IN THE SUPREME COURT OF QUEENSLAND Appeal No. 56 of 1987

FULL COURT

BEFORE:

The Chief Justice (Mr Justice Macrossan)

Mr Justice Ryan

Mr Justice Dowsett

BRISBANE, 26 APRIL 1991

IN THE MATTER OF John Leslie Wheeler of Paradise Waters in the State of Queensland a Solicitor

-and-

IN THE MATTER OF The Queensland Law Society Act 1952 as amended

JUDGMENT

THE CHIEF JUSTICE: In this matter the appeal of John Leslie Wheeler should be allowed for the limited purpose of setting aside the findings made by the statutory committee upon paras. 4.1.1, 4.5.1 and 4.5.2 which the statutory committee had before it for consideration. The findings otherwise of professional misconduct and the order for suspension imposed should stand.

The appellant named should be ordered to pay the respondent's costs of and incidental to the appeal to be taxed.

I agree with the reasons which have been prepared in this matter by Mr Justice Dowsett and I publish his reasons.

MR JUSTICE RYAN: I agree also with the order proposed by the learned Chief Justice and with the reasons of my brother Dowsett.

THE CHIEF JUSTICE: The orders will then be as I have indicated.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 56 of 1987

FULL COURT

IN THE MATTER of JOHN LESLIE WHEELER of Paradise Waters in the State of Queensland, Solicitor

-and-

IN THE MATTER of THE QUEENSLAND LAW SOCIETY ACT, 1952 as amended.

CHIEF JUSTICE

RYAN J

DOWSETT J

Reasons for judgment delivered by Dowsett J on the 26th April 1991. The Chief Justice and Ryan J agreeing with these reasons and order made.

“APPEAL BY JOHN LESLIE WHEELER BE ALLOWED FOR THE LIMITED PURPOSE OF SETTING ASIDE THE FINDINGS MADE BY THE STATUTORY COMMITTEE UPON PARAGRAPHS 4.1.1, 4.5.1 AND 4.5.2 WHICH THE

STATUTORY COMMITTEE HAD BEFORE IT FOR CONSIDERATION. THE FINDINGS OTHERWISE OF PROFESSIONAL MISCONDUCT AND THE ORDER FOR SUSPENSION IMPOSED TO STAND. ORDER THE APPELLANT PAY THE RESPONDENT'S COSTS OF AND INCIDENTAL TO THE APPEAL TO BE TAXED."

IN THE SUPREME COURT OF QUEENSLAND Motion No. 138 of 1987

FULL COURT

Before the Full Court

The Chief Justice

Mr. Justice Ryan

Mr. Justice Dowsett

Motion No. 138 of 1987

IN THE MATTER of JOHN LESLIE WHEELER of Paradise Waters in the State of Queensland, Solicitor

-and-

IN THE MATTER of THE QUEENSLAND LAW SOCIETY ACT, 1952 as amended.

JUDGMENT - DOWSETT J.

Delivered the Twenty-sixth day of April, 1991.

Counsel:	Mr C.E.K. Hampson Q.C. with L.D. Bowden for the Appellant
	Mr H.G. Fryberg Q.C. with A.J.H. Morris for the Respondent
Solicitors:	Morris Fletcher and Cross for the Appellant
	Gilshenan and Luton for Respondent
Hearing dates:	11th-12th March, 1991.

IN THE SUPREME COURT OF QUEENSLAND Motion No. 138 of 1987

FULL COURT

IN THE MATTER of JOHN LESLIE WHEELER of Paradise Waters in the State of Queensland, Solicitor

-and-

IN THE MATTER of THE QUEENSLAND LAW SOCIETY ACT, 1952 as amended.

JUDGMENT - DOWSETT J.

Delivered the Twenty-sixth day of April, 1991.

Following proceedings before the Statutory Committee of the Queensland Law Society. Incorporated, John Leslie Wheeler (the appellant) was, on 12th March, 1987, found to have committed professional misconduct and suspended from practice for a period of three years. The Council of the Society (the respondent) appealed against that order and the appellant lodged a cross-appeal, asserting that the charges ought to have been dismissed. On 6th April, 1988 the Court referred the matter back to the Statutory Committee for reasons. These reasons were delivered on 18th October, 1988. It is not immediately apparent why the matter has taken so long to return to this Court. In any event, the respondent has abandoned the original appeal, but the appellant has prosecuted the cross-appeal.

The alleged misconduct was particularized in an affidavit by P.D. Knox. There were four different aspects involving:—

(1) The appellant's conduct of the affairs of clients, J.B. and M.C. Crowe;

(2) The appellant's conduct of the affairs of clients G.J.G. and F.L. Beck;

(3) The appellant's conduct concerning the Cannes Property Trust.

(4) Alleged dishonesty in correspondence with another practitioner.

The complaints concerning the Becks were dismissed and need not be further considered.

