

In the Matter of Wendy Ann Wright

Case No: SCT/29
Date of Hearing: 14, 15, 16 and 22 December 1999
Appearing Before: Mr G C Fox (Chairperson)
Ms C C Endicott
Ms M Green (Lay Member)
Penalty: Struck off

Charges

1. The practitioner is guilty of professional misconduct, or alternatively, unprofessional conduct or practice in that the practitioner did, on 27 May 1996, rely upon the contents of an affidavit sworn 23 May 1996 in support of an application by the practitioner for the adjournment of certain proceedings then pending before His Honour Judge R of the District Court in the matter of KR & TR M v. C Group Pty Ltd, in circumstances where the practitioner well knew that:

- (i) as at 27 May 1996, the matters deposed to in the said affidavit had materially changed;
- (ii) as at 27 May 1996, no steps had been taken by or on behalf of the practitioner to inform the Court or the other party of such changes;
- (iii) reliance by Judge R upon the contents of the affidavit without knowledge of such changes would mislead, or be likely to mislead the Court as to the true circumstances prevailing as at 27 May 1996;

and the practitioner thereby engaged in conduct which the practitioner knew would mislead, or be likely to mislead Judge R of the District Court.

Particulars

- (a) The practitioner acted for the defendant, C Group Pty Ltd in a District Court Action, brought by KR & TR M, as plaintiff.
- (b) On 27 May 1996, the practitioner, on behalf of the defendant, applied to His Honour Judge R of the District Court for an adjournment of an application by the plaintiff for summary judgment.
- (c) The practitioner relied in support of the application for adjournment upon an affidavit of JPMH sworn 23 May 1996 and filed with the Court.

(d) JPMH deposed, inter alia:

"5. I have searched the Caboolture Shire Council building file on the 21st and 22nd May, 1996. I was unable to obtain details of the approved design levels from the Caboolture Shire Council. In order to determine any significant deviation from the design those detailed levels would need to be obtained.

6. If the "as constructed" levels are significantly different to the design levels, I estimate that my firm would take at least 3 months to ascertain the effects of such deviation and estimate the cost of any rectification works or additional works to enable the balance of the development to be completed."

(e) As at 27 May 1996, the true position was as follows:

- (i) JPMH had, on 24 May 1996, inspected the relevant files with the Caboolture Shire Council.
- (ii) JPMH had determined on 24 May 1996 that the "as constructed" levels were within construction tolerances, and did not significantly deviate from the design levels.
- (iii) In the circumstances, it was JPMH's view that no rectification works or additional works were required as a consequence of the "as constructed" levels deviating from the "design levels".

(iv) In the circumstances, JPMH's firm did not require any additional time to ascertain the effects of such deviation or to estimate the cost of any additional works.

(f) JPMH informed the practitioner of the matters deposed to in paragraph (e) above on 24 May 1996.

(g) On 27 May 1996, the practitioner appeared before Judge R of the District Court and relied upon the said affidavit of JPMH in support of an adjournment for three (3) months of the plaintiff's application for summary judgment, to enable JPMH time to locate and examine the relevant documents at the Caboolture Shire Council and to prepare a comprehensive report in respect thereof.

(h) On 27 May 1996, the practitioner failed to inform His Honour Judge R of the matters referred to in paragraph (e) above, or any of them.

2. The practitioner is guilty of professional misconduct, or alternatively, unprofessional conduct or practice in that the practitioner did, on 27 May 1996, make oral submissions to His Honour Judge R of the District Court, during the course of the hearing of an application in the matters of KR & TR M v. C Group Pty Ltd which submissions were, as the practitioner well knew, false or misleading.

Particulars

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

“Ms Wright:Your Honour, we would respectfully request an adjournment of this matter.....

His Honour: Well, I take it you want an adjournment in circumstances where your client doesn't have to pay anything.

Ms Wright: Yes Your Honour. Most definitely a stay. Your Honour, if I could elaborate.

His Honour: Yes.

Ms Wright: I have, since last Monday appearing before you, contacted all the relevant experts to try and have a report sufficient to requirements by today. That has proved impossible. I deposed to the fact that whereas JPMH, the consulting engineer, has been able to make a preliminary appraisal, he will require – and I have an affidavit of JPMH to that effect – but he will require up to three (3) months to ascertain the problems with the levels.”

