

**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**

**JOHN RANKINE SMITH  
Solicitor, Messrs A F & CD Smith  
Solicitors, 30 Harbour Street,  
Stranraer**

1. A Complaint dated 26 November 2008 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that John Rankine Smith, Solicitor, Messrs A F & C D Smith, Solicitors, 30 Harbour Street, Stranraer (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 29 April 2009 and notice thereof was duly served on the Respondent.
4. On 29 April 2009, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by James McCann, Solicitor, Clydebank.

5. The Answers were withdrawn and the Respondent pled guilty to the Complaint.

6. The Tribunal found the following facts established

6.1 The respondent was born on 10 July 1957. He was admitted as a solicitor on 25 November and enrolled as such on 28 December both months of 1979. He is the sole principal of AF & CD Smith, Solicitors, 30 Harbour Street, Stranraer.

**Mr A deceased**

6.2 Mr A died on 7th June 1993. The respondent was instructed in connection with the administration of the estate. He embarked on that executry administration on 23rd June 1993. The estate was large and complex and gave rise to issues involving taxation. By August 1995 the beneficiaries had agreed to proceed by way of a Deed of Family Arrangement. Thereafter there was correspondence in relation to a Will Trust Bond and in November 1998 the respondent took advice from senior counsel about that. In 2003 because the estate was still not wound up one of the beneficiaries (Mr B; see below) invoked the assistance of the complainers. In 2003, a complaint of inadequate professional service was upheld in respect of the respondent's delay in winding up the executry, and at that stage he agreed to make payment of compensation to Mr B in the sum of £900. The respondent paid the compensation in September 2003.

6.3 Mr B is one of two sons of the deceased and is a beneficiary in his late father's estate. His solicitors are Messrs. McMillan Kilpatrick of Ayr. Through those solicitors, Mr B complained that his brother Mr C the other beneficiary of the estate received additional sums from his late father's estate. The respondent

replied that Mr C was entitled to this additional payment because of a lifetime gift made to Mr B by his late father. As at the date of determination of the first complaint condescended upon the dispute between the brothers about the distribution of their late father's estate remained unresolved.

- 6.4 On 5<sup>th</sup> January 2004 i.e. shortly after disposal of the first complaint, the respondent wrote to McMillan Kilpatrick proposing that the remainder of the estate be divided equally between Mr C and Mr B as the way of completing matters. McMillan Kilpatrick again pointed out that in their view there had been an underpayment to their client. They stated that they and their client wished matters to be resolved as soon as possible. In the ongoing exchange of correspondence it was suggested that the matter be remitted to a suitably qualified third party.
- 6.5 On 28<sup>th</sup> July 2004 McMillan Kilpatrick wrote to the respondent and suggested contacting the complainers for guidance in relation to the possible instruction of a suitably qualified independent third party. In the absence of a response from the respondent, a reminder was sent to him on 16<sup>th</sup> August 2004.
- 6.6 The respondent replied on 18<sup>th</sup> August 2004 stating that he would contact the complainers before the end of the week. However the respondent did not write to the complainers until 23<sup>rd</sup> September 2004. He was prompted to do so by receipt of a fax on that date from Messrs. McMillan Kilpatrick. A list of suitably qualified solicitors was produced by the complainers and a copy sent to McMillan Kilpatrick who by letter dated 8<sup>th</sup> October 2004 suggested the instruction of Mr. D of Messrs. Maxwell McLaurin (who was not among the persons suggested by the complainers). On 4<sup>th</sup> November 2004 the respondent made contact with Messrs. Maxwell McLaurin by letter asking if they could assist. Messrs. Maxwell McLaurin wrote to the

respondent on 11<sup>th</sup> November 2004 stating Mr. D's fee rate. Prior to this Mr. D had made two telephone calls to the respondent, neither of which had been returned by the respondent, something which Mr. D mentioned in the letter. The letter requested further information about the case.

- 6.7 By letter to the respondent dated 19<sup>th</sup> November 2004 Messrs. McMillan Kilpatrick requested an update. On 26<sup>th</sup> November 2004 the respondent sent to them a copy of Messrs. Maxwell McLaurin's letter of 11<sup>th</sup> November 2004. On 14<sup>th</sup> December 2004 the respondent sent his file to the auditor of court for an interim fee note to be prepared. The auditor returned the file on 17 December 2004.
- 6.8 On 16 December 2004 Messrs. McMillan Kilpatrick wrote to the respondent. They confirmed their client's agreement to Messrs. Maxwell McLaurin's fee. They pointed out that, although the executry estate would normally bear this fee, they felt that in the circumstances of the case some sort of gesture should be made by the respondent in connection with the fee. The respondent did not reply. On 28<sup>th</sup> February 2005 Messrs. McMillan Kilpatrick sent a reminder to the respondent and, in the absence of a reply to that letter, sent a further reminder on 3<sup>rd</sup> March 2005.
- 6.9 On 7<sup>th</sup> March 2005 the respondent wrote to Messrs. Maxwell McLaurin. He enclosed only what he referred to as "the latest executry file." Messrs. Maxwell MacLaurin immediately passed the file to a law accountant. By a memo dated 11 March 2005 the law accountants advised of the further information and documents required by them. As noted on their file, Messrs. Maxwell McLaurin telephoned the respondent and requested that he send to them a print out of a ledger. As the respondent did not do so a reminder was sent to him by letter dated 9<sup>th</sup>