As to the Crowe allegations, it was asserted that the appellant had:—

> "In or about December 1981 and thereafter acted for J.V. and M.D. Crowe ('the clients') in a transaction of a loan by them of the sum of $200,000 to Wolmarie Pty. Ltd. ('the borrower') a client of his firm and in doing so neglected and acted contrary to their interests and in favour of the interests of the borrower.
>
> The first "particular" of this allegation was:—
>
> 4.1.1 Contrary to the instructions of the clients, advancing or causing the advance of the said sum of $200,000 in a single parcel to only one borrower."

The general allegation and this particular disclose two different grounds of complaint. Firstly, there is an allegation that the solicitor acted contrary to the interests of his client. Secondly, there is an allegation that the solicitor acted contrary to the client's instructions. It is clear from the cross-examination which occurred before the Statutory Committee that the gravamen of the charge was the lending of the moneys in one parcel contrary to instructions.

The evidence did not establish this particular. Although in evidence-in-chief Mr. Crowe was equivocal, in cross-examination he was quite precise. He was asked at p. 694 of the record:—

> "Did you say to Mr. Wheeler specifically that you didn't want the $200,000 being lent to only one person?"

He replied:

> “I didn't say to one person. I didn't say specifically that. I said on more than one thing.”

Whilst it is not entirely clear what Mr. Crowe may have meant by his instructions to Mr. Wheeler, it is clear that he did not mean to prohibit the lending of the whole amount to one person. It seems probable that he was looking to secure the advance by charges over more than one property. This is a curious approach to adopt. The usual approach would be to ensure that the property offered as security was adequate, having regard to the amount advanced. Be that as it may, it Was not Mr. Crowe's assertion that he had instructed Wheeler in the way alleged in para. 4.1.1. In those circumstances that particular must fail as a particular of misconduct.

The second particular, para. 4.1.2, was as follows:—

> “Failing to disclose to the clients his knowledge that the borrower proposed to and did in fact apply the advance as to only approximately one-half thereof in payment of $99,123.25 being substantially all of the purchase price of the land described as Re-subdivision 31 of Dub-division 2A of Re-subdivision A of Sub-division 2 of Portion 27 on Plan Cat No. 42887 Volume 1670 Folio 137 constituting security for the loan.”

It was proposed by the appellant that the Crowes lend $200,000 to Wolmarie Pty. Ltd. upon the security of a charge over the property described above. Mr. Wheeler justified his advice to the Crowes upon the basis of a valuation made available to him, which valuation was of Re-subdivisions 30 and 31. The valuers, John R. Meyers and Associates, valued the two parcels at $550,000. The “brief particulars” provided with the valuation are of some interest. They were as follows:—

> “The subject land is to form part of the combined site as described more fully in the valuation compiled by Mr. Glen White dated 26th May, 1981. It adjoins that property on the western side, and by combining the two areas, this therefore allows the developers to erect a larger number of home units and allows for more landscaping to be

> carried out, thus enhancing the total value of the complex.”

In other words, these two blocks had an added value because of an opportunity to amalgamate them with other land. It may be accepted for present purposes that the borrower was in a position to take advantage of this special circumstance. However this was not a benefit which would necessarily have been available to the Crowes in the event that they were compelled to rely upon their security. They were to have a charge over only one of the blocks, and in the event of a mortgagee's sale, the peculiar value referred to in the valuation might have been of dubious worth.

In any event, on the day appointed for settlement, the appellant discovered that the purchase price for the property in question (which purchase was being financed by the loan from the Crowes) was $100,000. Mr. Wheeler's partner, one Mr. Reynolds, was acting for the borrower in the acquisition, but at the last minute was unable to attend to settlement and delivered the papers to Mr. Wheeler so that he could do so. Mr. Wheeler, once possessed of this information as to purchase price, did nothing other than to attend to settlement. It was submitted that it was not open to Mr. Wheeler to communicate the fact of the purchase price to the Crowes. Further, it was said that since the Crowes were already bound to advance the money, it could make little difference to them.

These allegations overlook the true nature of the complaint made about Mr. Wheeler's conduct. The allegation is that he preferred the interests of Wolmarie to those of the Crowes, notwithstanding the fact that he was retained to act for the latter. The so-called particulars are intended to be particulars of overt acts evidencing the approach of the appellant to the whole transaction. Whilst it may be arguable that it was not open to Mr. Wheeler to disclose the purchase price to the Crowes without specific authority from the purchaser, this is of little significance. The adequacy of the security should have been

addressed at a very early stage, and given the circumstances in which the Crowes came to advance the moneys to Wolmarie, there was an obligation upon Mr. Wheeler to advise them as to the need for a valuation of the property.