(ii) The practitioner's statements were, as the practitioner well knew, false and misleading in that the practitioner knew, at the time of her statements, that JPMH had determined that there was no problem with the levels and that he did not require up to three (3) months to ascertain such problems.

- (b) (i) During the course of submissions, the following statement was made:

“Ms Wright: By way of clarification, Your Honour, this is halfway through the development of work done by M. If the levels are incorrect, then the rest of the levels for the other 50 stage development – 50 units – will have to be changed. JPMH believes that will take quite some time to be able to give a thorough report to this Court.”

(ii) The practitioner's statement was, as the practitioner well knew, false and misleading in that the practitioner knew, at the time of her statement, that JPMH had satisfied himself that the levels were within construction tolerances and in the circumstances did not require quite some time to be able to give a thorough report to the Court.

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

“Ms Wright:The main problem, Your Honour, by way of clarification, that JPMH (sic) has, is that detailed examination of the Caboolture Shire Council plans and files have not disclosed the engineering drawings. He requires these before he could even commence any serious report. JPMH, himself, spent quite some time at the Council on our request, going through many files of C Group, trying to find the relevant engineering plans. If I could just hand up these affidavits, Your Honour.

His Honour: Right. Now, one by JPMH.

Ms Wright: Yes, Your Honour, and the other one is of myself. JPMH's is sworn 23 May."

(ii) The practitioner's statements were, as the practitioner well knew, false and misleading in that the practitioner knew, at the time of the practitioner's statements that JPMH had located the relevant engineering plans on the files of Caboolture Shire Council and had undertaken an examination of those plans.

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

"His Honour: Well, is JPMH available today?

Ms Wright: We believe that Friday he was not available and his girl would not give us any contact number. I have not contacted him this morning. We would certainly like the opportunity of him to do a full report for us.

His Honour: Well, his employee wouldn't tell you where to get him at the weekend? Is that the problem?

Ms Wright: That's correct."

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

(a) She had in truth contacted JPMH at the Court earlier that morning, and had told him, to the effect that he could leave as his attendance was not required.

(b) A. JPMH's "girl" was in truth the practitioner's receptionist who also provided gratuitous secretarial services to JPMH from time to time (his office being in the practitioner's office complex).

B. The "girl" was not JPMH's employee.

C. The "girl" had not refused to provide to the practitioner or to the practitioner's firm JPMH's contact number, or refused to advise where to contact JPMH at the weekend.

D. The practitioner had in truth met with JPMH on the preceding Friday and requested that he be available to attend Court the following Monday.

E. There was no problem associated with the practitioner not contacting JPMH at the weekend, the practitioner having on the preceding Friday met with JPMH and requested his attendance at Court the following Monday.

F. The practitioner was at all times aware of JPMH's contact number.

(e) (i) During the course of submissions, the following statement was made:

"Ms Wright: A point that does concern my client most strongly, Your Honour, is the rectification costs of the M work and at the moment we cannot quantify that until these experts have given the....."

(ii) The practitioner's statement was, as the practitioner well knew, false or misleading in that the practitioner knew, at the time of her statement, that the rectification costs were as quantified in JPMH's report annexed to his affidavit of 23 May 1996 and that no additional rectification was required.

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

"Ms Wright: Your Honour, in answer to that we need our experts to be able to prove to this Court the damage the C Group has suffered....."

His Honour:Maybe it's inappropriate in this case to react that way, but that hasn't been shown yet, because what you're saying is that JPMH can't tell us aye or nay to that for three (3) months.

Ms Wright: Your Honour, I was astounded at the time – I would've thought that a month would've been sufficient. I'm not aware of what has to be done to check levels on a 50 unit development."

(ii) The practitioner's statements were, as the practitioner well knew, false or misleading, in that the practitioner knew, at the time of her statements that JPMH had satisfied himself that the levels were within construction tolerances and in the circumstances did not propose providing a further report and did not require any further time to do so.

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

"Ms Wright: If the road level is out, then all the plans for the rest of the development will have to be changed. The cost of that, we have no idea at the moment, I think that's what scares C Group so much....."

His Honour: Well, \$200,000.00 might not be enough.

Ms Wright: That's quite true, Your Honour. That was just the limit of the jurisdiction we claimed on our client's behalf."

(ii) The practitioner's statements were, as the practitioner well knew, false or misleading in that the practitioner knew, at the time of her statements, that JPMH had satisfied himself that the levels were within construction tolerances and that the cost of rectification was limited to a sum in the order of \$5,400.00 as particularised in the report annexed to JPMH's affidavit of 23 May 1996.

