

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

FINDINGS

in Complaint

by

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

against

**ALEXANDER RITCHIE
ROBERTSON, Solicitor, Messrs
Robertson Smith Solicitors, 148
Nethergate, Dundee**

1. A Complaint dated 16 April 2007 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alexander Ritchie Robertson, Solicitor, Messrs Robertson Smith Solicitors, 148 Nethergate, Dundee (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 which raised a preliminary issue.
3. In terms of its Rules the Tribunal appointed a debate to be heard in respect of the Complaint on 23 August 2007 and notice thereof was duly served on the Respondent.

4. When the case called on 23 August 2007, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Jonathan Brown, Counsel.
5. After hearing submissions from both parties the Tribunal refused the Respondent's motion to dismiss the Complaint as time barred.
6. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 23 August 2007. The Tribunal having considered the Complaint dated 16 April 2007 at the instance of the Council of the Law Society of Scotland against Alexander Ritchie Robertson, Solicitor, Messrs Robertson Smith Solicitors, 148 Nethergate, Dundee; Refuse the Respondent's motion for dismissal of the Complaint as time barred; Continue the case to a date to be afterwards fixed; Reserve the question of expenses and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Gordon Cunningham
Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

The Respondent's Answers contained a preliminary plea of time bar. The matter was accordingly set down for a debate.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown explained that the Respondent's motion was for dismissal of the Complaint on the basis of the preliminary point that it was time barred. Mr Brown submitted that the Law Society has a policy of not entertaining stale claims and this particular claim should not have been entertained. Mr Brown explained that there were two general questions for the Tribunal: firstly, whether the time bar defence was available to a solicitor appearing before the Tribunal; and secondly, if it was available, what was its scope. Mr Brown submitted that the principles were analogous to the Prescription and Limitation Act 1973. He stated that the time begins to run from the date of default or the date by which the Complainer could with reasonable diligence have become aware of the default. Mr Brown explained that the Answers to the Complaint were not full because the original files were not yet available. Mr Brown submitted that the act complained of ended at the end of 1992 when the Respondent ceased to be involved and at the very latest ended when he left Thorntons in October 1993. A complication was that Thorntons continued to act for the Complainer for a number of years and it was only at the end of the relationship between the Complainer and Thorntons that the Complainer took matters further and raised a damages action in 2001 and made the Complaint to the Law Society in 2002. Matters were put on hold until the conclusion of the damages action which is usual procedure and Mr Brown confirmed that no issue was taken with regard to this. Mr Brown stated that because 10 years had elapsed between the conclusion of the work and the making of the Complaint, the Law Society should not have entertained the Complaint. Mr Brown stated that the Tribunal was a creature of statute and had no express power to throw out a Complaint due to time bar. Mr Brown, however, submitted that the Law Society had a policy not to entertain claims after a period of 2 years and this was a publicly announced policy. Mr Brown asked whether if the Law Society misapplied their policy, the Tribunal could correct this error. Mr Brown referred the Tribunal to the previous decision of the Tribunal (Campbell Riddell Breeze Paterson) when the Tribunal considered that it

did have such a jurisdiction although the Campbell Riddell case was an Appeal under Section 42A where the Tribunal was acting as an Appellate body. Mr Brown stated that the previous Tribunal decision did not give any general theoretical explanation of the Tribunal's powers. It was not clear whether it was the right of the Complainer to complain or the Society's power to entertain the Complaint that was time barred or whether the Tribunal had an unfettered right to quash the Law Society's determination. In the Campbell Riddell case, the Tribunal quashed part of the Law Society's determination on the basis that the client should have investigated at the time because he had cause to suspect what had happened. The Tribunal's decision in respect of this was not argued on Appeal to the Court of Session. Mr Brown stated that it was accepted that the 1973 Act did not apply but submitted that if the prosecuting body publicly states that it will not entertain Complaints after x period had elapsed then this should not be done. Mr Brown submitted that in calculating time, time started to run from the time of default unless the person could not with due diligence have become aware of the default. This was applied in the Campbell Riddell case and was applied in respect of the damages claim made by the Complainer in the case of Adams v Messrs Thorntons & Others. Lord McFadyen's opinion was that the lay complainer could with reasonable diligence have been aware of the problem from at the latest 1995 and the claim was not raised until 2001 and accordingly it had prescribed. Mr Brown stated that the complication in this case was the continuing involvement of Thorntons. While Thorntons continued to act for the lay complainer it could be argued that the lay complainer could not reasonably know of the default. Mr Brown, however, pointed out that it was not Thorntons that were being prosecuted before the Tribunal, it was the Respondent and professional misconduct is personal to the solicitor and the Respondent had not acted for the lay complainer since at the very latest 1993. The Respondent had no control over whether or not Thorntons continued to act for the lay complainer. Mr Brown submitted that it would be inequitable to say that the case would have been time barred but for the fact that Thorntons continued to act for the lay complainer. Mr Brown submitted that even if the time began to run from as late as 1995, the Complaint was not made until 7 years later. Mr Brown asked that the Tribunal hold that the Complaint was time barred and should be dismissed. Mr Brown accepted that it was difficult to talk of rights being absolutely lost when the legislation did not provide for this, but the Tribunal's powers of disposal were unlimited and therefore the Tribunal had the power to achieve a just result and should

