have to be satisfied that the Practitioner in fact had written letters and deliberately not sent them. The standard of proof required is a high one (the *Briggінshaw* test).

Findings of the Tribunal – Charge 14

172. The Tribunal is not satisfied that the charge has been made out to the required standard and hence dismisses Charge number 14.

Reasons/Findings of the Tribunal – Charge 15

173. The Tribunal accepts that in the alternative to Charge number 14, the Practitioner is guilty of unprofessional conduct or practice in that during the period November/December 2001 in breach of her duty as a solicitor, the Practitioner as the solicitor for SEQCM, made the various representations to her client concerning the matter of the debt recovery from X which representations were made recklessly not caring whether they were true or false. The representations so made were made in a cavalier fashion with no care to ensure that the representations were in fact true. We are satisfied of these matters on the *Briggінshaw* standard.

Reasons/Findings of the Tribunal – Charge 16

174. Again the affidavit of the Practitioner provides her explanation.

175. The letter from Queensland Law Society dated 15 October 2001 is shown in the bundle of materials at page 431 and the letter from SEQCM to the Law Society is shown at page 429. The letter from the respondent to the Queensland Law Society is shown at page 433. The letter from the Practitioner to the Queensland Law Society is a very defensive letter but moreover denies that she received the letter from MM.

176. This was another illustration of documents not received by the respondent. It was submitted by counsel for the Law Society that it would be impossible to accept that in the context of the evidence in this matter. Possibly if it was an isolated incident of the respondent Practitioner not receiving some document it could be accepted but the submission was that there was a remarkable number of coincidences and that the Tribunal should not accept the respondent's explanation as to her conduct of this matter and her failing to receive a letter from MM.

177. The Tribunal dismisses Charge number 16 on the basis it is not satisfied to the required standard of proof (*Brigginshaw*) that the statements made as particularised in the charge were made by the Practitioner knowing them to be false.

Reasons/Findings of the Tribunal – Charge 17

178. We are satisfied that the statements particularised in Charge 16 were made by the Practitioner with a cavalier approach and with disregard for any care or accuracy. We are so satisfied to the *Brigginshaw* standard.

179. The Tribunal finds in the alternative Charge number 16 that the Practitioner is guilty of unprofessional conduct or practice, in that, during October/November 2001 in breach of her duty as a solicitor, the Practitioner made various representations and statements to the Queensland Law Society Incorporated ("the Society") during the course of the Society's investigation of a matter of complaint against the Practitioner by MM on behalf of SEQCM, which representations or statements were made recklessly not caring whether they were true or false.

Reasons/Findings of the Tribunal – Charge 18

180. The Practitioner in her own evidence submitted that there had been undue delay in acting on the instructions and following up particularly after the plaint had been forwarded to the Ipswich Magistrates Court.

181. The Tribunal finds that the respondent was guilty of unprofessional conduct or practice as Charge number 18 has been made out. The respondent admitted in evidence, "I didn't follow it up, I didn't pursue it until the client contacted me six weeks later." The respondent stated that: "She had quite a bit of difficulty with Rebecca – not filing things or not putting things where it's supposed to go. There were things apparently received and not brought to my attention." Given the Practitioner's admissions, the Society's onus of proof on the *Brigginshaw* standard has been met.

Further Hearing

182. The Tribunal has now made findings in relation to each of the 18 charges that were before it.

183. The Tribunal has found the following charges proved:

- Charge 1 (in respect of all matters particularised except 1(d)(iv)(G))
- Charge 2
- Charge 3 (in respect of all matters particularised except those particularised in 3(j) & 3(k))
- Charge 4 (but only in respect of the matters particularised in paragraphs 3(i), 3(j) & 3(k))
- Charge 5
- Charge 7
- Charge 8 (but only in respect of the matters particularised in 8(a), 8(b) & 8(c) of the particulars to that Charge)
- Charge 9 (but only in respect of the matters as particularised in paragraphs 8(f), 8(h) & 8(k))
- Charge 10 (but only in respect of the matters particularised in paragraph 10(f))
- Charge 11 (but only in respect of the matters particularised in paragraphs 10(c) & 10(d))
- Charge 12
- Charge 15
- Charge 17
- Charge 18

184. The Tribunal dismisses Charges 6, 13, 14 and 16.

185. The Tribunal has made the various determinations of both professional misconduct and unprofessional conduct or practice against the Practitioner. It is therefore appropriate for the Tribunal to hear submissions as to the penalties which should be imposed in respect of the charges which have been found proved. The Tribunal should also hear argument in relation to any application for costs.

186. The Tribunal proposes to deal with the issues of penalty and costs at a hearing in Brisbane on a date to be fixed by the Clerk to the Tribunal. The parties will be notified of the date of the further hearing.

