In the Matter of Henry William Smith

Case No: SC/384
Date of Hearing: 11 November 1997
Appearing Before: Mr A W Watt (Acting Chairman)
Mr V J Vandeleur
Mr G C Fox
Penalty: Suspended from practice until such time as the practitioner 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.

Charges

The allegations in the case formulated by the Council of the Queensland Law Society Incorporated were set out in paragraph 1 of the Application of the Queensland Law Society Incorporated dated the 25th day of October 1996 which stated as follows:

1. That the practitioner attempted to fraudulently convert trust moneys to his own use.

Particulars

(a) As at 29 April 1996, the practitioner held moneys in his trust account for clients of his legal practice as follows:

Client	Amount in Trust
A	$2,048.80
B	$2,591.04
C	$14,863.24
D	$3,128.00

(b) On or about 29 April 1996, the practitioner drew the following cheques on his trust account:

Cheque No.	Payee	Amount
3500	L	$2,048.80
3501	M	$2,591.04
3502	N	$14,862.24
3503	O	$3,128.00
Total		**$22,630.08**

(c) On or about 29 April 1996, the practitioner endorsed on the reverse side of each of the cheques particularised in sub-paragraph (b) (save for the cheque payable to M signatures purporting to be those of the respective payees of the cheques;

(d) On or about 29 April 1996, the practitioner attempted to deposit the cheques particularised in sub-paragraph (b) into the practitioner's personal cheque account maintained at the Coolangatta branch of Westpac Banking Corporation."

On the 11th day of November 1997 the matter came on for hearing before the Statutory Committee.

Ms M Doyle, Solicitor of Messrs Corrs Chambers Westgarth Solicitors appeared for the Queensland Law Society Incorporated.

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

Mr O'Gorman stated that the practitioner admitted the allegations contained in the Application of the Queensland Law Society Incorporated dated the 25th day of October 1996 and that those matters constituted professional misconduct. No oral evidence was called in respect of the charges.

Submissions

The Society's solicitor submitted as follows:

It was submitted that the appropriate penalty in this case was one of striking off. The purpose of disciplinary proceedings was not to punish and the Society recognised that this was a very unfortunate case, nevertheless the public had to be protected from the damage that could be done by a practitioner who had been found unfit to practise.

It was said in the case of *Mellifont v The Queensland Law Society Inc.* that a very long period of suspension was inappropriate unless there were very special circumstances.

The medical evidence before the Committee demonstrated that it was impossible to state definitively that the practitioner would be fit to practise at some future time. Nor had the practitioner approached his medical adviser to seek the therapy that was considered necessary to overcome his major depressive illness.

A distinction was drawn between the case of Bartlett and the present case in that there was evidence of definite severe physiological damage to the brain of Ms Barlett which was capable of clear and definite assessment, whereas there was no such evidence in relation to Mr Smith.

The medical evidence in Bartlett was that Ms Bartlett either did not know what she was doing or was incapable of controlling what she was doing and was incapable of distinguishing between right and wrong whereas the medical evidence, in this case, was quite clear that Mr Smith knew exactly what he was doing; he knew what he was doing was wrong but still did it.

It was further submitted that the order in Bartlett, namely, that the practitioner be suspended until such time as she could show that she was fit to practice, was open to question, the submission being that the Statutory Committee did not have power to make an order for suspension for an indeterminate period.

The Society relied on the case of *McNamara v The New South Wales Law Society*, an unreported decision of the Court of Appeal in which Justice Reynolds observed –

> "An order for suspension must be based upon a view that at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, subject to any limitation imposed on the issue of a Practising Certificate, his name will then be on the role of solicitors and he may resume his practice.
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> 'It will be seen that in cases of present unfitness such as we have here, an order for suspension will not frequently be appropriate because it is difficult for a Tribunal to feet confident that, at the expiration of one or more years, a person presently unfit to practice, will be fit. The use of the power to suspend is valuable as a punitive measure but needs cautious application where fitness and the Court's protective function is involved.'

The practitioner was struck off.

It was stated that, whilst the Law Society had every sympathy for the practitioner in this case and it acknowledged that it would be a hard order, the Statutory Committee now had an opportunity to clarify the position and make the appropriate order to strike off.

The practitioner's solicitor submitted as follows:

It was submitted that to strike off the practitioner would be harsh and particularly oppressive, even whilst acknowledging that the jurisdiction of the Statutory Committee was a protective one. The Bartlett type order met the necessary requirements of the protective role, whilst at the same time acknowledging the substantial mitigating and unusual personal and medical circumstances of the practitioner.

The medical evidence suggested, in relation to the practitioner's conduct, that:

> "He acted out a suicidal equivalent and virtually tore down his own creation of the practice in a manifestly self destructive behaviour."

And that:

> "Although speculative, it seems likely that the allegedly fraudulent behaviour represents a form of professional suicide."

Documentary evidence was tendered to demonstrate that at the time the practitioner engaged in the professional misconduct, the subject of the charges, his practice and personal financial positions were very healthy. It was submitted that this substantially corroborated the psychiatric opinion that he was acting in a para-suicidal way in respect of his own professional practice.

It was submitted that the case of McNamara, decided in New South Wales some 14 years before the decision of the Statutory Committee in Queensland in Bartlett, was of little relevance. It was noted that the Society did not appeal the Bartlett decision and it was submitted that the decision made in Bartlett was, for all practical and relevant factual ' matters, a decision which should be repeated in this instance.

It was submitted that the practitioner had acted responsibly in relation to the matter. Within a few months of the incident, he had handed in his Practising Certificate and had not practised since that time. It was submitted that it would be appropriate in terms of the protective jurisdiction of the Statutory Committee to make an order in terms of the Bartlett decision, namely that the practitioner be suspended from practice until such time a he was able to satisfy the Council of the Law Society that he was a fit and proper person to hold a Practising Certificate.

Finding and Orders

THE COMMITTEE ORDERED as follows:

The Committee finds the matters set out in the Application of the Queensland Law Society Incorporated filed the 31st day of October 1996, as admitted by the practitioner, proved and that those matters constitute professional misconduct. The Committee finds the practitioner guilty of professional misconduct.

The Committee is satisfied that at the time of the professional misconduct the practitioner was suffering from a major depressive illness. His actions were naive at a time when he was not in financial need. The Committee is satisfied that his major depressive illness was the cause of his misconduct.

Having given due consideration to the evidence, the Committee is satisfied that in the special circumstances of the case the name of the practitioner should not be struck from the roll of solicitors of the Supreme Court of Queensland, but that he should 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. The Committee ordered accordingly.

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

Appeal

The Society and the Attorney-General have lodged appeals in this matter.