

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL**

F I N D I N G S

in Complaint

by

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh**

against

**DANIEL COHEN, Solicitor,
formerly of 19 Rubislaw Terrace,
Aberdeen now of Maxieburn, 22
Bath Street Stonehaven**

1. A Complaint dated 28 January 2009 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that Daniel Cohen Solicitor, formerly of 19 Rubislaw Terrace, Aberdeen and now of Maxieburn, 22 Bath Street Stonehaven (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 29 April 2009 and notice thereof was duly served on the Respondent.
4. At the hearing on 29 April 2009, the Respondent was present and represented by his solicitor Mr David Clapham, Glasgow. The

Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh.

5. It was clarified that there was no dispute with regard to the majority of the facts.
6. The Tribunal heard evidence from the Respondent and submissions on behalf of the Complainers and the Respondent and found the following facts established.

6.1 The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He was born on 22nd May 1946. He was admitted as a solicitor on 2nd December 1971 and enrolled on the 16th of the same month. He was a partner in Cohen & Co Solicitors, Aberdeen from 1st March 1985 to 30th January 1998 at which time the firm as it then existed ceased. He became a partner in the newly constituted firm at 2nd February 1998 and carries on practice in partnership under the name of Messrs Cohen & Co at 22 Rubislaw Terrace, Aberdeen.

THE BUILDING SOCIETY

- 6.2 Between 1979 and 1985 the former firm of Cohen & Co had an agency for the Building Society. The Respondent acquired funds on behalf of clients which are believed to be sums from tenants for deposits for leases. He deposited funds with the Building Society in his name in trust for five named individuals. After cessation of the former firm these accounts and the balances relating thereto were not entered into the accounting records of the new firm
- 6.3 Prior to 2007 the Respondent moved home and advised the Building Society of his new address. From time to time he received multiple letters from the Building Society. He made

enquiry and discovered that there were six accounts one owned by him personally, one where he was the signatory for a third party and the remainder held by him in trust for third parties. On 27th February 2007 he requested details of the accounts. On 2nd March 2007 the Building Society replied to him listing the details of the accounts. The combined balances on these accounts amounted to £3,104.24 The Respondent gave notice to the Building Society that the passbooks were missing. He received a reply dated 9th March 2007 acknowledging this information and advising of the action taken.

- 6.4 Between 9th and 14th of March 2007 the Respondent instructed the Building Society to close the five accounts abovementioned and to transfer £1,500 of the funds to a mini ISA in his name, £500 to his own personal account with the Society and to send the balance to him by cheque to his home address. He sent in the required forms for each account and a certified copy of his driving licence. On 15th March 2007 the Building Society wrote to him confirming his instructions and asking for the full completion of the lost passbook forms, signature of the withdrawal slips, a certified copy of the second part of his driving licence and that he complete a Savings Account application form for the mini ISA.
- 6.5 On 17th March 2007 at office premises of the Building Society the Respondent submitted a handwritten letter confirming his instructions. He provided a lost or stolen passbook form and a withdrawal form for each account. He provided the certified copy of the second part of his driving licence and the completed application form for the mini ISA in his own name. The documentation was signed by him as an individual and bore his home address. The Building Society did not implement the Respondent's instructions. It had placed a hold on the five accounts on 9th March 2007. On 2nd April 2007 the Respondent

wrote to the Building Society with an explanation of the source of the funds and amended instructions to them to close the accounts and send the balances to him by cheques payable to himself. He was advised that funds would only be released on receipt of instructions signed by both partners of Cohen & Co and by cheques payable to Cohen & Co.

- 6.6 The Complainers inspected the firm of Cohen & Co from 8th to 11th May 2008. It was noted that there had been correspondence with the Building Society in connection with dormant accounts which had not been included in the current invested funds records. By letter dated 1st June 2008 the Respondent was asked to provide a copy of all the correspondence and a mandate to allow contact direct with the Building Society. He replied on 16th June with an explanation on the accounting issue and stating that after enquiry with the Building Society the intention was to close the accounts and remit the funds to the Q& LTR. He was again asked to produce the copy correspondence and mandate by letter of 18th July. On 16th August he sent some letters and a mandate for accounts held at 31st March 2007.
- 6.7 The Complainers wrote on 4th September repeating the request for copy correspondence and a general mandate. The Respondent replied with the mandate stating there was no other correspondence. The complainers wrote to him on 24th October asking for information on the uplift and disposal of the funds. At the same time they wrote to the Building Society to establish if the funds had been dealt with correctly. The Respondent wrote on 23rd November 2007 advising that the firm held no balances with the Building Society and that he could not trace any correspondence. He was asked to answer four specific questions in December 2007 and as he did not fully allay concerns he was again asked to answer those issues in a letter of 29th January 2008.

