

**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**

**IAIN LAUGHLAND  
SIVEWRIGHT HOWIE, Solicitor  
of MacLeod & Co, Solicitors, 5  
Longman Road, Inverness**

1. A Complaint dated 30 November 2009 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Iain Laughland Sivewright Howie, Solicitor of MacLeod & Co, Solicitors, 5 Longman Road, Inverness (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. A Record dated 20 January 2010 was lodged.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 9 February 2010 and notice thereof was duly served on the Respondent.

4. The hearing took place on 9 February 2010. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow. The Respondent was present and represented himself.
5. Mr Reid made a motion to make a number of amendments to the Complaint. This motion was not opposed and the Tribunal agreed to the Complaint being amended. A Joint Minute was lodged admitting the averments of fact, duty and professional misconduct in the Complaint as amended. No evidence was led.
6. The Tribunal found the following facts established

6.1 The Respondent was born 12 April 1965. He was admitted as a solicitor on 1 November 1989. He was enrolled as a solicitor on the roll of practising solicitors in Scotland on 20 November 1989. He was employed as a solicitor with the firm McArthur Stewart, 32 East Gate, Inverness from 20 November 1989 until 12 July 1996. Thereafter he was employed as a solicitor in the firm Innes & Mackay, Kintail House, Inverness from 15 July 1996 until 25 January 2002. From 1 February 2002 to date, he has been employed as a partner with the firm of Torquil Macleod & Co, Solicitors, 5 Longman Road, Inverness.

Mr & Mrs A

6.2 Mr & Mrs A are French nationals. They travelled to Scotland in July 2002. They secured employment. They lived and worked in Scotland until the summer of 2008. They lived within the Inverness area. Berthed at Wharf 1, was a barge known as Restaurant 1. This barge and business was owned by Company 1. The company was controlled by a Mr B. Mr & Mrs A approached Mr B with a view to leasing the barge and business from him and thereafter operating the barge as a restaurant. The Respondent received instructions from Mr B to

act on behalf of the company. The Respondent received instructions to draft and draw up a commercial lease between Company 1 and Mr & Mrs A. In connection with these instructions, the Respondent met with Mr B and Mr & Mrs A to extract from them information required to complete the lease. Following these meetings, the Respondent prepared a commercial lease which was delivered to Mr & Mrs A by him for their execution. A letter was sent by the Respondent to Mr & Mrs A enclosing the lease and asking for it to be signed by them and returned to him in order that he may complete a testing clause. The letter sent by the Respondent to Mr & Mrs A enclosing the lease stated "As explained at the meeting, it will be necessary for Mr A & Mrs A to sign and return to the Inland Revenue Stamp Office. I will prepare this following the commencement date of the lease, namely 1<sup>st</sup> March 2008 and arrange for the tenants to sign this as appropriate. I will thereafter register the lease with the Books of Council and Session and order say, initially, four extract copies. This will effectively complete matters."

- 6.3 The lease provided for a tenancy of one year commencing 1 March 2008. Mr & Mrs A signed the lease on 29 February 2008 along with Mr B, at that time a director of the company, both in the presence of the Respondent. Mr & Mrs A initially spent some days in refurbishing and redecorating the barge. The barge was in a state of considerable disrepair and infestation. Having cleaned the premises, they opened for business in mid-March 2008. Company 1 was placed in administration on 20 March 2008. Some two days after Mr & Mrs A opened for business, the administrators attended at the premises and advised Mr & Mrs A that their lease was void and they had two days in which to remove themselves, their family and their possessions and property from the premises. The administrators made a commercial decision and allowed Mr &

Mrs A to occupy the barge for a further period of three months. This allowed Mr & Mrs A to recoup some of the considerable expense which they had outlaid in start-up costs and presented the barge in a more commercially realistic fashion for the purpose of the administrators. After a period of three months, Mr & Mrs A removed themselves from the barge.

6.4 Mr & Mrs A were disappointed at what occurred. They believed that the Respondent was acting on their behalf and that they had been fooled into entering the lease. They intimated a complaint to the Law Society. An investigation was instigated. The file of the Respondent was recovered. Consideration of the file operated by the Respondent revealed that on 8 April 2008, he corresponded with the administrators advising them that he was acting for Company 1 at the time of the preparation of the lease and not for Mr & Mrs A who had “elected not to take independent legal advice on the terms of the lease and no request for searches etc, was made”. The file also revealed that the Respondent had been paid a professional fee of £528.75 inclusive of VAT. This fee was in respect of the preparation of the commercial lease and had been paid by Mr & Mrs A.

