SUPREME COURT OF QUEENSLAND

CITATION:	*Council of the Queensland Law Society Inc v Whitman* [2003] QCA 438
PARTIES:	**COUNCIL OF THE QUEENSLAND LAW SOCIETY INCORPORATED** (statutory appellant/appellant/cross-respondent) **v** **PAUL FRANCIS WHITMAN** (practitioner/respondent/cross-appellant)
FILE NO/S:	Appeal No 2207 of 2003 Charge No 83
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Solicitors' Complaints Tribunal
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2003
JUDGES:	de Jersey CJ, McPherson JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal and cross-appeal dismissed**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – MISCONDUCT, UNFITNESS AND DISCIPLINE – DISCIPLINARY ORDERS – IN GENERAL – where Solicitors' Complaints Tribunal found that respondent misappropriated trust monies, employed employee to practise as solicitor without appropriate practising certificate, falsely represented to the Queensland Law Society the nature of employee's employment, and failed to produce documents on request to the Queensland Law Society – where respondent suspended for nine months – whether Solicitors' Complaints Tribunal should have upheld charges – whether penalty imposed by Solicitors' Complaints Tribunal was appropriate *Queensland Law Society Act* 1927 (Qld) *Queensland Law Society Act* 1952 (Qld), s 3, s 5G, s 5H, s 6Z, s 38, s 39, s 40, s 40A *Queensland Law Society Amendment Act* 1930 (Qld), s 3, s 11, s 27, s 28 *Queensland Law Society Amendment Act* 1985 (Qld), s 3

Queensland Law Society Rules 1987 (Qld), r 97

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498, approved
A-G v Bax [1999] 2 Qd R 9, considered
A-G v Priddle [2002] QCA 297; Appeal No 10905 of 2001, 16 August 2001, considered
re Ahern [1981] Qd R 532, approved
Brown v Minister for Justice and Attorney-General [1993] QCA 216; Appeal No 241 of 1992, 11 June 1993, considered
Mellifont v Queensland Law Society Inc [1981] Qd R 17, approved
Queensland Law Society Inc v Carberry [2000] QCA 450; Appeal Nos 2949 of 2000 and 3217 of 2000, 3 November 2000, considered
Way v Bishop [1928] Ch 647, distinguished

COUNSEL: M J Burns for the appellant/cross-respondent
S J Keim for the respondent/cross-appellant

SOLICITORS: McCullough Robertson for the appellant/cross-respondent
Stephen Comino & Cominos for the respondent/cross-appellant

[1] **de JERSEY CJ:** After a five day hearing, the Solicitors' Complaints Tribunal found that four charges brought against the respondent solicitor by the appellant, the Council of the Queensland Law Society Incorporated, had been established. Those charges are:

> "1. On or about 7 August 2001, when acting as agent for Symons Solicitors, the solicitor misappropriated client trust funds of $630.00.
> 2. By letter to Queensland Law Society dated 23 January 2002, the Solicitor knowingly falsely represented to the Society that the nature of his firm's employment of one Robert Arthur Allen was other than that of a solicitor.
> 3. Between 1 July 2000 and 13 March 2002 the Solicitor provided employment to Allen to practise as a solicitor:
> (a) contrary to the Solicitor's representation in his letter dated 23 January 2002; and
> (b) knowing that Allen did not hold a practising certificate issued by the Society pursuant to the *Queensland Law Society Act* 1952.
> 4. In breach of s 5H of *Queensland Law Society Act* 1952, the Solicitor failed to produce the documents referred to in Notice dated 14 May 2002 given to him pursuant to s 5H of *Queensland Law Society Act* 1952."

The Tribunal found that the respondent had therefore been guilty of professional misconduct. It ordered that he be suspended from practice for nine months, and that he pay the appellant's costs.

[2] The appellant appeals against the penalty imposed, on the ground of manifest inadequacy. The appellant contends that the name of the respondent should have been struck from the roll of solicitors. By cross-appeal, the respondent submits that charges numbered two, three and four above should not have been upheld. The

appeal is by way of rehearing (s 6Z(2) *Queensland Law Society Act* 1952, and see *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17, 29).

[3] I deal first with the cross-appeal.

[4] The substance of charge numbered three above was that the respondent employed Allen as a solicitor contrary to the respondent's representation to the Law Society in his letter of 23 January 2002, and knowing Allen did not hold the practising certificate required of him. The respondent's letter was provided in response to an enquiry from the appellant as to the nature of the respondent's employment of Allen. In his letter, the respondent said:

> "The duties and responsibilities of Mr Allen are telephone receptionist, front counter receptionist, typist, filing clerk and research assistant."