The Meyers valuation, far from being sufficient for the Crowes' purposes, clearly indicated the need for a further valuation of the block as a discrete parcel. It is also inconceivable that a solicitor would not advise a lending client of the advisability of sighting the original contract of purchase which he was financing. The details of the transaction would probably have become public in any event, either by virtue of notification to the Valuer-General and the Local Authority or by registration of the transfer at the Titles Office. Thus there could be no reason for the borrower not to disclose such information. One would expect a prudent solicitor to advise a potential lender/client that he should demand access to the contract and a prudent solicitor, acting for a potential borrower to advise that such access should be granted. That the appellant's firm acted for both parties did not discharge him from the obligation to give such advice. If anything, because he was in this position of potential conflict, his duty was heavier than it might otherwise have been. I should not be taken as approving the practice of one firm acting for both borrower and lender in a situation such as the present. Indeed, I deprecate the practice.

Although it may be that strictly speaking, the appellant was not entitled to disclose the contents of the contract without instructions from the purchaser, his failure to seek such instruction and his failure to advise the Crowes of the need for valuation evidence bespeak his disregard of their interests. This was the approach taken before the Statutory Committee.

The third, fifth and sixth particulars, para. 4.1.3, 4.1.5 and 4.1.6 were as follows:—

“4.1.3 Failing to stamp and register the Bill of Mortgage

executed on or about 3 December 1981 by the borrower in favour of the clients as purported security for the loans.

"4.1.5 On or about the Twenty-fourth day of December, 1981 without the clients' knowledge or consent, causing or permitting to be delivered up to Midland Credit Limited the title deed to the said land for the purpose of enabling the said Midland Credit Limited to register a first bill of mortgage in its favour of the said land.

"4.1.6 Acting as described in 4.1.5 above without taking any or any sufficient steps to secure the clients' loans."

The allegation in para. 4.1.4 was not made out at the hearing below.

The initial advance by the Crowes was allegedly repaid in late December as a result of a re-financing of the borrower's affairs with Midland Credit as new lender. Midland Credit advanced money to Wolmarie, but only $3,000 was paid to the Crowes. As part of this transaction, the certificate of title for Re-subdivision 31 was delivered to Midland Credit as security for its advance. The Crowes' mortgage over that property was apparently abandoned. It was neither stamped nor registered. Obviously, the mortgage was liable to stamp duty, although it may be that the Crowes were not personally liable for that duty. The Crowes were not paid out from the Midland Credit advance. Save for $3,000, the money was deposited in the appellant's trust account to the credit of Wolmarie. See pp. 602-3 of the record.

The appellant had spoken with Mr. Crowe, informing him of Wolmarie's intention to pay out the loan. The appellant's evidence as to this is relevant. The evidence (p. 600 et seq) was as follows:—

> "Right, well, prior to the settlement, what contact did you have, if any, with Crowe regarding any instructions on the matter? --- On the matter of pay out?

“Yes? --- or of the matter of the settlement? --- Well, on 23rd or 22nd December or thereabouts, I spoke to Crowe on the phone and told him that the borrower was paying out and that they wanted to continue with the loan, and that is what he told me that he wanted. He did not want one transaction; he wanted a number. He wanted a number of parcels. My interpretation of what he said was he wanted four lots of 50, but he was saying he wanted it split over a number of transactions. I said to him, ‘Well, I will see what I can get from the borrower, and I will get back - leave it to me and I will get something of equal value, and get back to him.’

“Mr. Peterson” You said, “Leave it to me though? --- I will get something of equal value for submission ---

“Leave it to me -- that is pretty relevant. What you are really trying to say is this is Reynolds' fault, not yours. Crowe did not understand that. Crowe was looking to you was he not? ---

“Leave it to me.” was not to make decisions to lend the money. “Leave it to me” was to find out what the borrower would offer.

“Mr. Fryberg: Did you find out what the borrower would offer? --- I did.

“Did you get back to Crowe? --- No, I did not.

“Why did you not? --- Because the borrower, John Abel, phoned me at approximately 11 o'clock on Christmas Eve, and we discussed a property that he might submit to Crowe, and he said to me an offer of a second mortgage on the Cannes site plus a few other bits and pieces, and he asked me would that be acceptable to the mortgagee, and I said I thought so -- come down and we will sort it out. So -- that was about 11 o'clock, and he did not come down until about one minute before I was leaving which was about 12.30 or so - I had an appointment with somebody who I just could not put off so I took him into Don's office and said, ‘Crowe has agreed to extend that loan and Abel is here. Can you sort it out?’ and I left.”

Thus it seems that the immediate responsibility for what followed was Reynolds' in that he facilitated the delivery of the certificate of title to Midland Credit and

the deposit of the payment in the trust account to the credit of Wolmarie rather than the Crowes. Clearly, that, left the Crowes unsecured. The appellant's account of his discussions concerning security and his subsequent conduct indicate that he paid little attention to the interests of the Crowes in having adequate security. It is quite clear that he and Mr. Abel were more concerned about finding what could be mortgaged than with working out what would be attractive or even appropriate from the Crowes' point of view. In handing the matter to Mr. Reynolds, the appellant did not indicate to him the true position, namely that Mr. Crowe had not been consulted as to whether he was satisfied with the proposal. It was as a result of this off-handedness that no further steps were taken to secure the position to the Crowes' satisfaction. It is reasonable to infer from all of these circumstances that the appellant was not acting in the best interests of the Crowes in his attention to this matter.

