DISCIPLINARY PROCEEDINGS AND THE TASMANIAN LEGAL PROFESSION:

SOME OBSERVATIONS

Address by the Hon Alan Blow AO, Chief Justice of Tasmania, to the Conference of Regulatory Organisations in Hobart on 24 October 2023

I would like to begin by paying my respects to the traditional owners of the land. The traditional owners and custodians of the land on this side of the Derwent Estuary were the muwinina people. Tragically there are no known living descendants of the muwinina people. I pay my respects to the Tasmanian Aboriginal people, who are collectively known as the palawa people. I acknowledge their elders, past, present and emerging.

The Supreme Court of Van Diemen's Land commenced sitting on 10 May 1824, followed a week later by the Supreme Court of New South Wales. Next year will be the bicentenary year for the two Courts. In the 19th century in England, the Courts did not exercise a disciplinary jurisdiction over barristers. The benchers of the Inns of Court were responsible for admitting barristers to practice and, when appropriate, striking them off. There are a couple of reported cases in which it was said that those powers had been delegated to the Inns of Court by the judges,[1] but quite when or how any such delegations occurred seems to be very obscure.

However, the colonies of the British Empire did not have Inns of Court, and therefore the power to admit all types of lawyers to practice, and the power to remove them, was conferred on the Supreme Courts of the colonies.

The original Charter of Justice establishing the Supreme Court of Van Diemen's Land was superseded by a second one in 1831. Its provisions remain in force today, to the extent that they have not been superseded by legislation. Both Charters of Justice made provision for the Supreme Court of Van Diemen's Land to "approve, admit and enrol" persons who had been admitted in Britain or Ireland as barristers, advocates, writers, attorneys, solicitors or proctors, and then added the words, "subject always to be removed by the said Court from that station therein upon reasonable cause".

A new roll of practitioners was created in 1831. It takes the form of a scroll. It is now a lot longer than it was in 1831. As one would expect, the names of every admitted practitioner are recorded in it in chronological order. Those who have been struck off have literally been struck off. In each case a red line has been ruled through the name of the former practitioner, and a note of the unhappy event has been made on the roll in red ink.

The first strikings off did not occur until 1847. However, the first striking-off application in the colony was heard in 1825, when the Solicitor-General of Van Diemen's Land applied for the Attorney-General to be struck off. The Attorney-General had a right of private practice. Exercising that right, he had settled the pleadings in a civil action, not just for one side but for both sides. The Solicitor-General, a 23-year-old barrister named Alfred Stephen, thought this was inappropriate and moved for the Attorney-General, Joseph Gellibrand, to be disbarred. My

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1 *R v Benchers of Gray's Inn* (1780) 1 Doug (KB) 353, 99 ER 227; *Re Justices of the Court of Common Pleas of Antigua* (1830) 11 Knapp 267, 12 ER 321 (Privy Council)

predecessor, Pedder CJ, examined the authorities, and concluded that settling the pleadings for both the plaintiff and the defendant in the same case was not legally wrong. He dismissed the motion, but commented that, if he were to give vent to his own feelings, he would scarcely find words strong enough to disapprove of the practice. The Attorney-General and the Solicitor-General both resigned before judgment was given. The Solicitor-General, Alfred Stephen, went on to serve as Chief Justice of New South Wales from 1845 to 1873.

I started my legal career in Sydney but moved to Tasmania in 1976. Shortly after my arrival, a practitioner from Ulverstone told me that in the Tasmanian legal profession one had equal chances of ending one's career in Risdon Prison or on the Supreme Court bench. At that time I did not foresee that he and I would end up balancing those statistics. Six years after those words were uttered, he went to prison for stealing from his trust account, and 24 years after those words were uttered, I became a judge.

I was elected to the Council of the Law Society of Tasmania in 1980. The Society then, and until 2007, was responsible for the investigation of complaints against legal practitioners, and for the institution and prosecution of disciplinary proceedings. There was a Disciplinary Committee that consisted entirely of practitioners appointed by the Council of the Society. At that time the Society tended to be very protective of practitioners who were the subject of complaints. When a complaint was discussed at a meeting of the Council, the minutes did not disclose the practitioner's name or the nature of the complaint. If it was resolved that action was to be taken or not taken, that would be minuted. The minutes also revealed whether the practitioner came from the south, the north, or the north-west, but never any more.

In 1981 the Disciplinary Committee suspended a Devonport practitioner named Dickens for three months. The major findings against him were that on two occasions, when acting for purchasers who were obtaining mortgage finance, he released the loan funds before he was in a position to ensure that the relevant mortgage documents were available and capable of being registered. In one transaction, Mr Dickens and his wife were the vendors, and he was also acting for the purchasers and their building society. After his firm received the mortgage funds, but before settlement, he helped himself to $3,000 of the funds held in trust on behalf of the building society.

