

**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 NIGEL FERGUSON
MUIR, 24 Roseburn Terrace,
Edinburgh**

1. A Complaint dated 8th 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 John Nigel Ferguson Muir, 24 Roseburn Terrace, Edinburgh (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. No answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 26th April 2006 and notice thereof was duly served on the Respondent.
4. The hearing took place on 26th April 2006. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself.

5. A Joint Minute admitting the facts and averments of duty was lodged. The averments of professional misconduct were not admitted.

6. The Tribunal found the following facts established

6.1 The Respondent was born on 24th February 1951. He is a Solicitor enrolled in Scotland. He was admitted on 24th January and enrolled on 12th February both months of 1979. He was formerly a Partner in the firm of Messrs. Gray Muirhead, Solicitors, 33 York Place, Edinburgh. He now resides at 24 Roseburn Terrace, Edinburgh. He is not currently employed by any legal firm in Scotland.

6.2 **Miss A**

Miss A, LLB RGN is a consultant in rehabilitation and continuing needs. She operates from Property 1. She was instructed by the Respondent in connection with an action for damages in which he represented the Pursuer. The Pursuer in turn was acting on behalf of her daughter Ms B who had sustained a serious injury in a road traffic accident. Miss. A carried out substantial work in the case and rendered three fee notes dated 25th March 1999, 16th May 1999 and 9th September 1999 in the total sum of £2,925.50. Having received no communication or payment from the Respondent, Miss A wrote on 15th March 2000 to the Respondent's firm. At this stage she was dealing with the Respondents qualified assistant Mr. C. No response was made to that letter. On 5th June 2000 Miss A wrote again. On this occasion the Respondent replied to her, and stated that he was endeavouring to sort out the issues of expenses and the outstanding fees due to various experts and concluded by saying that he would let Miss A have a report on progress as soon as possible. Miss A acknowledged this letter on 10th June 2000 indicating that she looked forward to hearing

further from the Respondent. Miss A telephoned the Respondent's office on 1st March 2001, to be told that the accounts were to be taxed and that Gray Muirhead would "revert" to her. Thereafter Miss A wrote to the Respondent on 24th May 2001 and on 22nd October 2001. Neither of those letters was acknowledged by the Respondent. On 2nd January 2002 Miss A sought the assistance of the Complainers in resolving her dispute with the Respondent. Eventually Miss A raised court proceedings against the Respondent, and at that point the Respondent paid her account.

6.3 The Complainers first wrote to the Respondent on 9th January 2002. They requested a response within fourteen days. None was forthcoming. The Complainers wrote again to the Respondent on 24th January 2002. The Respondent did not reply. The Complainers adjusted heads of complaint with Miss A, and these were intimated formally to the Respondent by the Complainers under cover of a letter dated 5th June 2002. The letter identified the heads of complaint as being (1) failure to respond to Miss A's correspondence and telephone calls in relation to her outstanding accounts; (2) failure to make payment of Miss A's outstanding accounts despite instructing the complainer to act as an expert witness; and (3) failing to reply to Law Society correspondence. That letter requested that the Respondent produce within fourteen days his written response to the heads of complaint, any further background information which he wished to provide and his business file relating to the matter.

6.4 Thereafter the Respondent forwarded his files to the Complainers on 26th June 2002. He then telephoned the Complainers' client relations office on 30th July 2002 requesting the files back for the purposes of lodging them for a diet of taxation. The files were returned to the Respondent

