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

DECISION

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND

against

ROBERT THOMAS, Solicitor, of Messrs Robert Thomas & Caplan, Solicitors, 365 Victoria Road, Glasgow

1. A Complaint dated 22 November 2004 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that Robert Thomas, Solicitor, of Messrs Robert Thomas & Caplan, Solicitors, 365 Victoria Road, Glasgow (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. A preliminary plea of res judicata was intimated on behalf of the Respondent.

3. In terms of its Rules the Tribunal appointed a preliminary hearing to be fixed on 2 December 2004 and notice thereof was duly served on the Respondent.

4. At the hearing on 2 December 2004 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and was

represented by Herbert Kerrigan QC and by his solicitor David Sievewright, Solicitor, Glasgow.

5. Having considered submissions on behalf the Respondent and having heard the Fiscal on behalf of the Complainers the Tribunal decided to reserve its Decision and to issue it in due course. The Tribunal then considered its Decision. The Tribunal repelled the plea of res judicata and agreed to intimate the Decision to the parties. The Tribunal decided that the issue of expenses be reserved until the conclusion of the matter The Tribunal pronounced an Interlocutor in the following terms :-

> Edinburgh, 2 December 2004. The Tribunal having considered the Complaint dated 22 November 2004, at the instance of the Council of the Law Society of Scotland against Robert Thomas, Solicitor, of Messrs Robert Thomas & Caplan, Solicitors, 365 Victoria Road, Glasgow, Dismiss the Respondent's preliminary plea of res judicata and adjourn the Hearing of the Complaint to such future date as may be fixed. Direct that the issue of expenses be reserved until the conclusion of the matter, and Direct that publicity be given to this Decision but that such publicity be deferred until a date to be agreed by the Tribunal.

G Fraser Ritchie
Chairman

6. A copy of the foregoing Interlocutor together with a copy of the Decision 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

G Fraser Ritchie
Chairman

NOTE

A preliminary plea of res judicata was submitted on behalf of the Respondent and the case was set down for a debate on this preliminary plea on 2 December 2004.

SUBMISSIONS FOR THE RESPONDENT

Mr Kerrigan stated that the basis of his plea is that there is no distinction between what the Complainers are seeking to do in terms of this discipline procedure and that done by the Crown in the unsuccessful prosecution of Mr Thomas which resulted in an acquittal after a trial at Glasgow Sheriff Court. His plea of res judicata is based on the fact that in both cases the standard of proof is the same i.e. beyond reasonable doubt, the facts are precisely the same and the subject matter is precisely the same. Mr Kerrigan argued that in such circumstances, the earlier authority of Tucker (Discipline Tribunal Case 797/90), which will be relied upon by the Complainers, is distinguishable from the present circumstances. He referred the Tribunal to the main terms of the indictment against Mr Thomas which was correctly copied into the Record. In his view, in so far as it is possible to ascertain, the basis of the charges of professional misconduct are substantially the same as the allegations in the indictment. He stated that the Complaint in this case is not entirely in accordance with the rules as the charges of professional misconduct are referred to in a blanket way and are not detailed individually.

Mr Kerrigan stated that the main part of the indictment was that Mr Thomas acted knowingly or having reasonable grounds to suspect that Mr A's properties represented the proceeds of drug trafficking and that he acted for the purpose of assisting Mr A to get round the Confiscation Order. Mr Kerrigan argued that that is precisely what is specified as alleged misconduct in this case and that what his client was accused of in the indictment is indistinguishable from the gravamen of the misconduct charge. Mr Kerrigan argued that in these particular circumstances the Court having held that Mr Thomas "neither knew or had reasonable grounds to suspect that Property 1, in whole or in part, directly or indirectly represented the proceeds of drug trafficking of Mr A, his client and that he did not assist Mr A to avoid the making or enforcement of a Confiscation Order …" it is very difficult to see on what basis that Mr Thomas's

actings could amount to professional misconduct. Mr Kerrigan submitted that the plea of res judicata is well founded as his client has been tried and acquitted of precisely the matters alleged as misconduct in the present case.

