

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

FINDINGS

in Complaint

by

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

against

**ALISTAIR GEORGE KAY,
Solicitor, Kay & Co. Solicitors,
231A Union Street, Aberdeen**

1. A Complaint dated 26th April 2007 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alistair George Kay, Solicitor, of Kay & Co., Solicitors, 231A Union Street, Aberdeen (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. No Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 26th July 2007 and notice thereof was duly served on the Respondent.
4. The Complaint was heard on 26th July 2007. The Complainers were represented by their Fiscal, Andrew Lothian, Solicitor, Edinburgh. The Respondent was not present or represented.

5. After hearing evidence from the Depute Clerk with regard to service of the notice of hearing, the Tribunal proceeded to deal with the matter in the Respondent's absence.
6. The Complainers led the evidence of one witness and referred the Tribunal to numerous Productions lodged.
7. The Tribunal found the following facts established

7.1 The Respondent was born on 14 June 1959. He was admitted as a solicitor on 18 October 1996. He was enrolled as a solicitor in the Registers of Scotland on 22 October 1996. Following his admission as a Solicitor, the Respondent was employed by the firm of Tait & Peterson, Bank of Scotland Buildings, Lerwick, ZE1 0EB from 30 October 1996 until 24 July 1997. The Respondent was then employed by the firm of Storie, Cruden & Simpson, 2 Bon Accord Crescent, Aberdeen, AB11 6DH from 4 August 1997. From 8th February 1999, the Respondent was either employed by the firm of Storie, Cruden & Simpson or was in practice on his own account trading as Kay & Co., 231A Union Street, Aberdeen.

7.2 In or about 2006, Mr A instructed the Respondent *inter alia* in connection with the defence of solemn proceedings, and the conveyancing of heritable property. By letter dated 27th June 2006, Mr A invoked the aid of the Complainers regarding the manner in which the Respondent dealt with the instructions received from him. The Complainers obtained sufficient information to allow them to formulate and intimate a complaint to the Respondent. Eventually, and after a lengthy delay as a result of the Respondent failing to reply to the repeated requests made of him by the Complainers, the Complainers made a determination that the Respondent had failed to provide adequate professional services to his client, Mr A.

- 7.3 On 11th January 2007 the Complainers directed in terms of Section 42A(2)(d) of the Solicitors (Scotland) Act 1980 that the Respondent should pay Mr A the sum of £500 by way of compensation for inadequate professional services.
- 7.4 By letter dated 25th January 2007, the direction of the Complainers was intimated to the Respondent. The Respondent has not appealed against said direction.
- 7.5 On 27th February 2007, the Complainers served on the Respondent a Notice in terms of section 42B of the Solicitors (Scotland) Act 1980, calling upon the Respondent to provide confirmation within 21 days of the steps taken by him to implement the Complainers' direction. No response was received.
- 7.6 The Respondent has failed to implement the Complainers' direction.

Failure to respond to correspondence

- 7.7 The Complainers wrote to the Respondent on 5th July 2006 to seek his comments on the issues raised by Mr A in his complaint. The Respondent replied by letter dated 8th July 2006 indicating that he was about to go on annual leave and intended to respond towards the end of July. The Complainers then wrote to the Respondent requesting a response by 28th July 2006 at the latest. The Respondent wrote to the Complainers on 1st August 2006 to provide certain information in relation to his actings on behalf of Mr A.
- 7.8 The Complainers wrote to the Respondent by letter dated 8th August 2006 intimating a complaint in terms of an attached list of issues. The Complainers sought, within 21 days of the date of that letter: the Respondent's written response; any further

background information the Respondent wished to provide; the Respondent's business file or files relating to the matter; and details of any fees charged or to be charged. No response was received from the Respondent.