December 2005. At that point the respondent forwarded the ledger. Messrs. Maxwell McLaurin sent a further letter to the respondent dated 30<sup>th</sup> January 2006 saying that they intended to prepare a new account of charge and discharge. In that letter they asked for all of the original executry files. In a further letter to the respondent dated 20<sup>th</sup> February 2006 by way of a reminder Messrs. Maxwell McLaurin again asked for these files.

- 6.10 Mr. B thereafter again invoked the assistance of the complainers. The complaint was duly intimated to the respondent.
- 6.11 The respondent replied to the complaint on 29th September 2006. He said, inter alia, the following:-
- “1. There is no more estate to wind up. All the estate has been realised.
2. Accounts were sent to Mr. B’s solicitors. All that has changed is an increase in invested funds due to interest.
3. I should be grateful if you could ask Mr. B to show me correspondence where there was an agreement he should be paid an additional sum. Any inequality in distribution is in respect of previous lifetime transfers from the late Mr. B’s father.”
- 6.12 By letter dated 30<sup>th</sup> December 2006 Messrs. Maxwell McLaurin explained that although they had asked the respondent by telephone on various occasions to provide information required by the law accountants nothing was ever forthcoming from him.
- 6.13 Having been advised by the complainers that the matter was being sent to a reporter the respondent wrote again to the complainers on 17<sup>th</sup> January 2007 and stated, inter alia:-

“What is the point of all this. We have prepared and submitted an account of charge and discharge. From recollection although we do not have the file we have prepared and submitted a clients account print out.

With respect our recollection is that we did not approach Messrs. Maxwell and MacLaurin but they were approached by Messrs. McMillan Kilpatrick SSC.

We are anxious for this executry to be completed. Can you assist in bring this long outstanding matter to an end.”

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

- 7.1 his unconscionable delay and failure to complete his administration of the estate of the late Mr A between January 2004 and August 2006, having previously delayed unreasonably in the administration of said estate between 1993 and 2003.

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

Edinburgh 29 April 2009. The Tribunal having considered the Complaint dated 26 November 2008 at the instance of the Council of the Law Society of Scotland against John Rankine Smith, Solicitor, Messrs A F & C D Smith, Solicitors, 30 Harbour Street, Stranraer; Find the Respondent guilty of Professional Misconduct in respect of his unconscionable delay and failure to complete the administration of an estate between January 2004 and August 2006 having previously delayed unreasonably in the administration of the said estate between

1993 and 2003; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00 and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

**(signed)**

**David Coull**

**Vice Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Vice Chairman**



**NOTE**

The Respondent had lodged Answers to the Complaint but these were withdrawn on the day of the hearing and it was confirmed that the Respondent pled guilty to the Complaint as libelled. A written plea in mitigation was lodged and as there were no members of the public present it was not necessary for this to be read out. Mr McCann referred to the written plea in his submissions. Mr Lynch confirmed that he had had sight of the plea and had no objection to anything contained therein.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Lynch explained that there had been a significant delay up until 2003 which was 10 years after the death. An inadequate professional service finding was made at this time and following this there was no improvement and one of the beneficiaries invoked the assistance of the Law Society. Mr Lynch stated that there had been no complaints by the executors but referred the Tribunal to Smith & Barton page 139 case 588/89, which shows that solicitors owe a duty to beneficiaries to wind up the estate. Mr Lynch stated it was accepted that there were difficulties with this executry. He also indicated that he appreciated the co-operation of the Respondent and his agent.

**SUBMISSIONS FOR THE RESPONDENT**

Mr McCann referred to his written plea in mitigation and confirmed that one of the executors was an accountant and external to the Respondent's firm. He indicated that he wished to emphasise the unusual feature of this case. When the draft accounts had been prepared they were adjusted taking account of the lifetime gift made to Mr B. It was not until 5 or 6 years later that Mr B stated that he would not accept the adjustment. Mr McCann pointed out that it was never part of the duty of a solicitor to resolve a dispute between beneficiaries. The Respondent however should have indicated that he noted the claim made by the beneficiary but that the adjustment had been made and he had no further proposals to make with regard to the matter. The Respondent was in a position where he had done all that he could but his failure was not to make matters clear. There were awards of inadequate professional service

