

**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

**JOHN DAVIDSON, Solicitor,
Ivybank House, 22 Forrest Street,
Airdrie**

1. A Complaint dated 23 May 2008 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, John Davidson, Solicitor, Ivybank House, 22 Forrest Street, Airdrie (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. A Complaint dated 25 August 2008 was lodged with the Scottish Solicitors' Discipline Tribunal by the Complainers requesting that 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.
4. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.

5. A procedural hearing was fixed for 19 November 2008. The day before the hearing a letter was received from the Respondent saying he was unable to attend and enclosed a medical certificate from his doctor in respect of asthma and stating that he no longer had representation. In the Respondent's absence the Tribunal agreed to set the matters down for hearing on a date to be fixed.
6. In terms of its Rules the Tribunal appointed both Complaints to be heard on 26 March 2009 and notice thereof was duly served on the Respondent.
7. The hearing took place on 26 March 2009. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was not present or represented.
8. The Tribunal noted that a letter had been received by the Tribunal's Clerk from the Respondent enclosing a letter from his doctor stating that the Respondent was not fit to attend the hearing. This letter was not written on soul and conscience. Mr Lynch made a motion that the Tribunal should exercise its discretion to proceed in the Respondent's absence. The reasons advanced for that motion were that the letter had been received at a late stage, no information was available about the Respondent's medical condition or when he might be fit to attend a further hearing and that no Answers had been lodged. Mr Lynch referred the Tribunal to the case of The Queen on the application of Janik –v- Standards Board for England [2007] EWHC 835 which is authority for the proposition that when a medical condition prevents a litigant from presenting his case, a Tribunal may refuse any application to adjourn in exceptional circumstances, and that strong facts are required before an adjournment is to be refused in such circumstances. The Chairman indicated that he had requested that an email be sent to the Respondent on 25 March 2009 advising that his letter had been considered and that the Tribunal was not agreeable to adjourning the hearing on the basis of

the information received. The Tribunal noted that no further communication had been received from the Respondent. The Tribunal agreed that in the public interest the hearing would proceed in the Respondent's absence.

9. Mr Lynch asked that the Complaints be conjoined and made a motion to lodge Affidavit evidence in respect of two of his three witnesses in terms of Rule 9 of the Tribunal's rules. The Tribunal granted that motion.
10. Mr Lynch made a motion to lodge a slightly amended Section 53C Complaint and produced evidence that notice of this had been served on the Respondent by Sheriff Officers. The Tribunal agreed to the amended Complaint being lodged.
11. The Tribunal heard evidence from one witness, Mr A and considered Affidavit evidence from two other witnesses, Ms B and Mr C.
12. The Tribunal found the following facts established

12.1 The Respondent was born on 23 November 1959. He was admitted as a solicitor on 11 and enrolled on 12 both days of January 2000. He resides at Ivybank House, 22 Forrest Street, Airdrie. He formerly carried on practice on his own account at Ivybank House aforesaid. He is not currently employed by any legal firm.

MR A

12.2 Mr D (hereinafter referred to as "the deceased") who was born on 16 November 1937 and resided at Property 1, died on 31 December 1993. In terms of his will Edward Christie, Solicitor, Dunfermline was appointed as his executor nominate. Confirmation in favour of Mr Christie was issued by the Sheriff Clerk at Dunfermline on 2 September 2003.

Mr A (hereinafter referred to as “Mr A”) is the brother of the deceased.

- 12.3 The Respondent visited Mr A at his house in London on 11 May 2005. Mr A had had no prior dealings with the Respondent.
- 12.4 The Respondent advised Mr A that the deceased had been declared dead in 2002 and that the deceased’s property at Property 1, (“the property”) was semi-derelict and that no one had lived there for many years. The Respondent also advised Mr A that on his behalf, he could petition the Court for Mr A to be appointed executor dative to the deceased.
- 12.5 The Respondent produced a Memorandum of Agreement (hereinafter referred to as “the Agreement”) to be signed by Mr A. The Agreement was between Mr A, the Respondent and Mr E (hereinafter referred to as “Mr E”), whose address was shown as Property 2. In terms of the agreement (a) Mr A agreed to the Commissary Court in Edinburgh being petitioned on his behalf to be appointed executor dative to the deceased, (b) the Respondent and Mr E would pay the sum of £2000 to Mr A for fulfilling his role as executor dative and (c) the Respondent and Mr E would be jointly and severally liable for all legal expenses pertaining to the petition. The Agreement also provided that once confirmation had been granted in favour of Mr A, he would deliver a signed Disposition of the property in favour of the Respondent and Mr E, the consideration payable for disposing the property being £15,000.
- 12.6 The Agreement was signed by Mr A and the Respondent at London on 11 May 2005 before Mr A’s neighbour Mr F who acted as the witness. The Agreement does not bear to have

been signed by Mr E. The Respondent did not advise Mr A to seek independent legal advice prior to having him sign the Agreement.

