

**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**

**MARTIN JOHN CAREY,  
formerly of Alexander & Martin,  
Solicitors, Falkirk and now of  
Scullion & Company, Solicitors, 5  
Church Street, Hamilton**

1. A Complaint dated 27<sup>th</sup> September 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Martin John Carey, formerly of Alexander & Martin, Solicitors, Falkirk and now of Scullion & Company, Solicitors, 5 Church Street, Hamilton (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 by the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 18<sup>th</sup> January 2006 and notice thereof was duly served on the Respondent.

4. On 18<sup>th</sup> January 2006 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was not present or represented. Mr Reid advised the Tribunal that he had had discussions with Mr McCann, Solicitor, Clydebank who is representing the Respondent. Mr Reid made a joint motion to adjourn the hearing to allow negotiations to take place regarding the possibility of a Joint Minute being lodged admitting the facts of the matter. The Tribunal adjourned the hearing until 23<sup>rd</sup> February 2006.
5. Preliminary pleas of mora and personal bar were intimated on behalf of the Respondent. Answers in relation to the preliminary plea were lodged on behalf of the Complainers.
6. On 23<sup>rd</sup> February 2006 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by his solicitor James McCann, Solicitor, Clydebank. Due to lack of time the matter was adjourned to 26<sup>th</sup> April 2006.
7. When the case called on 26<sup>th</sup> April 2006 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by James McCann, Solicitor, Clydebank. Two Joint Minutes were lodged, one admitting the facts and averments of duty and the other agreeing to admit into evidence the correspondence contained in the six inventories of productions lodged on behalf of the Complainers and the Respondent. A further Record in relation to the preliminary plea was lodged.
8. The Tribunal agreed to a request from Mr McCann that the hearing be treated as a preliminary hearing in terms of Rule 48 of its Rules.
9. The Tribunal heard submissions in relation to the preliminary pleas of mora and personal bar. The Tribunal repelled the preliminary pleas. The Tribunal was then asked to have regard to the Joint Minute admitting the

facts and averments of duty. The Tribunal heard submissions in relation to the question of professional misconduct.

10. The Tribunal found the following facts established

10.1 The Respondent was born on 29<sup>th</sup> January 1960. He was admitted as a solicitor on 14<sup>th</sup> September 1982. He was enrolled as a solicitor in the Register of Solicitors in Scotland on 30<sup>th</sup> September 1982. Following his enrolment he secured employment as a Partner with Moore & Partners from 1<sup>st</sup> May 1987 until 31<sup>st</sup> July 1991. Thereafter he was assumed as a Partner in Alexander & Martin, Solicitors from 1<sup>st</sup> August 1991 to 31<sup>st</sup> January 2001. From 1<sup>st</sup> February 2001 until 25<sup>th</sup> February 2001 he was a Consultant with the firm Alexander & Martin. From 26<sup>th</sup> February 2001 until 5<sup>th</sup> April 2004 he was an employee with the firm Scullion & Company, Solicitors, Hamilton. On 6<sup>th</sup> April 2004 he was assumed as a Partner in the firm of Scullion & Company, Solicitors. He remains as a Partner in said firm.

10.2 Bank of Scotland

The Respondent in the course of his professional practice acted as the solicitor in a number of conveyancing transactions. The Bank of Scotland in a considerable number of transactions loaned monies to various clients who were represented by the Respondent in the course of their conveyancing transactions. Where a lending institution agrees to lend money to a client, it is normal practice that the solicitor acting in the conveyancing transaction on behalf of the client also assumes responsibility for acting on behalf of the lending institution to protect their interests. Such practice avoids duplication of work and maintains a lower professional charge to the client. The Respondent in the

course of his professional practice acted on behalf of a number of clients who had secured borrowing facilities from the Bank of Scotland. The Bank were concerned that the Respondent had repeatedly failed to reply to their enquiries regarding progress in relation to a number of transactions. By letter dated 14<sup>th</sup> February 2000 the Bank invoked the assistance of the Complainers, explaining that they had written on numerous occasions to the Respondent enquiring regarding progress in relation to a number of transactions and had failed to obtain a reply. Such was the concern on the part of the Bank that one of their officers attended at the address of the Respondent on 25<sup>th</sup> February 2000 and collected all files and paperwork held by the Respondent on behalf of the Bank in connection with various transactions. At the time of this complaint the Bank had concerns in relation to 31 separate conveyancing transactions. The sums involved by way of loaned funds were substantial. Given the volume of transactions in which the Respondent was instructed to act on behalf of the Bank, it was anticipated that further difficulties would arise. It was anticipated that further concerns would emanate from various branches of the Bank who had dealings with the Respondent. The Bank recovered as much documentation as they could in relation to the considerable number of transactions in which the Respondent was involved. The Bank thereafter proceeded to piece the documentation together with the purpose of not only securing the interests of the Bank which had loaned considerable sums of money but also to ensure that the title in favour of the individual client was not placed at risk. This involved recovering files and documentation from various sources, examining the Title Deeds and corresponding with third parties regarding defects in the title. Eventually after numerous enquiries had been carried out in connection with the considerable number of transactions, certain

conveyancing transactions were identified where the Respondent had failed adequately to protect the interests of his client and that of the Bank.

