

**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

**DAVID WILLIAM DICKSON,
Solicitor, 19 Waterloo Street,
Glasgow**

1. A Complaint dated 23 January, 2006 was lodged with the Scottish Solicitors Discipline Tribunal by the Council of Law Society of Scotland (hereinafter referred to as 'the Complainers') requesting that David William Dickson, 19 Waterloo Street, 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 might think 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 the Answers the Respondent raised a preliminary plea in respect of the relevancy of the averments in the Complaint. The matter was accordingly set down for a Procedural Hearing on 11 May, 2006 and notice thereof was duly served on the Respondent.
4. The Complaint called for a Procedural Hearing on 11 May 2006 and the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by George

Moore, Q.C., Solicitor Advocate, Glasgow. The Tribunal heard submissions from the Respondent to the effect that the averments in Article 3.2 and 4.1(b) of the Complaint were irrelevant. The Respondent submitted that if this matter was deleted what remained in the Complaint could not be sufficient to amount to professional misconduct. The Tribunal decided the averments of duty contained in Article 3.2 and the averments of professional misconduct contained in Article 4.1(b) of the Complaint were irrelevant and accordingly deleted them from the Complaint. The Tribunal agreed that a hearing be allowed in respect of the remainder of the averments in the Complaint on a date to be fixed.

5. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 31 August 2006 and notice thereof was duly served on the Respondent.
6. At the hearing on 31 August 2006 the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by George Moore, Q.C., Solicitor, Glasgow.
7. An amended Complaint was lodged together with a Joint Minute which admitted most of the facts in the amended Complaint and agreed many of the productions contained in the Inventory which was lodged on behalf of the Complainers. The Respondent gave evidence on his own behalf.
8. The Tribunal found the following facts established.
 - 8.1 The Respondent was born on 18 October 1957. He was admitted as a solicitor on 17 November and enrolled on 7 December both months of 1981. He carries on practice on his own account at 19 Waterloo Street, Glasgow.

8.2 Messrs Anderson MacArthur & Co, Solicitors, Portree were instructed by Mr A. Mr A's aunt Miss B granted a Power of Attorney in favour of Duncan M Burd, a partner of Messrs Anderson MacArthur & Co, and the said Mr A. It thereafter became apparent that Miss B had previously granted a Power of Attorney in favour of Mr C and Mr D both of whom were clients of the Respondent. The Respondent had not received any instructions from Miss B in relation to the Power of Attorney. In the course of his actings on behalf of the said Mr C and Mr D, the Respondent came into possession of certain funds which belonged to Miss B. After sundry correspondence with Messrs Anderson MacArthur, the Respondent wrote to Messrs Anderson MacArthur on 13 February 2003. In his letter, he set forth that a balance of £2251.00 was due to Miss B. He deducted therefrom the sum of £660.35 representing a fee of £562.00 plus vat, due by Mr C and Mr D to him, and remitted the balance of £1590.65 to Messrs Anderson MacArthur in full and final settlement of any claims which their client (Miss B) or Anderson MacArthur as her attorney might have against his clients in respect of any intromissions that they had with any of the funds or grants to which she (Miss B) was entitled. It was accepted by the Respondent that Miss B was not his client. No fee note was rendered to Miss B by the Respondent. The Respondent had no entitlement to deduct fees from funds which he accepted were due to Miss B.

8.3 In the foregoing circumstances Messrs Anderson MacArthur & Co, by letter dated 20 March 2003, invoked the assistance of the complainers. By letter dated 26 March 2003, the Complainers intimated the terms of that letter to the Respondent. At this stage however no response was required from the Respondent as the Complainers were carrying out further enquiries. On 17 April 2003 the Complainers wrote to the Respondent. They invited him at that stage to respond to Messrs Anderson MacArthur's concerns within fourteen days of that date. The Respondent did not reply. On 20 May 2003 the Complainers forwarded