- 12.7 Following the meeting on 11 May 2005 and at the request of Mr A by letter dated 18 May 2005, the Respondent sent to Mr A a copy of the Agreement. The Respondent in his letter of 18 May 2005 enclosing the copy Agreement, confirmed that he had petitioned the court on behalf of Mr A. The Respondent indicated that the process normally took about two weeks but that he would keep Mr A advised of progress. The Respondent also enclosed with this letter an Inventory Form C1 which he had completed on behalf of Mr A and he asked Mr A to sign it and thereafter return it to him.
- 12.8 The Inventory Form C1 prepared by the Respondent showed the only item of estate belonging to the Deceased as the property “at executor’s valuation of £15,000.00”. The Declaration on the Inventory was signed by the Mr A on 24 May 2005.
- 12.9 On receipt of the copy Agreement, Mr A sought the Respondent’s assurance in writing that the Respondent and Mr E in terms of the Agreement would be responsible for all outstanding local taxes affecting the property such as Rates and Council Tax. Mr A pointed out that the expression “all legal expenses” in the Agreement did not seem to cover such taxes. On 23 May 2005, the Respondent wrote to Mr A confirming that he and Mr E would be wholly responsible for any outstanding property taxes pertaining to the property and that the amount agreed to be paid for the property would not be diminished by any amount for any reason. This letter was typed on the Respondent’s headed notepaper and was signed by both the Respondent and Mr E before a witness, Mr G.

- 12.10 In the absence of any progress report from the Respondent, Mr A wrote to him on 24 August 2005 asking if the petition for his appointment as executor dative had been granted. Mr A did not receive a reply to this letter and a reminder was sent on 21 September 2005 to the Respondent. Mr A next wrote to the Respondent on 14 June 2006 pointing out that over a year had elapsed since the Respondent's letter of 23 May 2005 and despite reminders there had been no response and no progress report. Further reminders were sent to the Respondent by Mr A on 10 September 2006 and 13 December 2006, to which there was no response. Another reminder was sent by Mr A on 10 February 2007 and in this letter Mr A indicated that if the Respondent failed to respond to him within ten days of the date of the letter he would instigate a formal complaint. In the absence of any response from the Respondent, Mr A intimated his complaint to the Complainers by letter dated 20 February 2007.
- 12.11 On 26 March 2007, the Complainers wrote to the Respondent enclosing a copy of the complaint received from Mr A and requesting his comments on various points. They sought a response within 14 days. The Respondent did not respond. He did however telephone Mr A on 15 April 2007. The Respondent stated that he and his wife were both ill during 2005/06 (his wife's illness being near fatal) and he had had to stop work. He also stated that his father was recovering from a heart attack. The Respondent also stated that he had overlooked the fact that another form required to be signed as well as the Inventory and that he would send it to Mr A. The Respondent confirmed that he had received some of the letters sent by Mr A but because of his difficulties they had been "put on the back burner". The Respondent wanted to know if Mr A still had all his correspondence and documents

and if Mr A would now withdraw the complaint. The Respondent also indicated to Mr A that in due course he would send him a cheque for £2000 in terms of the Agreement. Mr A confirmed to the Complainers that he had no intention of withdrawing his complaint.

12.12 The Complainers made their own enquiries with Dunfermline Sheriff Court regarding the petition for the appointment of Mr A as executor dative to the deceased. The Sheriff Clerk by letter dated 29 March 2007, confirmed that the petition had been granted on 21 June 2005. He also confirmed that Confirmation in respect of the deceased's estate had been issued on 3 September 2003 in favour of Mr Edward Christie of Ross & Connel, Solicitors, Dunfermline in his capacity as Judicial Factor to the Deceased in terms of decree dated 9 June 2003. The Sheriff Clerk stated that there was no record of the Respondent applying for Confirmation.

12.13 The Complainers also ascertained from Ross & Connel that they had been instructed by Fife Council to act in this matter on 18 June 2002 as council tax was continuing to accrue for the property and the council had obtained a decree of declarator that the deceased was dead. The council wanted the deceased's estate to be wound up and distributed. Ross & Connel confirmed that once Confirmation had been obtained the estate had been ingathered by them. As they were unaware of the existence of any brother, on completion of the administration which involved the sale of the property and settlement of the council tax due to the council they remitted the sum of £49,831.37 to the Queen's and Lord Treasurer's Remembrancer on 26 February 2007. In the Confirmation issued to Mr Christie, the property was valued at £25,000 and was the only item of estate.

