In the Matter of Practitioner X

Case No: SC/391
Date of Finding: 11 November 1997
Appearing Before: Mr J S P O'Keeffe (Acting Chairman)
Mr V J Vandeleur
Mr G C Fox
Penalty: Fined $15,000

Charges

The allegations in the case formulated by the Council of the Queensland Law Society Incorporated were set out in paragraphs 1 to 5 inclusive (I) and 1 to 2 inclusive (H) of the Amended Application of the Queensland Law Society Incorporated filed by leave on the 16th day of September 1997 which stated as follows:

"1. That in breach of Rule 83(2) of the Rules of the Queensland Law Society Incorporated ("the Society") the practitioner failed to furnish to the Council a sufficient and satisfactory explanation in writing in relation to certain matters referred to in a complaint made to the Society on behalf of S, which failure continued for a period of 14 days from the date of his receiving notification from the Secretary that if his failure did continue for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct.

Particulars

(a) By letter dated 3rd January 1996 signed by the Secretary of the Society, the practitioner was requested to provide, within 21 days, a sufficient and satisfactory written explanation of the matters referred to in a letter of complaint from the solicitors on behalf of S;

(b) The practitioner did not reply to that letter;

(c) By letter dated 30th January 1996 signed by the Secretary of the Society, the practitioner was requested to respond to the letter dated 3rd January as a matter of urgency, and in any event within a further period of 10 days, and advised that a Rule 83 Notice would be served on the practitioner if he failed to so respond;

(d) The practitioner did not reply to that letter;

(e) By letter dated 12th February 1996 signed by the Secretary of the Society, the practitioner was notified by mail and by facsimile, pursuant to Rule 83 of the Rules of the Society, that if his failure continued for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct,

(f) In breach of Rule 83(2) of the Rules of the Society, the practitioner responded to that letter by letter dated 26th February 1996, which letter was not received by the Society until 4th March 1996.

2. That in further breach of Rule 83(2) of the Rules of the Society the practitioner again failed to furnish to the Council a sufficient and satisfactory explanation in writing in relation to certain matters referred to in a complaint made to the Society on behalf of S, which failure continued for a period of 14 days from the date of his receiving a further notification from the Secretary that if his failure did continue for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct.

Particulars

(a) By letter dated 22nd May 1996 signed by the Deputy Secretary of the Society, the practitioner was requested to provide, within 7 days, further information in relation to the matters referred to in a letter of complaint from the solicitors on behalf of S;

(b) The practitioner did not reply to that letter;

(c) By letter dated 5th June 1996 signed by the Secretary of the Society, the practitioner was requested to respond to the letter dated 22nd May by 7th June, failing which a Rule 83 Notice would be issued to him; (d) The practitioner did not reply to that letter;

(e) By letter dated 11th June 1996 signed by the Secretary of the Society, the practitioner was again notified by mail and by facsimile, pursuant to Rule 83 of the Rules of the Society, that if his failure continued for a period of 14 days from the date of his receiving such notification he would be liable to be dealt with for professional misconduct;

(f) In breach of Rule 83(2) of the Rules of the Society, the practitioner responded to that letter by letter dated 3rd July 1996.

3. That the practitioner was guilty of professional misconduct to the detriment of S in that he led S to believe that he had commenced a common law action for damages for negligence against S's former employer, and further, that a hearing date for the trial of that action was upcoming when, to his knowledge, no such action had been commenced.

Particulars

(a) In or about the month of June 1991 S consulted the practitioner in relation to the prospects of success of an action for damages for negligence against his former employer, the Q A S;

(b) The practitioner informed S that his prospects were good, in consequence of which S instructed the practitioner to institute proceedings on his behalf;

(c) The practitioner had not instituted any such proceedings on behalf of S by the time he ceased acting for S in October 1995;

(d) On a number of occasions up until October 1995, in response to enquiries by both S and his wife, the practitioner led S and his wife to believe that proceedings had been instituted, and that a hearing date was upcoming, in that, in the course of a number of conversations throughout the time the practitioner acted for S, the practitioner told S that he had good prospects of success in a common law action, he accepted the sum of $200 cash "to start the action in Court" and in response to a number of enquiries by S as to how far away they were from a case being heard, the practitioner's general response was that "we are getting to a date".

(f) In consequence of the practitioner's failure to institute any such proceedings, the limitation period within which S could commence an action for damages for negligence against his former employer expired without proceedings having been issued.

