

**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**

**DOUGLAS ANDREW LOGIE  
WINCHESTER, of Winchesters  
Solicitors, formerly of 71 Station  
Road, Ellon, Aberdeenshire now at  
57 Station Road, Ellon,  
Aberdeenshire**

1. A Complaint dated 25<sup>th</sup> April 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Douglas Andrew Logie Winchester, of Winchesters Solicitors, formerly of 71 Station Road, Ellon, Aberdeenshire now at 57 Station Road, Ellon, Aberdeenshire (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.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 6<sup>th</sup> October 2005 and notice thereof was duly served on the Respondent.
4. When the Complaint called on 6<sup>th</sup> October 2005 the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by Mr Clapham, Solicitor, Glasgow.
5. The Complainers led the evidence of four witnesses and the Respondent gave evidence on his own behalf. The case was then adjourned part-heard until 25<sup>th</sup> November 2005.
6. The Complaint called on 25<sup>th</sup> November 2005 and the Complainers were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by Mr Clapham, Solicitor, Glasgow.
7. After hearing submissions from both parties, the Tribunal found the following facts established

7.1 The Respondent was born 10<sup>th</sup> August 1952. He was admitted as a solicitor on 30<sup>th</sup> September 1976. He was enrolled as a solicitor in the Register of Solicitors for Scotland on 27<sup>th</sup> October 1976. Following his admission he secured employment as a solicitor. At

present he is a Partner in the firm Winchesters, Solicitors and Estate Agents, 57 Station Road, Ellon, Aberdeenshire.

7.2 Solicitors Direct

Solicitors Direct are a firm of Solicitors who practise from the address 4 Golden Square, Aberdeen. By letter dated 25<sup>th</sup> June 2002, they invoked the assistance of the Complainers in respect of conduct on the part of the Respondent. The Respondent was the solicitor for and acted on behalf of an organisation known as Company 1 of Property 1. The said firm, Solicitors Direct were solicitors for and acted on behalf of Company 2 (hereinafter referred to as “Company 2”) of Property 2. The Directors of Company 1 were a Mr A and a Mr B.

7.3 In or about early 2002, Company 1 required modernisation and reconstruction work to be carried out to the commercial premises from which their business operated. They instructed and agreed terms with Company 2 for that organisation to carry out the work required. It was agreed between the parties that payment to Company 2 in respect of the work to be carried out would be paid to them by way of staged payments. Given the terms of this arrangement, Company 2 required security to ensure that they would be paid. It was agreed between Company 1 and

Company 2 that the security to be provided would take the form of an irrevocable Mandate instructing the Respondent to make payment of invoices intimated by Company 2. The two Directors of Company 1, Mr A and Mr B were in the course of having a re-mortgage effected over their residential dwellinghouses with a view to securing funds to be loaned to Company 1 which would *inter alia* facilitate the payments required to Company 2 in respect of the invoices submitted by Company 2 for the work done by them to the commercial premises of Company 1.

7.4 By letter dated 23<sup>rd</sup> April 2002, Solicitors Direct, acting on behalf of Company 2 wrote to the Respondent enclosing a draft form of irrevocable mandate which was in the name of the Director, Mr A alone. Solicitors Direct specifically asked the Respondent to clarify whether the funds to be received by him would be held on behalf of Mr A as an individual, alone, or on behalf of both Directors, Mr A and Mr B. They also sought confirmation from the Respondent as to the amount of funds held or expected to be received by him. Having received this letter the Respondent thereafter sought instructions from the Directors of Company 1. Those instructions identified that the re-mortgage over the residential dwellinghouses of the Directors was to

enable the Directors to lend money to Company 1. Having learned this, the irrevocable Mandate would therefore have to be granted by Company 1 on whose behalf the Respondent expected to be holding monies for.

7.5 Having obtained these instructions, the Respondent wrote back to Solicitors Direct by letter dated 24<sup>th</sup> April 2002 advising them:-

“We refer to your letter of 23<sup>rd</sup> April and have to advise you that while we are not yet in funds, we believe that when funds are available we shall be holding them on behalf of Company 1. You may care to re-draft your mandate and let us have it for approval.”

Having received this information, Solicitors Direct re-drafted the terms of the mandate and returned it to the Respondent for execution on behalf of Company 1.

7.6 The mandate was signed by Mr A, a Director of Company 1 on 29<sup>th</sup> April 2002. The mandate irrevocably instructed Douglas Winchester to release funds to Company 2 when the said sums became due in terms of the contract between Company 1 and the said Company 2. In particular the Mandate provided that

“We irrevocably instruct you that the funds that are lodged with you are only to be released to the said Company 2 and are not to be released to any others

including ourselves”. Having had the mandate signed on behalf of Company 1, the Respondent wrote to Solicitors Direct on 30<sup>th</sup> April 2002 enclosing the mandate. That letter once again repeated that funds had not been provided as yet but assured Solicitors Direct that substantial sums were expected to be received which the Directors were lending to the company. The letter reflected the Respondent’s understanding of the situation. Having received the mandate there was further communication between Solicitors Direct and the Respondent, mainly Solicitors Direct making enquiry of the Respondent as to when funds were likely to be received. At no stage during the course of this correspondence did the Respondent indicate to Solicitors Direct that his instructions had changed with regard to the terms of the mandate.