Mr Kerrigan stated that the Tribunal has before it the relevant parts of the indictment and made reference to the Criminal Law Consolidation (Scotland) Act 1995 and to the Criminal Justice (International Co-operation) Act 1990 Section 14(2)(b) and accepted that the wording in the Complaint correctly reflects the sections involved. Mr Kerrigan stated that the gravamen is "knowing or should have known" and "assisting".

Mr Kerrigan referred to the Tucker case which is summarised in Smith & Barton's book on The Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal at page 23. He stated that this case gives the broad proposition of the requisites of a plea of res judicata. These are four in number. Mr Kerrigan read from Smith & Barton's book at page 23 –

" It has been broadly stated that the requisites of a plea of res judicata are

(a) a proper previous determination of the subject in question
(b) the parties to the second cause must be identical with, or representative of the parties to the first cause, or have the same interests
(c) the subject matters of the two actions must be the same, and
(d) there must be identity of media concludendi or grounds of action in law or in fact."

Mr Kerrigan stated that he adopted what was said in that paragraph. In relation to (a) - proper previous determination, he stated that that is not in dispute in this case. In relation to (c) - the subject matters of the two actions must be the same, he submitted that the Complainers are using the same bundle of productions as the Crown used at the trial and that there is no dispute about that. In relation to (b) - the parties to the cause are to be the same, he submitted that in the Tucker case the Fiscal did not seek to challenge the plea on this ground and he didn't think that the Fiscal would in this case either. Lastly he turned to the significant aspect of the case – (d) the media concludendi – Mr Kerrigan stated that this was the substance of his argument against

the Tucker case. He argued that the distinction which the Court of Session made in case of the Procurators of Glasgow v Colquhoun 1900 2F1192 (which is referred to in the Tucker case), doesn't apply here because the charges contained in the Complaint allege the same criminal conduct of which the Respondent had already been acquitted, and therefore in these circumstances it is not competent for the Tribunal to hear it.

He referred to page 24 of Smith & Barton and asked if there was anything in the charges which alleges different criminal conduct? He stated that he didn't think that the Fiscal would dispute that there was not. In the Tucker case the Tribunal held that there was a distinction between the words in the indictment and the Complaint and that if the Complaint contained the same words it wouldn't have been competent for it to proceed further.

Mr Kerrigan then turned to the indictment and the relevant charges. He referred to pages 17 of the Record, which detailed the charge 3 in full. He also referred to charge 5 on pages 17 and 18 and stated that that follows the wording of s14(2)(b) of the 1990 Act again. Again the wording was similar in relation to the property at Property 2 and the conveyance by Mr A and Ms B to Mr C and Ms B.

Mr Kerrigan stated that the charges on the indictment were a feature of the two statutes concerned. He stated that what is contained in the Complaint is simply a repetition of the statutory provisions which have been incorporated into the money laundering aspects of the Solicitors rules. He stated that in these circumstances though the Fiscal has chosen to make general reference to averments of facts, he has simply narrated what was the Crown case against Mr Thomas and simply said all of this amounts to professional misconduct and this Tribunal can visit it. Mr Kerrigan stated that his submission was that the Tribunal cannot visit it because it is absolutely identical and within the exception in Tucker in these circumstances there is a bar against the Tribunal hearing this case.

Mr Kerrigan stated that he was aware that the Fiscal would seek to rely on English authorities but submitted that both the cases of Saeed 1985 ICR 637 and Redgrave 2003 EWCA CIV 4 are distinguishable because they proceed on English procedural matters and are entirely different from Scottish practice and procedures and therefore

are of little assistance to the Tribunal. Mr Kerrigan stated that he did not intend to refer to these cases in detail but could proceed to rebut that proposition if the Tribunal are persuaded by the Fiscal that they should be taken into account.

Mr Kerrigan stated that in his view the critical issue is the comparison of the Complaint before the Tribunal and the indictment which Robert Thomas faced and of which he was acquitted by the decision of the learned Sheriff. Mr Kerrigan then stated that unless he could assist the Tribunal further those were his submissions.