against him but he still felt that he could not deal with the problem. Mr McCann explained that the Respondent had other problems to deal with at that time but he had now come through these and had improved his practice and improved the mechanisms for communication. Mr McCann explained that it was accepted that the Respondent did not react properly to the situation. Mr McCann advised that he was instructed in February 2009. Mr Lynch clarified that there was no suggestion that the pre 2003 delay was professional misconduct. Mr McCann explained the Respondent's professional background and the circumstances of the Complaint in his written plea in mitigation. He clarified that the major part of the executry work had been concluded by 2001. The problem with the delayed completion of the executry was the dispute between the beneficiaries. Mr McCann explained that the Respondent never took independent advice at any stage. If the Respondent and his firm had acceded to the instructions of Mr B they would have attracted a complaint from Mr C whose share would have had to be reduced. Mr McCann clarified in his written plea in mitigation that the Respondent accepted that he culpably delayed in the appropriate communication to the beneficiaries and their agents. Mr McCann indicated that the Respondent should have made it clear that the issue had been identified as being truly within an area of factual and legal dispute which he, as agent for the executors could not resolve. This should then have been communicated to the executors and the beneficiaries, making it clear what the position was and that it was for them and their own advisors to take such action as they saw fit. Mr McCann explained that the Respondent had been sanctioned by the Law Society to the extent of £3500 in respect of an inadequate professional service compensatory award and refund of fees. The Law Society's Professional Conduct Committee originally took the view that the situation did not amount to prosecutable misconduct but the matter was taken to the Ombudsman by the Lay Complainer whose recommendation then led to the Complaint coming to the Tribunal. Mr McCann further explained in his written plea in mitigation that following taking guidance, the Respondent withdrew from acting and disbursed the existing funds equally between the two beneficiaries leaving it to them and their advisors to decide what further steps to take with regard to resolving their dispute. Mr McCann pointed out that the Respondent has practised for 30 years without any difficulty. Mr McCann explains the steps the Respondent has taken to ensure his office is modernised and outlined the Respondent's personal and financial situation.

The Tribunal had difficulty with this case and invited the fiscal to further address it on how the facts were sufficient to amount to professional misconduct.

### **FURTHER SUBMISSIONS FOR THE COMPLAINERS**

Mr Lynch referred the Tribunal to the averments in Article 2.4, which he indicated should be read together with the background of delay between 1993 and 2003. Mr Lynch pointed out that a letter was sent on 28 July 2004 suggesting that the Law Society be contacted for advice but despite prompting there was no reply until 18 August 2004 and it was not until 23 September 2004 that the Respondent contacted the Law Society. On 8 October 2004 it was suggested that he instruct Messrs Maxwell Maclaurin but this was not done until November 2004 and thereafter the Respondent failed to return two telephone calls made by Mr D of Maxwell Maclaurin. Between November 2004 and March 2005 there was no significant activity. On 7 March 2005 the Respondent sent the file to Maxwell Maclaurin who then asked for further information. A reminder was sent in December 2005 and there was no explanation for this significant period of delay which was ongoing into 2006. Mr Lynch submitted that the Respondent had primary responsibility for progressing the executry and that this had to be looked at in the context of a previous delay. Mr Lynch indicated that the Tribunal should also take into account the fact that the explanation given was indicative of the lack of attention and diligence and Mr Lynch referred the Tribunal to page 139 of Smith & Barton. Mr Lynch indicated that the Respondent should have been able to say that the accounts had been produced and finalised and the beneficiaries could then have taken whatever steps were required. Mr Lynch indicated that there was no suggestion that the Respondent took instructions from the executors with regard to this matter and his leaving the estate in limbo was professional misconduct.

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

Mr McCann indicated that it was a matter for the Tribunal but explained that it was accepted that the Respondent had a duty to reply to his professional colleagues. Reference was made to page 67 and 68 of Smith & Barton.

**DECISION**

The Tribunal considered that this was a very borderline case. The solicitor was caught in the crossfire between two brothers who had fallen out. It was not in the Respondent's power to sort this matter out and this fall out was what contributed significantly to the delay in finalising the executry. The Respondent however accepts that he did not move matters forward as he should have done. Although the Respondent's primary duty was to the executors, he also had a duty to the beneficiaries. There was no evidence that the Respondent made contact with the executors with regard to the difficulties that he was having. The Tribunal had a great deal of sympathy for the position that the Respondent found himself in but noted that the Respondent accepted that he had not dealt with matters properly. It is the duty of a solicitor undertaking the administration of an executry to deal diligently with the estate and bring it to completion within a reasonable time. There was a clear delay between January 2004 and August 2006 and this taken in the context of the previous delay between 1993 and 2003 and also taken together with the Respondent's failure to respond to letters and phone calls from fellow agents resulted in the Tribunal finding that the Respondent's conduct did amount to professional misconduct. The Tribunal considered it unfortunate that even after the award of inadequate professional service had been made the Respondent still failed to deal with this executry as a matter of priority. The Tribunal however considered that the Respondent's conduct fell at the very lowest end of the scale of professional misconduct and did not consider that anything other than a Censure would be an appropriate sanction. The Tribunal made the usual Order with regard to expenses and publicity.

**Vice Chairman**