4. That the practitioner was guilty of unprofessional conduct to the detriment of S in that he:

(a) Failed to commence an action on behalf of S for damages for negligence against his former employer, the Q A S, thereby permitting S' cause of action against Q A S to be statute-barred.

Particulars

The particulars set out at paragraph 3(a), (b), (c) and (D were repeated and relied upon seriatim.

(b) Failed to act diligently or at all in the interests of his client, and failed to act in accordance with his client's instructions, by failing to file an Entry of Appearance and Defence on behalf of S to Magistrates Court Plaint and Summons No. 6103/93, or otherwise acting to prevent a default judgment being entered against S in that action.

Particulars

(i) In 1993 Magistrates Court Plaint and Summons No. 6103/93 was issued against S by the Q P C U;

(ii) S consulted the practitioner in relation to the Plaint and Summons and instructed the practitioner to file an Entry of Appearance and Defence thereto;

(iii) The practitioner did not file an Entry of Appearance and Defence to the Plaint and Summons;

(iv) The practitioner failed to take any other steps to avoid a default judgment being entered against S;

(v) In consequence of the practitioner's failure to take the steps referred to in sub-paragraph (iii) and (iv) hereof default judgment was entered by the Plaintiff against S.

5. That the practitioner was guilty of professional misconduct in that he failed to inform S of the facts that:

(a) He had not filed an Entry of Appearance and Defence to Magistrates Court Plaint and Summons No. 6103/93;

(b) Default judgment had been entered by the Plaintiff in that action against S; and

(c) The practitioner had successfully applied to the Magistrates Court to have the default judgment set aside.

Charges Re: H

1 That the practitioner was guilty of unprofessional conduct in that he failed to act diligently or at all in the interests of his client, and failed to act in accordance with his client's instructions by failing to institute proceedings for property settlement against her former de facto husband, one L.

Particulars

(a) On 16th February 1995 H consulted the practitioner in relation to a property settlement claim against her former de facto husband, one L. She paid the practitioner the sum of $40 for such consultation.

(b) Upon being advised by the practitioner on 16th February 1995 to the effect that she had a very good case, H considered her position and shortly thereafter telephoned the practitioner to inform him that she wished to commence proceedings against L, whereupon the practitioner asked her to pay the sum of $200 up front for searches and a caveat;

(c) On 27 February 1995 H attended at the office of the practitioner and paid him the sum of $100 on account of such expenses. H attended at the office of the practitioner again on 13th March 1995 when she paid him a further sum of $100 for expenses;

(d) H signed a Costs Agreement with the practitioner;

(e) H attended at the office of the practitioner on 24th March 1995 when she was advised that it may take 1 to 2 years for her case to be finalised;

(f) On 24th May 1995, H attended at the office of the practitioner, who requested H to sign a caveat over property registered in the name of L. H signed the caveat;

(g) The practitioner did not lodge the caveat for registration;

(h) In August 1995 the practitioner told H that the caveat would be in place until the Court hearing was finished;

(i) The practitioner failed to return telephone calls made to him by H on 6th July and 20th November 1995, and failed to provide H with copies of correspondence and other documents which, on 13th June, 20th September, 5th October and 11th December 1995, he informed her would be provided to her;

(j) H's instructions to the practitioner at all times between 16th February 1995 and 11th December 1995 were to the effect that he should prepare and initiate such legal proceedings as were available to her by way of property settlement against her former de facto husband;

(k) As at 11th December 1995 the documents necessary to initiate her claim had not been prepared or filed, and no explanation had been provided to her as to the practitioner's failure to commence such proceedings.

2 The practitioner was guilty of professional misconduct to the detriment of H in that he misled his client, H, that he, the practitioner, had instituted proceedings against her former de facto husband, one L, and had taken steps to progress those proceedings.

Particulars

(a) The particulars set out in paragraph 1(a), (b), (c), (d), (e), (0, (g), (h), (i), (j) and (k) were repeated and relied upon seriatim.