Following the Disciplinary Committee's decision, there was a discussion at a meeting of the Council of the Law Society about what the profession should be told about the matter. It was resolved, by majority vote as I recall, that a circular would be sent out, informing the profession that a practitioner had been suspended for three months and outlining what he had done, but not saying who the practitioner was. A practitioner in Ulverstone wrote to the Society asking to be informed of the identity of the practitioner whom he was not to have dealings with for the next three months.

As it happened, Dickens unsuccessfully appealed against his suspension to the Supreme Court. In those days nearly all legal firms in Tasmania received Roneoed copies of Supreme Court judgments promptly after they were handed down. Very soon after the decision not to name the practitioner, we all received copies of a decision of Cosgrove J entitled *Dickens v Law Society of Tasmania.*[2] That case was never reported, but it is routinely referred to in this State as authority for the proposition that the sole purpose of disciplinary proceedings is the protection of the public.

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2 [1981] TASSC 42 (Judgment 42/1981).

Another memorable example of leniency occurred in about 1982. A very prominent member of the profession had all but ceased practising and was living on a farm. From time to time he continued to dabble in legal work. On occasion he defended his neighbours in breathalyser cases before magistrates, sometimes successfully. The Law Society received a complaint about a matter in which he had been acting for both vendor and purchaser in a conveyancing transaction. At that time there was no restriction on acting for both sides, but in this case the practitioner was acting for both sides in negotiations as to the purchase price. Further investigation revealed that he did not have a practising certificate or a trust account, and that funds for the conveyancing transaction passed through his farm bank account. He took steps to get a practising certificate and open a trust account. Because of the immense respect that he commanded in the Tasmanian profession, the council of the Law Society decided, rightly in my view, that the best course was for the president to reprimand the practitioner. The practitioner duly attended at the president's office for the purpose of being reprimanded but did not take kindly to what was said, and started rampaging around the room like an angry bull. The practice of presidential reprimands was not discontinued, but the subsequent reprimands were in writing.

In the late 1980s the Law Society decided to appoint a trust account inspector who would undertake random audits of every firm's trust account. The inspector found some interesting things in the records of firms that received monies from investor clients and lent them to borrower clients. There was no particular problem where the monies of particular investors went into particular mortgage loans. However, some questionable arrangements were found in relation to firms who pooled the mortgage monies of investors and made loans from the pools to borrower clients.

The best case scenario was that the interest paid to the investor would be at the same rate as the interest charged to the borrower. However, there also seemed to be examples of investor clients being paid interest at lower rates than the borrowers were paying, with the investors being fully informed; similar arrangements where the investors knew that there was a difference in rates, but not how big a difference; and similar arrangements where the investors did not know that there was a difference. There may also have been situations where firms invested lump sums from their trust accounts and distributed the interest amongst their partners.

Some disciplinary proceedings were instituted. In one of those proceedings, the chair of the Disciplinary Committee remembered something about a circular that the Law Society had issued in the 1960s about the practice of firms investing trust money and dividing the interest among the partners. The Society had advised that, following a decision of the House of Lords the propriety of that practice would be reviewed by the Law Society, and the profession would be told what the Law Society decided about it. Unfortunately, the profession had never been told what the Society had decided about it. More than 20 years after the publication of that circular, the council of the Law Society had rejuvenated itself, and no one on the council or working for the Society had any memory or knowledge of that circular. But the chair of the Disciplinary Committee had a longer memory, and found his firm's copy of the circular.

It turned out that it had been a widespread practice in England and Scotland, but not a universal one, for solicitors to invest lump sums from their trust accounts at interest and keep the interest. Things came to a head when the practice was examined by the House of Lords in 1964 in a case called *Brown v Inland Revenue Commissioners* [1965] AC 244. Mr Brown was a Scottish solicitor who had been investing clients' money and profiting from the interest. In the UK at

that time, earned income was taxed at a lower rate than unearned income. Mr Brown argued that he had earned the interest in question by working as a legal practitioner. The House of Lords held that he had not earned that money at all because the interest belonged to his clients. The report of the case sets out, at 257-258, an extract from the 1951 annual report of the Law Society of Scotland approving of the practice. Essentially the Society took the view that it was too hard for any solicitor to do the arithmetic to work out how much to give to each client, and that therefore it was appropriate for the solicitor to keep all the interest. Counsel for Mr Brown argued to that effect before the House of Lords, but not successfully.

Back in Tasmania in the late 1980s the result was that a disciplinary proceeding collapsed, but that the practice was then prohibited. The partners in firms who had not adopted the practice finally understood why the partners in some other firms had been able to afford better cars.