7.7 Following the agreement which was reached between the respective companies, a stage payment was made to Company 2. The Respondent was acting on behalf of both Directors who were in the course of securing re-mortgages over their residential dwellinghouses to lend money to the company. There was a delay in the second and third payments being made to Company 2. As a result Solicitors Direct on 10<sup>th</sup> June 2002 wrote to the Respondent requesting payment of the second stage

payment. In this letter they also complained to the Respondent that they had learned the Respondent had made payment of an account to British Telecom due by Company 1 from monies held by the Respondent on behalf of Company 1. Payment had been made but to GSC IT for a telephone installation, which payment was in breach of the irrevocable mandate issued. Payments were also made to other creditors. The Respondent believed that there would be a sufficiency of funds and understood that if there were insufficient funds he could be personally liable for the amount paid. Separately by letter dated 11<sup>th</sup> June 2002 Solicitors Direct wrote again to the Respondent complaining that the Respondent on behalf of Company 1 had made payment of these sums. These payments had been made when the second stage payment remained outstanding. Company 2 issued their third and final invoice on 13<sup>th</sup> June 2002. At this time, Solicitors Direct on behalf of their clients were becoming concerned at the delay in payments being made. They wrote on behalf of their clients to the Respondent demanding payment. The Respondent had received money from the Director, Mr A. The mandate did not cover funds held by the Respondent as agent for Mr & Mrs A. Instead of these monies being transferred to the ledger operated for the company, Company 1, the

sum of £9211.51 was paid directly to the bank account of Company 1 on 18<sup>th</sup> June 2002. Prior to effecting this transaction the Respondent had not indicated to Solicitors Direct or to Company 2 that his instruction in relation to the transfer of funds and payments to be made to Company 2 had in any way been changed. The Respondent believed that Mr A was not happy that Company 2 had properly completed all the work that Company 2 were required to do and Mr A did not want Company 1 to pay further sums to Company 2. The Respondent advised Mr A that if Mr A did transfer funds in the Respondent's hands to Company 1, then if those funds were held by the Respondent as Company 1's Agent, he would be bound to forward those funds to Company 2. The Respondent was instructed by Mr A to transfer to the Respondent's ledger card for Company 1 sums such as that paid by the Respondent to GSL IT, and other creditors. Mr A instructed that beyond that, the funds were to go directly to Company 1's bank account and were not to pass through the Respondent's hands in his capacity as Agent for Company 1. The Respondent believed in all good faith that he was entitled to advise Mr A to proceed in this way as this was not a contravention of the Mandate. The Respondent wrote to Mr A on 21<sup>st</sup> June 2002 to ask for



his authority to explain the position to Solicitors Direct. No signed letter of authority was ever received by the Respondent from Mr A.

7.8 At or about this time the Respondent, independently and unbeknown to Solicitors Direct, made contact direct with Company 2 in response to a telephone message to do so. In turn that company brought the approach of the Respondent to the attention of their solicitors, Solicitors Direct. By letter dated 20<sup>th</sup> June 2002 Solicitors Direct wrote to the Respondent complaining that he had contacted their clients directly, bypassing their firm, when the Respondent well knew that their clients enjoyed independent legal representation. In terms of his letter dated 21<sup>st</sup> June 2002 the Respondent advised Solicitors Direct that the only monies which he held on behalf of Company 1, for distribution in terms of the mandate, was the sum of £34,665.86. The Respondent further added that two payments totalling that sum had already been made. By letter dated 18<sup>th</sup> June the Respondent wrote on behalf of Company 1 to Solicitors Direct confirming that he had not yet received the second Directors loan.

7.9 Solicitors Direct were unhappy with the manner in which the Respondent dealt with the obligations imposed upon him by the irrevocable mandate. They

invoked the assistance of the Complainers by letter dated 25<sup>th</sup> June 2002. Having received intimation of the Complaint, the Respondent made available to the Complainers computer print-outs of the client ledgers operated in respect of the transactions the Respondent had carried out on behalf of his clients, Mr and Mrs A, Mr B and Company 1. The ledger for Mr B discloses receipt of funds in the client account of the Respondent on 30<sup>th</sup> April with a transfer of the net balance being made to the account of Company 1 on 1<sup>st</sup> May. The sum transferred on this occasion was £34,655.86. Prior to this transfer being effected, the balance for the account of Company 1 was nil. Scrutiny of the ledger for Company 1 revealed that after the first stage payment was made to Company 2, the Respondent, in contravention of the irrevocable mandate, made payment of several other payments to different creditors of the said company. These payments reduced the balance on the account of Company 1. A balancing credit entry is made on 17<sup>th</sup> June by way of a transfer from a re-mortgage account. These monies were transferred from the ledger kept by the Respondent for Mr and Mrs A. Therefore despite what the Respondent advised Solicitors Direct in his letter of 21<sup>st</sup> June, £6087.12 of the re-mortgage for Mr and Mrs A had

been paid into the Company 1 account. Scrutiny of the client ledger operated by the Respondent for Mr and Mrs A revealed that re-mortgaged funds were received in that account on 11<sup>th</sup> June. £9211.51 on the Mr and Mrs A account was then transferred to a bank account operated for Company 1. The explanation as to why different procedures were adopted in relation to the re-mortgage proceeds for Mr B and Mr A was that different instructions were received from Mr A.