6.5 Mr & Mrs A were French nationals and were resident within the Inverness area on a temporary basis. Their command of the English language was passable. They were not familiar with Scottish procedure, Scots Law or the technicalities of a commercial lease. They were unaware of the need for them to secure independent legal representation. They believed that the Respondent was acting on their behalf. They discussed matters with the Respondent after being introduced to him by Mr B. Subsequently a lease was prepared and presented to them. Any meeting they had with the Respondent was in the presence of Mr B. They did not receive representation in writing from the

Respondent that they should secure independent legal advice. They were not advised by the Respondent that they should obtain their own solicitor. They relied upon the assurances given to them by the Respondent that all was in order. The Respondent had failed to carry out a search against the company. The company had issued a Floating Charge to the Clydesdale Bank plc. The Respondent failed to secure the consent of the Clydesdale Bank to the lease as a result of which the commercial lease entered into between Mr & Mrs A and the company was void. Mr & Mrs A lost considerable sums of money being the costs incurred by them in respect of cleaning and redecorating the barge premises along with a deposit of £3,600 and a payment of £600 in rent.

7. Having considered the foregoing circumstances and Productions lodged and having heard submissions from both parties the Tribunal could not be satisfied beyond reasonable doubt that the Respondent's conduct was sufficiently serious and reprehensible to amount to professional misconduct.
  
8. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 9 February 2010. The Tribunal having considered the Complaint dated 30 November 2009 at the instance of the Council of the Law Society of Scotland against Iain Laughland Sivewright Howie, Solicitor of MacLeod & Co, Solicitors, 5 Longman Road, Inverness; Make no Finding of Professional Misconduct; Make no Finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

**(signed)**  
**Chairman**

9. 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**

Mr Reid sought the leave of the Tribunal to make the following amendments to the Complaint -

1. The insertion of the word “Torquil” between the words “of” and “MacLeod & Co” where they appear in the last sentence of Article 1.1.
2. The deletion of the words “The lease prepared by the Respondent was not his own work. It was obvious it had been plagiarised from a lease prepared by the commercial firm, Dundas & Wilson, Solicitors, Edinburgh and amended by the Respondent to reflect the agreement between the company and Mr and Mrs A.” where they appear at lines 14-18 of Article 2.1.
3. The deletion of the words “either verbally or” where they appear at line 9 of Article 2.4.
4. The deletion of the following words from line 7 to the end of Article 3.1:-

“In order to preserve the reputation of the solicitors’ profession in Scotland, the complainers promulgated the Solicitors (Scotland) Practice Rules 1986. These Rules relate to transactions which commenced on or after 1<sup>st</sup> January 1987. They address various aspects of practice in the solicitors’ profession.

In particular, Rule 7 of the said Rules provides that “A solicitor acting on behalf of a party or prospective party to a transaction of any kind specified in Rule 5 hereof shall not issue any deed, writ, missive or other document requiring the signature of another party or prospective party to him without informing that party in writing that:

- (a) Such signature may have certain legal consequences; and
- (b) He should seek independent legal advice before signature.”

Rule 5 of the said Practice Rules identifies the type of transaction referred to in Rule 7. In particular it identifies transactions involving landlord and tenant or the lease of heritable property. In the circumstances of this case, Mr & Mrs A believed that the Respondent was acting on their behalf. This belief was misguided. There is no formal evidence to suggest that the Respondent was acting on their behalf. As such, they were unrepresented. Accordingly, in terms of the Practice Rule 7, the Respondent should have written to Mr & Mrs A advising them that the commercial lease had certain legal consequences for them and that they should seek independent legal advice before executing the deed. The Respondent did not do so as a result of which the Respondent's conduct was not in accordance with the principal articulated."

5. The insertion of the following sentence after the fourth sentence of Article 3.1 - "Therefore in order to avoid such a situation proper practice dictates that a letter should be sent by the solicitor to the unrepresented party advising that such a deed has certain legal consequences and that he should seek independent legal advice."
6. The deletion of the words "in breach of Rule 7 of the Solicitors (Scotland) Practice Rules 1986" where they appear in Article 4.1(a) and the insertion therefor of the words "as proper practice would dictate".

Mr Reid's motion was not opposed and the Tribunal agreed to the Complaint being amended as detailed above. A Joint Minute was lodged in which the averments of fact, duty and professional misconduct in the Complaint as amended were admitted. It was accordingly not necessary for evidence to be led.

### **SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid advised that the Respondent has over 20 years experience in the profession and has never previously appeared before the Tribunal. He advised that the background to this complaint was that Mr & Mrs A who were French nationals lived and worked for a period of time in Scotland and became involved in running a barge owned by Company 1. Mr A is a chef and agreed to take a lease of the barge. The



Respondent was instructed by Mr B of Company 1 to prepare a lease which is found at Complainer's Production number 1. Page 9 of that lease contains a testing clause which shows that the lease was signed on 29 February 2008 and that the Respondent witnessed the signatures of Mr & Mrs A and Mr B a director of the company.

Mr Reid indicated that the Mr & Mrs A were not legally represented and no missives had been prepared. The lease was prepared by the Respondent and sent to Mr & Mrs A for signature and the Respondent did not advise them of the need to take legal advice before signing it.

Mr Reid advised that two days after the Mr & Mrs A opened for business, administrators appointed in relation to Company 1 gave them notice to quit. The Mr & Mrs A persuaded the administrators to allow them to continue to trade for three months before they were required to vacate the barge. The Mr & Mrs A were very upset that they were forced to cease trading and suffered loss. Mr Reid indicated that any communications that he has had with the Mr & Mrs A suggest that they have a working knowledge of English but that this was far from perfect. Mr Reid indicated that it is clear from the correspondence with Mr & Mrs A that they thought that the Respondent was acting for all parties.