In fact, Mr Allen was then doing the work of a solicitor, as the respondent himself conceded in this passage during his cross-examination before the Tribunal:

> "**Question** "You see at the time you wrote your letter to the Law Society ... that's 23 January 2002, Mr Allen had been there for well over twelve months and had been doing solicitor's work, hadn't he?"
>
> **Answer** "He had started to do solicitor's work. My practice was only a very small practice doing mercantile work, debt collection work. It was very basic work, very basic and elementary work."

That "very basic", "elementary" work had extended to Mr Allen's appearing in court for the respondent's clients, including twice in the High Court of Australia.

[5] The Tribunal made these findings:

> "Mr Allen was admitted as a solicitor, carried out the work of a solicitor and was held out to people dealing with the firm as a solicitor. He saw clients of the firm, prepared trust deeds, attended to property conveyances, attended at a mediation and a settlement conference, recommended tactics and activities in respect to legal issues, prepared pleadings and made appearances before courts, including the High Court of Australia.
>
> While Mr Allen did do a large amount of his work as an employee in low level, unskilled or administrative areas, it is clear, from the evidence, that on files such as Symons, Stubberfield and some other files, some work of a higher level, professional nature was carried out during the specified period."

[6] In the Tribunal's view, the respondent had not candidly responded to the appellant's enquiry, and one would infer the explanation lay in his realization that Mr Allen, although acting as a solicitor, did not hold a current practising certificate. As to the manner in which a solicitor should treat such an enquiry, the Tribunal observed:

> "When faced with such a request or inquiry from their professional body, a solicitor is in much the same position as when dealing with the court. A solicitor has a duty to be truthful even to his own detriment, not just a duty to be truthful, but a positive duty to be full and frank and for his answers to be candid as well as truthful."

[7] Especially bearing in mind that the end purpose of the Law Society's investigation is protection of the public, and not the quasi-criminal prosecution of an allegedly errant solicitor directed to the possible imposition of a penalty (see *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 504, and *Mellifont* pp 28, 30), one could not gainsay that observation, which is consistent with the high standard of candour and general fidelity expected of practitioners. The Tribunal's view was that the respondent, by his letter,

> "falsely described the nature of the work performed by Mr Allen and that the practitioner knew that the representations in his letter were false and were designed to communicate a less than frank answer to the inquiries of the Society."

[8] The respondent contended before the Tribunal that it had not been necessary for Mr Allen to hold a practising certificate, because he was an employed solicitor and not practising on his own account. The Tribunal rejected that contention, and also rejected the respondent's claim that he honestly and reasonably believed that it was not necessary that Mr Allen hold a practising certificate. These were the conclusions of the Tribunal:

> "The Tribunal finds that the work carried out by Mr Allen during the period 1 July 2000 and 13 March 2002 constituted his practising as a solicitor in terms of the definition contained in the Queensland Law Society Act and in terms of the case authorities submitted to the Tribunal by the Society. The Tribunal was unable to agree with the interpretation contained in the submissions of the practitioner in relation to Section 40 of the Act. That Section, in the Tribunal's view, does not result in the conclusion that a person working as an employed solicitor is not practising as a solicitor.
>
> The Tribunal is unable to accept the submission that the practitioner's conduct establishes a genuine and reasonable, but mistaken belief, that Mr Allen did not require a Practising Certificate as at January 2002. If that belief was genuine and reasonable, the Tribunal would have expected the practitioner to have set out his arguments fully and frankly to the Queensland Law Society in January 2002. This was not attempted by the practitioner but rather, a misleading and false explanation was provided."

[9] Mr Keim, who appeared before us for the respondent, submitted that the category of practising solicitors obliged to hold practising certificates is confined to those who practise on their own account, and does not include employed solicitors.

[10] The obligation to hold a practising certificate rests on every person "who directly or indirectly acts or practises as a solicitor" (s 39 *Queensland Law Society Act*). See also s 38. The definition in s 3 of the Act of "practising practitioner" is of broad

ambit, suggesting simply that the practitioner must be actively involved in solicitor's work, and excluding those employed in the public service. Its terms are:

> "'practising practitioner' means any solicitor ... who directly or indirectly practises in Queensland: prima facie a solicitor ... who draws or prepares any documents relating to real or personal estate or any memorandum or articles of association of any company, or signs any instrument as correct for the purposes of registration, or who receives in trust the moneys of any person shall be deemed to be a practising practitioner, but does not include a solicitor, or conveyancer in any Commonwealth or State department acting in the course of his or her official duties."