6.8 On 19th February 2008 the Building Society wrote to the Complainers with the information requested and copies of the forms, documents and correspondence surrounding the five accounts. The Respondent was invited to comment as it seemed that the accounts had not been dealt with correctly by him. He confirmed by letter of 31st March that the accounts were still held by the Building Society and would be closed and the funds remitted to the Q & LTR. On 31st March the two partners of the firm instructed the Building Society to release the funds to the firm which was done on 14th April. On 8th April the complainers asked the Respondent to comment on why he had instructed that the funds be remitted to his personal account in March 2007. He wrote on 2nd May on behalf of the firm stating that it was a misjudgement by himself. The funds were sent to the Q & L T R.

7. Having considered the submissions on behalf of the Respondent and the Complainers, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

7.1 His between 27th February and 13th April 2007 instructing the Building Society to have funds which he held with them in trust for third parties or as a signatory on the account of a third party transferred to him for his own use as an individual and his attempt to misappropriate the sum of £3,104 24.

8. The Tribunal, having noted a previous finding of misconduct against the Respondent and having heard the Respondent's solicitor in mitigation, pronounced an Interlocutor in the following terms:-

Edinburgh 29 April 2009. The Tribunal having considered the Complaint dated 28 January 2009 at the instance of the Council of the Law Society of Scotland against Daniel Cohen Solicitor, formerly of 19 Rubislaw Terrace, Aberdeen and now of Maxieburn, 22 Bath Street

Stonehaven; Find the Respondent guilty of Professional Misconduct in respect of his between 27 February and 13 April 2007, instructing the Building Society to have funds which he held with them in trust for third parties or as a signatory on the account of a third party, transferred to him for his own use as an individual and his attempt to misappropriate the sum of £3104.24; Censure the Respondent; Fine the Respondent in the sum of £7500 to be forfeit to Her Majesty and Direct in terms of Section 53 (5) of the Solicitors (Scotland) Act 1980 that for a period of 5 years, any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council or the Practising Certificate Committee of the Council of the Law Society of Scotland; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00 and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

David Coull

Vice Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

It was clarified at the commencement of the hearing that the Respondent had no objection to Dr Coull sitting as Chairman despite the fact that they were acquainted with each other both being solicitors in Aberdeen. The Complainers also clarified that there was no objection to Dr Coull sitting. The Chairman enquired as to whether or not there would be any question of deferred publicity and Mr Clapham confirmed that there were no ongoing criminal proceedings against the Respondent. It was also confirmed that the Respondent was still on the Roll of Solicitors. It was explained that there was no dispute with regard to the facts but that the Respondent wished to give evidence to explain exactly what had happened.

EVIDENCE BY THE RESPONDENT

The Respondent confirmed that he had been a solicitor since 1971 and had practised on his own since 1978 trading under different names. He confirmed that he adopted the terms of his affidavit. He explained that he had the Aberdeen agency for the Building Society for a number of years and had a lot of accounts with them. He had a very busy professional practice but the Building Society agency became moribund and eventually ceased. Steps were taken to close accounts and the Respondent indicated that he was not sure which year this was. The accounts were properly closed and monies were paid to individuals. The Respondent explained that he moved to Stonehaven in 2005 and noticed that he was getting six circulars from the Building Society which he thought was odd as he only had one account with them. He felt that six circulars was a waste and so he wrote to the building society to find out why he was receiving these. He was then advised that there were accounts held by him in trust for various individuals. The Respondent confirmed that prior to receiving the letter from the Building Society, being Complainer's Production No 2, he was unaware that there were any accounts which he held in trust for individuals. He explained that these accounts were over 20 years old. The Respondent stated that he looked at the names and none of them meant anything to him as clients. He guessed that they were probably tenants of properties where his firm had acted as agent for the landlords. The practice at that time had been to put the rent deposits into the Building Society. He stated that he thought the tenants must probably have moved at short