The Tribunal asked Mr Kerrigan to deal specifically with how the Fiscal had incorporated into the Complaint the aspect of the Money Laundering Regulations in the Solicitors' rules.

There are other references in Article 2 to allegations of discussions of Money Laundering Regulations and Mr Kerrigan referred the Tribunal to the narration of the facts and submitted that all of this was the Crown case against Mr Thomas. He stated that when one comes to the averments of duty set out at Article 3 at page 15 of the Record, the allegations of duty which are included there have elicited the response that he has been arguing, and the Complaint has difficulty defining the particular gravamen of the charge. The Complaint goes on to look in detail at the duties. Mr Kerrigan stated that what has been specified is at page 16 of the Record -

> "The Respondent was well aware that the instructions he received from Mr A were designed solely to defeat the efforts of the Crown who were endeavouring to recover and confiscate the assets of Mr A. Having acted in the fashion which he did, the Respondent acted dishonestly and brought the profession into disrepute"

Mr Kerrigan stated that the essence of the Complaint is this aspect of dishonesty i.e. the criminal intention of the Respondent and that, in his submission, is identical to that which was the gravamen of the indictment. He noted that reference is made in Article 3.2 to the Code of Conduct for Solicitors, then there is greater specification in Article 3.3 of Article 5(a) of the said Code. Mr Kerrigan stated that the Fiscal in this case is seeking to pray in aid the provisions of the Solicitors' rules and in particular

the terms of Article 5(a). Mr Kerrigan argued that all this does in essence is simply to echo the statutory provisions which the Court was concerned with in terms of its decision on the indictment in the Sheriff and Jury case and in which the Sheriff upheld a submission of no case to answer. Mr Kerrigan stated that is why in his view, there is considerable force in his argument that Tucker makes it crystal clear that if it is a matter on which the law and facts are indistinguishable, the plea of res judicata is made out. In this case the facts in the Record are the same as those considered by the learned Sheriff when considering the no case to answer submission.

In answer to a question from the Tribunal as to whether he was saying that the statutory provisions before the Court were the same as the allegations in the Complaint Mr Kerrigan replied in the negative but said that in essence the prosecutions have the same identical features both in fact and in law. He stated that in his view, that is why it would be inappropriate for the Tribunal to decide it could not sustain this plea of res judicata.

Mr Kerrigan stated that when it comes to averments of professional misconduct the difficulty the Respondent has is the blanket averment in Article 4.1 that he has been guilty of -

> "acts or omissions which singularly or in cumulo constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980.."

Mr Kerrigan stated that there is no further specification of the averments. In his view, both the Respondent and the Tribunal are at the disadvantage of having to distil from the various averments what it is that the Fiscal is getting at. Mr Kerrigan's stated that in his opinion all that the Fiscal is getting at is the matter already decided upon by the Sheriff Court.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid referred the Tribunal to the list of authorities for the Complainers. He referred firstly to the second authority – copies of pages 70 –75 of McPhail on Sheriff Court Practice (2nd Edition). He referred to paragraph 2.104, which states

> "The rule may be stated thus: when a matter has been the subject of a judicial determination pronounced in foro contentioso by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds."

Mr Reid stated that the test referred to has four parts to it. Firstly the decision on the matter must have been made by a competent tribunal. Mr Reid conceded this point. He referred to page 73 of McPhail's book where it states that

> "A judgement in a criminal court may be res judicata in a civil action only in the exceptional circumstances that the parties are the same, the ground of action the same, and the remedy sought the same."

In his submission the exceptional circumstances referred to by McPhail are not present in this case. Mr Reid argued that the Sheriff Court and the Tribunal are different forums entirely. Mr Reid did not accept what was conceded in Tucker that the parties are the same. Mr Reid stated that he is not in any way connected to the public prosecution system and is not influenced by it. Mr Reid submitted that the grounds of action are different in the Sheriff Court and the Tribunal. In the prosecution in the criminal court, the Procurator Fiscal was faced with libelling a contravention of two criminal statutes and here the Respondent faces charges of professional misconduct in relation to alleged breaches of standards expected of solicitors. Mr Reid argued that the remedies also differ markedly. In this case there is no prospect of loss of liberty. The remedy sought would impact on the Respondent's livelihood and professional reputation.