be able to correct errors made by the Law Society in the application of its own policy. If the Tribunal lacked the power to do so, the solicitor would have to take judicial review proceedings in the Court of Session. Mr Brown submitted that there may be a difference between a Complaint taken by a lay complainer and a Complaint taken by the Law Society *ex proprio motu*. Mr Brown asked that if the Tribunal was not with him, a further procedural hearing should be fixed.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch provided the Tribunal with written submissions. He indicated that this case was of importance to the profession. Mr Lynch emphasized that the Law Society's Policy of only accepting Complaints for investigation made within 2 years was only a guideline. Mr Lynch explained that Lord McFadyen had held that the lay complainer should have been aware of the position by 1995 at the latest. Mr Lynch further explained that during the dependence of the action, the lay complainer obtained an opinion from an experienced conveyancing solicitor who was instructed as an expert. This solicitor's view was that there had been a number of serious acts of professional misconduct and recommended that even at this late stage a Complaint should be made to the Law Society. Mr Lynch pointed out that where there was a reference to the Ombudsman, the Society might be required to reinvestigate the Complaint and bring a Complaint or a prosecution long after the expiry of the 2 year or previously 5 year period. Mr Lynch submitted that the Law Society's policy makes it clear that the cut off point is normally 2 years, but if there are exceptional circumstances, that time limit can be set aside. Mr Lynch submitted that exceptional circumstances applied in this case. Mr Lynch stated that the Law Society dealt with the matter promptly once the Complaint had been made. Mr Lynch pointed out that although the actings complained of happened a long time ago, it is not uncommon in the Criminal Courts to find cases proceeding tens of years after the events complained of. Mr Lynch submitted that it was sensible for the Law Society to have a general policy of how it dealt with stale Complaints, however, there was no formal or rigid policy. Mr Lynch stated that if the position was that Complaints could not be investigated after 2 years, the situation could arise where a solicitor whose dishonesty comes to the attention of the Law Society only after a long period of time, would be entitled to avoid prosecution before the Discipline Tribunal simply due to the lapse of time. Mr

Lynch submitted that what the Respondent's preliminary plea was trying to do was have the Tribunal decide on the reasonableness of the Law Society's decision to prosecute him. Mr Lynch submitted that the Tribunal does not have the jurisdiction to entertain such an argument and that the appropriate forum for such a challenge would be judicial review in the Court of Session. Mr Lynch submitted that the Tribunal has no power to refuse to entertain a Complaint brought by the Law Society except in accordance with its own constitution and rules, none of which apply, or in very restricted circumstances and Mr Lynch then referred the Tribunal to various case law, Mr Lynch referred the Tribunal to the Council of the Law Society of Scotland-v-Hall [2002 SLT 989]. In this case the First Division held that the correct starting point from which to examine delay was the lodging of the Complaint with the Tribunal. Mr Lynch also referred the Tribunal to the case of Barry Tonner-v-Reiach and Hall [2007 CSIH48] where it was concluded that the Court had an inherent jurisdiction to order that proceedings be brought to an end because of excessive delay on the part of those who bring them. Mr Lynch, however, suggested that the Tribunal's decision in the Campbell Riddell case was wrong because as a matter of law, the subject matter under discussion does not admit a plea of prescription or limitation being sustained. Mr Lynch stated that it was not clear what the Tribunal found was time barred. Mr Lynch suggested that the Tribunal should have confined itself to saying that it did not think it was reasonable that the Society should have made any award or determination so long after the event and that it would accordingly in the exercise of its discretion quash the determination. Mr Lynch accepted that the case of Barry Tonner was not strictly in point but submitted that it was instructive of the approach which the Tribunal should take. He submitted that it was clear that the question of whether a delay occurs before or after the proceedings are raised is not a material distinction. Mr Lynch stated that the question which flowed from the opinion in Barry Tonner was whether the point had been reached at which justice could not possibly be done. Mr Lynch submitted that unless the Tribunal was satisfied that such a state of affairs existed, the prosecution must be allowed to proceed. Mr Lynch submitted that the Respondent had not shown that this was the case.