The main attack made upon this aspect of the case by the appellant was that whatever subsequently occurred was a consequence of Reynolds' involvement without the appellant's knowledge. In a causal sense, this may be true, but we are here assessing the appellant's conduct of affairs on behalf of the Crowes. That Reynolds may also have been guilty of misconduct is irrelevant. It is clear to me that the true matter of complaint against the present appellant is the way in which he took instructions and carried them into effect, without any regard, as I would conclude, to the interests of the Crowes. He should not have permitted surrender of the title deed to Midland Credit without ensuring that the Crowes' position was protected.

The final particular concerning the Crowe transactions was contained in para. 4.1.7 as follows:—

> “In the period from about 4 May 1982 to about 4 October 1984 making, causing to be made or permitting to be made payments to the clients of sums purporting to represent

interest owing by the borrower to the clients without disclosing to the clients:—

(i) that the borrower had ceased to make and was apparently incapable of making payments of interest;

(ii) that the payments then being made to the clients were in fact made out of his and his partner's funds."

The evidence disclosed that the appellant's firm paid a substantial number of instalments on behalf of the borrower from December 1981 until January 1985. (See answers to interrogatories in Supreme Court Action No. 1326 of 1985.) In evidence, the appellant said that during 1982, a practice was adopted by which the borrower would pay funds into the firm's trust account and the appellant would draw general account cheques payable to the Crowes, subsequently reimbursing that account from the trust account. This practice was adopted to enable remission of funds prior to clearance of the borrower's cheques. These cheques were dishonoured on occasions, but the appellant continued to pay the Crowes. By the end of 1982, the borrower was indebted to his solicitors in the sum of about $10,000 as a result of these transactions. After December, the borrower made only one further payment, but the solicitors still continued to pay the Crowes.

In cross-examination, the appellant conceded that his conduct in this respect was incorrect and that he should have recommended to the Crowes that they seek independent advice. Obviously, the advice would have been as to enforcement of such security as the Crowes held. The extraordinary lengths to which the appellant went to ensure that the Crowes were not out of pocket can only have been motivated by a desire to prevent them from making complaint, in the fond hope that the borrower's position would improve sufficiently to enable it to repay the loan. The only realistic explanation for such concern on the part of the appellant can be an awareness that he had previously failed to protect the Crowes' position.

It was submitted before us that this conduct fell outside the retainer of the solicitor and therefore could not go to the question of professional misconduct. Assuming for present purposes that the appellant did not continue to act as the Crowes' solicitor during the years 1982, 1983 and 1984, nonetheless his conduct in permitting his firm to pay the instalments on behalf of the borrower was, in my view, evidence of his own state of mind concerning the way in which he had attended to his previous instructions. In this context, it is not relevant that his instructions may not have continued through this period.

A second attack made upon the Statutory Committee's findings in this regard was that the Crowes had become aware of the insolvency of the borrower at a relatively early stage and thereafter had their own legal advice. This submission is based upon a misunderstanding of the evidence. As I understand it, the Crowes returned to Australia late in 1982, intending to collect the principal sum. Mr. Reynolds (in the appellant's absence) suggested that the loan be extended. Towards the end of 1984, the Crowes complained to the Law Society, apparently as a result of which Mr. Wheeler rang them. At this time, he informed them that Wolmarie was insolvent as was Abel who was the principal of that company. It was indicated that Abel hoped to repay the Crowes from off-shore funds by 31st May, 1985. Wheeler also indicated that if this was not achieved, then he and Reynolds would pay the Crowes. As far as I can see it was only after this occurrence that the Crowes consulted other solicitors. In any event, as I have said, the true significance of the conduct is not that it was itself misconduct but rather that it was evidence of an awareness of previous misconduct.

Particular 4.1.8 was not made out to the satisfaction of the Statutory Committee.

With respect to the general allegation in para. 4.1 that the appellant had acted contrary to the interests of his client and in the interests of the borrower, the

evidence indicated a consistent pattern of conduct in which reasonable steps to secure the Crowes' position were not taken. Reliance was placed on a valuation which was, on its face not relevant to the position of the Crowes. When it became evident that the property was, in fact, being, purchased by the borrower at a price much below the amount being advanced against the property as security, no step was taken to safeguard the Crowes or even to put them on notice. When the finances of Wolmarie were restructured following the Midland Credit loan, only a small amount was ever made available to the Crowes, and no attempt was made to ensure that adequate security was available to them after the “release” of the original security. Finally, steps were taken to prevent any disquiet on the part of the Crowes which may have led to complaints against the appellant.