(One should note the final exclusion, and that there is no expressed exclusion of employed solicitors.)

[11] On the face of it, Mr Allen fell within that description, and was obliged to hold a practising certificate. He had indeed held a practising certificate at an earlier time.

[12] In urging a contrary view, Mr Keim relied particularly on English case law to the effect that "practising as a solicitor" connotes a principal, a solicitor with clients (cf. *ex parte Harstein* (1975) 5 ACTR 100, 104 citing *Way v Bishop* [1928] Ch 647, 660, and *re Fabricius and Allen* [1989] ACTSC 56, para 27). In *re Kissane* (1977) 15 ALR 683 the Full Court of the Supreme Court of the Northern Territory pointed out one should in this context approach *Way v Bishop* with care, because of the traditionally strict approach taken to the construction of covenants in restraint of trade, that being at issue in *Way v Bishop*. I share that reservation.

[13] Mr Keim also relied on s 40(1)(b)(iii) of the Act, which provides:

> "Subject to this Act, on payment by the applicant of the prescribed practising fee together with the prescribed contribution to the fund and any levy then payable under this Act by the applicant, the secretary shall –
>
> ...
>
> (b) on application by a solicitor ... who shall not have practised as a solicitor ... prior to the date of such application, accompanied by a declaration by the applicant in the approved form showing, in the case of a solicitor –
>
> ...
>
> (iii) that the applicant has completed 1 year since admission as a solicitor in full time employment as an employed solicitor of a practising practitioner;
>
> issue to the applicant a certificate in the approved form endorsed with such conditions as may apply pursuant to the rules which shall be in force from the date of such certificate until 30 June next following such date."

[14] It is that section to which the Tribunal referred in its reasons. While taken alone, the provision may appear to suggest that a solicitor employed full-time by a practising solicitor, in that period of 12 months, need not hold a practising certificate, when the provision is read with s 40(1)(d) and s 40A(1), it becomes clear

that s 40(1)(b)(iii) is not to be seen as excluding the general requirement, emerging from ss 38 and 39, that all practising solicitors hold practising certificates.

[15] Although not with specific reference to this point, the scheme of the legislation was helpfully described in *re Ahern* [1981] Qd R 532, 539, in terms consistent with the view that merely being a practising solicitor employed by a principal does not relieve the employed solicitor of the need to hold a certificate. In that case Macrossan J (as he then was) said, at p 539:

> "The scheme of the Act, or that part of it in which the provisions above referred to are to be found, is that only persons entitled to practise as solicitors may receive practising certificates and no solicitor without one is entitled to practise as a solicitor. It is seen that, from this point of view, there are two very important groupings of solicitors: the larger group consists of those who are qualified as solicitors and admitted as such and the other group consists of those of the larger group who are not only qualified and admitted but are also entitled to practise as solicitors on their own account by virtue of their possession of practising certificates which are issued only to those with an appropriate background of practical experience."

As Mr Burns, who appeared for the appellant, submitted, the legislature could easily, by clear express terms, have excluded employed solicitors from those apparently obliged by ss 38 and 39 to hold practising certificates. I add that were employed solicitors otherwise excluded, the express exclusion in the s 3 definition of those employed in the public service would have been unnecessary. See also s 39(4).

[16] A practising solicitor, in that first period of 12 months during his or her employment by a principal, is in fact issued with a conditional practising certificate, conditioned that he or she "not practise as a solicitor on his or her own account, either alone or in partnership, until the solicitor has completed 52 weeks since the solicitor's admission as a solicitor in full-time employment as an employed solicitor of a practising practitioner …" (s 40A(1)).

[17] I note in passing that this interpretation of the provisions is consistent with the content of r 97(2) of the *Queensland Law Society Rules* 1987.

[18] On the facts found by the Tribunal, Mr Allen was at relevant times practising as a solicitor within ss 38 and 39 of the Act. He was therefore obliged to hold a practising certificate, albeit he was employed by the respondent.

[19] In his written submissions, Mr Keim additionally challenged the Tribunal's approach to this charge, and the related charge numbered two, for suggested failure to address the precise elements of the charge. It is convenient to set out the particulars of the third numbered charge:

> "**Particulars**
>
> 2.1 At all material times the solicitor was the principal of Whitman & Co Solicitors (the Firm) of 231 North Quay, Brisbane, Queensland.