10.3 The Respondent acted on behalf of Ms A in relation to her purchase of the subjects at Property 1. The conveyancing transaction settled on 17<sup>th</sup> August 1998. The seller's solicitor granted a formal undertaking to the Respondent that he would deliver an executed Disposition in favour of Ms A. Despite this undertaking being issued, the Respondent did not forward to the seller's solicitor the engrossed Disposition for execution until 21<sup>st</sup> October 1998. The Disposition was executed immediately and returned to the Respondent on 3<sup>rd</sup> November 1998. Having received return of the Disposition, the Respondent thereafter presented the deeds for registration on 2<sup>nd</sup> December 1998 with a Form 4 being issued by the Keeper of the Land Register on 3<sup>rd</sup> December 1998. The Keeper proceeded to deal with the application. On 14<sup>th</sup> December 1998 the Keeper wrote to the Respondent requiring certain further information in connection with the application. That enquiry was ignored by the Respondent and the application was cancelled by the Keeper in March 2000. The Respondent resubmitted the application on 21<sup>st</sup> September 2000 and the Land Certificate was issued eventually with a registration date of 22<sup>nd</sup> September 2000.

10.4 The Respondent acted on behalf of Mr & Mrs B in relation to the purchase of the property at Property 2. The transaction settled on 28<sup>th</sup> August 1998. The transaction settled on the basis that the settlement cheque issued by the Respondent would be held by the seller's solicitors as undelivered pending dispatch to the Respondent of settlement items including the executed Disposition. These were delivered to the Respondent on 4<sup>th</sup> September 1998. Having obtained this documentation,

the Respondent presented the deeds for registration on 2<sup>nd</sup> October 1998 with the Form 4 being issued by the Keeper on 6<sup>th</sup> October 1998. The Keeper proceeded thereafter to deal with the application. On 18<sup>th</sup> November 1998 a requisition was made of the Respondent by the Keeper who sought certain further information in connection with the application. This related to the location of a footpath within the title. Correspondence was exchanged between the Respondent and the Keeper. On 23<sup>rd</sup> February 2000 the Keeper cancelled the application. The Respondent thereafter resubmitted the deeds for registration on 16<sup>th</sup> May 2000. On 19<sup>th</sup> June 2000 the application was again returned by the Keeper requesting a further fee in respect of the dues of registration regarding three Discharges. On 25<sup>th</sup> September 2000 the Respondent eventually tendered to the Keeper a cheque in respect of the required recording dues.

10.5 The Respondent acted on behalf of Ms C in connection with the purchase of the property at Property 3. The transaction settled on 28<sup>th</sup> November 1997. The transaction settled on the basis that the settlement cheque from the Respondent would be held as undelivered pending dispatch to the Respondent of settlement items including the executed Disposition. These items were received by the Respondent on 1<sup>st</sup> December 1997. Thereafter the Respondent did nothing until 6<sup>th</sup> July 1999 when he presented the deeds for registration. On 17<sup>th</sup> August 1999, the Keeper who was considering the application requested from the Respondent an outstanding deed. This letter was ignored and the Keeper sent a reminder on 16<sup>th</sup> November 1999. Eventually the deed was sent by the Respondent to the Keeper on 13<sup>th</sup> January 2000. The application for registration was cancelled by the Keeper in June 2000. The application was resubmitted by the Respondent on 22<sup>nd</sup> September 2000. On 19<sup>th</sup> January 2001 a further requisition was made of the

Respondent by the Keeper. Correspondence was entered into between the Respondent and the Keeper and ultimately a Land Certificate was issued with a date of registration of 10<sup>th</sup> May 2002.

10.6 The Respondent acted for Mr D & Ms E in connection with the purchase of the property at Property 4. The transaction settled on 15<sup>th</sup> June 1998 with the settlement documentation being received by the Respondent on 17<sup>th</sup> June 1998. The Respondent did not present the deeds for registration to the Keeper until 26<sup>th</sup> October 1998. The Form 4 issued by the Keeper was dated 28<sup>th</sup> October 1998.

10.7 The Respondent acted on behalf of Mr & Mrs F in connection with the purchase of Property 5. The transaction settled on 29<sup>th</sup> October 1996 with the settlement documentation being received by the Respondent on 30<sup>th</sup> October 1996. Following settlement the Respondent discovered that the Standard Security had been incorrectly executed by his clients. On 28<sup>th</sup> January 1997 the Respondent wrote to his clients asking that they attend his office to execute the Standard Security once more. The Title Deeds, apart from the Standard Security, were presented for registration on 5<sup>th</sup> February 1997. On 11<sup>th</sup> February 1997, the Standard Security was sent to the client for signature and return. It was thereafter sent to the Keeper for registration on 3<sup>rd</sup> March 1997.