a reminder to Mr Dickson again requesting a response within fourteen days. The Respondent did reply to this letter on 2 June 2003. The Complainers acknowledged his response on 17 June 2003 and indicated that they would be in further touch in due course. On 17 July 2003 the Complainers wrote to the Respondent and requested that he furnish them with a copy of the style of Power of Attorney which he had provided to his clients Mr C and Mr D. On 31 July 2003 the Respondent replied saying that he had not kept a copy of the style and further stated that he had asked his clients if they still had the style, and that they had responded in the negative. On 10 September 2003 the Complainers wrote to the Respondent intimating three heads of complaint, two of which were subsequently departed from. The third head of complaint related to the taking of a fee from Miss B's funds in respect of work done on behalf of Mr C and Mr D. The letter of 10 September 2003 required the Respondent to provide a written response to each head of complaint, any further background information the Respondent might wish to provide, and delivery of his business file, all within fourteen days of 10 September 2003. On 25 September 2003 the Respondent replied, stating that he was obtaining written confirmation from his client to put up with his response to the complaint, and indicating that his client was currently abroad and that he would need more time. On 22 October 2003, the Complainers, having heard nothing further from the Respondent, sent him a reminder and requested that he be in touch within seven days. On 4 November 2003 the Respondent provided a response to the complaints, but did not enclose the file. Instead he wrote the following:-

“I am reluctant to hand over my file at this juncture as court proceedings are threatened by Anderson MacArthur but I am content to make it available for inspection within my office at any time”.

On 17 November 2003 the Complainers wrote to the Respondent indicating that they were seeking further information from Messrs Anderson MacArthur in relation to the complaint, and that they might ask for the file or a copy of the file in due course. On 3 February 2004 the Complainers wrote to the Respondent and requested that he produce the file within fourteen days. The Respondent did not reply.

8.4 The file was later produced. The solicitor reporter updated her report in the light of her perusal of that file and in due course her report was on 22 April 2005 copied to the Respondent. By letter dated 6 May 2005 George Moore Esq QC wrote to the Complainers a letter making certain representations on behalf of the Respondent.

9. Having considered the foregoing circumstances the Tribunal found the Respondent not guilty of professional misconduct.

10. Having heard from the Fiscal and from the Solicitor for the Respondent in relation to the question of expenses, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 31 August 2006. The Tribunal having considered the amended Complaint at the instance of the Council of the Law Society against David William Dickson, Solicitor, 19 Waterloo Place, Glasgow; Make no finding of professional misconduct; Find the Complainers liable for the expenses of the Debate in relation to the preliminary plea 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 at a unit rate of £11.85 and find no expenses due to or by either party in relation to today's hearing; Direct that publicity will be given to this decision and the decision on the preliminary plea and that this publicity should include the name of the Respondent.

(signed)

A. M. Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

An amended Complaint was lodged with the Tribunal together with a Joint Minute of Admissions admitting most of the facts in the Complaint as amended and agreeing many of the productions contained in the Inventory of Productions lodged on behalf of the Complainers. No evidence was led by the Complainers. Evidence was led on behalf of the Respondent.

EVIDENCE FOR THE RESPONDENT

The Respondent gave evidence on his own behalf. He stated that he was a sole practitioner carrying on a general chamber practice and undertaking very little court work. He has operated as a sole practitioner since 1992 and had been a qualified solicitor since 1981. He stated that he was approached by existing clients Mr C and Mr D in late spring or early summer of 2002. He stated that he had acted for them on many occasions and for relatives of theirs. Mr C and Mr D made enquiries with him regarding what was involved in a Power of Attorney as they had an elderly aunt who may have required one. He stated that he gave them a very brief background to the law in relation to this matter and sent them a blank style which he had used previously. He denied being involved in preparing the Power of Attorney. He stated that he was next approached by them in November 2002 after they had received a letter from solicitors in Portree regarding their aunt's affairs. Their aunt had taken legal advice and had a concern whether Mr C and Mr D were administering her affairs correctly and whether a new attorney should be appointed. The Respondent confirmed that by this stage in 2002 a Power of Attorney had been granted in Mr C and Mr D's favour.