2.2 Since in or around December 1999 to the present time, Allen has been employed by the Firm as a solicitor.

2.3 By letter to the solicitor dated 23 January 2002, the society wrote to the solicitor, relevantly in the following terms:
'*Please advise:*

- *the dates when Mr Allen commenced his employment at your firm or was otherwise retained by you;*
- *if Mr Allen is still employed by you, and, if not, the date such employment ceased;*
- *the duties and responsibilities of Mr Allen whilst he was employed by you;*
- *the reason why you have not informed the Society of the circumstances of Mr Allen's employment with your firm.'*

2.4 By letter dated 23 January 2002, the solicitor responded to the Society in the following terms:
'We refer to your letter of 23 January 2002.
I answer your questions seriatim.

1. *Mr Allen commenced employment with this firm in December 1999;*
2. *Mr Allen continues to be employed by this firm;*
3. *The duties and responsibilities of Mr Allen are telephone receptionist, front counter receptionist, typist, filing clerk and research assistant.'*

2.5 The clear import of the solicitor's response was that Mr Allen was not practising as a solicitor but rather was employed in an administrative capacity.

2.6 At the time of writing his letter of 23 January 2002, the solicitor was well aware that Mr Allen was employed by his firm as a solicitor and had during the course of his employment, been practising as a solicitor so that his representation to the contrary as outlined above was false as he well knew."

[20] It was submitted, first, that the Tribunal failed to address the particular representation made or implied. But on any fair reading of its reasons, the Tribunal plainly found – and reasonably – that the respondent falsely represented that Mr Allen was not acting as a solicitor. Then it was said that the respondent's letter addressed the position only as at its date, and not in respect of the preceding period of Mr Allen's employment. That involves a very narrow reading of the letter, and is based on a narrow view of a practitioner's obligation in responding to reasonable enquiries from the appellant. The respondent was asked to specify "the duties and responsibilities of Mr Allen while he was employed" by the respondent. In his letter, the respondent said they "are", the designated duties. But it does not lie in the respondent's mouth now to point out that he did not say "are and were": the appellant was entitled to read the letter as intended to be comprehensively responsive to its enquiry. In any event, as at the time of the letter, Mr Allen's duties

went beyond merely the administrative, as the respondent's own concession in cross-examination confirmed.

[21] I pass to charge numbered four above. The particulars of that charge are as follows:

> "**Particulars**
>
> 3.1 At all material times, the Solicitor [was] the principal of Whitman & Co, Solicitors of 231 North Quay, Brisbane (the Firm);
>
> 3.2 By letter dated 3 May 2002, the Queensland Law Society Inc (the Society) forwarded to the practitioner's solicitors Kerin & Co, a notice under Section 5G of *Queensland Law Society Act* 1952, calling upon the Solicitor to produce to the Society on or before 8 May 2002, all documents in his custody, possession or control, referred to in the Schedule to the said Notice.
>
> 3.3 The Solicitor failed to produce documents the subject of the said Section 5G Notice on or before 8 May 2002 as requested and on 14 May 2002, the Society, under the hand of its Director of Professional Standards, forwarded to the Solicitor a Notice under Section 5H of *Queensland Law Society Act* 1952 notifying him that if his failure to produce the said documents the subject of the said Notice date 3 May 2002 continued for a period of 14 days after the date of his receipt of the said Section 5H Notice, he would be liable to be dealt with for professional misconduct unless he had a reasonable excuse for not producing the said document.
>
> 3.4 The Solicitor failed to produce the said documents within the said fourteen day period or at all."

[22] Section 5H of the Act obliges a practitioner to comply with certain notices given by the appellant, and provides that should the practitioner fail to do so, the practitioner may be dealt with for professional misconduct. The practitioner commits professional misconduct "unless the practitioner has a reasonable excuse for not complying with the requirement" (s 5H(3)(a)). The appellant required the respondent to disclose client lists. The appellant's powers (s 5G(c)) include requiring the production of a document "the practitioner is entitled at law to produce." The respondent contended that the information on the list was confidential, and that its disclosure would breach legal professional privilege. While holding that the information was "inherently confidential", the Tribunal held that that did not deny the appellant access to the information in pursuit of its investigative powers. It followed that the Tribunal must have considered the respondent "entitled at law to produce" the lists, and that the confidentiality of the information gave rise to no "reasonable excuse" for withholding it.