10.8 The Respondent acted on behalf of Mr G & Ms H in connection with the purchase of the property at Property 6. The transaction settled on 27<sup>th</sup> March 1998. The deeds were presented to the Land Register for registration by the Respondent on 8<sup>th</sup> April 1998. The deeds were returned to the Bank on 19<sup>th</sup> August 1999 for retention by them as security holders. The deeds were returned to the Respondent because a

Matrimonial Homes Affidavit had not been notarised by the Respondent.

11. Having considered the foregoing circumstances the Tribunal found the Respondent guilty of Professional Misconduct in cumulo in respect of his unreasonable delay in recording or registering title deeds in favour of clients, his unreasonable delay in recording or registering standard securities in favour of lenders and his failure to communicate effectively with clients.
12. Having heard mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 26<sup>th</sup> April 2006. The Tribunal having considered the Complaint dated 27<sup>th</sup> September 2005 at the instance of the Council of the Law Society of Scotland against Martin John Carey, formerly of Alexander & Martin, Solicitors, Falkirk and now of Scullion & Company, Solicitors, 5 Church Street, Hamilton; Repel the preliminary pleas of mora and personal bar; Find the Respondent guilty of Professional Misconduct in cumulo in respect of his unreasonable delay in recording or registering title deeds in favour of clients, his unreasonable delay in recording or registering standard securities in favour of lenders and his failure to act in accordance with the principles set forth in Article 5(e) of the Code of Conduct for Scottish Solicitors 2002 in that he did not communicate effectively with clients; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and in the expenses of the Tribunal as the same may be taxed by the auditor of the Court of Session on an agent and client indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a 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)



Malcolm McPherson

Vice Chairman

13. 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**

Preliminary pleas of mora and personal bar were lodged on behalf of the Respondent. Answers in relation to the preliminary pleas were lodged by the Complainers and a Record in relation to the preliminary pleas was prepared and lodged with the Tribunal. Two Joint Minutes were lodged with the Tribunal on 26<sup>th</sup> April 2006. The first Joint Minute admitted the facts and averments of duty and the second agreed to admit into evidence the correspondence contained in the six inventories of productions lodged on behalf of the Complainers and the Respondent.

The Tribunal agreed to a request from Mr McCann that the hearing be treated as a preliminary hearing in terms of Rule 48 of its Rules.

Mr McCann submitted that the onus fell to him to put forward the preliminary pleas of mora and personal bar and Mr Reid agreed.

Mr McCann advised that to assist the Tribunal he had prepared and lodged a written submission containing a list of key dates which the Tribunal should have regard to in this case.

## **SUBMISSIONS FOR THE RESPONDENT IN RELATION TO THE PRELIMINARY PLEAS**

Mr McCann advised that in this case the Tribunal would be revisiting arguments of delay which had previously been made before the Tribunal. He referred to the cases of Council of the Law Society of Scotland v Alistair David Armstrong Hall 2002 SLT 989 and Council of the Law Society of Scotland v Neil Forsythe McPherson – Court of Session 11<sup>th</sup> June 2002 (unreported). He submitted that after the incorporation of the European Convention of Human Rights into Scots Law a view was taken that because the Tribunal was quasi-criminal that the Respondents had the right to a trial within a reasonable time. Then the Law Society took the view that you should ignore the time that the case took before it came to the Tribunal. In the case of McCartan which argued before the Tribunal on 4<sup>th</sup> September 2003 there was a plea taken in relation to delay on human rights grounds and also a common law plea of mora. The common law plea of mora was successful in that case in 2003. However, the judgement was never issued as Mr McCartan was killed in a car crash on the day the judgement was to be signed. Counsel's opinion was taken in relation to this and his view was that as soon as the Respondent died the judgement could not be issued. Mr McCann stated that in the circumstances he could not cite that case as a precedent and advised that there is no other precedent to refer to.

Mr McCann then stated that he would approach this matter by going through the facts of the case.

The case of McCartan involved the commission of a single but serious error and the Law Society had elected to await the outcome of a substantial negligence case under the master policy before prosecuting. The eventual award was in the region of £470,000. The Law Society waited six or seven years until this claim was resolved and then prosecuted Mr McCartan. The Tribunal in that case took the view that it was an important decision for Law Society how they prioritised civil, conduct and criminal cases. The Tribunal took the view that to wait until after the negligence case was too long. However, the detailed judgement was lost due to the death of Mr McCartan. Mr McCann submitted that the case involving the Respondent involved a period of six

years from his illness until his prosecution. Mr McCann submitted that the Tribunal could exercise its equitable jurisdiction to sustain the plea of mora and not convict.