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

"Ms Wright:We have made every attempt to get our experts here. We couldn't even get JPMH to come here today at such short notice....."

His Honour: Well, I've made it clear you've got the entire week. Has JPMH got no time in the week?

Ms Wright: Your Honour, I believe I would have to subpoena JPMH to ensure....."

(ii) The practitioner's statements were, as the practitioner well knew, false and misleading in that the practitioner knew, at the time of her statements, that:

(a) JPMH had been available to give evidence, and in attendance at the Court earlier that morning, and been told by the practitioner to leave as his attendance was not required.

(b) JPMH had voluntarily attended at Court to give evidence, without the requirement of a subpoena to ensure his attendance.

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

"Mr B:On 8 May 1996, not 20 May when JPMH became involved, on 8 May he swore – he deposed, on oath, that he's informed by the engineers and verily believe. There are no engineers. There are no engineers. They haven't produced the engineers, they haven't produced the engineers report upon which he formed that belief....."

His Honour: Was the 8 May affidavit sworn on the....."

Mr B: Sworn on 8 May, Your Honour, Mr T's affidavit in these proceedings.

Ms Wright: Your Honour, by way of clarification, if I may, JPMH was instructed on 20 May to prepare the letter and accompanying minor report for this Court but JPMH has been involved previous to that date with the C Group development."

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

(a) JPMH had been first retained for the purpose of providing a report in relation to the C Group development on 20 May 1996 and prior to that date had had no involvement with the C Group or with the project the subject of his report.

(b) the reference to JPMH having been involved previous to 20 May 1996 with the C Group development was misleading in that it conveyed to the Court the impression that JPMH was the engineer who had informed Mr T for the purposes of his affidavit of 8 May 1996, when in truth JPMH had not been involved with the project at that time.

3. In the alternative to Charge 2, the practitioner is guilty of professional misconduct, or alternatively, unprofessional conduct or practice in that the practitioner did, on 27 May 1996, make oral submissions to His Honour Judge R of the District Court, during the course of the hearing of an application in the matter of KR & T R M v. C Group Pty Ltd which submissions were recklessly made, uncaring as to their accuracy.

Particulars

(a) The Society repeats and relies on the statements of the practitioner particularised in paragraphs 2(a)(i), 2(b)(i), 2(c)(i), 2(d)(i), 2(e)(i), 2(f)(i), 2(g)(i), 2(h)(i) and 2(i)(i) of Charge 2.

(b) In the circumstances of the practitioner's knowledge as at the time of the said statements, as particularised in paragraphs 2(a)(ii), 2(b)(ii), 2(c)(ii), 2(d)(ii), 2(e)(ii), 2(f)(ii), 2(g)(ii), 2(h)(ii) and 2(i)(ii) of Charge 2, the said statements were recklessly made by the practitioner, uncaring as to their accuracy.

4. The practitioner is guilty of professional misconduct, or, alternatively, unprofessional conduct or practice in that the practitioner did, on 27 May 1996, make oral submissions to His Honour Judge R of the District Court, during the course of the hearing of an application in the matter of KR & TR M v. C Group Pty Ltd which submissions were, as the practitioner well knew, misleading, or alternatively, were recklessly made, uncaring as to their accuracy.

Particulars

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

"His Honour: Just at the moment I can assume, I suppose, that there was – that it's a trading company with a huge project and it presumably wouldn't have entered into arrangements obliging it to pay \$48,000.00 to the plaintiff, unless it could pay.

Ms Wright: But, Your Honour, my client company is not in financial strain.....

His Honour: Alright.

Ms Wright: At the risk of giving evidence from the bar table.

His Honour: I.....

Ms Wright: I can actually.....

His Honour:hadn't assumed that it is."

(b) Later, during the course of submissions, the following further exchange occurred:

"Ms Wright: That's quite true, Your Honour. That was just the limit of the jurisdiction we claimed on our client's behalf. Your Honour, by way of further clarification, if I may. The reason that C Group hasn't progressed to build any more townhouses at the moment, is not in any way related to C Group's financial viability, it's simply related to.....

His Honour: Well, I would rather you told me what you have, which is that C Group is financially sound, than that you told me that it's financially struggling. I take it from what you've said that it wouldn't actually hurt your client to have to honour the progress claims. You don't suggest that that's going to make all the difference?