on 31st July 2002 and acknowledged by him on 5th August 2002. The Respondent advised that the diet of taxation was to take place on 5th September 2002. On 17th September 2002 the Complainers wrote to the Respondent asking for an update following upon the diet of taxation. On 19th September 2002 the Respondent replied, stating that the taxation had been continued until 9th September at which time the Auditor had asked for certain additional information which was in the course of being provided to the Auditor. On 7th October 2002 the Complainers wrote to the Respondent requesting to know the current position. The Respondent did not reply. On 29th October 2002 a reminder was sent by the Complainers to the Respondent. The Respondent wrote to the Complainers on 6th November 2002. His letter dealt with matters concerning the same litigation that Miss. A had been involved in but his response did not deal with her account. On 16th December 2002 the Complainers wrote to the Respondent requesting a response within seven days. On 10th January 2003 the Complainers who had heard nothing from the Respondent wrote to him advising that if no response was received within fourteen days consideration would require to be given to whether statutory notices should be served upon him. On 12th February 2003 the Complainers served a statutory notice in terms of Section 42C of the Solicitors (Scotland) Act 1980, requiring the Respondent to produce to the Complainers within twenty one days thereof all books, accounts, deeds, securities, papers and other documents in his possession or control relating to Miss. A. The notice was obtempered on 25th March 2003, some twenty days late.

6.5 The accounts rendered in 1999 by Miss A were eventually settled by the Respondent in or about March 2004.

7. Having considered the foregoing circumstances and submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct in cumulo in respect of his failure to respond to correspondence in relation to outstanding fee notes from an expert witness instructed by him, his unreasonable delay in settling the fee notes of that expert witness, his persistent failure to respond to correspondence from the Law Society and his failure to timeously obtemper a statutory notice from the Law Society;
8. Having heard the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 26th April 2006. The Tribunal having considered the Complaint dated 8th September 2005 at the instance of the Council of the Law Society of Scotland against John Nigel Ferguson Muir, 24 Roseburn Terrace, Edinburgh; Find the Respondent guilty of Professional Misconduct in cumulo in respect of his failure to respond to correspondence in relation to outstanding fee notes from an expert witness instructed by him, his unreasonable delay in settling the fee notes of that expert witness, his persistent failure to respond to correspondence from the Law Society and his failure to timeously obtemper a statutory notice from the Law Society; 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

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 admitting the facts and averments of duty was lodged.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch advised that the Respondent had helpfully signed the Joint Minute that morning agreeing the facts and averments of duty. He advised that the issue for the Tribunal was whether these facts amount to professional misconduct in the circumstances.

Mr Lynch advised that the circumstances are summarised in Article 2 of the Complaint and stated that it is averred that these amount to professional misconduct singularly and in cumulo. Mr Lynch advised that the Respondent's first failure was to respond to Miss A, an expert witness instructed by him over a period of two years and four months prior to the Law Society's involvement in the case. There was also failure to settle Miss A fee note for a period of five years and failure to respond to correspondence from the Law Society and a failure to timeously obtemper their statutory notice.

Mr Lynch advised that Miss A was instructed as an expert witness regarding a complicated matter in relation to a head injury caused by a road traffic accident. She submitted three fee notes in 1999 which totalled £2925.50. By letter dated 15th March 2000 she wrote to the Respondent's firm and that stage the correspondence was being dealt with by Mr C, a qualified assistant under the Respondent's supervision. There was no response to that letter and by letter dated 5th June 2000 Miss A wrote again to the Respondent's firm. She received a response to that letter from the Respondent indicating that he was trying to sort out the matter. Miss A then heard nothing until she received a telephone call on 1st March 2001 telling her that the account was being taxed. Miss A wrote again by letters dated 24th May 2001 and 22nd October 2001. Neither letter was acknowledged. In 2002 Miss A sought the Law Society's help. Court action was raised by Miss A and the accounts were paid in full in 2004, a period of five years after they were originally submitted.

Mr Lynch advised that the correspondence with the Law Society began by letter dated 9th January 2002 which sought a reply within 14 days. There was no response to that letter or to a further letter of 24th January 2002. The heads of complaint were intimated to the Respondent by letter dated 5th June 2002 which also requested production of the files. This request was complied with by letter dated 26th June 2002. Mr Lynch indicated that there was then correspondence between the Respondent and the Law Society regarding the files in relation to the requirement that the accounts be taxed. The files were returned to the Respondent as a diet of taxation was to take place in September 2002. On 7th October 2002 the Complainers wrote to the Respondent requesting to know the current position. The Complainers did not receive a reply. On 29th October 2002 a reminder was sent by the Complainers to the Respondent. The Complainers received a reply but this did not deal with the issues in relation to Miss A's accounts. The Complainers wrote to the Respondent on 16th December 2002 requesting a response within 7 days. There was no response to that letter. The Complainers sent a further letter dated 10th January 2003 which again was not responded to. A statutory notice was then sent by the Complainers dated 12th February 2003, which notice was obtempered by the Respondent on 25th March 2003, some twenty days late.