Mr McCann stated that the facts in this case are contained in the three Inventories of Productions lodged by him. He referred the Tribunal to the First Inventory of Productions, which was a medical report. This report demonstrated that the Respondent was very ill at the time of the matters detailed in the Complaint. The medical report was sent to the Law Society by Mr Macreath, who was, at that time, representing both partners of the Respondent's former firm. Mr McCann submitted that the report does verify that there is clear evidence of the Respondent being in very poor mental health. The report confirms that the illness was affecting the Respondent during 1998 which ties in with the time period when there was a problem in the practice. Mr McCann submitted that this was a detailed and high quality report and represented a great deal of work by the doctor. Mr McCann submitted that this report demonstrates that the Respondent was suffering a very serious period of illness and had to resign as a partner as a result and then in 2001 became an assistant. In 2001 he was made bankrupt and worked as an assistant until he was discharged as a bankrupt and returned to full health and has now managed to be assumed as a partner again. Mr McCann submitted that the Law Society, in full knowledge of all of this, decided not to prosecute. However in 2003 a decision to prosecute was taken and Mr McCann submitted that this decision was taken too late and that this decision was not in the public or the profession's interest.

Mr McCann stated that Mr Muir, the Respondent's former partner, continued with the firm and said that he would deal with the five Bank of Scotland cases to which the Complaint relates. However, he wouldn't give the file to the Respondent. Mr McCann referred the Tribunal to productions R1, R2, and R3 of the Second Inventory in relation to five problem conveyancing cases – the same five as referred to in the Complaint. Mr McCann referred to the sequence of correspondence in that Inventory from productions R3 to R15 which demonstrate that the Respondent was offering to assist the Law Society in relation to these cases but was prevented from doing so by Mr Muir. Productions R21 to R26 show an important theme developing. There was an unacceptable state of affairs, the Respondent was ill and the Law Society pulled all the complaints against the Respondent together and dealt with it by a finding of

misconduct but decided not to prosecute. Mr McCann stated that he finally saw the files in the spring of 2002 when he went to Mr Macreath's office to examine them. Mr McCann referred to production R32 of the said Inventory; a letter dated 2 May 2002 outlining the Respondent's position. Mr McCann advised that matters moved on throughout the second half of 2002 with further correspondence.

Mr McCann then referred the Tribunal to production R40 of the said inventory, a letter to Mr Macreath from himself stating that the Respondent could not assist the Law Society in their investigations and asking if the title problems have been resolved. The Bank of Scotland arranged with Mr Muir to sort things out and the five cases were identified in February 2002. Mr McCann submitted that the delay from February 2002 until now was not due to the Respondent. Mr McCann submitted that production R44 of the said inventory is an important letter. This is a letter dated 18<sup>th</sup> October 2002, sending the medical report to the Law Society. Mr McCann referred to production number 47 of the said Inventory, a letter from him dated 1<sup>st</sup> November 2002 to the Law Society when he requested that they bring all matters together and deal with them and let the Respondent get on with his life. Mr McCann stated that production R49 of the said Inventory, a letter dated 25<sup>th</sup> February 2003 is important as it requests that all cases be brought together. Mr McCann submitted that production R55 of the said Inventory is a crucial letter. In it Mr Yelland states that he would endeavour to bring all outstanding cases together and that he would keep Mr McCann advised.

Mr McCann then referred to production R56 which was a letter from Mr Yelland indicating that the Law Society had decided not to prosecute the Respondent. Mr McCann conceded that this letter contained production R57 which was a determination of the Law Society's Client Relations Committee in relation to the Respondent. That excerpt did not specifically mention the Bank of Scotland cases but in the absence of any further letter from Mr Yelland or anyone else at the Society, he advised the Respondent that he thought that was the end of the matter and that all the complaints had been dealt with. Mr McCann said that he was certain that the Society would not then prosecute after that because of the decision in the McCartan case. Mr McCann advised that at that stage he closed his file in June 2003. Mr McCann stated that there was then a very long period of time with no correspondence from the Law

Society. He advised that the Respondent came out of bankruptcy and was assumed as a partner in April 2004. Mr McCann submitted that the Respondent allowed this to happen thinking that these matters were behind him. Mr McCann submitted that then out of the blue the Complainer's letter contained in production R58 of the said inventory indicated that the matters currently before the Tribunal were to be referred to a Committee Reporter.

Mr McCann submitted that there was a very long gap in correspondence between June 2003 and October 2004. He stated that during this time the Council of the Law Society obtained delegated powers from October 2003 to deal with prosecutions. Prior to that all decisions regarding prosecutions were taken by the Council of the Law Society as a whole unit. Mr McCann submitted that when the new system was introduced it should have been intimated to the Respondent and to his advisor that the complaint was still live and was being transferred to the new system. Mr McCann submitted that this did not happen. Mr McCann advised that what seems to have happened was that Mr Ritchie referred the matter to a Reporter who recommended prosecution and that this was endorsed by the Client Relations Committee. Mr McCann submitted that the Tribunal should not sustain the Complaint because of the delay. The delay involved was a gap of 2¼ years from Mr Yelland's letter in 2002 to 2005 when the Complaint was served. Mr McCann submitted that in his view this was far too long a gap before making such an important decision to prosecute a solicitor.

