Mr B Bartley, Solicitor, of Corrs Chambers Westgarth Solicitors appeared for the Queensland Law Society Incorporated.

The practitioner appeared in person.

The practitioner pleaded guilty to the allegations contained in the Application of the Queensland Law Society Incorporated dated January 19, 1996. No oral evidence was called in respect of the charges.

Submissions

A SUMMARY OF THE SOCIETY'S SUBMISSION is as follows:

Charges 1 to 8 relate to charges of misappropriation covering a period May 1993 to August 1994 of funds totalling $55,911.55 to discharge the practitioner's personal liabilities or those of his wife, for which he was personally responsible.

Charge number 9 was committed in November 1994 and related to the theft of funds held not by the practitioner but by another Solicitor.

Mr Davies stole two trust account cheque forms and forged the other practitioner's signature, and one of those cheques was used to purchase from the Commonwealth Bank a Bank Cheque in the sum of $68,104 made payable to W.S. Mitchell. The practitioner then opened a bank account at the National Australia Bank in the name of Mitchell and in order to open that account he produced a birth certificate and driver's licence in the name of Mitchell. Mr Davies actually received a total of $19,500. Most of the money has been recovered by the police.

The offences involved a course of dishonest conduct over the period of time, about 18 months, and involved not only misappropriation of substantial funds held by the practitioner on behalf of his client, but also funds held by another practitioner. In some instances the offences were committed by forging various documents and adopting various identities, as was the case in charge 9 and by concocting documents designed to hide the misappropriations.

Mr Davies declined to make a submission.

Findings and Orders

THE COMMITTEE ORDERED as follows:

The practitioner having pleaded guilty, the Committee finds the facts set out in the Application of the Queensland Law Society Incorporated dated January 19, 1996 proved. The Committee finds that those facts constitute professional misconduct. The Committee finds the practitioner guilty of professional misconduct. The Committee orders the name Graham Davies be struck from the roll of Solicitors for the Supreme Court of Queensland. The Committee further orders that the practitioner pay the costs of the Queensland Law Society Incorporated of and incidental to this application, the costs of the Clerk to the Statutory Committee and the costs of the shorthand writer to be assessed or taxed and the Committee directs that the Clerk to the Statutory Committee shall be entitled to costs as a Solicitor for perusing documents filed and care and consideration.

The Queensland Law Society Statutory Committee

Disciplinary Action Report Court of Appeal

Appellant:	The Queensland Law Society Incorporated
Respondent:	Henry William Smith
Appeal No:	10787 of 1997 (1 December 1997)
Date of Order:	27 April 1998
Penalty:	Struck off, by consent.

This was an appeal against the inadequacy of the penalty imposed by the Statutory Committee on November 11, 1997 (see Bi-Annual Report of Disciplinary Action No. 2 Supplement January 1998 at page 12).

The practitioner had admitted the charge before the Statutory Committee that on April 29, 1996 the practitioner drew four cheques on his Trust Account, totalling $22,630.08, endorsed them to himself and attempted to deposit the cheques into his personal cheque account. The Committee found the practitioner guilty of professional misconduct but was satisfied that at the time, the practitioner was suffering from a major depressive illness which was the cause of his misconduct. The Committee was satisfied that under the special circumstances of the case, the name of the practitioner should not be struck from the roll of solicitors, but that he should be suspended from practice until such time as he was able to satisfy the Council of the Queensland Law Society that he was a fit a proper person to hold a Practising Certificate.

Grounds of Appeal

1. The imposition of a suspension from practice of the practitioner for an indeterminate period was manifestly inadequate and inappropriate.
2. The Statutory Committee had no power under Section 6 (3) of the *Queensland Law Society Act* 1952 (as amended), or otherwise, to order the suspension from practice of the practitioner for an indeterminate period, namely until such time as he could satisfy the Council of the Law Society that he was a fit and proper person to practise.