Mr Lynch also submitted that the Law Society's guidelines referred to 2 years from the date of the action or when the Complainer found out about it. Mr Lynch stated that the lay complainer made the Complaint within 2 years of Thorntons ceasing to act for

him. Mr Lynch also pointed out that if the Law Society had taken the Complaint *ex proprio motu* there could have been no argument as the Society only knew about the conduct in 2002. Mr Lynch stated that it was accepted that the Tribunal had an inherent jurisdiction but submitted that it could only dismiss the case if justice could not now be done due to the delay. Mr Lynch stated that if this was what was being alleged, a Minute should have been lodged averring prejudice.

Mr Brown clarified that he was not making a submission that justice could not be done as he could not make this submission at this stage as he required to see the files first. Mr Brown clarified that his submission was that, as a point of principle, if the Law Society said that there was a cut off point this should be applied consistently and the Tribunal should ensure that this was the case.

DECISION

The Tribunal considered the submissions from parties carefully. The case raises interesting and difficult points. It is clear that the Prescription and Limitation Act 1973 does not apply to the Tribunal proceedings. The Tribunal does not accept that it has the power to dismiss a case because the Law Society has not properly applied its own policy. This would involve judging the reasonableness (in the *Wednesbury* sense) of a Law Society decision. There is nothing in the statute to give the Tribunal such a power and the Tribunal does not consider that it has jurisdiction to review a decision of the Law Society to prosecute a Complaint or to decide as a matter of principle whether the Law Society has applied its own policy correctly. The proper course of action for the Respondent if he wishes to challenge the Law Society's decision would be to apply for a judicial review.

In any event, in this case, the Tribunal does not consider that it is in a position to decide whether or not the Law Society has or has not applied its policy correctly. The Tribunal would require evidence of exactly what the policy was rather than just an information sheet. The Tribunal consider that the case of *Campbell Riddell* is dealing with a completely different type of situation. In the *Campbell Riddell* case the Tribunal was sitting as an Appeal Tribunal with an unfettered discretion to vary or quash the Law Society's determination and direction.

The Tribunal also noted that in terms of Section 51 of the Solicitors (Scotland) Act 1980, a party other than the Law Society can take a Complaint to the Tribunal. It is possible that the Ombudsman could bring a Complaint to the Tribunal which would be out with the Law Society's normal timescale for considering Complaints. It could seem nonsense if the Tribunal had to reject a Complaint if it was made by the Law Society out with this time period as time barred but could not do so when it came from the Ombudsman. The same point may also arise in connection with a Complaint by the Law Society, *ex proprio motu* rather than by a lay complainer, but the Tribunal cannot lay down a general principle on this point as it would depend on the individual facts and circumstances of each case.

The Tribunal, however, is of the opinion that it does have an inherent jurisdiction to find a case is time barred but the individual facts and circumstances of the case would have to be examined before this could be decided. If the Tribunal was satisfied that a point had been reached at which justice could not possibly be done due to the excessive delay, the Tribunal would have the power to bring a case to an end as time barred.

The Tribunal is not making a decision on whether or not it is not in the interests of justice to proceed due to the delay in this case. If this is to be argued at a future date then the Respondent should lodge an appropriate Minute in pursuit of his argument. Although the Tribunal considers that it cannot decide as a matter of principle on whether or not the Law Society has applied its own policy correctly, the application of any policy may be a relevant factor to take into consideration in considering whether or not a point has been reached at which justice could not be done.

The Tribunal accordingly refused the Respondent's motion. The Tribunal reserved the question of expenses until the substantive hearing on the merits of the Complaint. The Tribunal made the usual Order with regard to publicity and the case was continued to a date to be afterwards fixed.

Chairman