Mr Reid conceded that the second condition referred to by McPhail has been met.

However, in relation to the third condition, that the subject matter of the two actions has to be the same, Mr Reid stated that he had already argued that the subject matter differs considerably. He stated that here we are dealing with a common law standard and breach of the code of conduct, not breaches of the criminal law.

In relation to the fourth condition, media concludendi, Mr Reid stated that he understood that the factual circumstances are the same as led to Mr Thomas appearing before the Sheriff. Mr Reid conceded that the factual circumstances in the Complaint are probably the same as in the criminal prosecution. He accepted that he had lodged the productions from the trial in this case also. However, Mr Reid stated that the point he was making was that the outcome that is sought differs markedly and the authorities do allow for this to arise even where there has been an acquittal from the criminal charge.

In response to a question from the Tribunal, Mr Reid confirmed that he thought that he could prove what was in the Respondent's knowledge better than the prosecution did in the trial. He was asked if there were any new facts and replied that he was not involved in the original trial, but that he did not possess any new facts from what was available at the criminal prosecution. If he proved these facts, the Respondent might be guilty of professional misconduct.

The Tribunal pointed out that there are aspects of the allegations in the Complaint which are not a breach of the criminal law but which are allegations of breaches of the Solicitors' Code of Conduct, namely the failure to withdraw deeds from the Register.

In relation to McPhail's fifth condition, (para 2.109) the parties are to be the same, Mr Reid stated that he was not the same as a Procurator Fiscal, he is appointed differently. He stated that the fifth condition is not satisfied and that the res judicata plea should be repelled.

Mr Reid referred to the case of Redgrave. This was a decision of the Court of Appeal in England in 2003. Redgrave was a Police Officer charged with perverting the course of justice. The case was dismissed at the committal stage in the Magistrates Court, a

procedural hearing to decide if the case can go further and which in Mr Reid's view may be comparable to a no case to answer situation. The Court held that even assuming there was an acquittal from a criminal court, the double jeopardy rule had no role and there was no bar to disciplinary proceedings in relation to the same charge. Mr Reid referred to the dicta of Lord Diplock in the case of Ziderman –v- General Dental Council [1976] 2 All ER 334 quoted at paragraph 33 of the Redgrave case-

> "The purpose of disciplinary proceedings against a person convicted of crime is not to punish him a second time for the same offence but to protect the public who come to him as patients and to maintain the high standards and good reputation of an honourable profession"

Mr Reid stated that in his opinion this statement is of some relevance to this Tribunal as the Tribunal is concerned not with statute law, but is here to protect the public and to maintain the high standards of the profession. Mr Reid asked the Tribunal to consider paragraphs 37and 38 of the decision in the Redgrave case. At paragraph 38 it states -

> "..the material before the tribunal is likely to be different; in part because different rules of evidence are likely to apply and in part because judicial discretions may well be differently exercised – generally less strictly in the disciplinary context where at least the accused's liberty is not at stake…"

In conclusion, Mr Reid submitted that this case falls squarely within the bounds of the Tucker decision. As pointed out by a member of the Tribunal there are different averments and one does not relate to the criminal charges, but he conceded that the facts and circumstances are probably the same. However he argued that the conclusion sought is different from that sought in the previous Court. Mr Reid asked the Tribunal to repel the plea and to fix a hearing for evidence.

FURTHER SUBMISSIONS FOR THE RESPONDENT

Mr Kerrigan dealt firstly with the point raised by a member of the Tribunal that the Complaint deals with an additional averment of fact not included in the criminal trial.

He stated that this point was the subject of disputed evidence at the trial and that had the trial continued would have been the subject of further evidence.

