

**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

**JAMES JOSEPH MCDONAGH, 9
Bank Street, Dundee**

1. A Complaint dated 9 December 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, James Joseph McDonagh, 9 Bank Street, Dundee (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 1 March 2006 and notice thereof was duly served on the Respondent. On 28 February 2006 the Tribunal agreed to the hearing being adjourned because the Respondent indicated that he had never received the original Notice of the Complaint. On 2 March another copy of the Complaint was sent to the Respondent. On 21 March 2006 an extension of time for lodging answers was granted and answers were to be lodged by 6 April 2006.

4. No answers were lodged and the Tribunal appointed the Complaint to be heard on 11 May 2006 and notice thereof was duly served on the Respondent.
5. On 8 May 2006 the Respondent requested an adjournment of the hearing. On 9 May 2006 answers were received from the Respondent with another request that the hearing be adjourned. The request for an adjournment of the hearing was refused and the Respondent was advised that the hearing would take place on 11 May 2006.
6. When the case called on 11 May 2006 the Complainers were present and represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was not present or represented.
7. The Fiscal for the Complainers asked the Tribunal not to allow the late lodging of the answers and to allow him to proceed by way of affidavit evidence. After having considered the history of the case, the Tribunal resolved to proceed in the Respondent's absence and allow evidence by way of affidavit.
8. The Tribunal heard evidence from one witness for the Complainers and affidavit evidence from a further two witnesses.
9. The Tribunal found the following facts established
 - 9.1 The Respondent was born 18th May 1947. He was admitted as a solicitor on 12th March 1981. He was enrolled as a solicitor in the Register of Solicitors in Scotland on 7th April 1981. Following his admission he was employed as a Partner in the firm McDonagh Tough & Company from 1st August 1982 until 2nd March 1999. Thereafter he was employed with the firm Paul Anderson & Company from 3rd March 2000 until 15th June 2001. Since that date the Respondent has not lawfully been employed by a legal firm.

- 9.2 Mr A resides at Property 1. In or about early 2001, Mr A separated from his wife. At that time he sought and obtained legal advice from the Respondent who then was employed as an Assistant with the firm Paul Anderson & Company, Solicitors, Dundee. As a consequence of other matters unrelated, the firm of Paul Anderson & Company was dissolved on 15th June 2001. At that time the Respondent telephoned Mr A and offered to continue to represent him as his solicitor in relation to matters arising as a consequence of his separation. Mr A accepted this offer.
- 9.3 Initially the Respondent gave legal advice to Mr A advising Mr A that he was an Assistant with the firm McKenzie & Company, Solicitors of 29 Exchange Street, Dundee. The Respondent misled the said Mr A in this respect. On 11th January 2002 the Respondent rendered an invoice to Mr A for the sum of £200 representing a professional account in respect of matters the Respondent had advised him on arising from his separation. That invoice was paid by Mr A.
- 9.4 Thereafter the Respondent contacted Mr A and advised him that he was leaving the firm of McKenzie & Company and was to be employed by the organisation, Legal Direct (Scotland) Limited of PO Box 642, Dundee. Mr A was persuaded by the Respondent to allow his affairs to be dealt with by the Respondent at that organisation. The Respondent, whilst with that organisation assumed agency on behalf of Mr A in or about November 2002.
- 9.5 On 10th October 2003 the firm McQuittys of 97 Bonnygate, Cupar, Fife wrote to Mr A requesting his instructions for that firm to act on his behalf. Mr A had never heard of this firm nor had he agreed that that firm should act on his behalf. He

ignored the correspondence from McQuittys shortly thereafter. The Respondent contacted Mr A and assured him that his interests would be properly served by McQuittys acting on his behalf at that time. Mr A agreed that McQuittys could therefore represent him in connection with matters arising from his separation. Mr A believed that once again the Respondent had moved firm and was employed by the firm McQuittys. Mr A was led to believe by the Respondent that his affairs would be dealt with by the Respondent acting as an assistant with the firm McQuittys.