#### 7.10

##### Failure to Respond to the Complainers

Having received a letter of complaint from Solicitors Direct, the Complainers wrote on a number of occasions to the Respondent inviting him to provide a reply to the matters raised. The Respondent wrote to the Complainers on 8<sup>th</sup> October 2002. The Respondent wrote to the Complainers on 4<sup>th</sup> November 2002. As a consequence of his failure to reply in such a way as would enable the Law Society to complete its investigation, the Complainers issued a notice in terms of Section 15(2) of the Solicitors (Scotland) Act 1980 by recorded delivery dated 30<sup>th</sup> April 2003. Having received this notice, the Respondent indicated that he would provide the Complainers with a detailed letter of response. This reply was dated 1<sup>st</sup> May 2003. Despite that assurance, nothing was heard from the Respondent

as a consequence of which a further notice in terms of Section 15(2) of the Solicitors (Scotland) Act 1980 was intimated by recorded delivery to the Respondent dated 21<sup>st</sup> August 2003. The Respondent wrote to the Complainers on 1<sup>st</sup> September 2003. In his letter of 1<sup>st</sup> September 2003 the Respondent explained that he had drafted a response to the Complainers letter of 30<sup>th</sup> April 2003 but owing to an oversight the letter had not in fact left the Respondent's office. This letter was received by the Complainers on 21<sup>st</sup> September 2003.

8. Having considered the evidence led and the submissions made, the Tribunal made no finding of professional misconduct.
  
9. Having heard submissions regarding expenses and having noted that the Respondent was not seeking an award of expenses, the Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 25<sup>th</sup> November 2005. The Tribunal having considered the Complaint dated 25<sup>th</sup> April 2005 at the instance of the Council of the Law Society of Scotland against Douglas Andrew Logie Winchester, Solicitor of Winchesters Solicitors and Estate Agents, 57 Station Road, Ellon, Aberdeenshire; Make no Finding of Professional Misconduct; Make no Finding of expenses due to or by either party and Direct that publicity will be given to this decision and that this publicity will include the name of Respondent.

(signed)

Kenneth R Robb

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**

Answers had been lodged in which some of the facts in the Complaint were admitted. The Complainers led the evidence of four witnesses and the Respondent gave evidence on his own behalf.

**EVIDENCE FOR THE COMPLAINERS**

The Complainers led the evidence of Mr E, a practising solicitor in Aberdeen. Mr E confirmed that he was the solicitor acting for Company 2 who had been instructed by Company 1 to carry out extensive renovations to a car showroom. Mr E explained that Company 2 was a fledgling company at that time and this was the biggest contract that they had secured. Company 2 were concerned with regard to being overexposed and so staged payments and a mandate to ensure payment were arranged between Company 1 and Company 2. The Respondent was the solicitor acting on behalf of Company 1. The original mandate was drafted in the name of Mr A but this was returned by the Respondent who stated that it should be in the name of Company 1. Mr E referred the Tribunal to the letter from the Respondent which indicated that when funds became available they were to be held on behalf of Company 1 and accordingly it was appropriate that the mandate was by Company 1. The mandate was signed by Mr A on behalf of Company 1. The work commenced and the first stage payment was paid timeously. Mr E confirmed that the second invoice was submitted by him on 10<sup>th</sup> June 2002. Just before this his clients had told him that they were aware of Company 1 making payments to other creditors and this concerned them. Mr E stated that he brought this to the Respondent's attention in a letter dated 11<sup>th</sup> June. On the 13<sup>th</sup> June a third invoice was sent and concern was expressed with regard to delay in payment. The Respondent did not reply in writing to the letters. Mr E stated that around 20<sup>th</sup> June 2002 he heard that the Respondent had phoned Company 2 direct and the Respondent had no consent from him to do this. Mr E stated that he wrote to the Respondent on 20<sup>th</sup> June and asked for an explanation with regard to why he approached his client direct and also to obtain information with regard to the payments due. Mr E stated that he had a telephone conversation with the Respondent on 17<sup>th</sup> June when the Respondent stated that he had received funds in respect of Mr B but did not yet hold the funds on behalf of Mr

A. The Respondent also wrote a letter to him on the 18<sup>th</sup> June where he stated that he had not yet received the second directors loan. The Respondent also sent a letter on 21<sup>st</sup> June stating that he only held £34,665.86. Mr E stated that he had a gut reaction at this stage that something was wrong. He was then supplied with papers by Mr B which showed that the Respondent was in receipt of loan funds from Mr A by 17<sup>th</sup> June. Mr E referred to the ledgers which showed that the mortgage money was received into the ledger for Mr and Mrs A on the 11<sup>th</sup> June 2002 and that on 17<sup>th</sup> June 2002 £6087.12 was paid into the Company 1 account to cover payments made to other creditors. On the 18<sup>th</sup> June £9211.52 was transferred to Lloyds TSB account for the credit of Company 1. Mr E stated that there had been no indication from the Respondent that his client's instructions had changed. Mr E confirmed that on 18<sup>th</sup> June £8594 was paid to Company 2.