- 7.9 On 1st September 2006 the Complainers served on the Respondent a Notice in terms of section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980, requiring from the Respondent within 14 days a response as requested previously and an explanation for the delay. No response was received.
- 7.10 On 1st September 2006 the Complainers also served on the Respondent a Notice in terms of section 42C of the Solicitors (Scotland) Act 1980, calling upon the Respondent to produce the documents requested within 21 days and provide an explanation for the delay. No response was received.
- 7.11 On 22nd September 2006 the Complainers wrote to the Respondent to intimate a complaint of professional misconduct and requesting the Respondent's response, and his business files relating to Mr A, within 21 days. No response was received.
- 7.12 On 7th November 2006 the Complainers wrote to the Respondent to intimate to him that Mr A had raised further concerns but that the Complainers had advised Mr A that they would not investigate them. The Complainers intimated to the Respondent that Mr A had the right to refer that refusal to investigate to the Scottish Legal Services Ombudsman. They also informed the Respondent that the other concerns previously raised by Mr A would be allocated to a Reporter.
- 7.13 On 15th November 2006 the Complainers wrote to the Respondent to inform him that Mr A had complained to the Scottish Legal Services Ombudsman about the Complainers' failure to investigate the additional matters he had raised.

7.14 On 16th November 2006 the Complainers wrote to the Respondent to inform him that a Reporter had been appointed.

7.15 On 6th December 2006 the Complainers wrote to the Respondent to inform him that the report had been completed and that the complaint would be placed before the Client Relations Committee on 11th January 2007. A copy of the report was enclosed. The Respondent was asked for his comments in relation to the “conduct complaint” (i.e. the failure to respond to correspondence) and the “service complaint” (i.e. the complaints made by Mr A) by 20th December 2006. No response was received.

Repeated breaches

7.16 Between August 2006 and January 2007 the Complainers required to carry out investigations into the complaints made by Mr A. These investigations required the appointment of a Reporter and involved a complaint to the Scottish Legal Services Ombudsman. The Complainers repeatedly requested a response from the Respondent and access to his files in order that they might progress investigation of the complaints. The Respondent repeatedly failed to comply with the reasonable requests made of him by the Complainers and the notices served upon him.

8. Having considered the foregoing circumstances and heard a submission from the Fiscal, the Tribunal found the Respondent guilty of Professional Misconduct in respect of his failure to respond timeously, openly and accurately to reasonable enquiries made of him by the Complainers and to Statutory Notices served on him by the Complainers concerning Complaints made against him. The Tribunal also found that the Respondent had failed to comply with the Determination and Direction given by the Council of the Law Society of Scotland made under Section 42A of the Solicitors (Scotland) Act 1980 in respect of Mr A within the

period the specified: and the Tribunal resolved to make an Order in terms of Section 53C (2) of the Solicitors (Scotland) Act 1980.

9. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 26th July 2007. The Tribunal having considered the Complaint dated 26th April 2007 at the instance of the Council of the Law Society of Scotland against Alistair George Kay, Solicitor, of Kay & Co. Solicitors, 231A Union Street, Aberdeen; Find the Respondent guilty of Professional Misconduct in respect of his failure to respond timeously, openly and accurately to reasonable enquiries made of him by the Law Society and to Statutory Notices served on him by the Law Society concerning complaints made against him; and Find that the Respondent has failed to comply with the Determination and Direction given by the Council of the Law Society of Scotland made under Section 42A of the Solicitors (Scotland) Act 1980 within the period specified: Direct that an Order be issued under Section 53C of the said Act; Censure the Respondent, Fine the Respondent £1,000 to be forfeit to Her Majesty and Find the Respondent liable in the expenses of the Complainers and in the expenses of the Tribunal as the same maybe taxed by the auditor of the Court of Session on an agent and client indemnity basis in terms of Chapter Three of the Law Society's Table of Fees for general business for the unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

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

Chairman

NOTE

The Respondent was neither present nor represented at the Hearing. The Tribunal heard evidence from the Depute Clerk that the Notice of Hearing had been served on the Respondent by recorded delivery. The Depute Clerk advised that a printout from the Royal Mail's Track and Trace System had been obtained which indicated that the recorded delivery letter had been signed for on 31st May 2007. The Tribunal was satisfied that the Respondent had received service of the Notice of Hearing at his business address and accordingly the Tribunal agreed to proceed in the absence of the Respondent.

