

**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**

against

**ALEXANDER GILMOUR
MALCOLM, Solicitor, 23 Tarvit
Drive, Cupar, Fife**

1. A Complaint dated 1st December 2004 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alexander Gilmour Malcolm, Solicitor, 23 Tarvit Drive, Cupar, Fife (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 27th January 2005 and notice thereof was duly served on the Respondent.

4. When the case called on 27th January 2005 it was adjourned on the motion of the Respondent, who was not ready to proceed. The Tribunal adjourned the case to be heard on 23rd March 2005.
5. The Complaint was heard on 23rd March 2005. The Complainers were represented by their Fiscal Paul Reid, Solicitor, Glasgow. The Respondent was present and represented himself.
6. A Joint Minute was lodged in which the facts, averments of duty and averments of professional misconduct in the Complaint as amended were admitted.
7. The Tribunal found the following facts admitted or proved;
 - 7.1 The Respondent was born 15th July 1952. He was admitted as a solicitor on 10th September 1976. He was enrolled as a solicitor in the Register of Solicitors in Scotland on 30th September 1976. He was employed with the firm Campbell Brooke & Myles from 1st April 1984 until 31st December 1998. Thereafter he was a partner in the firm of Burns & Company from 1st January 1999 until 11th May 2001. Then he was a consultant partner with Messrs Clark & Ross Solicitors from 14th May 2001 until 31st October 2001. He was thereafter employed as a solicitor with J & G Wilson of 18 High Street, Kinross from 1st November 2001 until 3rd September 2004. The Respondent is presently not employed by a firm

7.2 Messrs A

Messrs A are a firm of Chartered Quantity Surveyors who operate from an address, Property 1. The Respondent formerly acted on behalf of that firm. In particular the Respondent acted on behalf of the firm in connection with a court action raised by them against the individual Mr B of Property 2. This court action related to professional fees dues to Messrs A following work carried out by them on behalf of Mr B in relation to alterations carried out to the address of Mr B. Ultimately the action at the instance of Messrs A was successful and a principal sum was awarded and recovered from Mr B. In addition, due to the success of the action, an award of expenses was made in favour of Messrs A. However during the course of the court action there had been a number of contra awards of expenses made against the firm Messrs A.

7.3 The firm Messrs A had paid to the Respondent a considerable sum towards the expenses of the aforesaid court action as it progressed. They sought from the Respondent a full and detailed accounting in respect of the monies paid to the Respondent and recovered on their behalf. The response from the Respondent was less than satisfactory as a consequence of which the firm Messrs A required to raise an action of account reckoning and payment against the Respondent to obtain from him a full and detailed accounting as to the manner in which he had dealt with their funds. It subsequently transpired that during the currency of his instructions, the Respondent had deliberately misled and deceived the partners of Messrs A by reporting to them a number of deceptions concerning the award of expenses made against the said Mr B. In particular the Respondent misled Messrs A by advising them that:-

- (a) A Charge for Payment was, after Decree had been obtained, served by Sheriff Officers on Mr B. The Charge for Payment had not been complied with.
- (b) A Poinding had been carried out and that goods belonging to Mr B had been uplifted and taken to a sale room in Falkirk.
- (c) Shortly prior to the sale of these goods, the poinded items had been redeemed by Mr B. Despite that, Mr B had not made payment of the award of expenses in full and that he had left himself open to be sequestrated.
- (d) Mr B was about to be sequestrated.

None of the above statements were true. The statements were contrived by the Respondent in his reports to his client. The information contained in the statements was entirely false. The Respondent deliberately misled his clients by reporting to them a number of deceptions which he knew to be untrue.

7.4 The Respondent made a payment of £22,000, to Messrs A. The terms of settlement included provision, in writing, namely that Messrs A would sign in favour of J & GW an Assingation of all rights competent to them, in terms of the Decree for expenses granted against Mr B and, it was agreed Messrs A would withdraw their complaint to the Law Society of Scotland. These terms were accepted by Jameson & Mackay, on behalf of Messrs A.

7.5 The Respondent was sequestrated from 12th August 2004.

8. Having considered the foregoing circumstances the Tribunal found the Respondent guilty of professional misconduct in respect of:

8.1 his deliberately contriving a number of statements which he intimated to his clients maintaining that they were true and accurate. The information intimated by the Respondent to his clients was untrue. The Respondent deliberately misled his clients into believing a state of affairs existed which was not so and the Respondent knew that it was untrue, all contrary to Article 7 of the Code of Conduct for Solicitors Holding Practising Certificates issued by the Law Society of Scotland in 1989.