(b) On 30th May 1995 the practitioner informed H that some papers and a letter would be served on her former de facto husband, one L. As H was concerned at the reaction by L to proceedings against him, H wished to receive a copy of the letter that would be forwarded by the practitioner to L;

(c) H subsequently telephoned the practitioner two or three times regarding the letter that was to be sent to L. The practitioner informed her the letter had not been sent, but that it would be sent in the next week or so;

(d) On 13th June 1995 H again telephoned the practitioner in relation to the letter. The practitioner asked H what reaction she had received when she collected her children for access. H replied there had been no reaction. Based on her previous discussions with the practitioner, H believed the letter had been sent to L, but assumed that L had not yet collected the letter from the mail box;

(e) Based on the instructions given by H to the practitioner in February 1995, including her payment of funds for legal expenses, her execution of a costs agreement and a caveat, as well as her several attendances upon the practitioner, H believed that proceedings had been instituted on her behalf;

(f) It was not until the 11th December 1995 that H was informed by the practitioner that proceedings had not been filed with the Court, but that could occur before Christmas, if H wished it to be done. H informed the practitioner that she wished proceedings to be instituted forthwith. The practitioner informed her she would receive the relevant material by 15th or 18th December 1995.

(g) No proceedings were commenced for H by the practitioner, nor did the practitioner forward copies of any documents to H."

On the 16th and 17th days of September 1997 and the 20th and 21st days of October 1997 and the 11th day of November 1997, the matter came on for hearing before the Statutory Committee.

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

Mr R A Perry of Counsel instructed by Messrs Gilshenan & Luton Solicitors appeared for the practitioner.

The practitioner contested the allegations contained in the Amended Application of the Queensland Law Society Incorporated filed by leave on 16th day of September 1997. Ms Schafer and Mr Perry both called evidence in respect of the charges.

Reasons for Decisions

This Application was heard over 4 days. During the course of that hearing the two complainants, S and H gave evidence and were cross-examined. The practitioner also gave evidence and was cross-examined. There was other evidence, to which the Committee shall refer where necessary. Ms j Schafer (Solicitor) appeared for the Queensland Law Society and Mr R A Perry of Counsel instructed by Messrs Gilshenan and Luton appeared for the practitioner.

The practitioner was admitted to practice in 1979. The Committee dealt with the charges in the order in which they occurred in the amended Application (the Application).

The Committee proceeded on the basis that the Society had the onus of proof and the appropriate standard was the civil standard but subject to the application of the Briginshaw principle.

The first two charges related to alleged failures to comply with Rule 83 Notices. Mr Perry in the course of his final address contended that the charges as formulated disclosed no offence because of the absence of an allegation that the alleged failures to comply with the Notices amounted to either professional misconduct or unprofessional conduct. The Committee did not take that view. Having regard to the 'deeming" provision set out in the Rule, the Committee was of the view that the charges as framed did disclose an offence. In any event, at the conclusion of the address Ms Schafer on behalf of the Society, asked for leave to amend the charges by inserting an allegation in each charge of professional misconduct. Mr Perry did not object to that amendment and the Committee allowed the amendment.

Charge 1

By letter dated January 3, 1996 Mr Thompson as Secretary of the Queensland Law Society Inc., wrote the practitioner a letter requesting an explanation. Receiving no reply he wrote a further letter dated January 30, 1996. Again he received no reply within the time limited. The practitioner asserted that his letter of February 26 replied to these letters.

Mr Thompson then sent a Rule 83 Notice by, he says, mail and fax on February 12, 1996. The practitioner swore he received the notice on February 13. Nothing turned on this. The practitioner responded by letter dated February 26, 1996. He swore he delivered this by hand on February 26. It was date stamped by the Society March 4, seven days later. In view of the conflict of evidence the Committee found this charge not proved.

Charge 2

By letter dated May 22, 1996 the Deputy Secretary of the Society wrote to the practitioner. He received no reply within the time limited.

On June 5, Mr Thompson wrote requesting a response. There was no reply within the time limited.

On June 11, 1996 Mr Thompson sent a Rule 83 Notice requiring a response within 14 days.

He sent another letter on June 26. The practitioner responded by letter dated July 3. The practitioner asserted that the letter of June 26 allowed an extension. The argument could not be sustained. He was already in breach of the Rule 83 Notice when the letter of June 26 was sent, and the letter recorded that state of affairs. The Committee found charge 2 proved and this amounted to professional misconduct.

Charge 3-5

The Committee then dealt with charge 3 which alleged the practitioner was guilty of Professional Misconduct on the basis that the practitioner "led S to believe" that he had commenced a Common Law action for damages for negligence against a former employer, and further, that a hearing date for the trial of that action was upcoming when, to his knowledge, no such action had been commenced. Five particulars are given of that charge in subparagraphs a, b, c, d and f. If the charge was to be made out, it would be necessary that some of the matters alleged in subparagraph (d) be established.