Reasons Given on 10 September 2002

The Tribunal has found the Practitioner guilty on charges 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 15, 17 and 18 as set out in paragraph 183 of our earlier decision.

The charges proved entail the following:

1. Failure to make full and frank disclosure to the court on an ex parte application, amounting to professional misconduct.
2. Relying on a fax to the court in support of the ex parte application where the Practitioner knew that the court's reliance on same would mislead or be likely to mislead the court, amounting to professional misconduct.
3. Making oral submissions to the court that the Practitioner knew were false or misleading, amounting to professional misconduct.
4. Making submissions to the court recklessly, not caring whether they were true or false, amounting to unprofessional conduct.
5. Producing an affidavit to the court when the Practitioner knew that that affidavit (her own affidavit) contained matters that were false or misleading, amounting to professional misconduct.
6. Producing written submissions and making oral submissions to the court where the Practitioner knew those submissions contained a statement that was false or misleading, amounting to professional misconduct.
7. Giving evidence and making submissions to court when the Practitioner knew that that evidence and those submissions were, in part, false or misleading, amounting to professional misconduct.
8. Giving evidence and making submissions to court recklessly, not caring whether they were true or false, amounting to unprofessional conduct.
9. Writing to HG in a letter containing a statement that the Practitioner knew was false or misleading, amounting to professional misconduct.
10. Writing to HG in a letter containing statements made recklessly, not caring whether they were true or false, amounting to unprofessional conduct.
11. Writing to the Society in a letter containing representations that were false or misleading, amounting to professional misconduct.
12. Making representations to her client recklessly, not caring whether they were true or false, amounting to unprofessional conduct or practice.
13. Making representations and statements to the Society recklessly, not caring whether they were true or false, amounting to unprofessional conduct.
14. Undue delay in the conduct of a matter, amounting to unprofessional conduct.

Charges 1, 2, 3, 5, 7, 8, 10 and 12 have been found to constitute professional misconduct, the balance amounting to unprofessional conduct or practice.

The former charges are the more serious charges. The conduct proved in relation to charges 1, 2, 3, 5, 7 and 8 is of a serious kind. It demonstrates clearly that the Practitioner is prepared to abandon her duty to the court to promote her own interests.

Charges 10 and 12 relate to writing to other solicitors and the Society and making false or misleading statements and such conduct is inconsistent with the high standard which is expected of a solicitor.

Charges 4, 9, 11, 15 and 17 are all of unprofessional conduct or practice and they relate to conduct that was reckless.

Charge 18 is the charge of undue delay and that amounts to unprofessional conduct.

These charges are less serious and would, of themselves, not warrant an order striking the Practitioner from the roll.

The role of this Tribunal is to protect the public. The public must have confidence that solicitors will act with utmost integrity and honesty. Further, a Practitioner must honour his/her duty to the court. The courts depend on the integrity of Practitioners appearing before them.

This Practitioner has demonstrated conduct seriously in breach of that fundamental duty of a solicitor. She has been shown to be untrustworthy and dishonest. Further, she has shown a complete lack of remorse in respect of that conduct.

In the decision of the Court of Appeal in *the Council of the Queensland Law Society Inc v. Wendy Ann Wright* [2001] QCA 58, at paragraph 67, the President of the Court of Appeal, Justice McMurdo says:

> *A Practitioner's duty to the Court arises out of the Practitioner's special relationship with the Court. It overrides the duties owed by a Practitioner to clients or others: see Giannarelli v. Wraith... The lawyer's duty to the Court includes candour, honesty and fairness.*

This Practitioner has shown neither candour nor honesty.

It would be incompatible with our duty to the public to allow the Practitioner to remain on the roll. A clear message must be sent to all Practitioners that their duty to the Court is absolutely paramount.

We cannot have any confidence that (given her proved misconduct) this Practitioner will ever be fit to practise as a solicitor.

We order that the name of the Practitioner be struck from the roll of solicitors kept by the Registrar of the Supreme Court.

Mr Rafter, on behalf of the Society, made an application for the costs of these proceedings.

Mr Wilson, for the Practitioner, argues that costs are discretionary and there is good reason why the Tribunal would exercise its discretion in declining the application for costs. He points out that the Practitioner is currently an undischarged bankrupt and that should a costs order be made, the costs would not be provable in the bankruptcy and this may result in the Practitioner having to endure a further period of bankruptcy after discharge from the current period.

We take the view that the issue of costs is completely at our discretion. The usual rule is that costs follow the event and, of course, Mr Wilson, on behalf of the Practitioner, conceded that that was the normal course.

Our view is that nothing that has been put to us would provide any proper ground for us to move away from that normal principle that costs follow the event.

We therefore order that the Practitioner pay the costs of the Queensland Law Society of these proceedings, including the costs of the recorder and of the clerk, as assessed by Hickey & Garrett, within a period of one month from the date the assessment is provided to the Practitioner.