Ms Wright: Your Honour, we say that that document was never signed by C Group."

- (c) The practitioner, by the matters set out above, submitted to the Court that her client company was not in financial strain.
- (d) The practitioner's submissions were misleading in that the practitioner knew as at 27 May 1996, that her client company, C Group Pty Ltd, was in financial strain.

Particulars

- (i) C Group Pty Ltd was in default of its finance arrangements with Westpac Banking Corporation and a sum of approximately \$705,000.00 was due and payable to Westpac.
- (ii) C Group Pty Ltd was in default of its obligations to the clients of AT, solicitor, pursuant to the terms of a Deed dated 29 November 1995 and a sum of approximately \$85,000.00 was due and payable to those clients.
- (iii) C Group Pty Ltd was attempting to refinance, from which refinancing the debts referred to in (i) and (ii) above were to be repaid.
- (iv) C Group Pty Ltd was defaulting in its obligation to pay rates to Caboolture Shire Council as and when they fell due.
- (v) As at 27 May 1996, the practitioner knew or ought reasonably to have known each of the matters referred to in (i) – (iv) above.

(vi) The practitioner was a director and shareholder of H Pty Ltd, a shareholder in C Group Pty Ltd and a unitholder in the C Group Unit Trust and thereby had a financial interest (whether on behalf of herself or others) in the activities of C Group Pty Ltd, which at the time included The A Project.

- (e) Alternatively to particular (d) above, the practitioner's submissions were misleading, or recklessly made, uncaring as to their accuracy, in that at the time of her submissions, the practitioner was unaware of the financial capacity of her client company and had no basis in fact for her submission to the Court that the company was not in financial strain.

Particulars

By letters to the Queensland Law Society Inc dated 21 August 1998 and 28 September 1998, the practitioner informed the Society that as at 27 May 1996, she was not privy to the financial capabilities of C Group Pty Ltd.

- 5. The practitioner is guilty of professional misconduct, or, alternatively, unprofessional conduct or practice, in that the practitioner did, on 20 May 1996, during the course of the hearing of an application before His Honour Judge R of the District Court in the matter of KR & TR M v. C Group Pty Ltd produce to the Court a document in circumstances which the practitioner knew would mislead, or were likely to mislead, the Court.

Particulars

- (a) In District Court Plaintiff No. 76 of 1996, KR & TR M issued a Judgment Summons against the defendant, C Group Pty Ltd (C Group).
- (b) The matter came on for hearing before His Honour Judge R on 20 May 1996, at which hearing C Group, which was represented by the practitioner, relied upon an affidavit by Mr T sworn on 8 May 1996 in which he deposed, inter alia:

"19. I am informed by the engineers and verily believe that the quality of the materials and workmanship provided by M is of such a low standard that rectification will not be an option. The work will require to be demolished and completely re-instated as new. C Group Pty Ltd intends to counter-claim against the plaintiff in the sum of two hundred thousand dollars (\$200,000.00) and to set-off such claim against M's claim."

- (c) During the course of the hearing on 20 May 1996, His Honour Judge R sought production by the practitioner of the advice from the engineers referred to in the affidavit of Mr T. The practitioner informed Judge R to the effect that the engineers' report was incomplete, and was asked by Judge R to produce to the Court following the luncheon adjournment such parts of the engineers' report as were then available.
- (d) Following the luncheon adjournment, the practitioner produced to His Honour a letter from JPMH dated 20 May 1996 in which JPMH stated he had inspected the subject works and would need more time to prepare a detailed report. Judge R adjourned the matter for a period of seven (7) days to enable time for the report to be prepared.
- (e) The circumstances in which the practitioner produced JPMH's letter to the Court were such as to represent to the Court that JPMH was the engineer whose advice had been relied upon by Mr T for the purpose of deposing to the matters set out in his affidavit.
- (f) In truth, and the practitioner well knew that:
- (i) JPMH was first retained by the practitioner to provide a report on the matter on the afternoon of 20 May 1996.
- (ii) JPMH had had no involvement with C Group or with the project prior to 20 May 1996.
- (iii) JPMH was not the engineer whose advice was relied upon by Mr T for the purpose of his affidavit of 8 May 1996.
- (g) In the premises, the circumstances of the production by the practitioner to His Honour Judge R of JPMH's letter of 20 May 1996 were such, as the practitioner well knew, as to mislead, or be likely to mislead the Court.
6. The practitioner is guilty of professional misconduct, or, alternatively, unprofessional conduct or practice in that the practitioner, in breach of her duty as a solicitor, sought to change the evidence of a witness, JPMH, contained in an affidavit sworn 3 August 1998 and relied upon by KR & TR M in support of their complaint to the Society concerning the conduct of the practitioner, by preparing and presenting or alternatively causing to be prepared or presented, to the said witness for execution, a further affidavit which:
- (a) conflicted in material respects with the witness' previous sworn testimony.
- (b) contained assertions which were false, and which the practitioner knew to be false.
- (c) changed the witness' evidence so that it was more favourable to the practitioner.
7. The practitioner is guilty of professional misconduct, or, alternatively, unprofessional conduct or practice in that the practitioner did, by letter dated 21 August 1998, write to the Queensland Law Society Inc ("the Society") concerning the matter of the complaint against her by KR & TR M, which letter was, as the practitioner well knew, false and misleading.