He confirmed that between November 2002 and January 2003 he acted for Mr C and Mr D. They advised him that they held monies due to their aunt and had concerns regarding her care.

The Respondent was referred to page 1 of the Complainer's Inventory of Productions and confirmed that he wrote to Messrs Anderson MacArthur & Co on 15 January 2003 stating that his clients held £2,251 on behalf of their aunt and asked them to accept that sum in full and final settlement of the monies due to their client Miss B.

The Respondent was then referred to page 43 of the said Inventory and confirmed that this letter dated 23 January 2003 was the response to that earlier letter and indicated that there was an issue regarding what sum was actually due. The Respondent stated that in response to that letter and on the instructions of his clients he sent the letter dated 13 February 2003 enclosing the sum of £1,590.65 in full and final settlement of any claim which their aunt may have had against his clients as their attorney. He stated that his clients' reasons for instructing him to send that letter were contained in page 16 of the said Inventory which is a letter dated 9 October 2003 sent to him by Mr C. The Respondent was asked what he understood the position to be if Anderson MacArthur did not agree to accept the cheque in full and final settlement. In response he stated that the position as he understood it was that they would return his cheque in those circumstances and he would then return the funds to Mr C and Mr D. The Respondent stated that this did not happen and that the cheque was cashed by Messrs Anderson MacArthur. The Respondent was asked if he ever queried his clients' instructions and he replied that they struck him as unfair but that he was looking after his clients' interests and that Miss B also had solicitors looking after her interests.

The Respondent stated that the next letter he received was to be found at page 44 of the said Inventory, a letter dated 20 March 2003 advising that Anderson MacArthur had cashed the cheque and reported the matter to the Law Society. The Respondent stated that Anderson MacArthur had never raised an action to recover the other monies allegedly due. The Respondent stated that his clients were never prosecuted and convicted in relation to any actings of theirs as attorneys. However, there was a prosecution and conviction against two carers for Miss B who had dishonestly withdrawn money from her bank account.

The Respondent confirmed that the letters from the Law Society initially concerned a complaint regarding the preparation by the Respondent of the Power of Attorney. He advised that this complaint was later withdrawn. There was also another complaint regarding the signing of the Power of Attorney. This head of complaint was also withdrawn. The Respondent referred to the correspondence contained in the said Inventory and confirmed that he had responded to the Complainer's letters albeit that there was some delay in responding to some of the letters. In respect of the formal intimation of the three heads of complaint by letter dated 10 September 2003 which is

found at page 11 of the said inventory, the Respondent advised that he required to speak to his clients before responding to this letter in detail. He did respond within the fourteen days requested advising that his client was abroad and that he hoped to respond within the next ten days. However, he did not do so within this timescale but responded following a further reminder. The Respondent advised that he was reluctant to release his file because of threatened court action but agreed to make it available for inspection. He advised that he had no file regarding the Power of Attorney because he had not acted in relation to this matter; but had a file regarding the third head of complaint, but in relation to that was reluctant to release it as he feared that there may have been criminal proceedings in the future.

Under cross examination the Respondent confirmed that Mr C and Mr D were not people who were close to him, however he knew them well. He stated that he liked them personally but that he was not seeking to keep them any happier than other clients. He stated that he had sent the style Power of Attorney to Mr C and Mr D and that it was from his styles bank. He said that he could not say exactly what he had sent Mr C and Mr D as he had not opened a file on the matter and had not kept a copy of what was sent.