In cross examination Mr E stated that he did not think it was necessary to obtain a mandate from the directors as well as the company. He however accepted that a company was a different legal entity from the directors. He also accepted that if funds were held for a director this was different from holding funds for a company and that the mandate only applied to the funds held on behalf of Company 1 and not the funds held on behalf of the individual directors. Mr E also accepted that it would be within the power of the company director to say that funds should not be transferred to the company ledger. Mr E accepted that the funds held for Mr A were not covered by the mandate. Mr E also accepted that the Respondent's letter of 24<sup>th</sup> April used the words "we believe", which he took to mean that this was the position as understood by the Respondent. Mr E also accepted that the letter of 30<sup>th</sup> April reflected the Respondent's understanding of the position at that time. Mr E further accepted that the Respondent could not discuss matters with him in connection with Mr A's affair without a signed mandate from Mr A. He accepted that Mr A might have stated that he did not want the money going into the Company 1 ledger if he had not wanted the money to go to Company 2 in terms of the mandate because he was not happy with the quality of the work. Mr E further accepted that a solicitor was entitled to take his own fee and VAT but it was necessary to consider the nature of the fee taking. Mr E confirmed that his understanding was that if the Respondent had made payments in contravention of the mandate he would expose himself to being personally liable for these. Mr E accepted that the monies paid to third party creditors had been recouped



from the A's mortgage proceeds and then paid out to Company 2. Mr E accepted that the letter written by the Respondent on the 18<sup>th</sup> June was written as agent for Company 1 and stated that they had not yet received the second directors loan. Mr E also accepted that the Respondent could not advise him that he had got the money from Mr A's re-mortgage without Mr A's consent. Mr E stated that he did not recall who the Respondent had spoken to at Company 2 and did not know if he had left a message or spoken to somebody in person. Mr E stated in re-examination that he did not receive any information that there was a problem with the workmanship by Company 2. Mr E explained that he felt he was misled by the Respondent and emphasised that a mandate is based on trust between fellow solicitors.

The Complainers then led the evidence of Mr C of Company 2. Mr C confirmed that in 2002 Company 2 were employed by Company 1 to carry out extensive works. Company 2 were concerned with regard to getting paid and had contacted Mr E. The cost of the works was approximately £70,000 and Mr C stated that he was told that the partners in Company 1 were releasing money from their residential properties. Mr C explained that his solicitor advised him to get a mandate and he understood this to mean that once funds were lodged with the solicitor, the solicitor could not pay anyone else until Company 2 had been paid in full. Mr C confirmed that the first payment was made and he then received information from others that other creditors had been paid and this caused him concern. Mr C stated that he got a phone call from the Respondent out of the blue and spoke with him direct. He did not recall the exact conversation but thought that it comprised an assurance that Company 2 would be paid. Mr C stated that Company 2 had been threatening to go offsite. Mr C then advised his solicitor of this. Mr C confirmed that he was not told that Company 1 were unhappy with any of the work. In cross examination Mr C confirmed that the relationship between Company 1 and Company 2 broke down because Company 2 were not paid on time. Mr C stated that he was sure that he had a conversation with the Respondent. In response to a question from the Tribunal Mr C stated that he thought that the final account was in line with the estimates.

The Complainers next led the evidence of Mr A who confirmed that he was a director of Company 1 which was a second hand car sales business. Mr A stated that the business started in June 2001 and that the Respondent was his solicitor and his

company's solicitor. Mr A explained that Company 1 leased premises and wished to convert them into a showroom which involved substantial renovation. Company 2 were taken on as the main contractor. Mr A and his co-director Mr B both re-mortgaged their houses and obtained a bank loan in order to pay Company 2. Mr A confirmed that the Respondent did the conveyancing work in respect of his re-mortgage. Mr A also confirmed that he signed the mandate although he did not recall whether he had had advice about this. Mr A stated that all the money from the re-mortgage went towards the building work done by Company 2. Mr A said that his instructions to the Respondent were that all the money from the re-mortgage would go into the Company 1 ledger. He stated that the Respondent paid other creditors because he directed him to, it being necessary to make these payments in order for the company to commence trading. Mr A stated that the mandate did not cover all Company 1 funds only sufficient to pay the invoices from Company 2 within 7 days. Mr A explained that he thought the re-mortgages all went into one pot of money. Mr A stated that he recalled putting on hold one of the payments to Company 2 as he was not happy with the work in connection with the frontage and he told the Respondent not to pay the invoice. He however did not recall telling the Respondent to put the £6000 in. He stated that the balance of £9000 he thought all went into the one bank account. In cross examination Mr A stated that he had very little recollection with regard to the events. He indicated that his partner had taken all the records that he had. Mr A stated that he did not remember signing the mandate but accepted that he did. Mr A explained that in connection with the TSB account in Ellon, the Respondent had a cheque book and was a signatory as he was company secretary. He confirmed that the money was for settling the business accounts not just for paying Company 2. Mr A stated that there was sufficient in the budget to pay Company 2 and make payments to third parties.