Mr Reid submitted that in order to avoid such a situation occurring, proper practice dictated that a letter should be sent by the solicitor to the unrepresented party advising that such a deed has certain legal consequences and that they should seek independent legal advice before signing it.

Mr Reid stated that he wanted to emphasise that the Respondent has been very compliant and has assisted in bringing this Complaint to a speedy conclusion by adopting a very reasonable stance.

Mr Reid referred the Tribunal to the two excerpts from textbooks which he had produced. Firstly he referred to pages 100 and 101 of Smith and Barton's book entitled "Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal" and to pages 154 to 155 of Paterson and Ritchie's book entitled "Law, Practice and Conduct for Solicitors". Mr Reid invited the Tribunal to find that professional

misconduct exists and that there is a danger that unrepresented parties will proceed to enter into documents on their own behalf which are against their interests. Mr Reid stated that the practice rules were promulgated to prevent this. He submitted that he did not think that the Law Society had envisaged a lease of a boat when it promulgated the rules. However in his view, this was a commercial agreement which involved considerable sums of money and so the Mr & Mrs A should have been advised of the consequences of signing such a lease.

Mr Reid submitted that the Mr & Mrs A's complaint was that if they had had a solicitor, this situation could have been avoided by searches being carried out in relation to the company granting the lease. Mr Reid stated that in the absence of advice being given about the consequences of signing the lease, Mr & Mrs A had been taken advantage of.

#### **SUBMISSIONS FOR THE RESPONDENT**

The Respondent stated that he had never previously had to answer a Complaint before the Tribunal. He stated that he could have declined to agree to the Complaint being amended however he advised that he has a lot of respect for the law and a distaste for codified law. He stated that he recognised that in this case the fact that this matter was not covered by a practice rule was to his advantage as the agreement in this case did not fall within the letter of that rule. However, he stated that he did accept the common law charge and agreed that in the spirit of good practice he really should have issued Mr & Mrs A with written advice to take legal advice.

In response to a question from the Tribunal, the Respondent advised that he did give the Mr & Mrs A verbal advice that they should seek legal advice on this matter.

In response to a question from the Tribunal as to whether this statement was contradicted by the Mr & Mrs A, Mr Reid advised that he has tried to contact Mr & Mrs A but they are now back in France and have not responded. Mr Reid stated that it was clear from the letter from the Mr & Mrs A that they thought that the Respondent was acting for both parties as happens routinely in France.

The Respondent stated that he did not record the meetings in writing and with hindsight regrets that. He stated that he had no agenda not to advise Mr & Mrs A to seek legal advice and that he did not realise that they did not understand his position. The Respondent stated at no time did he have any knowledge of financial difficulties in relation to his clients, Company 1.

The Respondent stated that he has taken this matter extremely seriously and has learnt from his mistake. He stated that he has taken steps to alter his computerised case management system to prompt him to generate a pro forma letter in these circumstances to give the necessary advice to unrepresented parties.

The Respondent stated that due to pressures to complete the transaction, he took his eye off the ball and focused on drafting the document when he should have focused on the other aspects. However, he stated that he did not believe that his failure changed the character of what happened in the follow on period.

In response to a question from the Tribunal as to how a member of the profession is to know when such a legal advice letter is to be issued, Mr Reid responded that it depends on the nature of the transaction. In this case the lease was similar to a lease of heritable property, but it was a boat. However it was a commercial lease and Mr Reid submitted that the rule is there to remind members of the profession to ensure that the correct advice is given to unrepresented parties.

The Respondent stated that he gave Mr & Mrs A the lease and they were going to sign it there and then but he made them take it away to consider it. He stated that he always discusses the implications with the parties although he could not swear exactly what words he used in this instance. He stated that the import of his words were that they should go away and take advice, preferably legal advice. He stated that Mr & Mrs A's English was not perfect but that Mrs A spoke better English than her husband. He stated that he tried very hard to explain the issues to them to get his point across. He stated that in doing so he may have confused them, but that his intention was to clarify the matter rather than to confuse.

**DECISION**

The Tribunal considered the Complaint as amended and the submissions made by both parties and in particular the statement of the Respondent that he advised the Mr & Mrs A verbally to take advice, preferably legal advice before signing the lease. The Tribunal had regard to the definition of Professional Misconduct as outlined in the case of Sharp –v- The Council of the Law Society of Scotland 1984 SC 129. The Tribunal find that as no practice rule has been breached in relation to this matter and that as it is satisfied that the Respondent did advise Mr & Mrs A verbally to take advice, the Respondent's failure to advise Mr & Mrs A in writing was not a serious and reprehensible departure from the standards expected of a competent and reputable solicitor. The Tribunal therefore considered that in the particular circumstances of this case the Respondent's conduct did not amount to professional misconduct. There were no motions for expenses and accordingly the Tribunal found no expenses due to or by either party. The Tribunal made the usual order in relation to publicity.

**Chairman**