- 12.14 The Complainers also checked the Roll of Solicitors and established that the Respondent had held a practising certificate up to 31 October 2004. He was removed from the Roll in September 2006 and restored to the Roll in March 2007. The letterhead on the letters which Mr A received from the Respondent dated 18 and 23 May 2005 described the Respondent as Solicitor and Notary Public and below his signature on each letter was the word Solicitor. In the Form C1 which the Respondent prepared, he was again described a Solicitor. The Respondent, at the meeting on 11 May 2005 condescended upon, gave to Mr A a business card on which he is described as Solicitor and Notary Public and his law and other degrees were also shown.
- 12.15 The Complainers wrote to the Respondent on 18 April 2007 requesting a response to their letter of 26 March 2007. No response from the Respondent was received by the Complainers. On 4 July 2007 the Complainers advised the Respondent that a formal complaint was being instigated. Following Mr A agreeing the list of issues and no response having been received from the Respondent, the Complainers on 10 July 2007 formally intimated the complaint on behalf of Mr A and sent to the Respondent a note of the list of issues. The Respondent was asked to respond within 21 days of the date of the letter. The Complainers received a telephone call from the Respondent on 31 July 2007 in which he indicated that he had just received their letter as there had been a problem with the post in his area and he requested a further 14 days to respond which was agreed by the Complainers in the circumstances.
- 12.16 On 14 August 2007, the Complainers received a letter from Mr A dated 12 August 2007 in which he indicated that the Respondent had telephoned him that evening. The

Respondent had suggested that a solicitor in Linlithgow call him on the next day to give him advice. Mr A indicated to the Complainers that he had declined this offer and confirmed that in view of what had happened he wished to proceed with the complaint. Also on 14 August 2007, the Complainers received a letter from the Respondent dated 12 August 2007 in which he stated that the extension of time given to him to respond had enabled him to discuss matters at length with Mr A. The Respondent stated that Mr A had confirmed to him that he no longer wished to proceed with the complaint. The Complainers replied to the Respondent on 16 August 2007 indicating that they had also fully discussed matters with Mr A and that he specifically had confirmed that he wished to continue with the complaint. The Respondent was asked for a formal response to the Complainers' letter of 10 July 2007 within 7 days of the date of the letter and was advised that in the absence of a formal response the Complainers would consider whether or not to serve formal notices on him.

12.17 The Complainers did not receive a response from the Respondent and on 29 August 2007, (a) a Notice in terms of Section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 was served on the Respondent by recorded delivery post by the Complainers and (2) a Notice in terms of Section 42C of the Act calling on the Respondent to produce to Ms B of the Complainers all books, accounts, deeds, securities, papers, and other documents in his possession or control relating to the affairs of Mr A by recorded delivery post was also served on the Respondent by the Complainers.

12.18 As the Respondent failed to respond to the Complainers within the time limits specified in the Notices dated 29 August 2007, further Notices were served by the Complainers on the Respondent on 21 September 2007 requiring him to

give to the Complainers six weeks notice of his intention to make application to take out a practicing certificate for the year commencing 1 November 2007 in terms of Section 15(2) (i) (i) of the Act. On 21 September 2007 the Complainers further wrote to the Respondent intimating to him a complaint in respect of his failure to deal with professional correspondence from the Complainers and required that the Respondent provide an explanation with fourteen days of that letter. No response has been received by the Complainers from the Respondent.

12.19 On 15 January 2008, the Complainers, acting through one of their Committees, determined that the Respondent had provided an inadequate professional service to his client Mr A. They directed that the fees to which the Respondent would be entitled in respect of the services provided to Mr A should be nil, and that the Respondent was directed to refund or waive the fees and outlays rendered to Mr A. They further directed that the Respondent was to pay compensation to Mr A in the sum of £1,100, all of the foregoing in terms of Section 42A of the Solicitors (Scotland) Act 1980.

12.20 The determination and direction condescended upon were intimated to the Respondent by letter dated 21 January 2008. The Respondent failed to reply. The Respondent has not made payment of the compensation. The Respondent has not appealed the decision or determination.

13. Having considered the foregoing circumstances and having heard a submission on behalf of the Complainers, the Tribunal found the Respondent guilty of Professional Misconduct singly and in cumulo in respect of:

- 13.1 his acting on behalf of Mr A in a situation in which there was a conflict of interest between his own interests and those of Mr A's;
- 13.2 his failure to advise Mr A to seek independent legal advice;
- 13.3 his breach of the requirements of Article 7 of the Code of Conduct for Scottish Solicitors promulgated in 2002 by acting in a dishonest fashion;
- 13.4 his breach of Section 23 of the Solicitors (Scotland) Act 1980 by practising as a solicitor or holding himself out as entitled by law to practise as a solicitor without having a current practising certificate;
- 13.5 his breach of Section 32 of the Solicitors (Scotland) Act 1980 by preparing an application for a grant of Confirmation in favour of executors when he was unqualified to do so by virtue of not having a practising certificate;
- 13.6 his acting in a situation in which he had neither a practising certificate nor professional indemnity insurance;
- 13.7 his failure to respond to correspondence from the Law Society of Scotland;
- 13.8 his attempt to mislead the Law Society of Scotland in relation to Mr A's attitude to the Complaint;
- 13.9 his failure to obtemper statutory notices served on him by the Law Society of Scotland.
- 13.10 in addition, the Tribunal found that the Respondent had failed to comply with the Determination and Direction given by the

Law Society of Scotland under Section 42A of the Solicitors (Scotland) Act 1980 in respect of Mr A within the period specified, the Tribunal resolved to make an Order in terms of Section 53C(2) of the Solicitors (Scotland) Act 1980.

14. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 26 March 2009. The Tribunal having considered the Complaints dated 23 May 2008 and 26 March 2009 at the instance of the Council of the Law Society of Scotland against John Davidson, Solicitor, Ivybank House, 22 Forrest Street, Airdrie; Find the Respondent guilty of Professional Misconduct singly and in cumulo in respect of his acting on behalf of Mr A in a situation in which there was a conflict of interest between his own interests and those of Mr A's; his failure to advise Mr A to seek independent legal advice; his breach of the requirements of Article 7 of the Code of Conduct for Scottish Solicitors promulgated in 2002 by acting in a dishonest fashion; his breach of Section 23 of the Solicitors (Scotland) Act 1980 by practising as a solicitor or holding himself out as entitled by law to practice as a solicitor without having a current practising certificate; his breach of Section 32 of the Solicitors (Scotland) Act 1980 by preparing an application for a grant of Confirmation in favour of executors when he was unqualified to do so by virtue of not having a practising certificate; his acting in a situation in which he had neither a practising certificate nor professional indemnity insurance; his failure to respond to correspondence from the Law Society of Scotland; his attempt to mislead the Law Society of Scotland in relation to Mr A's attitude to the complaint and his failure to obtemper statutory notices served on him by the Law Society of Scotland; Order that the name of the Respondent be struck off the Roll of Solicitors in Scotland; Find that the Respondent failed to comply with the Determination and Direction given by the Law Society of Scotland on 15 January 2008 under Section 42A of the Solicitors (Scotland) Act 1980 within the period specified; Direct

that an Order be issued under Section 53C of the said Act; 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, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

The Tribunal heard evidence from the Depute Clerk that the Complaint dated 23 May 2008 was served by Sheriff Officers on 3 July 2008 by leaving it at the Respondent's house. The Tribunal heard evidence from the Depute Clerk that the Complaint dated 25 August 2008 was served by Sheriff Officers on 25 September 2008 by the same method and that the Notices of Hearing were served on the Respondent personally by Sheriff Officers on 30 December 2008. The Tribunal also heard evidence from the Depute Clerk that a procedural hearing had been fixed for 19 November 2008 and that the Respondent had faxed a letter to the Tribunal's Clerk the day before that hearing enclosing a medical certificate and advising that he was not fit to attend the procedural hearing.

The Respondent was not present or represented at the hearing. He did not lodge Answers to the Complaint or any productions. The Tribunal noted that a letter had been received by the Tribunal's Clerk from the Respondent enclosing a letter from his doctor stating that the Respondent was not fit to attend the hearing. Mr Lynch made a motion that the Tribunal should exercise its discretion to proceed in the Respondent's absence. The reasons advanced for that motion were that the letter had been received at a very late stage, no information was available about the Respondent's medical condition or when he might be fit to attend the hearing and the fact that no Answers had been lodged. Mr Lynch referred the Tribunal to the case of The Queen on the application of Janik –v- Standards Board for England [2007] EWHC 835 which is authority for the proposition that when a medical condition prevents a litigant from presenting his case, a Tribunal may refuse any application to adjourn in exceptional circumstances, and that strong facts are required before an adjournment is to be refused in such circumstances.

The Chairman indicated that at his request an email had been sent to the Respondent on 25 March 2009 advising that the letter had been considered and that the Tribunal was not agreeable to adjourning the hearing on basis of the information received. The Tribunal noted that no further communication had been received from the Respondent and that the Respondent had not attended the earlier preliminary hearing. The Tribunal agreed that for the reasons advanced by Mr Lynch coupled with the fact that

an earlier hearing had been adjourned for medical reasons, in the public interest, the hearing should proceed in the Respondent's absence.

Mr Lynch asked that the Complaints be conjoined and made a motion to lodge Affidavit evidence in relation to two of his three witnesses. The Tribunal granted that motion.

Mr Lynch then made a motion to lodge a slightly amended Section 53C Complaint and produced evidence that notice of this had been served on the Respondent by Sheriff Officers. The Tribunal agreed to the amended Complaint being lodged.

An Inventory of Productions had been lodged for the Complainers. Mr Lynch indicated that he wished to lead evidence from one witness, Mr A and to lodge Affidavits in relation to his other two witnesses, Ms B and Mr C.