3. There was no proper basis for ordering the suspension of the practitioner from practice having regard to:
   (a) the finding that the practitioner had engaged in conduct by which he attempted to fraudulently convert trust money to his own use;
   (b) the finding that the practitioner was suffering from major depressive illness;
   (c) the evidence that the practitioner was in the early stages of dementia;
   (d) The absence of any finding or evidence to support a finding that the practitioner would, after a certain period, or at all be a fit person to hold a Practising Certificate or to remain on the roll of solicitors of the Supreme Court.

Society's Outline of Argument

1. There was no contest as to the truth of the charge that on April 29, 1996 the practitioner attempted fraudulent misappropriation of trust monies totalling $22,630.08.
2. It could not be said that the practitioner did not know what he was doing and did not know what he was doing was wrong. Indeed, in the report dated April 17, 1997 from Dr Ian Curtis, Consultant Psychiatrist, it is recorded that the practitioner said "he knew that he was writing the cheques and knew that it was wrong."
3. The medical evidence suggested that the practitioner was suffering from the early stage of dementia. That was the view expressed by Dr Ian Lynagh, Consultant Psychologist in his report of June 2, 1997. Dr Ian Curtis provided a further report on June 2, 1997 in which he confirmed that it appeared that the practitioner was suffering from "early stage of some type of dementing process". Dr Curtis continued: "I think, and Dr Lynagh may well confirm to you, that we have already found sufficient to say that the practitioner was lacking the intellectual functioning and brain organic resources to do the work that he was doing at the time of the alleged offending behaviour. Like all intelligent men, he may have well been aware at some level that he was loosing his abilities."
4. Both Dr Curtis and Dr Lynagh suggested that further medical and neuro-psychological examination of the practitioner be undertaken. There was no evidence that had been done.
5. There was no evidence to suggest that, if the practitioner was suffering from an early stage of a dementia, that condition was curable at all or that the onset of the loss of ability spoken of by Dr Curtis could, by any form of treatment or after the lapse of any particular period of time, be redeemed.
6. There was also evidence that the practitioner had been suffering from a masked depressive illness and that his attempted fraudulent conversion of the trust monies was his acting out of a form of professional suicide.
7. Dr Byrne in his report of August 12, 1997 made a strong recommendation that the practitioner obtain treatment from a consultant psychiatrist for his major depressive disorder. Dr Byrne expressed the view that the condition was treatable and that "after appropriate treatment, a recurrence of his inappropriate behaviour is unlikely". The doctor stated that "at least six months should be allowed for treatment". Dr Curtis subsequently expressed his agreement with Dr Byrne's conclusions but observed that the practitioner had not approached him for treatment.
8. There was no evidence:
   (a) that the practitioner had sought any treatment;
   (b) to suggest that without treatment, there would be no recurrence of the form of professional misconduct found by the Statutory Committee in this case. Indeed the inference to be drawn from the evidence of Dr Byrne, namely, that "after appropriate treatment, recurrence of his inappropriate behaviour is unlikely" is that without such treatment there was a likelihood of such a recurrence;
   (c) as to the period after which it would be likely that the depressive illness suffered by the practitioner might be controlled such that it was unlikely that there would be a recurrence of his inappropriate behaviour, Dr Bryne's evidence as to the least period for treatment cannot be understood as identifying the period after which it would be likely that the depressive illness suffered by the practitioner would be cured.
9. The question for the Court was whether the practitioner should be held up to the public as a person fit and proper to follow the honourable calling of a solicitor. The power of the Court to discipline a solicitor is protective. *NSW Bar Association v Evatt (1968) 117CLR 177 at 183-184; Clyne v NSW Bar Association (1960) 104CLR 186 at 201-202*.
10. The finding of an attempt at fraudulent misappropriation of trust monies demonstrated the practitioners lack of fitness to be so held out. In the ordinary course that conduct would warrant his being struck off the roll. *Re: A practitioner (1984) 36 SASR 590. The Queensland Law Society Incorporated v Mead (Unrep CA Qld 22 April 1997)*.
11. Whilst the practitioner's medical condition may explain his conduct, that condition serves to reinforce the conclusion that it ought to be found that he was not a fit and proper person to remain on the roll as a solicitor. A person who engages in professional misconduct because of a medical condition is nevertheless not

someone to be held out to the public as a person who is fit and proper to follow the honourable calling of a solicitor.