The Respondent was asked why he considered that the deduction of his fee was unfair, he replied that because he thought that ultimately any money belonging to Miss B should be going back to her and that it seemed to him to be fairly harsh, but it was not up to him to make the decision as to whether to return the money in full. The Respondent confirmed the cheque was written on his clients' account and that the money had come in reasonably shortly before it was sent. The Respondent stated that he was not sure whether he was holding the monies when he wrote the letter at page 1 of the said Inventory. The Respondent stated that the money was written up in his firm's books as being held in the name of Mr C and Mr D re Miss B re dispute. The Respondent stated that he knew that the Power of Attorney in favour of Mr C and Mr D had been revoked. The Respondent stated that he understood that his clients came by the money in a variety of ways both from money found in the house and in bank accounts.

In response to a question from the Tribunal the Respondent advised that when he wrote the letter at page 1 of the said Inventory he openly acknowledged that the funds belonged to Miss B. In response to a further question the Respondent confirmed that this did not represent a change in his position from when he received the money and entered it into his business books. The Respondent stated that he viewed the funds as being in dispute as to how much would go back to Miss B. The Respondent confirmed that he used the words "sum due" but that the amount in the Inventory appended to the letter amounted to an offer to settle. He advised that this schedule was drawn up by his clients.

The Respondent confirmed that if Anderson MacArthur had written back and not accepted the position he would have sent the full amount back to his clients.

The Respondent confirmed that between January and February his clients' instructions changed and that as he had not received a reply to his initial letter his clients instructed him to send a cheque for the lesser amount. He stated that his clients hoped that Anderson MacArthur would accept a lower amount to avoid a court action.

The Respondent advised that he did not take his fee at the stage that the cheque was sent. He advised that he only took his fee after Anderson MacArthur cashed his cheque. He stated that he thought that he had been advised by his bank that the cheque had been cashed before Anderson MacArthur sent their letter of 20 March 2003. The Respondent stated that he took his fee on the basis that Anderson MacArthur must have accepted that the cheque was in full and final settlement as that was the premise on which the cheque was sent.

In response to a question from Mr Lynch as to whether he had taken steps to inform himself of the law prior to sending the cheque on that basis, the Respondent replied in the negative stating that his understanding was that full and final settlement meant just that. The Respondent stated that he remains of the view that as Anderson MacArthur had cashed the cheque that he was entitled to take his fee. In response to a question from Mr Lynch as to whether something different was said in Mr Moore's letter to the Law Society, specifically at page 40 of the said inventory, Mr Dickson replied that

that letter was written to try and resolve the complaints process. The Respondent stated that all he wanted to say was that he wished he hadn't allowed Mr Moore to write the letter.

The Respondent accepted that he received the fourteen day letter at page 5 of the said Inventory. He advised that he did not respond to it due to an oversight on his part. In relation to why he did not respond within the ten day period stated in his letter at page 13 of the said Inventory, the Respondent stated that this was due to delay on his part and that he could not remember exactly when he spoke to his client.

In response to a question from the Tribunal the Respondent stated that when the letter from Mr Moore to the Law Society was written he wanted to see the complaint go away. He stated that he now accepts that he should have written to Anderson MacArthur to see if they would accept the revised figure and if not given them the full money back. The Respondent stated that what was in the letter is not now his position and that with the benefit of hindsight he shouldn't have let Mr Moore write the letter on his behalf. The Respondent stated that if he had taken his fee without Anderson MacArthur's consent then that would have been incorrect. However he believed that by tendering the money in full and final settlement the matter was at an end and his fee could be taken when the cheque was cashed.

In response to a question from the Tribunal the Respondent confirmed that he has never refunded the fee. He stated that it was never suggested by anyone that this should be done.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch referred to Article 3.2 of the Complaint and advised that put at its simplest; a solicitor may not, without the consent of B take monies belonging to B and use it for A. He stated that it was clear that the Respondent was aware in January and February of 2003 that he was in possession of funds belonging, not to his clients, but to their aunt Miss B. He stated that it is not entirely clear what the Respondent's position is but pointed to the evidence found in the letters from January and February 2003 written by the Respondent at pages 1, 2 and 3 of the Complainers' Inventory of

Productions. He stated that in these letters there is compelling evidence of the Respondent's understanding that the money did not belong to his clients and therefore for him to have taken his fee from that money amounts to professional misconduct. Mr Lynch submitted that this action was not done overnight, the Respondent had time to reflect on his position. Mr Lynch submitted that the Respondent had told the Tribunal that he thought his instructions were unjust and unfair and submitted that if such questions arise in the mind of an experienced practitioner, as the Respondent was in 2003, he surely must have put himself on notice that something wasn't quite right. Under these circumstances he invited the Tribunal to find the Respondent guilty of professional misconduct.