In those circumstances, having regard to the appropriate onus of proof and keeping in mind the seriousness of the allegations, I am satisfied that the only inference reasonably consistent with all of the facts is that the appellant was motivated in his conduct of the Crowes' affairs by a desire to fund the operations of Wolmarie and that he had little or no regard to his duty to protect the position of the Crowes as lenders. In his examination before the Statutory Committee, he admitted misconduct in respect of the original valuation problem and in respect of his subsequent conduct in paying the instalments.

As this is an appeal by way of re-hearing, this Court should form its own judgment of the facts so far as it is able to do so. See Bell v. Stuart (1920) 28 C.L.R. 419 at pp. 424-5 and Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan (1931) 46 C.L.R. 73 at p. 107.

It is true that one of the particulars upon which the Statutory Committee relied in finding misconduct was not supported by the evidence. Notwithstanding this, all of the evidence pointed in one direction. I can see no basis for

upsetting the conclusion that in his handling of these matters, Wheeler's conduct amounted to professional misconduct.

The second matter of complaint against the appellant upheld by the Statutory Committee concerned what was called the "Cannes Property Unit Trust". This matter had some links with the Crowe matter but had much wider ramifications. The gravamen of this complaint was that:—

> "... whilst acting as, "a director of, and solicitor and attorney for Bunbar Pty. Ltd. ('the trustee') as trustee of a unit trust called the Cannes Property Trust ('the trust') (the appellant) acted or alternatively caused or advised the trustee to act contrary to the interest of the trustee and/or of the unit holders and beneficiaries of the trust ... and in favour of the interests of his client, John Abel, and/or companies which the said Abel controlled or with which he (the said Abel) was associated."

For reasons which are obvious from the wording of the charge, it is necessary to identify the ambit of the term "professional misconduct" which is the term used in s. 6(2) of the "Queensland Law Society Act 1952-1985", the authority for the present proceedings. In Ex parte Attorney-General; Re a Barrister and Solicitor (1972) 20 F.L.R. 234 at p. 245, the Full Court of the Supreme Court of the Australian Capital Territory declined to define the term but quoted with apparent approval the view taken by the South Australian Supreme Court in Re A, a Practitioner of the Supreme Court (1927) S.A.S.R. 58 as follows:—

> "Conduct which may reasonably be held to violate or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency."

Whilst it cannot be said that professional misconduct must necessarily involve conduct of a practitioner in discharging his responsibilities pursuant to a particular retainer, it is quite clear that professional misconduct must be conduct in connection with his profession. The

reference in para. 4.5 to the appellant's capacity as a director was therefore potentially an invitation to error, unless his actions as a director in a particular matter were shown to have been so closely associated with his professional capacity that conduct in one capacity amounted to misconduct in the other. It is necessary to look at the specific allegations to see if this was so in the present case.

The first particular, para. 4.5.1 was as follows:

> "Acting as aforesaid when he knew or ought to have known the allotments of land to be developed by the trust were to be sold to the trustee on behalf of a trust by companies, Cumbur Pty. Ltd. ('Cumbur') and Wolmarie Pty. Ltd. ('Wolmarie') controlled by or associated with the said Abel at a cost substantially inflated above that for which they had recently acquired the said allotments ...."

Particulars follow as to those allegations. The particulars revealed that by contracts dated 23rd April, 1981 Cumbur agreed to purchase the various properties for $1.7 million and on 9th June, 1981 agreed to sell them to the trust for $2.75 million. Wolmarie acquired property for $200,000 in July and September, 1981 and sold to the trust for $600,000, apparently also in June 1981. The difficulty with this allegation was that it did not attack any specific conduct by the appellant as a solicitor. As a director, he presumably caused Bunbar to agree to acquire the property, or at least participated in that decision. Whilst this may have been a breach of his duty as a director, it had nothing to do with his position as a solicitor. It was not alleged that he advised as to the obligations of the trustee, nor does it appear that he had reason to believe that the transactions were unfavourable to the beneficiaries. It may be that he permitted himself to be put into a position of conflict of interest and duty, given his professional relationships with Abel who controlled Cumbur and Wolmarie, but this was not the allegation made against him.

A solicitor is not obliged to decline to act as such in a transaction involving a trustee simply because the trustee is acting in a way which the solicitor considers to be contrary to the interests of the beneficiaries, unless there is reason to believe the conduct is dishonest or otherwise in breach of trust. A solicitor is entitled to carry out any instructions which do not themselves make him a party to any fraud or breach of trust. This, of course, does not exempt him from liability as a director if he has breached his duty in that regard, but without more, breach of duty as a director is not professional misconduct in this context.