EVIDENCE FOR THE COMPLAINERS

Mr A gave evidence that his full name was Mr A and that he was aged 73 and lived at an address in London. He advised that he was the brother of D who was born on 16 November 1937. He stated that as far as he knew his late brother had last lived in Palm Beach, Florida and stated that he last saw him in 1975. The witness stated that in May 2005 he had no further knowledge of his brother's whereabouts. Mr A gave evidence that he was visited in May 2005 by the Respondent who called at his house and asked him if he was Mr A. The witness stated that the Respondent identified himself as a solicitor and asked him if he knew about a property in Lochgelly. In relation to that property the witness advised that his parents had lived there until they died in the mid nineteen eighties and that the house was inherited by his brother, Mr D. Mr A advised that the Respondent told him that the house was empty and in very poor repair, particularly the roof. Mr A advised that the Respondent also told him that under Scots law as he was the only living relative he could apply to Dunfermline Sheriff Court to be appointed his brother's executor dative qua blood. He advised that the Respondent told him that his brother had been declared dead by Dunfermline Sheriff Court in 2002. The witness advised that the Respondent had stated that he could act for him and brought a form with him for Mr A to sign.

Mr A stated that the Respondent produced an agreement which had been prepared in advance which required to be witnessed and he got his neighbour Mr F to witness the agreement. He stated that Mr F asked the Respondent what he did for a living and the Respondent replied that he was a solicitor and gave him his business card which confirmed that. The witness produced the business card to the Tribunal. Mr A stated that the agreement was signed and witnessed by Mr F and confirmed that the agreement referred to was the document at Page 17 of the Inventory of Productions for the Complainers. Mr A advised that the agreement was between himself, the Respondent and a Mr E. He advised that Mr E was a developer and a friend of the Respondent. The witness confirmed that he had never met Mr E but understood that Mr E wanted to acquire the property, restore it and sell it. The witness stated that he was advised by the Respondent that the property was valued at £15,000. Mr A stated that he understood that in terms of the agreement Mr E and the Respondent were to pay him the sum of £2,000 and that he was all he was to receive.

Mr A confirmed that Page 34 of the said Inventory of Productions was a photocopy of the Respondent's business card where he is designed as a solicitor and notary public. The witness advised that in terms of the agreement the Respondent and Mr E were to be liable for his legal expenses. He advised that he signed the agreement and the Respondent left.

The witness advised that the Respondent did not suggest during the course of this discussion that he should take independent legal advice.

The witness stated that he wrote to the Respondent after the meeting asking for a copy of the agreement and then he wrote to him again with regard to liability for outstanding rates and local taxes etc. The witness advised that the Respondent replied saying that he would be responsible for any arrears of taxes etc.

The witness was referred to Page 11 of the said Inventory and confirmed that this was a copy of a letter dated 18 May 2005 which he had received from the Respondent confirming that the Respondent had petitioned the Court for Mr A's appointment as executor dative. The witness confirmed that this letter enclosed a form C1 which the

Respondent had submitted on his behalf. The witness confirmed that a copy of the form C1 is at Pages 7 – 9 of the said Inventory. The witness confirmed that he had written the words “returned to Mr Davidson on 24.5.05” on the top right hand corner of the first page of the form. The witness confirmed that details of the house in Lochgelly were provided on the third page of the form and that this is found at Page 9 of the said Inventory. The witness was then referred to Page 13 of the said Inventory and confirmed that this was a copy of a letter sent by him to the Respondent dated 13 May 2005 asking for a copy of the agreement. The witness was referred to Page 6 of the said Inventory and confirmed that this was a copy of a letter from himself to the Respondent dated 21 May 2005 asking about the local taxes etc.

The witness was then referred to Page 5 of the said Inventory and confirmed that this was a copy of a letter sent by the Respondent to himself dated 23 May 2005 confirming that the Respondent and Mr E would be responsible for any outstanding property taxes relating to the property. The witness confirmed that this letter was signed by Mr E also and witnessed by someone called Mr G. Mr A stated that he did not know who Mr G was.

Mr A advised that he did not hear from the Respondent after that and wrote to him by letter dated 24 August 2005, a copy of which is found at Page 14 of the said Inventory. The witness confirmed that he did not receive a response to that letter. The witness advised that he wrote again to the Respondent by letter dated 21 September 2005, a copy of which is found at Page 15 of the said Inventory. The witness advised that he did not receive a response to that letter.

The witness was referred to Page 16 of the said Inventory and confirmed that this was a copy of a letter dated 14 June 2006 which was written over a year later and during that period there had been no response from the Respondent. The witness stated that he did not receive a response to that letter either. The witness stated that he wrote again to the Respondent on 10 September 2006, and confirmed that a copy of that letter was found at Page 17 of the said Inventory. The witness stated that he did not receive a reply to that letter.

The witness stated that he wrote again to the Respondent on 13 December 2006 and confirmed that a copy of that letter was found at Page 18 of the said Inventory. The witness stated that he had sent the letter by recorded delivery and that it was not returned to him. He stated that he did not receive a response from the Respondent.