notice and forgotten about their deposits and that this could happen in the oil city. He explained that there was no means to check this as it was 20 years ago. The Respondent explained that he did not think it was a firm matter as the letters were sent to his home address. He took steps to sort matters out and made various phone calls. He was told that there were no passbooks and that he accordingly needed to fill in a lost passbook form which he did. He explained that he decided to visit the branch to resolve matters and did this on a Saturday morning with his young son. There was a girl there and he said to her “what should we do?” and she said that he should tell them what he wanted to do with the money and this was when he wrote the hand written letter being Complainer’s Production No 5. The Respondent stated that he received no guidance from the Building Society and indicated that he had no thoughts at this time about the Q & LTR. He accepted that this was remiss of him but indicated that he was trying to sort out the administrative matter and asked the Tribunal to bear in mind that he had been guided by the Building Society. He emphasised that he did not regard it as a firm matter. In response to a question from a Tribunal member, he confirmed that the letter from Building Society dated 16 March, being Complainer’s Production No 4, was addressed to his office. He indicated that it was not unusual for there to be a mix up between personal and firm matters. He explained that there were then some phone calls and suggestions that what he wanted to be done could not be done and he wrote the letter of 2 April, being Complainer’s Production No 6, when they had asked for an explanation. The Respondent indicated that if cheques had been sent to him he would not have put them through the firm because there would have been no need. He indicated that he did not know what he would have done after that. The Respondent stated that the Q & LTR crossed his mind before he wrote the letter of 13 April 2007, being Complainer’s Production No 7. He explained that it became a firm matter because the Building Society stated that any payments would have to go through Cohen & Company. Both he and his partner had to sign a form of indemnity. The Respondent stated that it took a year for the Building Society to send the money to Cohen & Company and when it came in it went to Q & LTR. The Respondent confirmed that had the money come in before the Law Society inspections it would have gone to Q & LTR.

The Respondent stated that he thought he raised the matter with the inspectors. He explained that as the accounts were so old there was no requirement to put them

through the books of the firm. The Respondent indicated that he was being guided by the Building Society but it was not a significant matter as far as he could see and he did not realise that he would end up before the Tribunal. He explained that in spring 2007 he was a partner in private practice and had a very good income and there was accordingly no reason why he would wish to benefit himself. He stated that he did not discuss the matter with anyone at the time. The Respondent referred to the references lodged on his behalf and explained that Mr A was his contact in the charity.

In cross-examination the Respondent confirmed that he had substantial experience as a solicitor and of running a firm as a business. He accepted that this requires a high level of integrity and honesty. It was put to the Respondent that he had gone a long way to creating an ISA in his own name. He agreed that this is what he wrote in the letter and the reason was because he had no guidance from the Building Society and the money had to go somewhere. He explained that he regarded it as a personal matter as the people were not known and the balances had to go somewhere. He stated that to try and identify who the people were was like finding a needle in a haystack. He confirmed that he did not take any steps to try and identify them but he formed the opinion that none of them were clients of his. The Respondent stated that the guidance from the Building Society's head office was that because the money was in trust it would have to go through the firm. The Respondent refuted that he delayed in responding to the Law Society with regard to the matter. He was also adamant that he did not misappropriate the funds on the basis that no one would know.

In response to a question from the Tribunal, the Respondent indicated that he thought of Q & TLR as soon as the matter became a firm matter and explained that as he had different trading names it was his practice to put things into his name as senior partner. He confirmed that he was a person of experience and so he did think of the Q & LTR but did not think that it was a matter for his firm. He accepted that he made an error of judgement and was sorry. He explained that that Saturday morning his thought process was that the funds could be used for his own purposes but there was no criminal intent. He explained that the accounts were opened between 1981 and 1985 and there had been no activities on the accounts since. He explained that when he closed the Building Society agency he had moved offices and did not know what

had happened to the passbooks. He stated that the people were probably tenants who were not clients of the firm. He stated that he did not contact the Law Society as he had regarded it as a personal matter. He indicated that he thought there was no one to misappropriate from. He explained that there was a change in his thinking between 17 March 2007 and 2 April 2007. In response to further questions from the Tribunal he indicated that he had a good memory for clients' names and was 98% sure that these people were not clients. He indicated that he did not check with the other solicitors that he had employed with regard to this. He accepted that he acted too hastily.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston clarified that the allegation included an attempt to misappropriate funds that he was not entitled to. She submitted that the Respondent being a solicitor of long standing and experience at senior level should have been well aware of the existence and the reasons for the Q & LTR. She stated that there was no dispute that the Respondent was a signatory in respect on one account and that the others were held by him in trust. She stated he should have applied at all stages, a high level of honesty and integrity. Ms Johnston submitted that the Respondent made no effort to trace the rightful owners of the money. She referred the Tribunal to Article 2.3 and submitted that the Respondent had already taken steps and was on the way to full misappropriation. Ms Johnston referred the Tribunal to Production No 4, which was a letter from the Building Society asking him to complete an application form for a mini ISA. This showed that it was not only on the Saturday morning that he had thought of this. Ms Johnston's position was that on any reasonable interpretation this was a considered arrangement to open a mini ISA and have the money paid to him. Ms Johnston's submission was that the Respondent thought that there were no records and no one was watching. In connection with the lack of guidance from the Building Society as the Respondent was experienced he should not have needed any guidance. She submitted that there was a possibility that the funds were due to clients of the firm. Ms Johnston also asked the Tribunal to accept that he had delayed in providing information to the Law Society.