Mr McCann then referred the Tribunal to productions R58 and 59 when the case appeared to be re-opened by the Law Society. Mr McCann referred to production R60 of the said Inventory which is a letter from the Client Relations Office of the Law Society enclosing guidance in relation to the prosecution of alleged professional misconduct. Mr McCann submitted that this guidance states that even where there is sufficient evidence to prosecute, the Law Society may take the view that it is not in the public interest to prosecute a solicitor where the solicitor was at the time of misconduct suffering from sufficient significant mental or physical ill health. Another reason given in that circular for a decision not to prosecute is where there has been a long delay between the misconduct taking place and prosecution of the solicitor unless the delay has been caused by the solicitor who is the subject of the complaint.

Mr McCann submitted that the Respondent did fall within the category of a solicitor who should not be prosecuted following the public interest test, as there is evidence of his illness at the time of the misconduct and there appears to be little prospect of repetition as he is fully rehabilitated since. Mr McCann submitted that the Tribunal should sustain the plea of mora as it is entirely consistent with the Law Society's own guidelines.

Mr McCann submitted that something else happened in 2003 to affect the way that the Law Society dealt with complaints. Due to pressure from the Ombudsman to speed up complaints a new system of tracer sheets was introduced by the Law Society to chase up files. However, Mr McCann submitted that it is an important evidential point that there is no evidence of date of the files concerned being tracked after 2003. Mr McCann submitted that although there had been delay in his responding on the Respondent's behalf to the Complaint served at the end of last year, this was due to the fact that the Respondent did not have access to the files. It looked as if the files had gone back to Mr Muir. Mr McCann referred to the Third Inventory of Productions for the Respondent. Files in relation to the Respondent's former firm were held in storage by Drivers Jonas who contacted the Respondent in late 2005 and the Respondent agreed to take possession of the files. Mr McCann submitted that the Respondent did not think that these old files from his former firm would contain the five files in relation to this Complaint. However, in searching through these old files the Respondent found the five files. Mr McCann submitted that this is indicative of them having been surrendered by the Law Society to Mr Muir in 2003 suggesting the end of the complaints process. Mr McCann submitted that having seen these files briefly in 2002 he didn't expect to find anything vitally important in them but he submitted that if these files had been the subject of a live complaints process then they would have contained tracer sheets.

Mr McCann then referred to the last item in the Third Inventory of Productions for the Respondent. That item was a letter from the Respondent's new partner Mr Scullion in relation to the Respondent's progress in the new firm. Mr McCann stated that it was extremely unfortunate to see that he was assumed as a partner in the belief that these matters were at an end and behind him only to find that these matters from the distant past had been inexplicably re-opened by the Complainers.

Mr McCann submitted that there is a strong case for holding that it is not in the public or the professions interest to convict the Respondent of misconduct. Mr McCann submitted that the Law Society have taken too long in bringing this Complaint and have behaved in an unpredictable manner in relation to these matters.

Mr McCann then turned to the law on mora. He referred to the list of references for the Respondent which was lodged with the Tribunal. Mr McCann firstly referred to Smith & Barton's book - "Procedures and Decisions of the Scottish Solicitors Discipline Tribunal" at pages 146-148. Mr McCann submitted that illness is not a defence but has to be taken into account. The Law Society guidance states that the question of illness should be taken into account even where there is evidence of misconduct. Mr McCann then made reference to Sheriff McPhail's book on Sheriff Court Practice at paragraph 2.123. Mr McCann submitted that across different fields of the law there are various periods of prescription – three months for employment law, six months for criminal proceedings etc. Mr McCann submitted that in this way the law reminds pleaders that old evidence should not be relied on. However, he submitted that the Tribunal has no prescriptive period, but should be aware of the principle of justice delayed. Mr McCann advised that McPhail's book states that a plea of mora is comparatively unusual because of the application of prescription. Mr McCann compared this case with a motor accident where after three years the person at fault could not be sued. Mr McCann submitted that the Law Society had knowledge of the Respondent's failure by the spring of 2002 and that by serving a complaint in 2005 it was far too late.

Mr McCann then referred to item 3 of the list of references for the Respondent – David M Walker's book "Prescription and Limitation of Actions" at Chapter 11 on the subject of Mora at pages 157-159. Mr McCann made reference to the following quotes from that chapter:

*"... this plea is one aspect of the general doctrine of personal bar, which is to the general effect that a person will not be allowed to act inconsistently with his own prior statement ..."*

*“I do not doubt that, where coupled with lapse of time there have been actings or conduct fitted to mislead, or to alter the position of the other party to the worse, the plea of mora may be sustained.”*

Mr McCann submitted that he was not suggesting that the Respondent was intentionally misled by the Complainers, but that he was unintentionally misled by the correspondence in the case taken as a whole.

Mr McCann submitted that the five cases currently before the Tribunal relate to conveyancing. In one case there was a defective affidavit and he stated that he was not clear why this could not be put right. Mr McCann submitted that when the cases are collected together the Tribunal would have to be satisfied that the conduct taken together amounts to misconduct. Mr McCann stated that he has no way of knowing now whether the Respondent was even in the office when the requisitions came in and therefore it is impossible for him to admit misconduct in the absence of information from a firm which no longer exists. Mr McCann submitted that this is the essence of a preliminary plea in relation to delay, that evidence can vanish or diminish over a period of time to such an extent where no-one can say with certainty what happened at the crucial time.