[23] The relevant information, the names and addresses of clients, was mere information, and not comparable with confidential advice or other communications ordinarily protected by legal professional privilege. Before this court, Mr Keim relied not on legal professional privilege, but on the contractual duty to respect the confidentiality of material. That duty arises only if the relevant information has been imparted in confidence. The material before the Tribunal appears not to have gone directly to the question whether or not the information was imparted to the respondent in

circumstances of express confidentiality, or from which an expectation of confidentiality would arise (save in one case where any confidentiality was clearly waived). There was otherwise nothing established of those circumstances. It fell to the respondent to lead the evidence if he wished to rely on this point. The Tribunal was right to proceed on the basis that the respondent was lawfully entitled to produce the information to the appellant, where the appellant sought that information in the exercise of its statutory investigative power. (I refer later, in relation to the matter of penalty, to the respondent's reliance on the advice of a more senior practitioner.)

[24] The cross-appeal should be dismissed.

[25] In turning to the matter of penalty, which is the subject of the appeal, I first mention the charge numbered one. Its particulars are:

"**Particulars**

1.1 At all material times the Solicitor was the principal of Whitman & Co., Solicitors of 231 North Quay, Brisbane (the Firm).

1.2 At all material times the Firm was acting as agent for Symons, Solicitors of 179 Barkly Street, St Kilda, Melbourne in relation to a bankruptcy matter concerning a client of Symons, Solicitors, one Bohdan Angelo Denysenko (the Client).

1.3 Under cover of a letter to the Firm dated 13 December 2000, Symons Solicitors forwarded to the Firm, inter alia, a cheque for $980.00 for the following purposes:

Whitman & Co – agency fee	$350.00
Monies to be paid to the client's creditors pursuant to a proposed composition with his creditors	$630.00
Total:	$980.00

1.4 On 19 December 2000, the said sum of $980 was paid into the Firm's general trust account to the credit of the individual trust ledger account of Symons Solicitors.

1.5 On 7 August 2001, without the knowledge or authority of Symons Solicitors, the Solicitor transferred the said sum of $980 from his Firm's general trust account to its general account in part payment of an interim account dated 16 February 2001 totalling $1,113.28 which the Firm had rendered to Symons Solicitors in relation to the matter.

1.6 At all relevant times, of the said sum of $980 transferred as set out in paragraph 1.5 the sum of [$630] constituted trust monies within the meaning of that term in the *Trust Accounts Act* 1973.

1.7 At no time throughout the period from in or about 19 December 2000 when the said sum of $980 was paid into the Firm's general trust account until on or around 7 August 2001 when the said transfer to the general account was effected, did the purpose for which the said sum of $630 was originally paid into the said general trust account change with the result that the said transfer to the general account constituted a misappropriation of trust monies."

[26] The Tribunal made the following findings:

> "The Tribunal accepts the evidence of Mr Symons that the purpose had not failed by 7 August, 2001 when the practitioner used the funds to pay his bill.
>
> The Tribunal also finds that the practitioner was aware that the quantum of his bill was in dispute and that, by transferring the funds from his trust account, the practitioner had misappropriated his client's trust funds of $630.00.
>
> The Tribunal does not find any fraudulent intent on the part of the practitioner, but finds that his actions amount to a withdrawal from his trust account in the absence of authority from his client. The Tribunal does not agree that the reasons advanced by the practitioner for his actions were reasonable or excused his breach of the Trust Account Act and Regulations."

[27] Although the Tribunal's findings upholding this charge were not the subject of the cross-appeal, it was (in writing) submitted for the respondent that the findings are ambiguous, in identifying "the issue that arises for determination" as whether the funds were still, as at the time of payment into the general account, reserved to be paid to creditors, while then going on to deal additionally with whether, in appropriating the monies in payment of his own account, the respondent appreciated that the quantum of that account was in dispute. That second consideration was potentially relevant. There is no ambiguity about the reasons. The Tribunal identified two significant features: first, that at all times the money was held in trust for the designated purpose; and second, that in appropriating them to his own account, the respondent knew that his client disputed the amount claimed for fees (that dispute being established by evidence from Mr Symons and Mr Foote). That gave a particular flavour to the misappropriation, albeit falling short of dishonesty: the respondent's conduct might be characterized as slick or expedient. I do not consider the Tribunal was precluded, by the terms of the charge, from expressing a conclusion on that second aspect.