Another decision of the Disciplinary Committee that I considered lenient was handed down in 1990. A partner in a six-partner firm was under pressure to do something about uncollected costs owing by his clients. He wrote letters to 17 of them. In each letter he referred to a recent conversation and asked the client to sign and return an enclosed document that he called an aide-memoire. Ten of those clients did not respond to the letter. Six of them signed and returned the document. One of them sent the document to the Law Society. The documents that were described as aides-memoire were in fact equitable charges over all of the assets of the various clients. The Disciplinary Committee took into account the pressure that the practitioner was under in relation to outstanding costs, and decided that an appropriate penalty was a suspension from practice for 16 weeks.

The Society took advice as to what work a suspended practitioner was allowed to do. The advice revealed that in Tasmania at that time there was no restriction on a suspended practitioner being employed by a law firm as a clerk, and that he or she could do anything that a clerk could do. However, there was no suggestion that anyone sought to take advantage of that state of affairs. The practitioner did the right thing and absented himself from the practice for the required 16 weeks.

There was another memorable disciplinary proceeding in 1987. This is not an example of leniency, but it is an example of a species of misconduct that is likely to be mentioned later in this conference. A family lawyer who was acting for a husband in property settlement proceedings wrote to the wife's solicitor making an offer of settlement. In his letter he added a threat, to the effect that, if the offer were not accepted, information would be provided to the Department of Social Security denouncing the wife for defrauding the Commonwealth. (This was before the name Centrelink was dreamed up.) Section 241 of the *Criminal Code* (Tas) makes provision to the effect that a crime called blackmail is committed when a person, with a view to temporary or permanent gain for himself of for any other person, makes any unwarranted demand with menaces. The solicitor for the wife did what every solicitor in that situation routinely does, and forwarded to the client the letter containing the offer of settlement and the threat of denunciation to the Department. It arrived in the same mail as a letter from the Department of Social Security thanking the wife for participating in its amnesty and confessing that she had been receiving benefits to which she was not entitled, and promising that no action would be taken to prosecute her or to recover any money. The wife complained to the Law Society. One thing led to another and the solicitor for the husband was fined.

The Society subsequently adopted a practice whereby complaints would be referred to the Director of Public Prosecutions or the police if it appeared that a crime had been committed.

Another bizarre situation arose in relation to a complaint concerning the conduct of a practitioner in a conference, presided over by a Deputy Registrar of the Family Court, for the purpose of attempting to settle a property dispute. The wife complained that the solicitor for the husband had sworn at her and abused her during the conference. The Society decided to take no action because Order 24 of the *Family Law Rules* prohibited evidence of anything said during such a conference from being admitted in any form of legal proceedings.

I served on the Investigating Committee of our Law Society from 1987 to 1995. That was long before jurisdiction in relation to complaints was given to the Legal Profession Board of Tasmania. The Investigating Committee was constituted by the eight Hobart-based members of the Society's council. It met on a fortnightly basis to scrutinise and discuss complaints. We received about 100 complaints per year. About a third of them disappeared when the complainants were asked to sign authorities for the release of their letters of complaint to the relevant practitioners, and for the release of their files to the Society. Many of the complaints were about practitioners not doing a good enough job, or other grievances unrelated to practitioners' conduct. Only a small percentage warranted the institution of disciplinary proceedings. One of the disadvantages of complaints being dealt with at brief fortnightly meetings was that in some cases there developed what I call a "tennis match syndrome", whereby a letter from one side would be sent to the other for comment, and then the comment would be sent back for further comment, and then that letter sent for comment, and so on ad infinitum.

That was all a long time ago. The only observation I would like to make in relation to the present disciplinary arrangements concerns the advantages of decision-making by a tribunal rather than a Supreme Court judge. Our legislation provides for a Disciplinary Tribunal with ten members from the legal profession and five lay members. The lawyers on the Tribunal are chosen by the judges. The result is that the lawyers available to sit in Tribunal proceedings have a breadth of legal knowledge and experience that is much wider than that of the judges. As far as I know, I am the only judge on our bench who has ever been a conveyancing and probate practitioner. Few of us have ever practised in family law. None of us has had much experience in non-contentious commercial work. When I was practising there was never a requirement for me to give a client an estimate of costs, and GST had not been introduced. An appropriately constituted tribunal will often be much better suited than a judge to evaluate allegations of misconduct or impropriety on the part of a practitioner because of the breadth of knowledge and experience that can be assembled.

Before I take questions, I would like to apologise for the low intellectual content of this speech. When I was asked to speak, it occurred to me that I could perhaps speak about the concept of professional misconduct, but I found that there was a session where Professor Gino Dal Pont would be doing that. It occurred to me that I could perhaps speak about recent cases concerning disciplinary proceedings and the legal profession, but I found that Kate Cuthbertson was covering that topic. I therefore decided that I would have to talk about past events. I see that as fitting, since I have come to realise that in the years that I practised, and in the years that I have served as judge, I have been making my living out of hindsight. Thank you.