The Complainers then led the evidence of Faye Shortt, Case Manager with the Law Society. Ms Shortt outlined the process followed by Case Managers in connection with complaints received. She emphasised that the whole system depended on responses being received from solicitors. Ms Shortt stated that she dealt with the latter stages of the complaint and had reviewed the files in connection with all the letters sent. The first letter of complaint was from Mr E on 25<sup>th</sup> June 2002. The first written intimation to the Respondent was by a letter dated 1<sup>st</sup> August 2002. The first

formal intimation which required a response was dated 17<sup>th</sup> September 2002. A reminder letter was sent on 9<sup>th</sup> October 2002 but Ms Shortt accepted that the Respondent did send a reply dated 8<sup>th</sup> October 2002 setting out his responses to the heads of complaint. Another letter was sent to the Respondent on 1<sup>st</sup> November 2002 and a response was received on 4<sup>th</sup> November. Another letter was sent to the Respondent on 13<sup>th</sup> November 2002 and a reminder was sent on 5<sup>th</sup> December. On 7<sup>th</sup> January 2003 a letter was sent to the Respondent asking for further comments. The Respondent sent an email on 8<sup>th</sup> January and another letter was sent to him on 21<sup>st</sup> January. Another letter was sent on 25<sup>th</sup> March 2003 and another reminder on 8<sup>th</sup> April 2003. On 30<sup>th</sup> April 2003 Section 15(2)(i)(i) Notice was sent to the Respondent. On 1<sup>st</sup> May 2003 a letter was sent by the Respondent indicating that he was sending his response but this was not received. On 25<sup>th</sup> August 2003 a further notice was sent to the Respondent as he had not responded to the notice sent in April. Another notice was sent in September as the previous letter had an incorrect section in it. The Respondent responded by letter received 21<sup>st</sup> September enclosing a copy of the letter dated 1<sup>st</sup> May 2003. Ms Shortt stated that the complaint was first intimated in September 2002 and it was not until September 2003 that the Respondent provided a detailed response. This delayed the investigation.

In cross examination Ms Shortt accepted that the Respondent's communication had been acceptable up until 4<sup>th</sup> November and the letter of 13<sup>th</sup> November did not call for a reply. She also accepted that the letter of 5<sup>th</sup> December indicated that it would be eight weeks until the Respondent heard from the Law Society. On the 7<sup>th</sup> January another letter had come in from Solicitors Direct Ms Shortt stated that she did not know what was in the email from the Respondent on 8<sup>th</sup> January. She accepted that the case manager left around this time and another case manager became involved. In connection with the letter of 1<sup>st</sup> May 2003 which was not sent Ms Shortt stated that there were phone calls and emails to the Respondent advising him that his letter had not been received.

## **EVIDENCE FOR THE RESPONDENT**

The Respondent indicated that his firm's present address was 57 Station Road, Ellon. He confirmed that in 2002 he had been approached by Mr A and Mr B in connection

with incorporating a company for them. A Mr D was their financial adviser and was to arrange the obtaining of funds for them to start the business. The Respondent indicated that the mandate was not his idea but he took instructions on it from his clients. The Respondent understood that the directors were to lend money from re-mortgaging their properties to the company. His letter of 30<sup>th</sup> April was sent in good faith and reflected his understanding. The Respondent indicated that he had acted for Mr B before but not Mr A. He dealt with both Mr B's and Mr A's re-mortgages. In connection with the payments to the third parties the Respondent indicated that he had been under pressure to pay and did so because he thought there would be plenty of money to cover this and the payments due to Company 2. He told Mr A that he would have to put the money into the Company 1 ledger to cover these payments but that if he put the rest of the money in the mandate would apply to it. The Respondent stated that he accepted the payments to third parties contravened the mandate but he had not done this dishonestly. He indicated that he knew he would be personally liable to Company 2 for these payments and he was prepared to accept this. When the money from the B's re-mortgage came in the money went into Company 1 by inter-client transfer and went out to pay Company 2. The Respondent stated that he was subject to Mr A's instructions in connection with not transferring the sums in the A's ledger to Company 1. It would have been different if there had been other mandates also in place. The Respondent stated that he did not see any reason why he should resign from acting. The Respondent's position was that he did not mislead Mr E. He could not recall the exact terms of the phone call with him. The Respondent indicated that he could not have discussed Mr A's affairs with Mr E. He became aware that Company 2 thought he had done something improper and therefore he sent his client a letter of authority to sign so that he could disclose what had happened. This letter of authority was not returned by Mr A. In connection with the contact with Company 2 the Respondent stated that his recollection was that he phoned but he got a receptionist and he had phoned them as requested by either Mr A or Mr B. He accepted that this was not normal practice. He indicated that he left a message but Mr C did not phone him back. He accepted that he should not have made contact.