[28] The Tribunal gave the following reasons for its determination that the respondent should be suspended for nine months:

> "The Tribunal has had difficulty deciding as to the appropriate penalty. Personalities in this case have intervened in what was initially a somewhat straightforward transaction investigated following a complaint of Symons. It has involved five days of hearing, together with some hours of interlocutory skirmishing.
>
> The trust account transaction that started the whole episode was not a very serious matter, rather in the category of an excess of authority or mistake. Money can, not infrequently, be paid into trust for a purpose that fails wholly or partly and, as Mr Whitman said on this case, for a purpose that he thought was thwarted and the money falls in the general funds and is made available by the client for other purposes. The expressed trust purpose fails and there is a resulting trust.

> It is easy to see how the use of $630.00 for outstanding legal fees after sending a detailed bill could be anticipated. However, that assumption could not have survived the objection in the letter of 9 March, 2001. The appropriation was not furtive or hasty, nor does it seem to be part of a systematic system to avoid Trust Account regulations. It was done some five months after the bill was sent.
>
> The appropriation was done, however, in the face of the objection and as if the law did not apply to the practitioner if it was inconvenient. He has not cooperated at all with the Law Society, which has the obligation to investigate these matters. Even when the problem was plain, he persisted with the obstinate view that he was right.
>
> Findings of guilt on the other charges do give rise to a more serious consideration. Professional misconduct has been found and the Tribunal considers that a significant penalty should be given to act as a deterrent to the solicitor, who gives the appearance of still not believing he has done anything wrong and is likely therefore to re-offend, and as a deterrent to others who may think they can treat the investigations of the Law Society as an avoidable nuisance.
>
> The reputation of the profession is tarnished by this behaviour and Mr Whitman cannot enjoy the benefits of being a member of the legal profession without accepting the responsibilities and burdens, including the burden of having to accept a higher standard of conduct than that imposed on the public.
>
> The Tribunal takes into account the submissions made by counsel for the practitioner as to the practitioner's personal circumstances. He has after all been a solicitor for 25 years and in sole practice since 1984 without being investigated by the Law Society.
>
> The Tribunal believes that the practitioner is capable of learning now from his mistakes.
>
> The Tribunal suspends the practitioner from practice for nine months."

[29] Counsel for the appellant submitted before the Tribunal that the respondent should be struck off, whereas Counsel for the respondent submitted, in particular reliance on *Adamson*, that no penalty beyond suspension was warranted.

[30] Mr Burns, who appeared before us for the appellant, submitted the aggregation of the following circumstances warranted removal from the roll:

> "1. the finding that the Respondent was aware that the quantum of his account was in dispute at the time when he transferred $630.00;
> 2. the finding that the Respondent deliberately misled the Society in his letter of 23 January 2002;
> 3. the finding that the Respondent knowingly employed Allen as a solicitor and, further, allowed Allen to practise as a solicitor, in circumstances when the

Respondent knew that Allen did not hold a Practising Certificate in contravention of the Act;

4. the complete rejection of the Respondent's evidence on essential matters;
5. the evidence adduced on behalf of the Respondent from clients and client referrers from which it is apparent that the Respondent misled many of those witnesses as to the nature of the work which he had been assigned to Allen;
6. the evidence that the Respondent had allowed Allen to swear and file an Affidavit in the Supreme Court of Queensland in which Allen described himself as "a solicitor in the employ of Whitman and Co";
7. the absence of any semblance of cooperation;
8. the conduct by the Respondent of the proceedings;
9. the absence of remorse as demonstrated by the Respondent's failed attempt to absolve himself from blame; and
10. the Respondent's lack of insight into his own failings leading to a specific finding that he 'is likely therefore to re-offend'."

[31] On the other hand, Mr Keim for the respondent pointed to the "serious conduct" found against the respondent as being "a failure of frankness and candour when same would have been recommended." While the respondent knowingly employed Allen, who he appreciated should have had, but lacked, a practising certificate, that did not on the evidence actually jeopardize any client's interests. The Tribunal found the respondent was "capable of learning now from his mistakes," and noted that he had introduced "new systems to avoid future problems arising." Balancing those matters against the respondent's previously unblemished 25 years as a solicitor, with 18 of those in sole practice, evidence of detriment to his health and finances, and the favourable character evidence, and acknowledging the absence of evidence of detriment to clients, suspension was all that was warranted.