Mr McCann then referred to the fifth reference on the list of references for the Respondent. This is an article by Mary McGowan of the Law Society’s Client Relations Office published in the Journal of the Law Society in March 2006. The article states that after the review in 2001 the Law Society agreed that the same time limit should apply for service and conduct cases. The time limit was set at two years. It stated that the Law Society will consider cases within two years of complaints coming to their attention. Mr McCann quoted from this article which stated:

*“The Society’s guiding principle remains that it is best to investigate complaints as soon as possible after the event, as memories are fresh and paperwork is intact and available.”*

Mr McCann submitted that had this Complaint been raised in 2002 he would have been in a position to fully advise the Respondent on his position. Mr McCann



submitted that it is clear that this prosecution fails the test in relation to delay as the evidence is either gone or weakened and the confusing correspondence gives a clear indication of the investigation coming to an end as evidenced by the files being released. Mr McCann urged the Tribunal to sustain the plea and not to convict the Respondent and to dismiss the Complaint.

### **SUBMISSIONS FOR THE COMPLAINERS IN RELATION TO THE PRELIMINARY PLEA**

Mr Reid stated that the Complaint contains reference to six transactions and not five as referred to by Mr McCann.

Mr Reid indicated that he would respond to the pleas of personal bar and mora separately and indicated that in doing so he would be referring to the references numbered 1 to 7, which he had lodged.

In relation to the plea of personal bar, Mr Reid submitted that the factual circumstances pivot on the Director of Client Relations letter of 25th February 2003 which is production R55 of the Respondent's Second Inventory of Productions. Mr Reid invited the Tribunal to consider that that letter in no way binds the Law Society. Mr Reid submitted that the letter was written by an employee of the Society and only commits him to endeavour to draw together the outstanding cases. Mr Reid stated that this letter must be read against a background of a considerable number of complaints in which conveyancing required to be rectified. Mr Reid referred the Tribunal to production R1 of the Respondent's Second Inventory of Productions, a letter dated 25 July 2001 from the Bank of Scotland to the Law Society intimating the cases outstanding and complaints by members of the public. Mr Reid submitted that conveyancing problems do not arise immediately but come to light when the owners of the property decide to sell. Mr Reid referred to Production R56 of the said Inventory, a letter from Philip Yelland, the Director of the Client Relations Office to Mr McCann. Mr Reid indicated that this letter clearly does not relate to the Bank of Scotland matters as it relates to two distinct reference numbers. Mr Reid stated that this is also clear from Production R57 of the said Inventory, a letter dated 20 June 2003 from the Client Relations Office to the Respondent communicating the same

decision. That second letter enclosed the schedule of the decision of the Client Relations Committee and it was clear from that that this letter referred to specific cases and not to the Bank of Scotland cases.

Mr Reid referred to the leading authority Thom-v-HMA 1976 JC 48. Mr Reid stated that this case involved a letter from the Procurator Fiscal to a solicitor acting for the accused in a criminal matter. The letter indicated that the Procurator Fiscal was taking no further steps in the matter. The court held that the letter constituted an unequivocal and unqualified announcement on behalf of the Crown that no further proceedings were to be taken on the charge and amounted to a decision to desert simpliciter.

Mr Reid stated that the decision in the Thom case could not be applied to the facts of this case. Mr Reid submitted that under no stretch of the imagination could the letter of 25<sup>th</sup> February 2003 be construed as an unequivocal or unqualified announcement of the decision not to prosecute. Mr Reid submitted that the rationale in the Thom case was forward in the case of Murphy-v-HMA 2002 SLT 1416. In that case a letter had been sent from the Procurator Fiscal indicating that it was his intention to proceed against the accused under summary procedure. The court held in that case that the correspondence did not contain a concluded decision and the court reiterated that correspondence must be unequivocal or unqualified to constitute personal bar. Mr Reid submitted that this rationale cannot be applied to the letter of 25<sup>th</sup> February 2003.

Mr Reid then referred to his third authority, the unreported decision of Douglas Cook-v-HMA from 2003. That case involved an offer from the Procurator Fiscal. In his judgement temporary Judge Stewart confirmed that the test was as in the Thom decision. The court interpreted the letter as an offer and not a guarantee and indicated that the final decision could only be made by Crown Counsel. In that case the court held that there was no renunciation of the right to prosecute.

Mr Reid submitted that taking into account all the circumstances, including the three authorities and the fact that the letter of 25<sup>th</sup> February 2003 was only an offer to do something, that the Tribunal should repel the plea of personal bar.