In connection with the failure to respond to the Law Society he accepted that he did not respond as quickly as he should have done but he did reply on a number of occasions. The letter of 1<sup>st</sup> May 2003 which had been drafted and put to one side to

be re-examined had been overlooked and had not been sent out. He accepted responsibility for this.

In cross examination the Respondent stated that the mandate was in standard terms and he had no issue with it. He agreed that it was envisaged that the re-mortgage money would go into the Company 1 pot to pay the accounts of the company. Mr A changed his position due to the fact that he was not happy with the work done by Company 2. The Respondent indicated that as the money that was paid to third parties was recouped he did not think there was any need to tell Mr E. In connection with the phone call with Mr E on 17<sup>th</sup> June, the second directors loan to Company 1 had not been received. His letter of the 18<sup>th</sup> June had Company 1 in the heading and referred to Company 1 having not received the second director's loan which was correct although the money from the A's re-mortgage had arrived in the A's ledger on 11<sup>th</sup> June. The Respondent stated that he did not have a cheque book for the Company 1 TSB account. The Respondent accepted that there was no letter of complaint sent to Company 2 with regard to the workmanship. The Respondent accepted that Mr C seemed an honest witness but emphasised that he had no recollection of a telephone conversation with him. In connection with the failure to respond he accepted that there were delays but it was only a matter of months between May and September 2003.

## **SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid indicated that it was not in dispute that Mr E had acted for Company 2 and that the Respondent had acted for Company 1 and their Directors Mr A and Mr B. Nor was it in dispute that the Directors had re-mortgaged their houses in order to loan money to the company. Mr A's evidence was that the loans were to pay Company 2. Mr E had drafted a mandate and intimated it to the Respondent who asked for it to be re-drafted in the name of Company 1. The mandate was irrevocable and instructed the Respondent to make payments to Company 2 and that the funds were not to be released to any others including the Directors themselves. The mandate was signed on behalf of Company 1 by Mr A. Mr Reid submitted that it was clear from the ledgers that the re-mortgage funds for Mr B were received on 30<sup>th</sup> April 2002 and payments were made in breach of the mandate. The re-mortgage monies for Mr A

were received into the A's ledger on 11<sup>th</sup> June 2002. It was on that date that money was paid out to third parties. On the 17<sup>th</sup> June monies were transferred into the Company 1 account to reimburse the outlays paid by the Respondent in breach of the mandate. On the 18<sup>th</sup> June the balance of the money from the A's re-mortgage was paid to Company 1 business account. Mr Reid pointed out that the various outlays paid in breach of the mandate were made on different dates and involved a lot of work on the part of the Respondent to effect the payments. Mr Reid asked the Tribunal to consider whether or not the payments made were of an urgent nature pointing out that one of the payments was made to a radio company and one to a second hand car salesman.

In connection with the Respondent's misrepresentation to Mr E, Mr Reid emphasised that on the 17<sup>th</sup> June in a telephone conversation, the Respondent told Mr E that he was not in receipt of the second Director's loan but it was clear from the ledger that the money had come into Mr A's ledger on the 11<sup>th</sup> June and so the Respondent knew at the time of phone call that the monies had come in. The Respondent had also intromitted with funds on various dates prior to the phone call with Mr E. The letter sent by the Respondent on 18<sup>th</sup> June reiterates the terms of the telephone conversation. Mr Reid alleged that the Respondent had attempted to create a smoke screen to hide his misrepresentation. Mr Reid referred the Tribunal to Smith and Barton and to the duty to inform another solicitor of any change of circumstances. Mr Reid emphasised the importance of the principle that there be trust and honesty between solicitors. The Respondent had flagrantly ignored the terms of the mandate. Mr Reid pointed out that the Respondent was the Company Secretary and he ignored his obligations in terms of the mandate. Mr Reid indicated that it was important in order to maintain the reputation of the profession that solicitors could rely on one another's word. Mr Reid pointed out that Mr A's evidence was that the funds were to go into a communal pot. If Mr A then instructed the Respondent not to pay Company 2 this was an improper instruction and the Respondent should have withdrawn from acting. Mr Reid pointed out that no written complaint with regard to Company 2's work had been intimated. Mr Reid referred the Tribunal to Webster on Professional Ethics at page 12 where it is stated that if a solicitor receives an irregular instruction that they cannot disclose due to confidentiality, the solicitor should cease to act. Mr Reid alleged that the technical

differences between the legal entity of the Directors and the company was a smoke screen put up by the Respondent.

The Respondent had also been in breach of the duty not to get in touch with a client directly when the client is represented by another solicitor. Mr Reid asked the Tribunal to accept Mr C's evidence in this regard. In connection with the failure to respond Mr Reid indicated that he accepted that the Act set no time limits but pointed out that the Law Society had an obligation to promote the interests of the public and it could not perform its statutory obligation unless solicitors replied to letters. The Complaint was first formally intimated to the Respondent on 17<sup>th</sup> September and a response was sought within 14 days. The Respondent did not reply within the 14 days. Various reminders were sent to the Respondent and he did not reply. Notices were also sent.