SUBMISSIONS FOR THE RESPONDENT

Mr Clapham referred the Tribunal to the test in the Sharp case. He asked the Tribunal to consider the whole circumstances and remember that not every departure from the standards expected of a solicitor amounted to professional misconduct. Mr Clapham stated that in this case there was no complaining client and no pattern of behaviour. Mr Clapham asked the Tribunal to look at the actual circumstances and not what might have occurred. Mr Clapham indicated that the Respondent accepted that he had made a misjudgement which might better be described as an absence of judgement as he did not think through what was the correct way to deal with the situation. Mr Clapham invited the Tribunal to find the Respondent credible and reliable. Mr Clapham submitted that it might be a valid professional judgement to enquire and send the money to Q & LTR however this did not occur to the Respondent and he was faced with a situation he had to resolve. Mr Clapham asked the Tribunal to see what had occurred through the mind of the Respondent at the time. He was a high earner and successful partner and there was no reason for him to take the risk of jeopardising his professional position. Mr Clapham indicated that if the Tribunal were to find the Respondent guilty of professional misconduct it was hoped that the Tribunal would be prepared to say that this was due to an error of judgement rather than anything more sinister.

DECISION

It was clear to the Tribunal from the terms of Production No 4, being the letter from the Building Society dated 15 March 2007, that the Respondent had already thought of putting some of the money into a mini cash ISA and receiving a cheque for the rest prior to going into the building society on the Saturday morning when he wrote the letter confirming this. On the basis of this, the Tribunal could not accept that the Respondent did not know what he was going to do with the money. The Tribunal also found that the Respondent had been inconsistent in his evidence in that he stated in his evidence in chief that he did not know what he would have done with the money but in response to a question accepted that his thought process was that the funds could be used for his own purposes. The Respondent's position appears to be that he thought there was no one to misappropriate funds from and yet he made no attempt to

try and identify the people concerned, nor did he check his records or check with any of his staff. The Tribunal found it quite astonishing that the Respondent, a very experienced solicitor who had been a senior partner for a considerable period of time, would not immediately know that if the owners of the accounts could not be traced the appropriate way to deal with the matter was to send the money to Q & LTR. The Respondent seemed to be making the distinction between himself and his firm and explained that is why he did not think of the Q & LTR but irrespective of whether it was the Respondent as an individual or his firm, the money should have gone to the Q & LTR and was not money that the Respondent was entitled to. The Respondent stated in evidence that he had no guidance from the Building Society but also stated elsewhere in his evidence that he was just trying to get an administrative matter finished and that he was guided by the Building Society. The Tribunal noted that the Respondent, at the material time, was earning a good income, which makes the Respondent's behaviour bizarre. In the Tribunal's view however, the Respondent did this because he thought he could, there being no records and no one who was likely to complain. The Tribunal was satisfied beyond reasonable doubt that the Respondent was involved in a deliberate attempt to misappropriate funds which did not belong to him. This clearly amounts to serious and reprehensible behaviour and is professional misconduct.

The fiscal lodged previous Findings against the Respondent and these were admitted by the Respondent.

MITIGATION

Mr Clapham indicated that the previous Findings were non analogous and 13 years old. Mr Clapham asked the Tribunal to accept that the Respondent's judgement was clouded and that he had a long record of service since 1971. Mr Clapham also referred the Tribunal to the various references lodged from fellow professionals, clients, an accountant and a charity. Mr Clapham also asked the Tribunal to bear in mind that there was no misappropriation at the end of the day. Mr Clapham advised that the Respondent's son was presently in practice and he had considered joining him but it depended on the outcome of these proceedings.

PENALTY

The Tribunal was extremely concerned by the Respondent's conduct. It is imperative that solicitors act with honesty and integrity at all times. For someone in the Respondent's position to attempt to misappropriate money is regrettably disgraceful and dishonourable and is very damaging to the reputation of the legal profession. The Tribunal however took into account the fact that there was no actual gain to the Respondent and no actual loss to anyone. In the circumstances the Tribunal stopped short of striking the Respondent's name from the Roll or suspending him from practice. The Tribunal however considered that in order to ensure the protection of the public, a restriction on the Respondent's practising certificate was required. The Tribunal also considered, given the dishonesty involved, that a fine should be imposed in addition to this. The Tribunal noted that the Respondent had been fined £5000 in respect of the previous Findings and consider that a fine of £7500 is appropriate. The Tribunal made the usual Order with regard to publicity and expenses.

Vice Chairman