Mr Lynch submitted that it is well settled law that a failure to respond to correspondence in these circumstances amounts to professional misconduct. Mr Lynch submitted that the investigation of Miss A complaint was delayed if not actually hampered by the Respondent's delay. Mr Lynch submitted that it is settled law that this course of conduct when taken together amounts to misconduct and he invited the Tribunal to find the Respondent guilty of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

The Respondent submitted that the issue of whether or not these circumstances amount to professional misconduct was a matter for the Tribunal to decide upon. The Respondent stated that he accepted that his conduct fell below the ethical standards of a solicitor practising in Scotland. He submitted that it was a matter for the Tribunal to determine whether or not the facts amounted to professional misconduct and stated that he was happy to leave it to the Tribunal to make this decision.

DECISION

The Tribunal was of the view that any failure in the obligation on solicitors to correspond with expert witnesses instructed by them and to settle such witnesses' fees timeously is a serious issue which affects the reputation of the profession. In addition, the Tribunal considered that it is the responsibility of members of the profession to respond timeously to correspondence and to statutory notices from the Law Society in order that the Society can effectively carry out its duties in dealing with complaints from members of the public. The Tribunal was of the view that the Respondent's failure to reply to correspondence from the Law Society hampered the Society's efforts to resolve the complaint against him. The Tribunal was satisfied beyond reasonable doubt that taking both failures into account this in cumulo amounted to professional misconduct.

MITIGATION

The Respondent submitted that his conduct arose from a particular set of circumstances and that he did not have a policy to withhold payment from expert

witnesses. He submitted there were unfortunate circumstances which resulted in the delay and that he wished to apologise to Miss A for the problems which arose. The Respondent submitted that during the period concerned his business was not doing terribly well. He advised that in 2003 the firm had to merge and himself and his partner left the profession at that stage. The Respondent advised that between 2000 and 2003 the firm was undergoing considerable financial difficulties and that it was hard to focus his attention on this particular matter. He advised that by the summer of 2003 he and his partner had decided that they needed to undertake a merger, however there was a gap between making this decision and identifying a firm to merge with and the merger taking place. The Respondent advised that in the second half of 2002 during which time a lot of the events condended upon took place, the financial position of the firm dramatically worsened and both he and his partner struggled to keep the business afloat and to stabilise matters so that they were able to be in a position to merge with another firm.

The Respondent advised that in the beginning of 2003 he had health problems which meant that his attention was further distracted from this matter. He advised that his health was a considerable source of worry and anxiety, especially during the first few months of 2003. The Respondent advised that during 2003 he and his partner did manage to stabilise the firm to some extent and the merger took place and he and his partner left the profession. The Respondent advised there was still some residual business to be sorted out including this case. He advised that he made settlement of the outstanding fee note in 2004. In summing up, the Respondent submitted that the combined pressures of his failing business and his health worries distracted him from carrying out as good a job as he would have wanted.

In response to a question from the Tribunal in relation to his current financial position the Respondent advised that he had had a series of jobs since leaving the profession but none have lasted for very long.

PENALTY

Having considered the circumstances of the case, the documentation and the submissions, the Tribunal was of the view that in this case the professional misconduct was at the very low end of the scale. The Tribunal noted that this was a

one-off incident arising from a particular set of circumstances and that the Respondent had voluntarily left the profession and does not have regular employment. In view of this the Tribunal considered that a Censure was the appropriate sanction to mark this failure. The Tribunal made the usual order for publicity and expenses.

Vice Chairman