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

Mr Clapham referred the Tribunal to the Sharp Test and reminded the Tribunal that the onus of proof was on the Complainers to prove their case beyond reasonable doubt.

In connection with the failure to reply Mr Clapham suggested that the Law Society should have lodged the whole file containing all the correspondence between them and the Respondent. There had been various case managers involved in the case who did not give evidence to the Tribunal. There was reference to a letter in August 2002 but there was no copy letter produced. The first formal intimation of the Complaint sent to the Respondent was on 17<sup>th</sup> September 2002 which asked for a reply within 14 days. Mr Clapham pointed out that the Respondent replied on the 8<sup>th</sup> October, a few days after the 14 days had expired. A letter sent by the Law Society on 1<sup>st</sup> November 2002 allowed the Respondent an opportunity for further comment but did not say that there was any need to reply. The letter of 5<sup>th</sup> December stated that the Law Society was putting the matter to a Reporter and it would be eight weeks until the Respondent heard further. The Respondent had drafted a letter on 1<sup>st</sup> May which he intended to send to the Law Society but due to an oversight on his part the letter was not sent until

the 1<sup>st</sup> September. Mr Clapham stated that this may not be businesslike but was not sufficiently serious to amount to professional misconduct.

Mr Clapham stated that it was not clear from the terms of the Complaint that the allegation was that the Respondent had actually had a telephone conversation with Mr C. The only evidence that a conversation had taken place was from Mr C. Mr Clapham asked the Tribunal to consider how reliable Mr C's evidence was in respect of a conversation which had taken place over three years ago. Mr Clapham submitted that although there may have been a breach of etiquette it was not sufficient to amount to professional misconduct.

In connection with the mandate Mr Clapham submitted that Mr A's recollection was very poor. Mr A however provided support for the Respondent's position that the Respondent had been asked to withhold payment to Company 2 due to a problem with the workmanship of the door. Mr Clapham submitted that this showed that there was a problem with the work which explained why the two Directors loans had been treated in different ways. The Respondent had found himself in a difficult situation which was why he had sent the letter of authority to Mr A which if signed would have allowed him to explain the position to Mr E. This letter of authority was never returned by Mr A.

Mr Clapham emphasised that Mr E accepted that when the loan monies came in from the A's re-mortgage the money was not Company 1 money until it had been transferred from the A's ledger into the Company 1 ledger. Mr E further had accepted in cross examination that clients could change their minds and that the Respondent was bound by client confidentiality in this respect. Mr Clapham stated that with hindsight there should have been a chain of mandates in place. The mandate would only cover money which the Respondent held on behalf of Company 1. Mr Clapham submitted that there was no deliberate design by the Respondent. Mr E had accepted that the Respondent could only discuss Mr A's affairs with Mr A's consent. Mr Clapham asserted that the letter sent on the 18<sup>th</sup> June by the Respondent had Company 1 in the heading and meant that Company 1 had not received the second Director's loan. Mr Clapham asked the Tribunal to accept that the Respondent had not intended to set up any kind of smoke screen. In connection with the payment to third parties in



breach of the mandate Mr Clapham pointed out that Mr A had stated that the money was not solely to pay Company 2. The Respondent was under pressure to pay third parties and the payments were necessary for the business to commence. In doing so the Respondent did have regard for the mandate and knew that he was putting himself at risk. He put himself out on a limb for his client. Although it was accepted that the Respondent had breached the terms of the mandate Mr Clapham asked the Tribunal to find that this was not sufficient to amount to professional misconduct.

## **DECISION**

The Tribunal found the Respondent to be a credible and reliable witness. He seemed genuine in his evidence and his account was consistent throughout. The Tribunal also found Mr E and Mr C to be credible and reliable witnesses. Mr A's evidence was less reliable as he had a vague recollection. The Tribunal also accepted the evidence of Fay Shortt although this evidence was based to a great extent on her reading of the file as she had not been the case manager involved throughout most of the process. In connection with the failure to respond it was clear from the evidence led and the productions lodged that the first intimation of the formal Complaint to the Respondent was on 17<sup>th</sup> September 2002. The Respondent replied on 8<sup>th</sup> October 2002. Another letter was sent to the Respondent on 1<sup>st</sup> November and a response was received from the Respondent on 4<sup>th</sup> November. Another letter was sent to the Respondent on 13<sup>th</sup> November with a reminder on 5<sup>th</sup> December but these letters only asked the Respondent if he had any further comment they did not require a reply. On 7<sup>th</sup> January 2003 a letter was sent to the Respondent asking for further comments and he sent an email in response to this on 8<sup>th</sup> January. Another letter was sent on 21<sup>st</sup> January and another on 25<sup>th</sup> March with a reminder on 8<sup>th</sup> April. On 30<sup>th</sup> April a notice was sent to the Respondent. On 1<sup>st</sup> May the Respondent replied indicating that he was sending in his response. Due to inadvertence this response was not posted on 1<sup>st</sup> May and was not sent by the Respondent until 1<sup>st</sup> September and received by the Law Society on 21<sup>st</sup> September. The Respondent explained that he had drafted a response on 1<sup>st</sup> May 2003 and set it aside to look at it again and then due to an oversight had not sent it out. The Tribunal found this plausible and accepted the Respondent's account. The Tribunal accordingly found that there was a delay in replying to correspondence from the Law Society but this had been explained by the

Respondent and the Tribunal did not consider that it was sufficient to amount to professional misconduct. The Respondent had sent various replies during the period of the investigation.