We were urged to have close regard to the various documents relating to the establishment of the Cannes Property Unit Trust in which documents the firm of Wheeler and Reynolds was described as “the trust solicitors”. Wheeler and Reynolds individually were also listed as, “trustees of the trust and directors of the trustee company”. It is unclear what this meant. The trustee was Bunbar Pty. Ltd. Both Wheeler and Reynolds were directors of that company. Whether they also undertook obligations as trustees in their personal capacities is not clear. The terms upon which subscriptions to the trust were received were on the basis that the moneys would be held by the trustees (whoever they were) until all units had been subscribed for, at which time the moneys were to be paid to the trust fund. In the event that all units were not subscribed for, the moneys were to be returned to the original subscribers. It may be that the natural persons who were described as trustees and directors of the trustee company (Wheeler, Reynolds and one Robin Franks) were to be personally liable until the payment of such moneys to the fund.

However this may be, it does not take the matter any further. The appellant may have breached his duty as trustee or as a director of Bunbar, but on the evidence to which we have been referred, I am unable to find any professional misconduct proven in respect of para. 4.5.1.

Paragraph 4.5.2 alleged as a particular:—

> "Failing to disclose to unit holders and beneficiaries the matters which he knew referred to in para. 4.5.1."

The difficulty with this particular was that it assumed a professional duty to the various unit holders. For present purposes, unit holders and beneficiaries may be taken to be the same persons, namely subscribers for units in the trust. Whatever Wheeler's duty may have been as a director of Bunbar and as a trustee (if he was a trustee), I cannot see that as a solicitor he was obliged to communicate information to such subscribers. To place such a duty upon a solicitor would be to require a solicitor advising a trustee to "second guess" the trustee on all matters of business and indeed, to make the solicitor an insurer of the beneficiaries against any misconduct by the trustee, at least where the solicitor was aware of the overt acts involved in such misconduct. I am not to be taken as implying that if a solicitor were aware that a trustee proposed to act in breach of his trust and facilitated this breach by the provision of legal services, he would not be guilty of professional misconduct. Rather, I am saying that in respect of this particular as with the previous one, there is no evidence of any act or omission as a solicitor with such knowledge. It may be taken that he knew that the trustee was acquiring property at a price greater than that at which the vendors had acquired the same property. There is nothing unusual in this, particularly in a real estate market as volatile as that of the Gold Coast. As a solicitor, he was not obliged to make the disclosures referred to para. 4.5.2.

Paragraph 4.5.3 alleged:—

> "Receiving, accepting and/or acting upon a purported subscription for 75 units in the trust by an entity described as John Abel Pty. Ltd. when:—

4.5.3.1 No application or subscription for the said units was made in writing;

4.5.3.2 No deposit or other payment for the said units was

made."

Once again, the difficulty with this assertion, if it be taken in isolation, was that it did not relate to anything done in the appellant's capacity as a solicitor. The only capacity in which he could have received and acted upon applications for the allotment of units was as a trustee or as a director of the trustee company. However the allegation should be read in the light of the next allegation.

Particular 4.5.4 was as follows:—

> "Disbursing or causing or permitting to be disbursed the funds subscribed to the trust as follows:—
>
> (then follows a list of disbursements)
>
> and not in acquisition of the said allotments or otherwise in the interests of the trustee, the unit holders and the beneficiaries."

Some of the moneys subscribed found their way into the solicitors' trust account, whilst other moneys were deposited to the account of Bunbar. Whilst with respect to the latter account I doubt that such disbursements could constitute professional misconduct, the position is otherwise with respect to moneys in the trust account. Section 7 of the "Trust Accounts Act 1973-1978" provides that:—

> "(1) A trustee shall establish and keep in a bank or banks in the state one or more trust accounts designated or evidenced as such into which he shall pay all trust moneys."

Relevantly, the word "trustee" is defined to mean, "any solicitor ... engaged in the practice of his profession ... and who, or the firm of which he is a partner, in the course of such practice receives any money upon trust or upon terms requiring, him to account to any person therefor:..."

The term “trust moneys” means:—

> “In relation to any trustee ... moneys received for or on behalf of any other person by the trustee in the course of or in connection with the practice of his profession or the carrying on of his business ...”

The receipt of the money into the trust account must in all probability have evidenced its receipt by the appellant in his capacity as a solicitor. Alternatively, the involvement of his trust account in the transaction was such, in my view, as to justify the conclusion that any misconduct in relation thereto constituted professional misconduct.

In effect, what was asserted in para. 4.5.3 was that the appellant (or perhaps Bunbar at the instigation of the appellant) accepted an oral application for an allotment of units in the trust without requiring a written application and without extracting the necessary deposit. The unit trust was one in which members of the public, in effect, were invited to subscribe for particular units, paying a deposit of some $30,000 prior to 31st August, 1981 as was intended, and the balance of the deposit prescribed by the trust deed for each unit prior to 30th November, 1981. The concept behind the unit trust was that the funds were to be used to acquire land and construct thereon a block of home units. Each unit in the trust entitled the holder to a particular home unit when the building units plan was registered. The balance of the purchase price for each unit was to be paid shortly after registration of the plan.