Particulars

- (a) On 14 August 1998, the Society wrote to the practitioner enclosing a letter of complaint from W & Associates, solicitors, on behalf of KR & TR M, dated 4 August 1998, and requesting the practitioner's response to the matters raised by the complaint.
- (b) By letter dated 21 August 1998, the practitioner replied to the Society, stating, inter alia, in response to a complaint that she had misled the District Court on 27 May 1996 as to the availability of a witness, JPMH:
- (i) ".....I had informed JPMH I wanted him to be at Court on 27th to assist me if required to get an adjournment the client had instructed we apply for. He was reticent to do so as he had other appointments. He gave me the understanding that he would be at Court if possible. When I arrived at the Court, I was running late (see the first paragraph on page 2 of the transcript) and did not see JPMH prior to the commencement of the proceedings. The obvious assumption by myself at the time was that JPMH was unable to attend Court....."

- (ii) ".....As I am aware, on 24th May 1996, JPMH had a conversation with myself. During that conversation I asked him to be available to give evidence on Monday (27th May 1996) if needed. JPMH was reticent to do so as he had other appointments on that morning and indicated that he would be there if possible. On entry to the Court, I did not see JPMH in the gardens at the front of the Court, and as such, at that point was not aware that JPMH was available to give evidence....."
- (iii) ".....In his affidavit JPMH states that he was told by me at 10 past 10 that he was not required. JPMH has informed us that at that time he saw me leave the District Court building, located him in the garden, told him that he wasn't required and walked up the road with him.I am not, for one moment, casting aspersions upon JPMH's recollection of the time, but say that the time was approximately ten past eleven as the Court was adjourned at 10.59am.At 11.02am I was contacted by Mr T by mobile phone and received instructions which would mean JPMH did not need to give evidence."
- (c) The said statements were false and misleading as in truth the practitioner had met with JPMH in the precincts of the District Court at about 10.10am on 27 May 1996 and informed him to the effect that his attendance as a witness was not required, and that he could leave.
- (d) By the said letter of 21 August 1998, the practitioner also stated, inter alia, in response to a complaint that she had misled the District Court on 27 May 1996 by seeking an adjournment of three (3) months in reliance on an affidavit by JPMH sworn 23 May 1996 in which JPMH deposed that if, "as constructed" levels were different to design levels, he would require three (3) months to ascertain the effect of such deviation:
- (i) "Unfortunately in our discussion (on 24 May 1996) I had not asked or JPMH had not dispelled the estimation of three (3) months in his affidavit of 23 May 1996....."
- (ii) ".....In his meeting with me on 24 May, he provided me with a preliminary verbal advice that the levels were within constructional tolerances. Unfortunately, he did not dispel his estimate of a time for report contained in paragraph 6 of the affidavit of 23 May 1996, nor give me an estimation of the time that it would take him to prepare a report on his investigations and his findings as to whether any rectification would be required, the extent of rectification or the cost of rectification in a proper report that could be presented to the defendant, C Group Pty Ltd, and for them to provide me with instructions."
- (iii) "Hence at page 2, line 47, I deposed "JPMH believes that it will take quite some time to be able to give a thorough report to this Court". This obviously was based on the original advice (as in paragraph 6 of the affidavit of 23 May 1996) was not dispelled during the verbal discussions on 24 May 1996."
- (e) The said statements were false or misleading as the practitioner knew, following her meeting with JPMH on 24 May 1996, that the "as constructed" levels were within construction tolerances and in consequence JPMH did not require a further three (3) months in which to prepare a report on his investigations and findings as to whether any rectification would be required, or in which to prepare a report on the extent and cost of rectification, there being no requirement for rectification.
8. In the alternative to Charge 7, the practitioner is guilty of professional misconduct, or, alternatively, unprofessional conduct or practice in that the practitioner's letter dated 21 August 1998 written to the Queensland Law Society Inc concerning the matter of the complaint against her by KR & TR M contained representations which were recklessly made, uncaring as to their accuracy.