12. In *Re Currie (F.C.Qld unreported 8 March 1991)*. The Full Court said "The Court protects the public by ensuring that the legal profession, in this case the solicitors' branch, is comprised of people who are as far as the Court can reasonably determine, physically, emotionally, intellectually and morally fit to practise. Individual members of the public who have dealings with solicitors must be able to have confidence in the particular practitioners with whom they deal and also in the profession at large". This was an application by Mr Currie for readmission in circumstances where he had many years earlier been struck off. His previous unfitness was precipitated by mental infirmity and not by demonstrated dishonesty. Nevertheless, the Court said "...the medical evidence is unequivocal and although the applicant's prognosis is very good, provided he maintains his treatment, the possibility that another psychotic episode may occur cannot be excluded. In view of this, there is a real difficulty in concluding that the applicant is presently medically and mentally fit to carry out the duties of a solicitor."
13. A similar principle applies in the instant case in determining whether the practitioner ought to have been struck off the roll. Here (unlike in *Re: Currie*) the practitioner has undergone no treatment. He remained at the time of the hearing before the Statutory Committee unfit to be a solicitor. Moreover, if he received treatment for his major depressive illness the possibility could not be excluded that he may again engage in conduct of the type the subject of the findings. This was so either because of the possible onset of dementia or because a recurrence of his behaviour was merely "unlikely".
14. The Statutory Committee was plainly of the view that the practitioner was not a fit and proper person to be held out as a solicitor. The Statutory Committee's findings that he be suspended until such time he was able to demonstrate that he is a fit and proper person to hold a Practising Certificate is evidence of this.
15. The order made by the Statutory Committee was inappropriate in a number of respects.
16. First, given that the function of the disciplinary jurisdiction is entirely protective of the public, the Statutory Committee was wrong to impose what might be thought to be the lesser penalty of suspension rather than striking off. The issue is not one of penalising the practitioner at all: see *re Maraj (1995) 15 WAR12*. In that case the Court had to consider an application by the Tribunal for an order that the practitioner be suspended from practice for two years from the date of the Order of the Full Court and the period of suspension continue thereafter until the practitioner is able to satisfy the Legal Practice Board that, in all the circumstances then existing, his professional competence and reliability are such that suspension should thereafter be lifted. In refusing to make such an order the Full Court stated:

    "The Tribunal accepted that the object of disciplinary proceedings was not retribution, but the protection of the public and the reputation of the profession. This is correct. However, the Tribunal appears to have considered that the various mitigating factors listed in paragraph 33 of the report meant that striking off was too harsh and unnecessary for the attainment of the relevant object. In so doing the Tribunal seems to have misunderstood the significance of the object in relation to the protection of the public. The significance is that in order to protect the public and the reputation of the profession the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was one of punishment."
17. In this case, the practitioner's medical condition, the naivety of his conduct, the absence of financial need are irrelevant to the issue of his fitness to be held out as a solicitor.
18. Second, an order to suspension ought only be made when the Court can be satisfied that at the termination of the period of suspension, the practitioner will no longer be unfit to practise.
19. In *The Law Society of NSW v McNamara (NSW Court of Appeal, unreported 7 March 1980)* the Court had to consider an order by the NSW Statutory Committee reprimanding a solicitor and containing the following rider:

    "We are of the opinion that the solicitor should be given the opportunity of pursuing his chosen career as a solicitor albeit under supervision in an employed position and if the Law Society resolves to issue a Practising Certificate to the solicitor, we would recommend that this should be issued subject to a condition that the solicitor be entitled to practise only as an employed solicitor."