[32] The adverse effect on the respondent personally is not materially relevant to the fashioning of the appropriate response, which must be directed to the broader public interest; should the practitioner be held out as fit to practise? This observation relates also to the content of the affidavit received on the hearing of the appeal. One may accept the effect of these events on the respondent and his family has been severe. But harsh as this may seem, even where there has been no demonstrated prejudice to clients, the only relevant issue now is proper public support and protection.

[33] The especially serious misconduct of the respondent related to charges numbers two and three. It began with his employing Mr Allen as a solicitor, knowing that Mr Allen lacked the practising certificate which he, the respondent, should have appreciated was required. The respondent thereby probably made himself party to the offence and contempt of court (s 39(1) *Queensland Law Society Act*) committed by Mr Allen. Of comparable seriousness was the respondent's ethical dereliction in subsequently deliberately misleading the appellant as the nature of the work done by Mr Allen. The Tribunal found the respondent was dishonest in what he told the appellant. Obviously enough, that is a most significant finding. Also, the respondent's attempt to minimize his error through persistently advancing an unduly technical reading of his relevant letter did him no credit. Finally, the Tribunal's rejection of the respondent's claim to have believed no certificate was needed, meant that on that aspect, the Tribunal considered him either dishonest or unreasonable. Even to take an unreasonable approach to such a basic matter (and it

is on that basis the court should proceed) is, for a practising solicitor, especially a solicitor of many years' experience, a matter for serious concern.

[34] Of somewhat less seriousness was the misappropriation of the sum of $630. I earlier used the epithets slick and expedient. The circumstance that the respondent knew that the amount of his account was disputed should have alerted him to the need for scrupulous care in any transfer of that money. His approach was at least cavalier and self-serving. The end point, and this carries a lot of significance, is that he put his own interests ahead of his client's.

[35] Of the least seriousness is the respondent's failure to respond to the notice, but even that demonstrated significantly inappropriate conduct on the part of a practitioner – who should proceed on the basis the professional body is, with proper motivation, proceeding through an investigative phase directed to upholding the public interest. When faced with the notice, the respondent took advice from a senior counsellor within the Queensland Law Society, whose cautionary advice about disclosure related to "files". But it was merely client names and addresses which the respondent was asked to disclose, not files. There is no suggestion, accepting for the moment that the respondent regarded that information as confidential, that he approached any of his clients to authorize its release to the appellant – then pursuing its investigatory power. It is difficult to conceive that, if approached in that way, the clients would have objected. But it is not necessary to go further into that issue.

[36] That leads into an overarching consideration. The respondent was generally uncooperative with the appellant, and apparently took an unduly combative approach before the Tribunal. Neither the investigation, nor the hearing, is criminal in nature: it is a process directed towards protection of the public. Recognizing that, a practitioner is duty bound to cooperate reasonably in the process. Mr Keim stressed that such lack of cooperation was not the subject of a separate charge (cf. *Barwick v Law Society of NSW* [2000] HCA 2, para 160, in relation to the rather higher level question of dishonesty). But this lack of cooperation, etc, attended the charges which were preferred, and the way they were defended before the Tribunal, and because it characterized the matters directly before the Tribunal, the Tribunal was right to have regard to that aspect, for it bore on the respondent's lack of proper appreciation of the public interest which should have informed his professionalism. This having emerged, the Tribunal would have been unrealistically blinkered to ignore it. Such considerations were taken into account in *Bax* [1999] 2 Qd R 9, 22, *Carberry* [2000] QCA 450, paras 7, 34, and other cases.

[37] Mr Burns referred us to a number of cases, including *Bax*, and *Priddle* [2002] QCA 297. The issue is whether the respondent should any longer be held out as fit to practise, whether he is "a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor" (*A J Brown*, CA 241 of 1992, 11 June 1993, citing *re Weare* [1893] 2 QB 439, 448); or whether – as accepted by the Tribunal – he might be expected to emerge from a period of suspension with a proper appreciation of his professional responsibilities and the capacity and determination to meet them.

[38] The issue is not necessarily to be determined by a close comparison of circumstances from case to case. On the face of things, this dereliction was less serious than *Mellifont*'s, for example, but no case sets any indelibly drawn cut-off point.

[39] It is of obvious significance that the members of the Tribunal had the opportunity to observe the demeanour of the respondent during a hearing which extended over some days. It was in that context they selected suspension as the requisite response.

[40] On the other hand, they noted that the respondent "gave the appearance of still not believing he has done anything wrong and is likely therefore to re-offend" (albeit they added that he was "capable of learning now from his mistakes").