The Committee commenced by mentioning that charge 3, as originally amended, contained the word "falsely' in the body of the charge. The charge as originally amended also included a subparagraph (e) which read, "That information was false in fact as the practitioner well knew". There was quite a good deal of discussion at the outset of the hearing between Counsel about amendments to charge 3. That commenced at page 5 of the transcript and went to page 10. It was necessary to mention this because Counsel for the practitioner in his closing address, placed a great deal of emphasis on the fact that allegations of falsity had been removed from the body of the charge and the particulars. There was some discussion during the course of Mr Perry's address with a member of the Committee as to whether the word 'falsely" added anything to the allegation. Generally speaking there could well be a difference between an allegation of 'leading someone to believe" and "falsely leading someone to believe". However when one read charge 3 as a whole, it contained both an allegation that S was led to believe certain things including the fact that an action had been commenced and went on to allege that to his (the practitioner's) knowledge no such action had been commenced. In the Committee's view this was tantamount to an allegation of falsity. Accordingly the Committee did not accept the submission made by Mr Perry that the removal of a specific allegation of falsity made a material difference to the charge.

The Committee then turned to a consideration of the evidence.

The principal evidence by the practitioner on this point was that set out in paragraph 9(xi) of his Affidavit in which he said, "I can recall no conversation in which I ever said to S proceedings has been commenced". S on the other hand in paragraph 11 of his first Affidavit refers to a number of times that he telephoned the practitioner and asked him how the matter was going and the practitioner saying to him, 'Things are going okay, we should get a date of hearing soon' or that a date of hearing was 'riot far off". In paragraph 11 (ii) of this Affidavit in reply, S deposes further to this type of response from the practitioner. In this case he didn't appear to limit it to telephone conversations. Indeed it appears that S saw the practitioner so many times in person that one doubted whether he ever had a great deal of telephone contact with the practitioner Mr Perry pointed to a number of quite cogent reasons why the Committee should be very cautious about accepting S as a reliable witness.

Indeed Mr Perry submitted that in a number of important respects S was deliberately untruthful. The Committee agreed that there were some fairly striking anomalies and apparent inconsistencies in the evidence given by S. Notwithstanding that, the Committee did not form the view that S was a dishonest witness. The Committee accepted that in spite of the position of some responsibility he held in his job with the QATB he was in many respects quite naive. The Committee also took account of the fact that he obviously suffered from significant psychiatric problems and was taking prescribed drugs which could have an adverse affect on his memory.

In relation to the particular matter the Committee was dealing with, namely what the practitioner said to S to lead him to believe that proceedings had been commenced, S was effectively cross-examined by Mr Perry from Page 43 to 48 of the transcript. Having considered the whole of the evidence and the submissions made by Mr Perry, the Committee was not satisfied on balance of probability that the practitioner ever directly assured S that proceedings had been instituted (as deposed to by Mr S at Page 43 of his cross-examination) but The Committee was satisfied on balance of probability that S did from time to time enquire of the practitioner how the action was going and the practitioner replied 'we are getting to a date" or words to that effect. In coming to this conclusion. The Committee had regard to the fact that it was common ground that S had contact with the practitioner on very many occasions during the relevant period. Notwithstanding that other matters were obviously discussed in the course of those contacts, it is simply beyond the bounds of probability that S did not from time to time inquire of the practitioner how the action was going.

Having regard to the fact that no action had ever been commenced, and assuming, as found, that S did from time to time inquire of the practitioner how the action was going, the reply attributed to the practitioner by S, namely "we are getting to a date" is inherently probable. Furthermore, the only reasonable inference S could draw from the statements by the practitioner "we are getting to a date" is that an action has been commenced. This was not the case and the practitioner must have known it was not the case. In short the practitioner deceived his client over a significant period of time about a matter which was obviously very important to the client. The Committee accordingly found that charge 3 had been proved and that the practitioner was in respect of this matter guilty of Professional Misconduct.

The Committee mentioned at this stage that some medical evidence was lead on behalf of the practitioner. While there might be cases in which the medical evidence can be looked at for the purpose of determining whether or not a person has been guilty of Professional Misconduct, the Committee was of the view that this was not one of those cases and the medical evidence would be better looked at in relation to any penalty that the Committee might impose. The Committee was of the view that medical evidence would usually only be directly relevant to the question of Professional Misconduct in a situation where a practitioner had taken the stance of admitting his conduct was inappropriate and was seeking to avoid that conduct being categorised as Professional Misconduct on the grounds of a medical condition.