Particulars

The Society repeats and relies on particulars (a) – (e) of Charge 7 above.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr R P Devlin of Counsel instructed by Clayton Utz, solicitors.
- (b) For the practitioner:
Mr J S Douglas, QC, instructed by Robertson O’Gorman, solicitors.

Findings and Orders

1. The Tribunal found Charges 1, 2, 4, 5, 6 and 7 proved and that these charges amounted to professional misconduct.
2. The Tribunal found the practitioner guilty of professional misconduct.
3. The Tribunal ordered that the name of the practitioner, Wendy Ann Wright, be struck from the Roll of Solicitors of the Supreme Court of Queensland.
4. The Tribunal ordered that Wendy Ann Wright pay the costs of the proceedings including the costs of the recorders and the Clerk to be agreed, or failing agreement, to be assessed by an assessor and the Tribunal nominated Mr Fred Monsour as the assessor.
5. The Tribunal ordered that the Order for striking off take effect from 1 March 2000, and until that time the practitioner was not to accept new instructions and was not to act for any party in litigious matters.

Reasons

General

Mr Douglas suggested that recent amendments to the Queensland Law Society Act meant that the criminal standard of proof may now apply to these proceedings. He suggested that this arose because the amendments provided that any fine imposed by the Tribunal would be payable into the Fidelity Guarantee Fund rather than the Society’s own funds. He quite properly drew our attention to the relevant provisions of *Adamson v. Queensland Law Society Inc* (1990) 1 QD.R.498, and acknowledged that this authority was binding on the Tribunal at present. At page 506, His Honour Justice Thomas stated that “in the absence of clear legislative indication to the contrary”, the *Briginshaw* standard should be applied. The Tribunal was unable to find any legislative indication to the contrary and accordingly applied the *Briginshaw* standard.

Charges 1, 2, and 3

At the heart of these charges lies the practitioner’s understanding of her conversation with JPMH on 24 May 1996. JPMH was retained by the practitioner to investigate and report. His understanding of his retainer is set out in his letter of 22 May 1996 being Exhibit A to his affidavit of 23 May 1996. He was to inspect the roadworks and drainage for stage 6 and prepare a report on any defect found, and also to investigate and report on possible deviation from approved level design for roadworks for the same portion of the development.

The letter records that inspections were carried out, including inspections in the presence of Mr T and the practitioner. His letter indicates the defects he observed and includes an estimate of cost to repair. He notes that no tests have been taken. He does not indicate that he proposes to undertake any tests. He is not a geotechnical engineer.

In relation to the deviation his letter says that he has the surveyor’s “as constructed” levels available but he has not been able to obtain details of the approved design levels from the Council. His letter says that when these levels are available he will be in a position to compare and comment on the construction in relation to normal tolerances.

By a letter dated 23 May, the surveyors, P & M Pty Ltd, record that they have been instructed by the practitioner, have carried out their survey and have given a plan to JPMH.

Whether or not there was any deviation was very important. JPMH searched the Caboolture Shire Council building files on Tuesday, 21 May and thereafter daily until he was finally able to obtain the information he sought on Friday, 24 May. During the course of submissions before the Court the practitioner commented, in relation to the possibility of an error in road levels, “I think that’s what scares C Group so much”. She agreed with His Honour’s comments that \$200,000.00 might not be enough to rectify this possible problem.

JPMH deposes that after inspecting the Council file, he attended on the practitioner and informed her of the result of his inspection. He acknowledged in his evidence that the conversation may have been sparse in detail.

In her affidavit filed in these proceedings, the practitioner says that on Friday, 24 May, JPMH told her that he had simply looked at a Council file in relation to the road way, had not seen the approved engineering drawings, and she considered he acquiesced in her insistence that he was the appropriate person to do this work, i.e. the three months to check the levels on all stages. She says that JPMH had satisfied himself as to the construction tolerances of the road construction. She understands the term “construction tolerances” in the sense of the various levels in the make up of the road itself (which we shall call for the purposes of

these proceedings the layers sense), rather than in the sense of deviation between design and as constructed pavement levels (which we shall call the surface levels sense).