The Tribunal heard evidence from Lorna Johnston, a Case Manager with the Law Society. Miss Johnston confirmed that the Respondent is a Solicitor currently on the roll in Scotland practising on his own account in the firm of Kay & Co. at 231A Union Street, Aberdeen. Miss Johnston confirmed that the Respondent was born on 14th June 1959 and admitted as a Solicitor on 18th October 1996. Miss Johnston stated that following his admission as a Solicitor, he was employed by the firm of Tait & Peterson in Lerwick from October 1996 until July 1997. He was then employed by the firm of Storie, Cruden & Simpson in Aberdeen from 4th August 1997. The witness indicated that there was some doubt as to when the Respondent's employment with that firm ended and he commenced employment on his own account trading as Kay & Co. The witness confirmed that he was either employed by Storie, Cruden & Simpson or in practice on his own account from 8th February 1999. The witness confirmed that the reason she was unable to say for definite when his employment terminated, is that there was an overlap in the Law Society records. Those Records show that he was employed by Storie, Cruden & Simpson until April 1999 and also that he started work on his own account in February 1999.

Miss Johnston stated that she received a help form from Mr A in June 2006 and wrote to the Respondent requesting a response within 14 days. Miss Johnston stated that she had not received a reply to that letter and received only a holding letter dated 8th July 2006 stating that a full response would be sent to her towards the end of July. Miss Johnston stated that she received a response from the Respondent on 4th August 2006 which was a letter dated 1st August 2006. The witness stated that in response to that letter she sent a letter dated 8th August 2006 to the Respondent asking him for certain

things. These were (a) a written response to each of the issues on the list attached to that letter, (b) the file in relation to the Complaint and (c) details of the fees charged. The witness advised that the Respondent was asked to respond within 21 days. She stated that she did not get a response to that letter.

The witness was referred to Production 8, a letter dated 1st September 2006 from her to the Respondent. The witness stated that this was a Statutory Notice in terms of Section 15 of the Solicitors (Scotland) Act 1980. Miss Johnston stated that she sent that Notice because she had not received a response to the letter intimating the Complaint. She stated that the notice required a response and an explanation for the delay in replying within 14 days of the date of the notice. The witness stated that she did not receive any response to that notice.

Miss Johnston stated that a further Notice under Section 42C of the said Act was enclosed with the other Statutory Notice which called upon the Respondent to produce the file in relation to Mr A. The witness was referred to Production 11 and confirmed that this was a letter dated 22nd September 2006 sent by her to the Respondent and advised that the purpose of that letter was to make sure the Respondent had got a copy of the Notice sent by recorded delivery and that the letter also intimated a new complaint regarding failure to respond to the Notices.

The witness was referred to Production 12 and confirmed that this was a note prepared by her in relation to a telephone conversation with the Respondent. The witness was asked if there was anything said in the conversation regarding the files. She stated that she could not recall the phone call but said it was her normal practice to do the file note immediately after the telephone conversation and that there was nothing in the note to confirm any discussion regarding the file.

The witness was referred to Production 14 and confirmed that this was a letter dated 15th November 2006 sent by Philip Yelland to the Respondent confirming that the case has been referred to the Scottish Legal Services Ombudsman. The witness was then referred to Production 15 and confirmed that this was a copy of a letter sent by her to the Respondent advising that a Reporter had been appointed in relation to the complaint. Miss Johnston advised that the Reporter prepares his report and recommends whether or not the complaint should be upheld.

The witness was then referred to Production 18 and confirmed that this was a letter dated 25th January 2007 sent by her to the Respondent advising that the Law Society had now decided the matter of the service complaint. The letter advised that the complaint had been upheld by the Client Relations Committee and that compensation of £500 had been directed to be paid to Mr A. This letter asked the Respondent to provide a written explanation of the steps taken to comply with the Direction within 21 days of the date of the letter. The witness confirmed that the Respondent did not comply with this requirement.