Charge 4(a)

This charge alleged Unprofessional Conduct for failing to commence proceedings within the time limited for the commencement of proceedings. It is of course true that there are many occasions where time limits are missed and no prosecution results. Furthermore in many such cases a prosecution would not be justified.

A typical case may involve a practitioner opening a file undertaking all of the preliminary work which one should undertake as part of the prosecution of proceedings for damages and for some reason or other the originating process is not filed within the prescribed time.

It emerged from the evidence that the practitioner did absolutely nothing to advance the progress of any claim from the time the practitioner received instructions, until the file was taken from him some 3 years later. Furthermore, nothing was done during the whole of that time (not even one letter written) in the context where there was regular contact between the client and the practitioner so that the existence of this claim must have been, throughout the whole of that period of time, in the mind of the practitioner. The Society in bringing this charge relied upon the particulars set out in subparagraphs a, b, c and f of Charge 3. The particulars did not specifically allege the peculiar circumstance which would warrant a finding of Unprofessional Conduct under this head eg. that not even one letter was written throughout the whole period. Generally speaking in relation to the question of particulars, the Committee prefer the view put to us by Ms Schafer, namely that once evidence was in, the Committee was entitled to look at the whole of the evidence in determining whether or not a charge was made out even though the charge may not be precisely particularised in terms of the evidence. On the evidence before the Committee, the Committee found Charge 4(a) proved and the practitioner guilty of Unprofessional Conduct.

Charges 4(b) and 5 – Credit Union Matters

These were set out in charges 4(b) and 5 of the Application. Charge 4(b) dealt with failing to file a defence, and 5 related to the alleged failure to inform the complainant in relation to the failure to act, default judgment being entered, and being set aside.

It was acknowledged by the practitioner that he failed to file a defence and default judgment was issued.

Without more, failure to avoid a judgment being entered did not amount to unprofessional conduct. This suggests negligence. Although the charge was in essence of the same nature as that contained in 4(a) (failure to institute proceedings), and it was most unfortunate that they related to the same client, there was no allegation of a pattern or course of conduct which might have lead us to regard this behaviour as unprofessional conduct.

The Committee found charge 4(b) had not been proved. In relation to charge 5 the complainant alleged that he was unaware of the judgment until he saw another solicitor. The practitioner denied this.

One could understand that the practitioner would not want to magnify the seriousness of this matter. Indeed it would be understandable if he did not dwell at length on it.

He made a mistake. It was a mistake capable of rectification. He rectified it.

It would not have been permissible for him to mislead the complainant about the nature of the proceedings undertaken.

The complainant says he was unaware of these matters. The practitioner swore to the contrary.

The complainant signed an affidavit supporting the application to set aside judgment. Mr J, who was the solicitor acting for the Credit Union and who gave evidence before the Committee, made a contemporaneous record of a conversation with the complainant which supported the practitioner's version. The complainant deposed to being on medication which affected his memory.

The Committee found that this charge had not been proved.

Charge 1-H

Common Ground

The Committee commenced their consideration of the H matter by summarising what was essentially the common ground:

(i) H consulted the practitioner on the 16th February 1995 in relation to a claim against her former defacto husband (L) for an equitable interest in certain property. The practitioner indicated that if H decided to go ahead he would pursue the claim on a speculative basis. He asked H to think about the matter and let him know what she wanted to do.

(ii) H telephoned the practitioner on the 27th of February 1995 and either in that telephone conversation or the telephone conversation returned by the practitioner (perhaps on the 28th of February, 1995), H indicated she wanted to proceed. In saying that she indicated she "wanted to proceed' the Committee is purposely using neutral language. The Committee appreciated that there is a conflict between H and the practitioner as to what was actually said by H on this occasion.

(iii) Prior to this telephone contact H had received a letter from the practitioner dated the 21st February 1995 which is exhibited as exhibit A1 to the practitioner's Affidavit. This letter is of some importance as it indicated that the practitioner had addressed his mind to the legal issues involved (he enclosed an extract from a legal publication which presumably set out the current law relating to claims of this nature) and also in that letter made it clear that he wanted $200 paid "to commence investigations". The amount of $200 was paid in two instalments.