In relation to the plea of mora Mr Reid referred the Tribunal to his seventh authority, an extract from McPhail's book. He referred the Tribunal to page 81 of the said book and in particular to the following passage:

*“The plea must be supported by appropriate averments inferring prejudice or acquiescence.”*

Mr Reid submitted that his interpretation of prejudice is that it must be prejudice in relation to the preparation of a case. He submitted that any personal prejudice is personal to the Respondent and is not what is envisaged as far the plea of mora is concerned. He referred to another quote from McPhail's book at page 81:

*“It more frequently occurs that where the delay has taken place to the prejudice of the defender, and where in consequence the weighing of the value of evidence and the drawing of inferences from it are rendered more anxious and difficult, the Court scrutinises the evidence with particular care.”*

Mr Reid then referred to the sixth authority which he had lodged which was a copy of the leading authority on mora, the case of Assets Co.-v-Bain's Trs (1904) 6F.692. Mr Reid indicated that he had provided the Tribunal with the first page of the case and two subsequent pages where the plea of mora was discussed, as it was a side issue in this case. He referred to page 705 where the Lord President stated

*“It appears to me, however, that the plea of mora cannot be successfully maintained merely on account of the lapse of time, but that the person stating it must also be able to shew that this position has been materially altered, or that he has been materially prejudiced, by the delay alleged...”*

and later in the same judgement at the same page -

*“But in order to lead to such a plea receiving effect, there must, in my judgement have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances to the detriment of the other party,...”*

Mr Reid submitted that this proposition was then reiterated by Lord Traynor at page 740 of the same case where he states there has to be excessive or undue delay in the assertion of a known right and that this delay must be to the detriment of the other party.

Mr Reid urged the Tribunal to consider this issue against the background of the failures uncovered in relation to the Respondent's practice. The partners then fell out and the partnership was dissolved. The Law Society encountered an unhelpful attitude from Mr Muir. In addition, the Law Society had to consider its obligation to pay particular attention to the rectification of the conveyancing in relation to a number of members of the public and the position of the Bank of Scotland who were affected by the problems.

Mr Reid stated that Mr McCann has extracted specific correspondence from a long running saga and has failed to have regard to the priority afforded to the interests of the public and the Bank of Scotland by the Law Society.

Mr Reid stated that it is also important to distinguish the professional regulatory body from the position of a person in a normal court action. The Law Society has a statutory obligation to protect the public and Mr Reid invited the Tribunal to refrain from criticising the Law Society for pursuing the rectification of the conveyancing to the extent that they did. Mr Reid submitted that in fairness to the Respondent the true extent and breadth of problems could not be identified until the conveyancing issues were resolved. Mr Reid submitted that it would have been grossly unfair to consider prosecuting the Respondent until all the matters were fully revealed and he submitted that the component part identified by the authorities quoted namely the identification of the "known right" – that is the purpose of these proceedings was not identified until the conveyancing problems were resolved.

Mr Reid submitted that the correspondence lodged by Mr McCann reveals strenuous efforts by the Law Society to rectify the conveyancing difficulties. This required to be carried out with a number of obstacles in their way, namely denial of blame, blaming of the other partner and the absence of the files. However, Mr Reid stated that he was grateful to Mr McCann for conceding that he saw the files in 2002. Mr

Reid submitted that given that the Tribunal is now faced with a Joint Minute admitting the facts it is difficult to see what prejudice has been suffered by the Respondent in the preparation of his case.

To sum up his case Mr Reid submitted firstly, that the prejudice identified by Mr McCann is personal to the Respondent and does not relate to the preparation of his defence in this matter. Mr Reid stated that given that Mr McCann had the opportunity to examine the files in the spring of 2002 and that there is now a Joint Minute admitting the factual circumstances of the misconduct, there is in his submission no prejudice to the Respondent as required in terms of the principle laid down by the courts.

Secondly, the “known right” that is the purpose of the process i.e. the extent of the professional misconduct, could not be identified until a later stage in the conveyancing rectification process.

Thirdly, Mr Reid submitted that it is the statutory responsibility of the Law Society to protect the public and that a lapse of time on its own is not sufficient to sustain this plea. Mr Reid submitted that the delay must be unreasonable and inexcusable. Mr Reid submitted that the delay occurred as the Law Society pursued the protection of members of the public and the bank.

Mr Reid submitted that the reference by Mr McCann in the pleadings to the file being lost or misplaced was simply incorrect. Mr Reid stated as evidence of this he had lodged a Third Inventory of Productions which comprised of extracts of the relevant correspondence from the file which started with a letter dated 28<sup>th</sup> May 2003 and continued until production 36 a letter dated 6<sup>th</sup> October 2004. Mr Reid submitted that the productions contained in the said Inventory contain correspondence which further evidences the efforts by the Society to resolve the numerous conveyancing difficulties. Mr Reid submitted that the file remained very current and very active and that there was a great deal of work carried out by the Case Manager between those two dates. Mr Reid submitted that there were a number of obstacles placed in the Law Society’s way, not least the dismissal of Levy and Macrae from acting on Mr Muir’s behalf and the extensive correspondence with Mr Muir in relation to securing

the outstanding deeds to complete the conveyancing. Mr Reid submitted that it is not correct that the file was lost or mislaid and invited the Tribunal to accept that there was a great deal of work carried out during that period.