The witness stated that he wrote again to the Respondent on 10 February 2007 and that a copy of that letter is found at Page 19 of the said Inventory. He confirmed that he indicated in that letter that he would take the matter up with the appropriate legal authority in Scotland and advised that he had no response to that letter. The witness advised that Page 20 of the said Inventory was a copy of the same letter found at Page 19 of the said Inventory and confirmed that he sent one by ordinary mail and one by recorded delivery to make sure that the Respondent received the letter. The witness stated that the reference at the bottom of that letter dated 10 February 2007 to having proof that the Respondent refused to accept delivery of his recorded delivery letters referred to a letter sent much further back. The letter referred to was dated 13 December 2006 and it was returned to him by Royal Mail.

The witness stated that by then his patience was exhausted and he decided to complain to the Law Society of Scotland in March 2007. He stated that a copy of his Help Form is found at Pages 1 and 2 of the said Inventory and was submitted under cover of a letter dated 14 March 2007 which is found at Page 3 of the said Inventory. The witness advised that he sent a supplementary statement to the Law Society which is found at Page 4 of the said Inventory and attached several documents, a number of which he had referred to in evidence earlier.

The witness advised that sometime shortly thereafter he was contacted by the Respondent. He stated that it was on a Sunday evening, 15 April 2007 and the Respondent telephoned him at home and spoke to him at length saying that he had been ill and he had family problems due to illness and said he had put the matter on the backburner. The witness stated that the Respondent had asked him to write to the Law Society withdrawing his complaint and he would send him a cheque for £2,000. The witness stated that he told the Respondent that he would think about it. However he wrote to the Law Society the next day by letter dated 16 April 2007, a copy of which is found at Pages 37 and 38 of the said Inventory. That letter explained what

had happened and on the second page of that letter at Page 38 of the said Inventory the witness stated that he advised the Law Society that he would not withdraw his complaint until the matter was resolved.

The witness advised that he next had contact with the Respondent when the Respondent called him in August 2007, again on a Sunday evening. The witness advised that he was not sure of the date. The witness advised that the Respondent said that he had been ill and that his wife had been ill and asked him if he would please write to the Law Society and withdraw the complaint. The witness advised that he listened and told the Respondent that he had since learned that his brother's estate had gone to the Crown and that he intended to write again to the Law Society regarding this. The witness advised that he did write to the Society and confirmed that a copy of his letter is Page 52 of the said Inventory. The witness confirmed that the Respondent had told him that he could get advice from a solicitor in Linlithgow who would be calling him the next day. The witness advised that no such call was received. The witness confirmed that he said in his letter to the Law Society that he did not intend to withdraw his complaint and would not take any further calls from the Respondent.

The witness advised that in relation to his late brother's estate he had been informed by the Law Society that it had gone to the Crown. He stated that he then made enquiries himself with the Crown Office who confirmed that he would be eligible to recover the estate. He stated that he subsequently instructed Scottish solicitors to act for him. He first contacted Messrs Ross and Connell but they said that they could not act for him as there was a conflict of interest and recommended Macbeth Currie who took the matter over. The witness stated that he recovered between £40,000 and £50,000 from the Crown. The witness advised that he heard from the Law Society that he was to receive compensation from the Respondent and have his fees and outlays returned. He stated that he has not received any monies from the Respondent.

Mr Lynch then referred the Tribunal to the Affidavit evidence of Ms B and Mr C.

Ms B's Affidavit advised that she was formerly employed as a case manager by the Law Society of Scotland and now is employed by the Scottish Legal Complaints Commission. In connection with her employment with the Complainers, she made

certain enquiries in relation to the Respondent following on a complaint being intimated by Mr A. On checking the Roll of Solicitors in Scotland Ms B established that the Respondent was admitted as a solicitor on 11 January 2000 and enrolled as such on 12 January 2000. His name was removed from the Roll in September 2006 but restored in March 2007. He held a practising certificate up until 31 October 2004 but did not renew his certificate thereafter until March 2007.

The Affidavit stated that on 26 March 2007, Ms B wrote on behalf of the Complainers to the Respondent enclosing a copy of Mr A's letter of complaint and asked for a response within fourteen days. No answer was forthcoming. She thereafter enquired at Dunfermline Sheriff Court as to the position in relation to the estate of the late Mr D. She was advised in terms of a letter dated 29 March 2007 from the Sheriff Clerk at Dunfermline that a Petition for the appointment of Mr A as executor dative to the late Mr D was granted on 21 June 2005, but Confirmation had already been issued on 3 September 2003 in favour of Mr Edward Christie of Ross and Connell Solicitors, Dunfermline. Mr Christie was confirmed as executor having previously been appointed as Judicial Factor to the late Mr D by Decree dated 9 June 2003. The Sheriff Clerk indicated that there was no record of the Respondent having applied for Confirmation.