[41] I consider the matters established against the respondent, taken alone, warranted a substantial period of suspension. I would have ordered his suspension for 12 months, but the difference between that and the nine months in fact ordered would not justify interference by this court.

[42] I have been troubled, however, by whether the Tribunal's particular finding, that the respondent "gave the appearance of still not believing he has done anything wrong and is likely therefore to re-offend," did not warrant striking off, leaving the respondent in the position of having to apply for re-admission at a time when he may be able to establish his fitness. In the end, I have accepted that that observation, presumably drawn from the inappropriately combative stance taken throughout by the respondent, should be read as modified by the rider that he was "capable of learning now from his mistakes," indicating the Tribunal's view that the respondent may responsibly, at the end of the period of suspension, be presented as fit to practise.

[43] While, as I have said, the respondent was treated with a degree of leniency, the extent of that leniency is not such as to warrant interference on appeal.

[44] I would order that the appeal and the cross-appeal be dismissed.

[45] We have not heard submissions as to costs. I foreshadow my inclination that there should be no order as to costs. The appeal and the cross-appeal have respectively been dismissed. The argument on the cross-appeal consumed the larger part of the oral hearing. The appellant, the Council of the Queensland Law Society Inc, was in my view not unreasonable in seeking the court's review of the issue of penalty. In all the circumstances, my inclination would be to make no order, although the issue of costs may be the subject of written submissions as necessary.

[46] **McPHERSON JA:** I agree with the reasons of the Chief Justice for dismissing this appeal. I propose to add only a few additional remarks of my own about the definition in s 3 of the *Queensland Law Society Act 1952* of the expression "practising practitioner".

[47] The definition is set out in the reasons of de Jersey CJ, and I need not repeat it here. It was first introduced in the original Law Society Act in 1930 by s 3 of Amending Act of that year (21 Geo 5, No 46). It was the statute that established the Fidelity Guarantee Fund, contained in Part 3 of the current Act of 1952, to which practitioners were and are required to contribute annually. The obligation to pay the contribution was limited to "practising practitioners", and it was enforced by requiring practitioners (who were either solicitors or conveyancers) to apply and pay for an annual practising certificate, without which they were not entitled to practice: see the provisions of ss 11, 27 and 28 of the amending Act of 1930, which correspond approximately to ss 19, 37 and 38 of the current Act. The system was

modelled on a scheme originally devised in New Zealand, and bears an obvious resemblance to the third party motor vehicle insurance scheme, which at about the same time was being made compulsory by statute.

[48] Given its origins, one is led to ask why the legislature would choose to confine the obligation to obtain an annual practising certificate to solicitors carrying on a practice as such on their own account. Employed solicitors are hardly much less prone than their principals to cause pecuniary loss through stealing or fraudulent misappropriation, which it is the purpose of the scheme to recompense. When the Act wishes to speak of a solicitor practising on his or her own account, either alone or in partnership, it uses that expression, as it does in s 40A(1)(i) of the Act.

[49] Finally, there is the additional consideration that the definition in s 3 of "practising practitioner" expressly excludes "a solicitor in any Commonwealth or State department acting in the course of his or her official duties." The exclusion (or, strictly, the express non-inclusion) of such solicitors was probably due both to constitutional considerations (cf *Blackall v Trotter (No 1)* [1969] VR 639), and to the fact that at the time the legislative scheme was introduced the Crown Solicitor and his staff had only one client the Crown, as to which it was in a sense its own insurer. If the intention had been not to include employed solicitors, that part of the definition would have been the place to do it.

[50] As it happens, the definition in s 3 of the original Act did embody another express non-inclusion, which was carried into the 1952 Act; that is to say, of:

> "a practitioner employed as a clerk by another practitioner"

One may guess that it may sometimes have been a source of dispute whether a practitioner was employed "as" a clerk. Whether or not that is so, that portion of the definition in s 3 of the Act of 1952 was repealed by the Queensland Law Society Act Amendment Act 1985, s 3 (a)(iii). From then, if not before, there can scarcely have been a doubt that a solicitor employed as a clerk by another practitioner was, if he in fact directly or indirectly practised in Queensland as a solicitor, a "practising practitioner" within the scope of the definition in the 1952 Act, and so required in accordance with s 40 to apply annually for a practising certificate, as well as being prohibited by s 38 from doing so without one.

[51] **JONES J:** I agree with the reasons of the Chief Justice and with the orders he proposes.