The importance of a written application was that it constituted written evidence of an agreement to acquire a unit and therefore to pay the appropriate deposit and eventually, the balance of the purchase price. The appellant was at all material times familiar with the contents of the application form (See pp. 617-9). A critical aspect of the application form was the following paragraph:—

> “It is hereby agreed that any moneys paid upon the execution of this application will be held in trust by the trustees in an interest bearing deposit account at the Commercial Bank of Australia, Surfers Paradise Branch and shall not under any circumstances be paid to the trust fund until all trust units are applied for. In the event that all trust units currently available in this issue are not subscribed for on or before the 31st day of August, 1981 then the deposit moneys paid as at that date and the interest accrued thereon shall be refunded to the applicant in full. Should at any date prior to 31st August, 1981 the trust be fully subscribed, the trustee shall from such date transfer all moneys held by way of deposits to the trust fund and the interest accrued thereon to that date shall be paid to the applicant. From the time such funds be transferred to the trust account I/we agree to be bound by the terms of the trust deed or any arrangements thereto.”

Thus it can be seen that full subscription on or before 31st August, 1981 would alter the entitlement to the moneys subscribed. If all units were not subscribed for on or before 31st August, 1981, then subscribers were entitled to the return of those funds. In August of 1981, the appellant knew that 75 of the proposed 85 units had been only orally subscribed for by a company associated with Abel. Given that the appellant was aware of the contents of the application form as appears from his evidence, he was also aware that the Abel company had not bound itself in the way that the other subscribers had. He also was aware that it had not paid the appropriate deposits. It was obviously arguable that there was really no subscription by that company. In those circumstances, the appellant knew, or ought to have known that the funds in his trust account were at least arguably repayable to the subscribers. He asserted in his evidence that oral subscription was sufficient for the purpose of satisfying this condition, but I have great difficulty in accepting that this was so. Even if the contrary were merely arguable, he, as trustee of his solicitor's trust account, ought not to have made a decision to pay out funds other than to the subscribers without first informing them of the circumstances and advising them to seek appropriate advice. In fact, from

September, 1981 until November of 1981, he disbursed $150,000 from his trust account which was the total of the relevant deposits. All of the moneys went to Bunbar, Abel or Kahama Pty. Ltd., the company which was to supervise the development, a company closely associated with Abel. This was, in my view, a clear breach of his duty as trustee of his trust account, quite apart from whatever obligations he may have had under the trust deed and was professional misconduct, being so closely associated with his practice of the profession.

Paragraph 4.6 asserted as follows:—

> "In a letter dated 9th February, 1983 from Wheeler and Reynolds to Geoffrey Wockner falsely represented that his firm's records and the records of the trustee of the Cannes Property Trust showed that all funds paid by unit holders to the trust were used in payment of fees of consultants engaged for the Cannes project knowing that to be false in that his firm's, records and those of the trustee showed the payment set out in paragraph 4.5.4."

On 26th January, 1983, Mr. Wockner, who is a solicitor, wrote to the, appellant's firm as follows:—

> "Re: Cannes Property Unit Trust - Barpatello Pty. Ltd.
>
> I act for Barpatello Pty. Ltd. in the above matter.
>
> Sums of $60,000 and $40,000 were paid to your firm on behalf of Barpatello Pty. Ltd. with regard to the Cannes Development.
>
> Would you please provide within seven days from the date hereof an accounting of the funds paid both to Bunbar Pty. Ltd. and to your firm.
>
> Please advise further if the trust units were fully subscribed and appropriate details of the trust fund.
>
> I require also a statement as to the disposition of the funds paid to the trustees.

> I would be obliged if you would furnish the above information as soon as possible and at the least within seven days."

The letter dated 9th February, 1983 which was from Mr. Wheeler was in the following form:—

> "Re: Cannes - Barpatello Pty. Ltd.
>
> We refer to your letter of 26th ultimo and advise that our records and the trustees' records show that all funds paid by your client were used in payment of consultants' fees. As in fact were all funds paid by the purchasers. There are no funds held in our trust account and there are no funds held in trust by the trustee on behalf of any purchasers.
>
> All trust units were fully subscribed. The total funds received from purchasers were $345,000."

When one peruses the evidence-in-chief of the appellant at pp. 621-3 of the record, it is perfectly clear that Wheeler had no real idea of where the moneys had gone. Allegedly because of his complete faith, in Abel, he had paid large amounts of money to him. Indeed, in respect of the Barpatello money, he said that his own recollection was that the subscription from Barpatello was not received until after the closing date and that Abel decided to sell some of his units to Barpatello without Barpatello being consulted about that course. In fact, Barpatello's money was probably credited to Abel. Cheques were drawn to transfer the funds to him. It may be that Abel re-deposited the money with Bunbar, but that is not clear. What is clear is that it was quite incorrect to say that the Barpatello money was used to pay consultants. It was, in fact, paid to Abel, allegedly as the purchase price for units in the trust.