Ms B then contacted Ross and Connell Solicitors who advised that they had been instructed by Fife Council in 2002 because of arrears of council tax. Fife Council obtained a declarator from the Court to the effect that Mr D had died. Ross and Connell advised that once the confirmation had been obtained the estate had been ingathered by them. As they were unaware of the existence of any blood relatives of the deceased they advised that they remitted the proceeds of their realisations in the amount of £49,831.37 to the Queen's and Lord Treasurer's Remembrancer on 26 February 2007.

The Affidavit advised that on 18 April 2007 Ms B wrote again to the Respondent in view of his failure to reply to her letter of 26 March 2007. She then wrote on 4 July 2007 to the Respondent to advise him that a formal complaint was being instigated. The Respondent was not required to reply to that letter. On 10 July 2007 she wrote to the Respondent and gave him formal intimation of the Complaint and the list of the

issues relating to the Complaint. A response was required within twenty one days. On 31 July 2007 the Respondent telephoned the Complainers' offices and stated that he had just received this letter. He requested a further fourteen day period to respond and this was agreed.

The Affidavit advised that on 14 August 2007 Ms B received a letter from the Respondent dated 12 August 2007. The letter suggested that the Respondent had spoken to Mr A who no longer wanted to insist upon his complaint. On 16 August 2007, having spoken to Mr A and having been advised that he wished to insist upon the complaint, Ms B wrote to the Respondent and asked him for a response to her letter of 10 July 2007 within a period of seven days. The Respondent did not reply. On 29 August 2007 she wrote to the Respondent and served upon him at the same time notices in terms of Section 15(2) and 42C of the Solicitors (Scotland) Act 1980.

The Affidavit advised that so far as Ms B is aware neither letter was returned by the post office.

The Affidavit advised that the Respondent did not contact the Complainers following upon service of the notices. On 21 September 2007 Ms B served upon the Respondent the second part of the notice under Section 15(2) of the 1980 Act. This was in the name of Philip Yelland who is the Complainers' Director of Regulation. This notice required the Respondent to give six weeks notice of his intention to make an application to take out a practising certificate for the year commencing 1 November 2007. Also on 21 September 2007 Ms B wrote to the Respondent to intimate a complaint in respect of his failure to reply to the Complainer's correspondence. She asked for a response within fourteen days. The Respondent did not reply.

The Affidavit advised that on 15 January 2008, the Complainers acting through one of their Committees determined that the Respondent had provided an inadequate professional service to his client Mr A. They directed that the fees to which the Respondent would be entitled in respect of the services provided to Mr A would be nil and the Respondent was directed to waive or refund the fees and outlays rendered to Mr A. They further directed that the Respondent was to pay compensation to Mr A in

the sum of £1,100 all of the foregoing in terms of Section 42A of the Solicitors (Scotland) Act 1980.

The Affidavit advised that Ms B intimated the determination and direction referred to above to the Respondent by letter dated 21 January 2008. By letter dated 19 February 2008 the Complainers called upon the Respondent to state in terms of Section 42B of the Solicitors (Scotland) Act 1980 what steps he had taken to comply with the determination. The letter of 19 February 2008 was sent by recorded delivery post. The Affidavit advised that Ms B understands that the letter of 19 February 2008 was returned to the Complainers by the postal authorities. The letter of 21 January 2008 was not returned and from this she infers that this was received by the Respondent. The Respondent did not make contact with the Complainers. The Respondent has not made payment of the compensation. The Respondent has not appealed the decision or determination within the period specified in the statute.

The final paragraph of the Affidavit confirms that all of the documents mentioned in the Affidavit form part of the Inventory of Productions for the Complainers, a copy of which Ms B has signed and docketed as relative to her Affidavit.

Mr Lynch referred the Tribunal to the Affidavit by Ms B which had been lodged which had a docket signed relating to the Inventory. Mr Lynch asked the Tribunal to note that a number of the documents referred to by Ms B in her Affidavit are letters from the Law Society bearing her name.

Mr C's Affidavit advised that he has been employed by the Complainers as a case manager since July 2004. He is familiar with the Complainers' practices and office procedures. He has examined the Complainers' records in relation to the Complaints against the Respondent. His Affidavit states that the Complainers maintain the Roll of the Solicitors in Scotland. Mr C's Affidavit confirms that from his examination of the Roll, the Respondent was admitted as a solicitor on 11 January 2000 and enrolled as such on 12 January 2000. His name was removed from the Roll in September 2006 and was restored in March 2007. Between September 2006 and March 2007 the Respondent did not hold a practising certificate entitling him to practice as a solicitor in Scotland.