The witness was then referred to Production 19 and confirmed that this was a letter dated 27th February 2007 sent by her to the Respondent enclosing a Notice under Section 42B of the said Act calling upon the Respondent to confirm that he had complied with the Direction of the Client Relations Committee and advising him that if he did not comply with this Direction, there would be a Complaint made by the Law Society to the Tribunal. The witness confirmed that she did not receive any such confirmation from the Respondent.

The witness stated that throughout this period she had been in contact with the complainer Mr A. Miss Johnston advised that the last time she heard from him was in March 2007 and at that stage he had not received the compensation of £500. She asked him at that stage to contact her if he did receive the compensation. She advised that she had not heard from him. She advised that he had written to her since in relation to other matters. She advised that she wrote to him confirming the date of the Hearing today and that he wrote back saying that he intended to attend.

The witness was asked why she had sent Notices and letters asking for the files and the response to the Complaint. The witness advised that she needed the files for the service complaint and the Respondent's response so that the Reporter could prepare a full report to allow the Committee to take a reasoned view on the complaint.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lothian advised that there were two aspects to the Complaint. Firstly, the Respondent's failure to implement a Direction in terms of Section 53C of the 1980

Act and he sought an Order on behalf of the Council of the Law Society for implement of that Direction. He stated that he had written himself to the Respondent twice and left telephone messages on his office answer machine asking the Respondent to confirm if the compensation has been paid and also asking whether he intended to attend the Hearing today. Mr Lothian stated that he was satisfied that he had dialled the right number as the message on the answer machine referred to Kay & Co. Solicitors. Mr Lothian submitted that the Tribunal could be satisfied that the Respondent has failed to comply with the Determination and Direction and he stated that he was seeking an Order under Section 53C.

Mr Lothian submitted that the second aspect of the Complaint is the averment of professional misconduct in relation to the Respondent's failure to respond to correspondence. He said that the failures relate to a single complaint against the Respondent and the continuing failure of the Respondent to respond to the Law Society over a period of approximately 5 months between August 2006 and January 2007 whilst the complaint was under investigation. Mr Lothian stated that apart from two letters, the Respondent failed to respond to the Complainers. He had received ten letters and four Statutory Notices and that none of these produced a response. Mr Lothian stated that he accepted that not all of the letters called for a response but most did and the Respondent has not given any reason why he has failed to respond.

Mr Lothian stated that failing to respond to the Law Society hampers the Society in the performance of its statutory duty and that position was exasperated by the fact that a Reporter was appointed and had to prepare a report without sight of the files. Mr Lothian advised that the Ombudsman was also involved with a related matter. Mr Lothian stated that the Tribunal has made it clear in previous decisions that a failure to respond in such circumstances can amount to professional misconduct and submitted that the Tribunal should hold that the Respondent is guilty of professional misconduct in this case.

DECISION

The Tribunal found Miss Johnston to be a credible and reliable witness and accepted her evidence. On the basis of this evidence and the Productions lodged, the Tribunal was satisfied beyond reasonable doubt that the Respondent had failed to comply with

the Determination and Direction of the Law Society in connection with Mr A and the Tribunal made an Order under Section 53C(2) of the Solicitors (Scotland) Act 1980.

The Tribunal was also satisfied beyond reasonable doubt that the Respondent was guilty of professional misconduct in relation to his failure over a period of six months to give a detailed response to the Law Society despite reminders, coupled with his failure to respond to four Statutory Notices. The Tribunal consider that failure to respond to the Law Society timeously hampers the Society in the performance of its statutory duty and is prejudicial to the reputation of the legal profession. The Tribunal also noted that the Respondent has failed to pay the compensation ordered by the Law Society in relation to the complaint made against by his former client. The Tribunal noted that the Respondent has not explained his failures to respond. Taking into account all of the above circumstances, the Tribunal felt that a Censure plus a fine of £1,000 would be an appropriate penalty. The Tribunal also made the Order sought under Section 53C in relation to the outstanding compensation. The Tribunal made the usual Order with regard to publicity and expenses.

Chairman