As I have said, the only inference open from Wheeler's evidence was that he had no particular knowledge as to where much of the money had gone, quite apart from the Barpatello issue. His assertion to Mr. Wockner that it had been paid to consultants was more a matter of fond hope

than real belief. The only reasonable inference is that the letter of 9th February, 1983 was designed to discourage Mr. Wockner and his client from further enquiries and as far as possible, to avoid providing any information. I am satisfied that the appellant knew that his assertions in that letter were false. Although some of the money probably did go to consultants, I am quite confident that Wheeler had no reason to believe, nor did he believe that all of it had been so directed.

I have no difficulty in concluding that to write such a letter to a fellow practitioner enquiring as to the whereabouts of funds paid to the appellant by a client of the enquiring solicitor was professional misconduct.

Paragraph 4.7 alleged:—

> "By a letter dated 8th March, 1983 from Wheeler and Reynolds to Geoffrey Wockner falsely represented that the moneys contributed by unit holders were expended as set out in the enclosure with that said letter, knowing that to be false in that the enclosure set out income and expenditure of the Cannes Unit Trust as follows:
>
> (hereinafter followed particulars)
>
> Whereas actual payments were those set out in paras. 4.5.4."

By letter dated 14th February, 1983, Mr. Wockner asked for a statement setting out the disbursement of $345,000 as alleged in Wheeler's letter of 9th February, 1983. He eventually received a reply by letter dated 8th March, 1983 which stated as follows:—

> "We have been requested by the Project Manager to advise you that it is not now possible for the project to proceed because of the current economic climate. We enclose a copy of the financial statement of the trust up to the present time."

The enclosed income and expenditure statement was as follows:—

"Income and Expenditure of Cannes Unit Trust

Expenditure by Project Manager		
- Architect's Fee	$	219,111.00
- Engineer's Fee	$	66,100.00
- Quantity Surveyor	$	60,900.00
- Hydraulics	$	10,000.00
- Building Permit	$	14,919.00
- Printing and Promotion	$	21,936.00.
- Legal Fees	$	908.49
Total	$	393,874.49
Income by Deposits received	$	345,000.00
Net Loss	$	48,874.49"

Evidence from the appellant indicated that, in fact, even the figure of $345,000 as total receipts was incorrect. Something in excess of $400,000 appears to have been received. See p. 626 of the record. There was further correspondence with Mr. Wockner in which the figure of $390,000 was eventually offered as the total subscription. It would be unsafe to infer that there was any deliberate dishonesty as to the total amount of subscriptions. It is more probable that Mr. Wheeler was doing his best, but not very well. The cross-examination of the appellant at p. 670-78 of the record shows that he at no time had any belief in the correctness of the so-called income and expenditure statement. The most he was able to say was that he felt that amounts properly charged against the trust were sufficient to account for all moneys subscribed. He at no time believed that the statement which was enclosed with his letter of 8th March, 1983 provided an accurate accounting for the funds of the unit trust. Again, I have little trouble in concluding that to respond to Mr. Wockner's letter in this way was professional misconduct.

Some additional difficulty has been caused by the reasons provided by the Statutory Committee as previously mentioned. The Committee concluded that the practitioner had not made a deliberate decision to deceive nor deliberately misled it in his evidence. Having so observed, the Committee then stated:—

> “Having regard to all the circumstances surrounding charges 4.6 and 4.7 and taking into account the evidence of the practitioner before the Committee and the high standard of proof required the Committee is not prepared to find that in these instances the actions of the practitioner resulted from considered and deliberate decisions on his part to deceive.”

It was urged before us that such an observation was inconsistent with findings that the practitioner was guilty of the misconduct alleged in paras. 4.6 and 4.7. After consideration, I do not find this attack to be justified. It is clear that what the Statutory Committee meant to imply was that there had been something less than premeditation in his conduct. However there is no reason to doubt that he knew the information to be false at the time of writing the two letters. It is more likely that the Committee was recognising that by the time in question, the practitioner was under considerable pressure and that his judgment may have been affected.

In the circumstances, a number of specific findings cannot be upheld. However I have no doubt that on the findings which I would uphold, findings of professional misconduct and a substantial period of suspension from practice were justified. In all the circumstances, I am not satisfied that the period of three years was inappropriate, even having regard to those aspects of the Committee's determination which I cannot accept. In any event, it would seem that the appellant has already served his period of suspension, and no point will be served by “fine-tuning” at this stage. I certainly would not interfere to increase the period of suspension, particularly in view of the fact that the respondent abandoned its appeal at the outset.

I would therefore vary the determination of the Statutory Committee by deleting the findings concerning paras. 4.1.1, 4.5.1 and 4.5.2. The first finding was not supported by the evidence. The others were not relevant for present purposes. I would uphold the finding of professional misconduct and the suspension imposed.

Notwithstanding the appellant's success on some issues, the overall result is such that I would not interfere with the order as to costs made below. I would also order the appellant to pay the respondent's costs of this appeal.