    The members of the Court were critical of the form in which the Statutory Committee had made its order in that case. However, the Court further had to consider the question of whether the practitioner should be struck off or suspended. Reynolds J A stated:

    "The choice lies between suspension and striking off. An order for suspension must be based upon a view that at the determination of the period of suspension the practitioner will no longer be unfit to practise because, subject to any limitation

imposed on the issue of a Practising Certificate, his name will then be on the roll of solicitors and he may resume his practice. Thus stated, it will be seen that in cases of present unfitness an order for suspension will not frequently be appropriate because it is difficult for a tribunal to feel confident that at the expiration of one or more years a person presently unfit for practice will be fit. The use of the power to suspend is valuable as a punitive measure but needs cautious application where fitness and the Court's protective function is involved."

20. In *Jauncey v Law Society of NSW (Court of Appeal NSW, unreported, 1 February 1989)* Clarke J after referring to this passage from the reasons of Reynolds J A stated:

    "I agree with these observations although I think it should be recognised that an order of suspension may be appropriate in limited circumstances. This is more likely to arise in cases where an order is made long after the misconduct which demonstrated unfitness occurred and a meritorious degree of rehabilitation extending over the interval between this conduct and the hearing of the case has been shown."

    Observations to the like effect were made by the Full Court of Queensland in *Mellifont v The Queensland Law Society Inc (1981) QdR 17 at 31.*

21. The Court could not be satisfied that at the expiration of any period the practitioner would be a fit and proper person to he held out as a member of the profession of solicitors.

22. Third, the form of the order by the Statutory Committee made the period of suspension uncertain and therefore inappropriate. It might have operated for a very long time. The imposition of a suspension for a long time was discouraged in *Mellifont v The Queensland Law Society Inc*.

Orders, by consent, of Court of Appeal

1. That the part of the orders of the Statutory Committee of the Queensland Law Society Incorporated ("the Statutory Committee") of November 11, 1997 whereby the Statutory Committee ordered that the practitioner be suspended from practice until such time as he is able to satisfy the Council of the Queensland Law Society Incorporated that he is a fit and proper person to hold a Practising Certificate, be set aside.
2. That the name of the practitioner be struck off the roll of solicitors of the Supreme Court of Queensland.
3. That the practitioner pay the costs of the Queensland Law Society up to and including February 26, 1998.

(The Attorney General and Minister for Justice also lodged an Appeal, No. 11284 of 1997 on December 12, 1997. A similar order was made in that Appeal).

The Queensland Law Society Statutory Committee

Court of Appeal Hearing

Appellant: The Queensland Law Society
Respondent: Craig Stephen Bax
Appeal no.: 7423 of 1997

Appeal

Both the Council of the Society and the Attorney-General lodged appeals against the inadequacy of the penalty.

The Statutory Committee had fined Craig Stephen Bax $15,000 on July 29, 1997. The charges brought against the practitioner were:

1. That he signed as witness of a Deed of Loan which was purported to have been executed on March 30, 1993 but which was not executed until after September 20, 1993, as the practitioner well knew. The practitioner thereby falsely represented that the Deed of Loan had been executed on March 30, 1993.
2. That the practitioner signed as witness a Bill of Mortgage purported to have been executed on March 30, 1993, but which was not in fact executed until after September 20, 1993, as the practitioner well knew. The practitioner thereby falsely represented that the Bill of Mortgage had been executed on March 30, 1993.
3. On May 24, 1994, the practitioner falsely represented at a creditors' meeting that the Bill of Mortgage had been executed in March 1993, when in fact he knew that the Bill of Mortgage had not been executed until after September 20, 1993.

Findings and Orders

The Appeal Court found the charges proven and that the attitude of the solicitor towards the matter was not such as to suggest that suspension, rather than striking off, was the proper remedy.

The Court ordered:

1. Allow appeals by the Queensland Law Society Incorporated and by the Minister for Justice and Attorney-General.
2. Set aside the order of the Statutory Committee made on July 29, 1997 that the respondent be fined the sum of $15,000.
3. Order in lieu that the name of the respondent be struck off the roll of solicitors.