Nothing in JPMH's letter of 22 May or his affidavit of 23 May suggests he is pursuing an investigation of construction tolerances in the layers sense. Rather he makes it clear that it is the surface levels issue which he regards as still outstanding.

Notwithstanding that the surface levels issue was of such importance, the practitioner did not follow up JPMH's letter after their 24 May meeting on the results of his investigation which she says were outstanding as at that time. She says that Mr T was to follow him up.

The layers interpretation adopted by the practitioner in her evidence before this Tribunal is not apparent from her letter to the Queensland Law Society of 21 August 1998. Indeed, the context in which the term is used on page 5 of that letter relates to construction tolerances in the surface levels sense.

This Tribunal found JPMH to be a credible witness. In all the circumstances, we cannot accept that the practitioner was under any misunderstanding as to the nature of his communication to her on 24 May 1996. Accordingly, we find Charges 1 and 2 proved. Charge 3 is an alternative charge which is not necessary for us to consider.

Charge 4

Charge 4 relates to oral submissions made by the practitioner to His Honour Judge R on 27 May 1996 in relation to the financial position of her client. She says in her evidence that she knew the company was not in financial strain because it had finance in place for well in excess of 1 million dollars. In her letter to the Law Society of 28 September 1998, she states that she is not privy to the financial capabilities of C Group. In her evidence before us she says that she was privy to the financial mortgage situation of the company, of the funding, in other words that was in place. She says that she does not know what Mr T was doing with the company so far as his own financial arrangements were concerned. She only knew what related to the property development that she was handling which was virtually the sale of the units. She says she did not have anything to do with the applications for refinancing.

It is clear that the practitioner had at the relevant time insufficient knowledge of the full financial position of the company to ascertain whether or not it could pay \$48,000.00 to the plaintiff in the relevant proceedings. Notwithstanding this she volunteered to His Honour that her "client company is not in financial strain". His Honour then made it clear that he understood the practitioner to have told him that the "C Group is financially sound". The evidence before us indicates that the practitioner had no reasonable basis upon which to provide these assurances. We do not find that the

practitioner believed these assurances to be false. We find in the alternative that the submissions were recklessly made and accordingly, we find Charge 4 proved.

Charges 5, 6, 7 & 8

As to Charge 5, on 20 May 1996, during the course of the hearing of an application before His Honour, Judge R, of the District Court in the matter of KR & TR M v. C Group Pty Ltd, the practitioner produced to the Court a report of JPMH dated 20 May 1996.

This charge relates to the complaint that the production of this report was such so as to mislead the Court into the erroneous belief that JPMH was the engineer who had informed Mr T that the quality of the materials and workmanship provided by M were of such a low standard that rectification of the work was not an option but that the work would have to be demolished and completely reinstated as new at a cost of \$200,000.00.

The practitioner gave evidence to the Tribunal that she did not represent to the Court on 20 May 1996 that JPMH was the engineer relied on by Mr T for the purpose of his affidavit sworn 8 May 1996.

Evidence was given by MWR who was the solicitor instructing Counsel for KR & TR M on 20 May 1996. MWR had made contemporaneous notes of the submissions made to Judge R by the representatives of the parties. MWR conceded in his evidence that his notes were not a verbatim account of the submissions but were a record of the verbal submissions made as quickly as he could write at the time.

MWR gave evidence of his recollection that the practitioner told Judge R that the engineer referred to by Mr T was not FN but was JPMH. His recollection was supported by his notes. The accuracy of those notes was questioned during MWR's cross examination.

The Tribunal has compared the contemporaneous notes of MWR with the Reasons for Decision of His Honour, Judge R, and the fragment of transcribed argument that followed the delivery of those Reasons. This comparison reveals that the notes of MWR are an accurate record of the Reasons and the final argument.

The Tribunal is prepared to find that the notes of MWR of the argument prior to the delivery of the Reasons are also an accurate record of the submissions made to the Court by the practitioner. The Tribunal found MWR to be a credible witness. The Tribunal does not accept the evidence of the practitioner as to the submissions made by her on 20 May 1996 whenever the practitioner's evidence conflicts with the evidence of MWR.