In connection with the Respondent falsely representing to Solicitors Direct a state of affairs which he knew to be untrue, the Tribunal was not satisfied beyond reasonable doubt that this was the case. Mr E in his evidence accepted that money going into Mr & Mrs A's ledger was different from the money going into Company 1 ledger. At the time when the Respondent spoke to Mr E on 17<sup>th</sup> June 2002 the loan monies in respect of Mr A's re-mortgage had gone into Mr & Mrs A's account but not into Company 1 ledger. This was also the case when the Respondent wrote to Mr E on 18<sup>th</sup> and 21<sup>st</sup> June. The Respondent's position, which is supported by the evidence from Mr A, was that the money had not been put into Company 1 ledger because Mr A advised the Respondent not to do this due to difficulties with the workmanship by Company 2. It is clear from the Respondent's evidence that he recognised that this put him in a difficult situation. This account of events is consistent with the Respondent then sending Mr A a letter of authority to allow him to convey what had happened to Mr E. Mr E, in his evidence, accepted that the Respondent would have been bound by client confidentiality and would accordingly have been unable to tell him of Mr A's changed instructions without receiving the written authority from Mr A. The Complainers position is that the Respondent should have withdrawn from acting when he found himself in this situation. The Respondent did however take steps by writing to Mr A to get his authority to disclose to Mr E what had happened. Unfortunately this authority was not received. The Tribunal found that it was quite clear from the evidence that it was only once the money was held by the Respondent on behalf of Company 1 that the mandate would apply to it. As there was no mandate in place covering funds held by Mr & Mrs A the Respondent could not advise his client that he must pay the money received from the re-mortgage into the Company 1 account. The Tribunal can understand why Mr E feels that he was misled by the telephone call of 17<sup>th</sup> June and the letters of 18<sup>th</sup> and 21<sup>st</sup> June. However the Tribunal accept that the Respondent receiving money on behalf of Mr & Mrs A is not the same as Company 1 receiving the money. The Respondent in this case was put in an unfortunate situation by a client's change of instructions. Mr E would not have known that anything had changed. The Tribunal accepts however that the Respondent

could not tell him without written authority from his client due to client confidentiality. There are difficulties when the duties to a client conflict with the duties to fellow professionals. When it became apparent to the Respondent that there was a real problem the more prudent course of action for the Respondent may have been to withdraw from acting. The Tribunal however in the whole circumstances of the case could not find that his actings amounted to professional misconduct.

In connection with the payments made in contravention of the mandate it was clear from all the evidence and the productions lodged that the Respondent did make payments to third parties in contravention of the mandate. The Tribunal however accepted the Respondent's explanation that he had pressure from his clients to make these payments to enable the business to start. The Respondent's evidence which was supported by the evidence from Mr A, was that there would be sufficient funds to pay the third parties and pay Company 2. The Tribunal accepted that this was the Respondent's understanding of the position. The Tribunal further accepted that the Respondent realised that he would be personally responsible for the payments in the event that the monies were not sufficient to cover them. The Tribunal find that the Respondent's actions in this regard were misguided and consider that the Respondent's conduct was unsatisfactory. The Tribunal however do not consider that it is serious and reprehensible enough to amount to professional misconduct in all the circumstances.

In connection with the direct contact by the Respondent to Company 2 the only evidence that there was an actual conversation between the Respondent and Mr C was from Mr C himself. Although the Tribunal found Mr C to be a credible witness the conversation took place over three years ago. Given the conflicting evidence given by the Respondent, the Tribunal was not satisfied beyond reasonable doubt that there was a direct conversation between the Respondent and Mr C. The Tribunal however was satisfied beyond reasonable doubt that the Respondent did make contact with Company 2 in response to a telephone message to do so. The Tribunal considered that this was not good practice. The Respondent should have responded via Company 2 solicitor. The Tribunal however do not consider that this is sufficiently serious and reprehensible so as to amount to professional misconduct. No prejudice was caused by the phone call.

The Tribunal accordingly made no finding of professional misconduct in respect of any of the averments in the Complaint.

The Tribunal asked for submissions on expenses and Mr Clapham, on behalf of the Respondent, indicated that his client would not wish to move for expenses and asked the Tribunal to find that there be no expenses due to or by either party. Mr Clapham said that his client's position was that he did not want the profession to have to pay for the prosecution. Mr Reid had no objection to this. As this is a decision in terms of Schedule 4 to the Solicitors (Scotland) Act 1980 publicity requires to be given to the decision.

Vice Chairman