Mr C's Affidavit advised that the records of recorded delivery mail sent by the Complainers go back only as far 26 September 2007. Any records of recorded delivery mail prior to that date have been destroyed. Accordingly the Complainers are not in a position to provide any receipts for recorded delivery mail which was delivered prior to 26 September 2007. In the absence of the tracking references which would appear on the face of the recorded delivery receipts, it is not possible to check the Royal Mail database. Mr C's Affidavit advised that he examined the position specifically in relation to two letters dated 29 August 2000 and one letter dated 21 September 2007 (being a notice under Section 15 of the Solicitors (Scotland) Act 1980) and one letter dated 19 February 2008, all of which according to the Complainers' file were sent by recorded delivery post to the Respondent at his address in Airdrie. The letter of 19 February 2008, which was a notice under Section 42B of the Solicitors (Scotland) Act 1980, was returned to the Complainers undelivered. The reason for non-delivery was not stated on the notice of non-delivery. The other letters mentioned were not returned. Mr C's Affidavit states that he infers from that that these letters were delivered to and received by the Respondent.

The Chairman raised the issue of the productions not being individually docketed by Ms B.

Mr Lynch stated that he wished to make a submission in relation to this. He submitted that there was no evidence led to contradict the Complainers' position and there is settled authority which has been approved in a recent case that where evidence is led and nothing is led to contradict that that a positive inference should be given to the party leading that evidence. Mr Lynch advised that Ms B states in her Affidavit that these letters were not responded to. The only matter for discussion is whether there is a sufficient link between the Affidavit and the productions to allow the Tribunal to look at the productions themselves. Mr Lynch stated that his position was that if it is permissible to refer to a document by the name of the document there is no reason why the information supplied in paragraph fourteen of Ms B's Affidavit is not sufficient to link the documents to the Affidavit. Mr Lynch submitted that there is a blanket docket which is enough to refer to these documents or failing that to refer to those specifically mentioned within the Affidavit.

Mr Lynch invited the Tribunal to rule on this matter. The Tribunal adjourned to consider the matter.

The decision of the Tribunal was that given the terms of paragraph fourteen and the docket on the Inventory, the Tribunal was satisfied that there was a sufficient link between the Affidavit and the productions to enable the Tribunal to take into account the terms of the individual productions.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch invited the Tribunal to make findings of fact in relation to averments 2.1 to 2.17 in the substantive complaint and to find the Respondent guilty of professional misconduct. Mr Lynch also asked the Tribunal to grant the requested Order under Section 53C.

In response to a question from the Tribunal, Mr Lynch indicated that he had no up to date information about the Respondent. He advised that the information he had previously received from the Complainers indicated that the Respondent is not currently practising.

DECISION

The Tribunal was satisfied that the Respondent was aware of the Complaint and the hearing. The Tribunal noted that the Respondent had not lodged Answers or attended the Tribunal hearing. The Tribunal found the witness Mr A to be entirely credible and reliable. The Tribunal was satisfied beyond reasonable doubt on the basis of the evidence heard, the productions and the Affidavit evidence lodged that the Respondent was guilty of professional misconduct singly and in cumulo by acting on behalf of Mr A in a situation where there was a conflict of interest between his own interest and those of Mr A's, by failing to advise Mr A to seek independent legal advice, by acting in breach of the requirements of Article 7 of the Code of Conduct for Scottish Solicitors promulgated in 2002 by acting in a dishonest fashion, by contravening Sections 23 and 32 of the Solicitors (Scotland) Act 1980 by acting in a

situation in which he had neither a practising certificate nor professional indemnity insurance, by failing to respond to correspondence from the Complainers, by attempting to mislead the Complainers in relation to Mr A's attitude to the Complaint and by failing to obtemper statutory notices served upon him by the Complainers.

The Tribunal was also satisfied beyond reasonable doubt on the basis of the evidence heard and the Affidavit evidence and productions lodged that the Respondent had failed to comply with the Determination and Direction of the Law Society. The Tribunal accordingly proceeded to make an Order under Section 53C of the Solicitors (Scotland) Act 1980.

The Tribunal considered that the cumulative effect of the Respondent's failures was very serious. The Respondent had acted in an obvious conflict of interest situation to procure personal gain and in so doing had passed himself off as a practising solicitor when he was well aware that he was not. In this case a member of the public with no previous connection to the Respondent was specifically targeted and the Respondent used his position as a solicitor to attempt to gain Mr A's trust and defraud him. The Tribunal considered that this course of conduct was clearly premeditated and that by involving himself in this fraudulent scheme the Respondent acted in a manner which has adversely affected the reputation of the profession. It is imperative if the public is to have confidence in the legal profession that solicitors act honestly at all times and in such a way as to put their personal integrity beyond question. The Tribunal took into account the doctor's letter received but noted that no explanation has been put forward by the Respondent for his actions. For these reasons the Tribunal concluded that the Respondent is not a fit and proper person to remain as a solicitor and therefore that the appropriate sanction is to order that the name of the Respondent be struck off the Roll of Solicitors in Scotland. The Tribunal made the usual order with regard to expenses and publicity.

Chairman