Mr Reid urged the Tribunal to have consideration to his three-fold response to the plea of mora and to his comments regarding the issue of personal bar. Mr Reid asked the Tribunal to find that there was no substance to the pleas advanced and accordingly to repel the pleas.

#### **FURTHER SUBMISSIONS ON BEHALF OF THE RESPONDENT RE THE PRELIMINARY PLEA**

Mr McCann indicated that he had two further points to make. Firstly, during the period February 2003 to October 2004 if there was a managed and ongoing process to resolve these cases, this information was not indicated to either himself or to the Respondent. Secondly, Mr McCann submitted that the Fiscal is saying that essentially the Law Society put off the decision to prosecute while they did something else. Mr McCann submitted that that was the point in the McCartan case and in that case the Tribunal held that this was wrong. Mr McCann submitted that the Fiscal's submission supports his plea. Mr McCann submitted that the Law Society are now saying they did something else. Mr McCann submitted that the Law Society cannot wait until other things are sorted out before taking the decision to prosecute.

#### **FURTHER SUBMISSIONS ON BEHALF OF THE COMPLAINERS RE THE PRELIMINARY PLEA**

Mr Reid submitted that in relation to the McCartan case this differed considerably from the present case. In the McCartan case the Law Society's process was concluded and the case was held back to await the outcome of a civil case. Mr Reid submitted that in this case the prosecution was held back to await the outcome of the conveyancing rectification as the issues of alleged professional misconduct were not clear.

## **DECISION WITH REGARD TO PLEA OF PERSONAL BAR/*MORA***

In relation to the plea of mora and personal bar, the Tribunal was of the view that the letter dated 20<sup>th</sup> June 2003 from the Law Society dealt exclusively with the cases mentioned in the heading of that letter. The Tribunal did not accept that that letter should be interpreted as closing matters with regard to any of the other complaints. The Tribunal was of the view that the Respondent has not had his position materially altered nor has it been materially prejudiced by the alleged delay. The Tribunal did not consider that the time delay in itself was sufficient to sustain the plea of mora. The Tribunal was of the view that for the plea of mora to be successful there would have to have been excessive or unreasonable delay and a material alteration of circumstances to the detriment of the Respondent. The Tribunal was of the view that despite the delay in this case, the second part of the test of mora was not fulfilled as there was no material alteration of circumstances to the detriment of the Respondent. Accordingly the Tribunal repelled the preliminary plea.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr McCann stated that the facts and averments of duty were admitted in terms of the Joint Minute however the issue of professional misconduct was a matter for the Tribunal. He submitted that was still open to the Tribunal to take the view that it is not safe to convict in the absence of any evidence being available from the Respondent's former office due to the dissolution of the partnership and the considerable length of time since the conveyancing problems arose.

## **SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid submitted that given previous decisions of the Tribunal and in particular those decisions referred to in pages 127-132 of Smith & Barton's book it is settled law that failure to record deeds timeously amounts to professional misconduct. Mr Reid submitted that the Complaint alleges clear failures to deal with such matters and amounts to professional misconduct.

## **DECISION**

The Tribunal was of the view that failure to record deeds timeously amounts to professional misconduct and noted that there are previous decisions from the Tribunal to that effect. In this case the Respondent's failures put the various purchasers and the lender at risk and in cumulo amount to serious and reprehensible conduct as defined in the case of Sharp v The Council of the Law Society of Scotland 1984 SC 134.

## **SUBMISSIONS FOR THE RESPONDENT IN MITIGATION**

Mr McCann referred the Tribunal again to the terms of the detailed medical report lodged by him. Mr McCann asked the Tribunal to take into account that the failures by the Respondent took place a long time ago in 1998. Mr McCann submitted that he had no comments to make on the matter of expenses however he asked the Tribunal to exercise its power to limit the publicity in this case in order that it would not affect the Respondent's current partner. Mr McCann advised that the Respondent would not have been assumed as a partner had he thought that this matter was still outstanding.

In relation to the Respondent's failures Mr McCann submitted that these were from 1998 at the latest and that there has been evidence of detailed co-operation with the Law Society and he urged the Tribunal to be lenient and impose only a Censure as the circumstances justify leniency.

## **PENALTY**

The Tribunal noted that when the failures occurred the Respondent was under some very considerable health pressures and accepted that the failures to record deeds resulted from these pressures. The Tribunal therefore considered that in the circumstances these failures were at the lower end of the scale of professional misconduct. The Tribunal noted that the Respondent has recovered completely from his illness and has been assumed as a partner in another firm. The Tribunal also took into account the lengthy period of time since these failures occurred and considered



that in all the circumstances a fine would not serve any purpose and a lenient penalty was appropriate. Accordingly the Tribunal Censured the Respondent and made the usual award for expenses. In relation to publicity the Tribunal considered that there were no grounds for exercising its very limited discretion to restrict publicity and accordingly made the usual order.

**Vice Chairman**