In relation to the failure to answer correspondence from the Complainers timeously, Mr Lynch referred the Tribunal to the correspondence referred to in detail in the course of the Respondent's evidence. He submitted that the Complainers' letter of 17 April 2002 requesting an answer in fourteen days was not replied to at all. In relation to the Respondent's letter of 25 September 2003 Mr Lynch stated that this was a holding letter stating that he would reply within ten days. Mr Lynch submitted that the Respondent did not reply within that period and in fact only replied after a reminder was sent and ultimately sent an inadequate response. Mr Lynch submitted that the Respondent never provided a meaningful response to the third head of complaint. He did not respond to the letter of 3 February 2004 from the Law Society which requested a response within fourteen days. Mr Lynch submitted that the whole flavour of the correspondence contained in the Complainers' Inventory is of the Respondent trying to avoid investigation by the Law Society which is not consistent with his duty to deal timeously, accurately and openly with correspondence from the Complainers as contained in Article 3.6 of the Complaint. Mr Lynch invited the Tribunal to find the Respondent guilty of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Moore referred to the definition of professional misconduct as contained in the case of Sharp v The Council of the Law Society of Scotland 1984 SLT 313.

“There are certain standards of conduct to be expected of competent solicitors. A departure from these standards, which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.”

Mr Moore stated that the degree of culpability must be considered by the Tribunal and that the standard of proof in this case is beyond reasonable doubt. Mr Moore submitted that the Tribunal had to look at the reality of what took place in this case which is clear from the agreed correspondence. In this case a chamber practitioner was drawn into a confrontational situation. The Respondent's books made it clear that the money was being held by his clients on behalf of Miss B.

Mr Moore pointed to five factors which make it clear that the serious and reprehensible test as set out in the Sharp case do not apply to what the Respondent did in this case. Firstly he acted on the instructions of his clients. Secondly he did this completely openly and it is extremely important that the Tribunal recognise that there was no attempt to mislead anyone. The letters could not have clearer and there is no attempt to disguise the fees on the invoice as “professional fees”. Thirdly the cheque was sent not to an unrepresented person but to a firm of solicitors and indeed to a partner in that firm. The Respondent expected that firm to safeguard the interests of their client. Fourthly this is a completely different situation from that which Mr Lynch put to the Respondent which related to retaining funds for the purposes of writing a cheque for the deposit for a holiday on behalf of his client. Fifthly if the Respondent had asked first and acted later there would be no case before the Tribunal today. Instead he deducted the amount of his fees and sent the balance to the solicitors with an explanation of what he was doing. Mr Moore submitted this was a question of consent and the Respondent thought that he was obtaining the consent of the solicitors acting for Miss B's attorneys. Mr Moore submitted that many solicitors would think that this was a smart move.

Mr Moore submitted that the Tribunal should bear in mind the overall context of the sending of the cheque. Mr Moore submitted that it was clear from the correspondence that the Respondent had instructions to send the cheque and deduct the fees. He stated that with hindsight an experienced solicitor should have considered whether

this was correct but submitted that in the circumstances it did not amount to professional misconduct. However, he conceded that if the cheque was sent direct to Miss B a different view might be taken.