The complaint that the Court was misled by the practitioner is supported by comments made by Judge R in his Reasons for Decision of 20 May 1996. On page 4 of the Reasons, His Honour states:

“One would assume the engineers to be FN who issued the progress payment certificates and who has supplied an affidavit used by the plaintiff to the effect that the work was performed properly and to the appropriate standard. It now appears the engineers are another firm, JPMH, and that they are in the course of preparing a report of some kind”.

This statement was erroneous but was not corrected by the practitioner. His Honour later on 27 May 1996 conceded that he might have been wrong in making that statement but nevertheless His Honour remained under the impression given by the practitioner that JPMH was the engineer in question and that is established by the comments of His Honour recorded on page 13 of the transcript of 27 May 1996 proceedings as follows:

“So it just happened that JPMH and Mr G chose exactly the same words to evaluate two different contractors’ work”.

The Tribunal found that the practitioner told the Court that the engineers who had informed Mr T was not FN but were JPMH and that the practitioner produced a report of JPMH dated 20 May 1996 in circumstances where the practitioner knew that the Court would be misled.

The Tribunal found Charge 5 proved.

As to Charge 6, it is alleged that in breach of her duty as a solicitor, the practitioner sought to change the evidence of JPMH contained in an affidavit sworn 3 August 1998 and relied on by KR & TR M in support of their complaint to the Society concerning the conduct of the practitioner by preparing and presenting to JPMH a further affidavit for execution which conflicted in material respects with the previous sworn testimony of JPMH, and which contained assertions that were false and which the practitioner knew were false and which changed the evidence of JPMH so that it was more favourable to the practitioner.

The practitioner denied that the affidavit she presented to JPMH on or about 18 August 1998 contained assertions which were false and which she knew were false. Her evidence was that she drafted the affidavit based on what the practitioner and JPMH had discussed in a telephone conversation held on 18 August 1998 and that she was under the impression that JPMH had implicitly at least agreed with the assertions she had drafted into the affidavit.

It was the evidence of JPMH that he did not tell the practitioner the facts contained in paragraph 3 of the draft affidavit, he did not tell the practitioner on 24 May 1996 that he would require a lengthy period of time to do a thorough and complete investigation and he did not tell the practitioner that the affidavit sworn 3 August 1998 was done in haste and did not convey the correct matters.

The Tribunal does not accept the practitioner’s explanation

of the circumstances which resulted in the preparation and presenting of the draft affidavit to JPMH on 18 August 1998. The Tribunal has already determined that JPMH was a credible witness.

The Tribunal found Charge 6 proved.

As to Charge 7, it is alleged that on 21 August 1998, the practitioner wrote to the Queensland Law Society concerning the matter of a complaint against her by KR & TR M by a letter which the practitioner knew was false and misleading.

The practitioner informed the Society that she had assumed that JPMH was unable to attend at Court on 27 May 1996 and that she became aware of his presence only after the Court had adjourned the hearing of the summary judgment application at 10.59am.

JPMH had given evidence that the practitioner had spoken to him at 10.10am and told him that he was then free to go.

The Tribunal does not accept the practitioner’s response set out in paragraph 7(b) of the charge to the complaint that the practitioner had misled the Court on 27 May 1996 as to the availability of JPMH and finds that the practitioner’s response was false and misleading.

The practitioner informed the Society that she had remained under the impression during her conversation on 24 May 1996 that JPMH would require three months to prepare a report on whether the levels were within construction tolerances. She denied that she had misled the Court on 27 May 1996 by relying on the report of JPMH dated 23 May 1996 when she had been told by JPMH that the as constructed levels were within construction tolerances.

This explanation provided to the Society is not supported by the evidence of JPMH and the Tribunal does not accept that the practitioner was under any misunderstanding as to the nature of the communication received from JPMH on 24 May 1996.

The Tribunal does not accept the practitioner’s response set out in paragraph 7(d) of the charge to the complaint that the practitioner had informed the Court on 27 May 1996 that JPMH would require a further three months to prepare his report but finds that the practitioner’s response was false and misleading.

The Tribunal found Charge 7 proved. Charge 8 is an alternative charge on which a finding is unnecessary.

The Tribunal finds that the conduct proven amounts to professional misconduct and the Tribunal accordingly finds the practitioner guilty of professional misconduct.

Appeal

Ms Wright has lodged an appeal.