(iv) There was a further consultation between the practitioner and H on the 24th of March 1995. In this connection there is a note in H's diary for that day which reads "10.30am. the practitioner. 2 yr case. $30,000 to $40,000". There are hand written notes annexed to the practitioner's Affidavit of certain information he obtained from H on this occasion.

(v) There was a further consultation on the 24th of May 1995. This was the date on which the practitioner presented a Caveat. It does not appear from the material who initiated this appointment.

(vi) There was a further consultation between H and the practitioner on the 30th of May. There was a discussion between the practitioner and H in relation to sending a letter to L. There was in the material as exhibit 1 to the practitioner's Affidavit a draft of a letter to L which bore the date the 30th of May 1995. There was also a further canvassing of H' "life story'. The practitioner says in this regard that he actually dictated a draft Statement on this day. While it may not be common ground it would seem probable that the practitioner did, as he deposed to at page 16 of his Affidavit, prepare a draft Statement of Affidavit on that day and because of some confusion about dates suggested that the consultation be terminated and the H go home and check her dates and provide him with written instructions setting out the history of her relationship.

(vii) A further appointment was subsequently made for the 20th of September 1995; there had been some phone contact between the parties in the meantime.

(viii) The consultation which occurred on the 20th of September was marked by H expressing hostility to the practitioner and indicating a lack of confidence in him.

(ix) On the 20th of September it was agreed that H was to send the practitioner a list of dates of her cohabitation with L. H claimed that she sent this material on the 5th of October after ringing the practitioner to ascertain his new address. The practitioner claimed he never received this material.

(x) During at least some of the relevant period in 1995 the practitioner's life was in turmoil because of a matrimonial dispute and the building in which his professional offices had been located being "sold out from under him".

Assessment of H's Evidence

The Committee formed the view that H was generally a truthful and reliable witness but noted that some of the assertions made by her were not accurate. One of her diary entries was to the effect that the practitioner had told her that he had sent the letter to L "last week". When cross-examined by Mr Perry about this aspect, she agreed that the practitioner did not say that but that she inferred from the questions he had asked about "any change in L's conduct" that a letter had in fact been sent last week. The Committee also thought it unlikely that in the telephone conversation to which she deposed that she had with the practitioner shortly after the initial appointment (see paragraph 3 of her first Affidavit) she told him she wished him to institute proceedings on her behalf. This sounded more like language of the person who drew the Affidavit (and we do not in any way criticise the person who drew the Affidavit) rather than the language of H. We do however find that H made it clear to the practitioner that she wished him to go ahead with the matter. The practitioner in our view was justified in taking that as an instruction to investigate the matter with a view to going ahead if proceedings had a reasonable prospect of success.

The Caveat

To the extent that it may be relevant, the Committee found it more probable than not that H did sign a Caveat which had been prepared by the practitioner on the 24th of May 1995. In making this finding the Committee noted that the practitioner said that he prepared a draft Caveat so that H would have a better idea of what a Caveat was all about. If one were going to leave blank both the interest being claimed (item 3 of the Caveat) and the grounds of claim (item 4 of the Caveat) it would not be a particularly enlightening document. The Committee also noted that according to the practitioner (paragraph 5 (vi) of his Affidavit) the consultation on the 24th of May 1995 was set for 9.00am and that H was asked to wait or to come back in half an hour. He said that at that time there was no discussion of signing a Caveat or anything else. The practitioner however agreed that he prepared a Caveat on the day (a copy of which is in evidence) and showed it to H for the purpose of assisting her to better understand the nature of a Caveat. H had a note in her diary about the contact on the 24th of May which read 'Solicitor 9.00am to 11.15am signed Caveat". The Committee also noted that exhibit J(iii) to the practitioner's Affidavit was an order for a search for two Title Deeds which appear to have left the practitioner's office by fax at 9.05am on the 24th of May. The results of those searches appear to have been received by the practitioner by fax at 12.35pm on the same date. While the Committee was reluctant to place significant emphasis on these facts (because they were not canvassed in the course of the proceedings) they constituted some basis to support a view that the practitioner prior to speaking to H at all on the 24th of May had formed the intention of preparing a Caveat for presentation to H on that day.