9. Having heard the Respondent in mitigation the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 23rd March 2005. The Tribunal having considered the Complaint dated 1st December 2004 at the instance of the Council of the Law Society of Scotland against Alexander Gilmour Malcolm, Solicitor, 23 Tarvit Drive, Cupar, Fife; Find the Respondent guilty of professional misconduct in respect of his acting in a dishonest fashion by contriving a number of false reports to his clients and providing his clients with false information which he knew to be untrue, all contrary to Article 7 of the Code of Conduct for Solicitors Holding Practising Certificates issued by the Law Society of Scotland in 1989; Censure the Respondent and Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that until 11th August 2007 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 or successive employers as may be approved by the Council of the Law Society of Scotland 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 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 Law Society's Table of Fees for general business; and

Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

A Cockburn (signed)

Vice 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

Vice Chairman

NOTE

A Joint Minute was lodged in which the facts, averments of duty and averments of professional misconduct in the Complaint, as amended, were admitted. No evidence was accordingly led.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid stated that the Respondent had been instructed in the raising of an action against Mr B and had been successful in recovering the principal sum plus expenses. The Respondent's clients were anxious to ensure recovery of their expenses and sought an accounting from the Respondent in connection with the monies that they had paid to him. They had instructed other solicitors who raised an action of accounting. The Respondent deliberately misled his clients by providing them with dishonest information in connection with the enforcement of the Decree for expenses. The Respondent's clients were upset and had been caused inconvenience as a result of the Respondent misleading them. A court action had been raised against the Respondent and he had paid £22,000 to his clients and the right to recover the expenses from Mr B had been assigned to the Respondent but there could be a problem with this as the Respondent was sequestrated. Mr Reid pointed out that the Respondent had saved time and expense by entering into a Joint Minute.

SUBMISSIONS FOR THE RESPONDENT

The Respondent explained that he had prepared an account for judicial expenses in the sum of £13,158 but he was not satisfied with regard to the level of expenses and wanted more detail and this account had, in any event, been returned by the Sheriff Clerk because the fee had not been paid. The Respondent explained that between November 2001 and July 2002 he was particularly pressed in connection with other matters and his clients, Messrs A, were pestering him all the time. The Respondent explained that one lie led to another and he was under particular pressure trying to

deal with files transferred from his old firm and also new business that he had taken on when transferring to his new firm. One of the members of his family was also ill and the Respondent accepts that he took his eye off the ball. The Respondent explained that he was able to give his clients a cheque for £22,000 as he had received money from his father's estate. The Respondent stated that although Messrs A had withdrawn their complaint from the Law Society and the Law Society had written to him to say that they had closed their file, the Law Society had still decided to pursue the matter and take the case against him to the Tribunal. The Respondent emphasised that he had made no financial gain from what had happened and had lost a lot of money as a result. The Respondent stated that he was not able to practice as a principal at the moment due to his sequestration and asked that the Tribunal deal with the matter by way of a Censure. The Respondent explained his financial situation and family situation. In answer to a question from the Tribunal the Respondent stated that he felt unable, at the time that the action was raised against him, to admit what had happened and so paid out more than was necessary.

DECISION

The essential qualities of a solicitor are honesty, truthfulness and integrity. The Respondent's conduct on this occasion was not in accordance with the basic principals of honesty. He misled his clients by contriving a number of statements which he intimated to them as being true when they were not. The Respondent well knew that they were not. This conduct brings the profession into disrepute and is not the kind of conduct the public would expect of a solicitor. The Tribunal however took account of the fact that the Respondent had been in practice for 28 years and had never had any previous difficulties and had co-operated with the Law Society and entered into a Joint Minute. The Respondent seemed genuinely contrite with regard to what had happened and had straightforwardly explained the circumstances to the Tribunal. The Respondent had probably paid his clients a sum in excess of what had actually been required. The Tribunal noted that the Respondent was presently sequestrated. The Tribunal considered Censuring the Respondent but in view of the serious view that the Tribunal takes of any kind of dishonesty, the Tribunal felt that it was also necessary to impose a restriction on the Respondent's practising certificate to ensure protection of the public. The Tribunal felt it was appropriate to impose this

restriction until 11th August 2007 when the Respondent's sequestration is due to expire. The Tribunal made the usual order with regard to publicity and expenses.

Vice Chairman