In relation to the use of English authorities, Mr Kerrigan stated that this is always a difficult issue and that it is necessary to look at the procedural aspects with care. He stated that the pre-trial procedure in the Magistrates Court in England is not in any way comparable to a trial followed by a successful no case to answer submission in Scotland. He stated that in essence the Fiscal is seeking to say that the Tribunal should overrule Tucker by reference to these English authorities. Mr Kerrigan submitted that what is said at p33 of the Redgrave case by Lord Diplock does not refute the crux of the decision in the Tucker case and lessens the direction taken by the early case of Colquhoun. In the English cases they are not dealing with proof beyond reasonable doubt. They have the hybrid test in England between balance of probabilities and beyond reasonable doubt depending on the seriousness of the charge. He referred the Tribunal to Lord Justice Popplewell's judgement at paragraph 21 of the Saeed case (in the ICR at page 644). He argued that the English authorities are not consistent with the decision that the Tribunal itself took in Tucker and which the Court in Scotland took in Colquhoun. He submitted that the English authorities are of little assistance in the determination of this matter.

In answer to a question from the Tribunal, Mr Kerrigan stated if the argument that the powers of the court are different is enough to repel a plea of res judicata then that argument logically extended would mean that such a plea could never arise as a Tribunal will never have powers of imprisonment.

In answer to what was referred to in Sheriff McPhail's book, Mr Kerrigan stated that in his view McPhail is not contrary to the Tucker case and that McPhail just has a different way of expressing things. He stated that he was astonished that the Fiscal did not make the concession made in the Tucker case and that, in his view, the Fiscal's position is indistinguishable from that of the Crown and that this is highlighted in the case of Redgrave. He referred to McPhail's book at pages 71 to 75 and stated that the features of the plea of res judicata are made out. He stated that there is no specific aspect of the Complaint referring to matters not covered in the criminal proceedings which relates solely to solicitor's business. He stated that the Tribunal is being asked

to come to a different conclusion from the Sheriff and that would mean the Fiscal would be asking the Tribunal to say that the Sheriff got it wrong.

The Tribunal pointed out that different evidential rules apply to cases before it, as such proceedings are governed by the Civil Evidence (Scotland) Act 1988.

Mr Kerrigan stated in response that in principle it could be the case that the Tribunal could be dealing with the same evidence but applied different rules of procedure. In his view, if the Fiscal proves what he is intending to, the conclusion would be that the Sheriff should have come to a different conclusion. In his submission, the essential issues of law have already been focussed and dealt with by the Sheriff in the criminal case and distinguishing the English cases in accordance with the law of Scotland, the Tribunal should uphold the plea of res judicata.

The Tribunal asked if Mr Kerrigan was accepting that there was a higher standard for solicitors than for members of the public. In response Mr Kerrigan stated that, in his view, the distinction becomes negligible when dealing with the same set of facts. He argued that the Tribunal should not be saying that the facts were not properly applied the first time and that therefore the plea of res judicata is made out.

The Tribunal asked Mr Kerrigan if he thought that there were areas of professional misconduct, which do not amount to res judicata.

Mr Kerrigan replied that such areas should have been specifically alluded to by the Fiscal in bringing the Complaint. He stated that there should be more specification of misconduct, but everything in this case is just lumped together in general averments of professional misconduct.

DECISION OF THE TRIBUNAL

The Tribunal considered all the authorities that it had been referred to by the parties. In particular, the Tribunal considered the test set out in the Tucker case and referred to in Sheriff McPhail’s book on Sheriff Court Practice.

The Tribunal noted there was acceptance that the first part of the test, that there must have been a proper previous determination, had been satisfied.

The Tribunal then turned to the second part of the test, that the parties must be identical, or be representative of the parties to the first cause or have the same interests. The Tribunal was of the view that Section 1 of the Solicitors (Scotland) Act 1980 gives the Law Society an additional object that the Lord Advocate doesn't have, that is the promotion of the interests of the solicitors profession as well as the promotion of the interests of the public in relation to that profession. The Tribunal took the view that without the concession made in the Tucker case, although the Law Society and the Crown have a common interest, as argued by Mr Reid it goes further than that. The Tribunal took the view that the Complainers are not the same as the Crown who are prosecuting in the public interest. The Tribunal recognised that the remedies sought in the two actions were different. In this case there is no prospect of loss of liberty. In these disciplinary proceedings the remedy sought would impact on the Respondent's livelihood and professional reputation. The Tribunal was of the view therefore that the parties are not identical, that the Law Society is not representative of the Crown and that their interests in prosecuting these cases are not the same.