Mr Moore then drew the Tribunal's attention to paragraph 1(b) of the letter which he wrote on behalf of the Respondent to the Law Society. Mr Moore submitted that it would have been serious and reprehensible conduct if the Respondent had attempted to mislead Anderson MacArthur in any way. Mr Moore submitted that all Anderson MacArthur had to do was to say no and to return his cheque. However, their response was not to send the money back, what they did was to cash the cheque and report him to the Law Society. Mr Moore submitted that having regard to all these important factors the Tribunal should find the Respondent not guilty of professional misconduct.

In relation to the delay in responding to correspondence Mr Moore conceded that there were delays and certainly gaps in the correspondence. In relation to the delay in responding to the letter of 10 September 2003 the Respondent's reply was timeous and Mr Moore submitted that the Complaint did not relate to the adequacy of the reply as the Complaint was in relation to a failure to respond timeously. However, Mr Moore conceded that some correspondence was slow and was delayed. However, he submitted that such delay was not enough to amount to professional misconduct. He submitted that there was no evidence that any delay on the part of the Respondent held up the investigation as it was moving on at its own slow pace.

DECISION

In relation to averment 4.1(c) that the Respondent had failed to answer correspondence from the Complainers timeously the Tribunal found that there had been delay in responding to certain correspondence. However, the Tribunal found that there had not been serial delay nor had there been extensive delay. The Tribunal was of the view that although there had been individual failures to reply timeously to correspondence the Respondent's conduct overall could not be described as serious and reprehensible. He had replied timeously to some correspondence and where he had failed to respond as requested such delays amounted to a matter of days rather than weeks or months and it could not be said that the Respondent's delay had

delayed materially the Complainers' investigations. As such the Tribunal considered that the Respondent's conduct did not reach the standard required by the Sharp test and therefore could not be described as professional misconduct.

In relation to the remaining averment 4.1(a) that of deducting from funds belonging to Miss B fees due to him by Mr C and Mr D, the Tribunal considered the correspondence which had been lodged. The Tribunal was not impressed by the evidence of the Respondent, particularly in relation to his answers to the Tribunal's own questions. The Tribunal considered that the Respondent's answers in general simply lacked frankness and in many respects lacked credibility. If the Complainers were required to prove their case to the lower standard i.e. that of the balance of probabilities the Tribunal might have determined that the complaint be upheld. The Tribunal noted the terms of the correspondence which clearly showed that the Respondent was acting on his clients' instructions and had sent the money to solicitors acting on behalf of Miss B rather than to her directly. The Tribunal also had regard to the uncontradicted evidence of the Respondent as to the basis on which the funds were held as per the ledger card, and noted that the sum received from Mr C and Mr D was always recorded in the Respondent's client account as funds "held by Mr C and Mr D re Miss B re dispute". Taking all these matters into account the Tribunal are not satisfied beyond reasonable doubt that the conduct was serious and reprehensible and for that reason do not find that professional misconduct has been established.

The Tribunal heard submissions from both parties on the matter of expenses. Mr Moore moved for the expenses of both the Debate and the main hearing. This motion was opposed by Mr Reid who submitted that the Tribunal should order that no expenses be due to or by either party in relation to the Debate as the Respondent's preliminary plea was only partially upheld. In relation to the main hearing Mr Reid submitted that expenses should be awarded in favour of the Complainers as the Respondent's actions had lead to these proceedings.

The Tribunal was of the view that the Debate was wholly unnecessary as the point at issue was patent, namely that the Regulations called for a Solicitor / Client relationship and the prosecution was based on the fact that Miss B was not the client

of the Respondent. The Tribunal accordingly found the Complainers liable for the expenses of the Debate in relation to the preliminary plea on the usual basis. In relation to the expenses of the main hearing the Tribunal took into account the entire circumstances of the case including the concessions made by the Respondent in the course of his evidence that he did delay in issuing correspondence to his professional body and that he was uncomfortable about taking the action that he did. The Tribunal also had regard to the fact that the Complainers were discharging a statutory function and accordingly found that it was appropriate in all the circumstances that no expenses be ordered to be due to or by either party in respect of the main hearing.

Chairman