Further Findings

Apart from the items of common ground which the Committee had set out above and the specific finding the Committee made in relation to the signing of a Caveat the Committee made the following further findings in relation to the H matter:

1. The practitioner did not lodge a Caveat because he was concerned that H may not have had a caveatable interest.
2. A draft Costs Agreement was prepared by the practitioner but not signed.
3. For reasons which cannot be explained the practitioner did not received the letter posted by H on or about 5th October.
4. In the telephone conversation which took place on 11th December 1995 the practitioner did apologise to H for having done nothing to progress her case and that he did ask H if she wanted to start proceedings before Christmas whereupon H indicated to him that she wanted him to do whatever had to be done to progress the matter as soon as possible. The Committee further found that the practitioner did on the occasion indicate that he would take care of the matter as soon as possible. Nothing further occurred until H withdrew her instructions early in January 1996.

There were of course many other issues where there was a conflict of evidence between the practitioner and H but the Committee did not find it necessary to make specific findings in relation to those matters.

If the Committee was to accept the evidence given by the practitioner both in Affidavit form and orally the Committee would conclude that his approach to this matter was a careful and studied one and that the delays were caused by the difficulty of getting precise instructions from H. Speaking in general terms the Committee did not accept this version as being accurate. The Committee could not help but think that the practitioner was less than efficient in completing the necessary investigations into this matter and coming to a firm conclusion as to whether proceedings were warranted. It would certainly have been preferable for him following the encounter with H on the 20th September to have "cut the paynter" completely.

While the parameters of Professional Misconduct are fairly clear the question of whether conduct should be categorised as Unprofessional Conduct is very much a matter of degree. In assessing the practitioner's conduct in this case the Committee took into account that sole practitioners in the course of their practice of necessity deal with a considerable number of files over a range of different legal areas and it happens from time to time that practitioners for one reason or another "get out of their depth" or develop something of a mental block in relation to a file. As a result there is procrastination and a postponement of the difficult decision that often had to be made. The manner in which the practitioner conducted the H matter may well have left him open to criticism by his client and general dissatisfaction by his client. This often results in the loss of the client and damage to his general professional reputation. These were the inevitable and natural sanctions which resulted from a Solicitor running a file inefficiently. It was however a further step to brand the conduct as Unprofessional Conduct and impose a penal sanction on the practitioner. In all the circumstances of this case, which the Committee treated as an entirely discrete matter, the Committee was not satisfied that Charge 1 in relation to H had been proved.

Charge 2-H

This was a charge of Professional Misconduct based on the allegation that the practitioner had misled H to the effect that he had instituted proceedings against her former de facto husband. The Committee concluded that the practitioner at no time informed H that proceedings had been commenced.

Given the manner in which the practitioner conducted this matter and the poor standard of communication with his client, the Committee was not surprised that Ms H formed a belief that proceedings had been instituted. The Committee was of the view that this very poor standard of practice had given rise to this unhappy state of affairs and the bringing of both these charges relating to Ms H.

Orders and Findings

THE COMMITTEE ORDERED as follows:

"The Committee finds that S charges 2, 3 and 4(a) are proved, but that S charges 1, 4(b) and 5 are not proved. The Committee finds that H charges 1and 2 are not proved. The Committee finds that S charges 2 and 3 constituted professional misconduct and charge 4(a) constituted unprofessional conduct. The Committee publishes its reasons. The Committee finds the practitioner guilty of both professional misconduct and unprofessional conduct.

The Committee orders that the practitioner S be fined the sum of $15,000 payable by 25 equal consecutive calendar monthly instalments of $600, the first of which will be due and payable on 28 February 1998 and thereafter on the last day of each and every calendar month, default in any payment, at the election of the Queensland Law Society Incorporated, resulting in the balance then outstanding becoming immediately due and payable.

The Committee further orders that the practitioner, at his expense, permit an appointee of the Queensland Law Society Incorporated to attend at his practice and undertake an inspection and examination of the practitioner's files, records and office systems and to report any matters requiring remedial action tc6 the practitioner and to the Queensland Law Society Incorporated. Such inspections and examinations are to take place on a six monthly basis for the next two years and thereafter on an annual basis for the ensuing three years. The first such inspection and examination are to take place not later than 30 June 1998.

In fixing the fine, the Committee took into account the cost of such inspections and examinations.

With respect to costs, the Committee proceeds on the basis that in this jurisdiction costs should normally follow the event. However, the Committee is of the opinion that to save the parties additional trouble and expense in determining the costs of issues and in view of the Committee's comments relating to the H charges, the Committee has determined, in the exercise of its discretion, to make no order as to costs.

The Committee further orders that there be liberty to apply."