The Tribunal then considered the third part of the test, that the subject matter of the two actions must be the same. The Tribunal was satisfied there is a difference in that in this case it is dealing with a common law standard and alleged breaches of the Code of Conduct for solicitors and not alleged breaches of criminal law statutes. The Tribunal noted that there do appear to be additional matters included in the Complaint which did not form part of the charges in the indictment, namely that contained in Article 3.4 of the Record in relation to the Respondent's alleged failure to withdraw deeds from the Lands Register once he was aware of the existence of the Interdict. The Tribunal considered that there may indeed be the same evidence adduced but that arising from that evidence there may be different issues. In particular differences may arise in relation to the admissibility and sufficiency of evidence required as the Tribunal is governed by the Civil Evidence (Scotland) Act 1988. Therefore the Tribunal considered that the subject matter of the two actions was not identical.

The Tribunal then considered the fourth part of the test, that there must be identity of the media concludendi, or grounds of action in law or in fact. The Tribunal noted that the Fiscal had stated that although the facts and circumstances may be the same the remedy sought is markedly different. The Tribunal had regard to the judgement of Lord Justice Simon Brown in the case of Redgrave at paragraph 38 where he stated -

> "There are two main reasons why the double jeopardy rule should not apply to tribunals even where they apply the criminal standard of proof. In the first place it must be recognised that the character and purpose of proceedings is entirely different – the central point made by Lord Diplock in Ziderman (see paragraph 33 above). Secondly, however, and no less importantly, the material before the tribunal is likely to be different; in part because different rules of evidence are likely to apply and in part because judicial discretion may well be differently exercised – generally less strictly in the disciplinary context where at least the accused's liberty is not at stake. It may also be that on occasions…witnesses will be readier to give evidence at disciplinary hearings held in private than in the full glare of open court proceedings."

The Tribunal was of the view that this English authority could assist the Tribunal given the generally accepted paucity of Scottish authorities in relation to disciplinary matters. In the case of Redgrave it appears the standard of proof was also beyond reasonable doubt (see para 37). The Tribunal also noted that because of the effect of the Civil Evidence (Scotland) Act 1988, whereas essential facts need to be corroborated in a criminal trial, the evidence in this case may not be the same. The Tribunal considered Mr Kerrigan's argument that as the Tribunal has no power of imprisonment that res judicata is effectively a dead letter and can never arise. The Tribunal was of the view that this is not the case as res judicata is possible in other circumstances where the test in Tucker is able to be satisfied.

The Tribunal did not agree with Mr Kerrigan's contention that a dismissal of the plea of res judicata would be tantamount to saying that the Sheriff got it wrong, as in hearing the evidence in the case the Tribunal might be proceeding on different evidence. The Tribunal was reassured in this view by the above quoted words of Lord Justice Simon Brown, and also approving the dicta of Lord Diplock at para 33 of

Redgrave, which were referred to by the Fiscal, and therefore concluded that the media concludendi are not necessarily the same. The Tribunal noted that Mr Kerrigan had argued that if there was a distinction between criminal behaviour and misconduct that the Fiscal should have specified it in the Complaint and not lumped it altogether in averments of misconduct. However, the Tribunal was of the view that there was sufficient notice in the Complaint as to what the Complainers consider the Respondent has done or failed to do to which amounts to misconduct. The Tribunal was of the view that for the very good reason that the allegations are not a criminal charge they are not encapsulated within a single charge of misconduct.

Accordingly the Tribunal determine that the test in Tucker is not satisfied and that the exceptional circumstances referred to by McPhail do not exist in this case and therefore the plea of res judicata should be repelled and a future date fixed for the hearing of evidence in this matter. The Tribunal direct that the question of expenses be reserved until the conclusion of the matter. The Tribunal direct that publicity be given to this decision but that such publicity be deferred until a date to be agreed by the Tribunal.

G.Fraser Ritchie

Chairman