- 9.6 The Respondent was sequestered on 2nd March 1999. As a consequence of his sequestration, the Practising Certificate of the Respondent was suspended. The Respondent made application to the Complainers to issue to him a Restricted Practising Certificate. The Complainers were prepared to allow the Respondent to practise in the role of assistant with the firm Paul Anderson & Company, Solicitors, Dundee. A Restricted Practising Certificate was issued to the Respondent with that condition attached thereon. The Respondent was employed by the firm Paul Anderson & Company between 25th February 2000 and 15th June 2001 when that firm dissolved. On 15th June 2001 the Restricted Practising Certificate issued by the Complainers to the Respondent was suspended as a consequence of the Respondent's approved employers no longer existing. Separately on 23rd June 2000 and 10th November 2003 the Respondent appeared before the Scottish Solicitors Discipline Tribunal in respect of Complaints alleging professional misconduct on his part. On both occasions professional misconduct was established. On 23rd June 2000 the disposal of the Scottish Solicitors Discipline Tribunal was to impose a restriction that for a period of five years the Respondent should act as a qualified assistant to an employer approved by the Complainers and thereafter until he satisfied

the Tribunal that he was fit to hold a full Practising Certificate. Further on 10th November 2003 the disposal of the Scottish Solicitors Discipline Tribunal was that for a period of 10 years, any Practising Certificate held or issued to the Respondent be subject to such a restriction limiting him to act as an assistant to such employer as may be approved by the Complainers. This restriction was to run concurrently with the restriction imposed on 23rd June 2000. After the dissolution of the firm Paul Anderson & Company, the Respondent did not make application to the Complainers to allow him to act as an assistant with any other legal firm in Scotland. During the period when the Respondent acted on behalf of the client, Mr A, the Respondent did not advise Mr A that he was firstly subject to a Restricted Practising Certificate and latterly acting without a Practising Certificate. The Respondent misled his client Mr A into believing that he was a practising Scottish solicitor. The client Mr A would not have allowed the Respondent to deal with his affairs if he had been made aware that firstly the Practising Certificate of the Respondent was restricted and latterly the Respondent was without a Practising Certificate.

- 9.7 From 15th June 2001 the Respondent was without a Practising Certificate. Despite this he continued to hold himself out as a solicitor and acted on behalf of the client, Mr A. In pursuit of this deception the Respondent employed the offices and identity of various legal firms and other legal organisations. From 15th June 2001 the Respondent demanded from his client, Mr A payments to account in respect of professional charges for the so called legal services provided by the Respondent to his client. In total from 15th June 2001 at the demand of the Respondent, Mr A paid to the Respondent the sum of £1,273.17. In addition during this period, Mr A sought from the Respondent a full and detailed accounting in respect of the

monies which he had paid. This request for an accounting from the Respondent was ignored. Further the Respondent at the time he sought payment of monies from Mr A in respect of professional charges was initially an undischarged bankrupt and latterly subject to a Restricted Practising Certificate following a disposal of the Scottish Solicitors Discipline Tribunal. In response to the demands for payment, Mr A made payment of the monies due. The Respondent intromitted with client funds by demanding and receiving monies from his client, Mr A. This was a further breach of the conditions attached to the Restricted Practising Certificate of the Respondent by his intromission with client funds.

9.8 Mr A was dissatisfied with the manner in which the Respondent dealt with his affairs. By letter dated 1st July 2004 Mr A invoked the aid of the Complainers. The Complainers obtained sufficient information from Mr A to allow them to formulate and intimate a Complaint to the Respondent. Their request for an explanation from the Respondent was ignored. A number of reminders were intimated to the Respondent. These reminders were ignored. As a consequence of the repeated failure on the part of the Respondent to reply to their enquiries; it was necessary for the Complainers to intimate by recorded delivery Statutory Notices in terms of the Solicitors (Scotland) Act 1980. These Statutory Notices were ignored by the Respondent. As a result of the Respondent's failure to reply to the enquiry made of him by the Complainers the complaint of Mr A to Complainers was frustrated, hampered and unreasonably delayed.

10. After hearing submissions from the Complainers, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

- 10.1 His deceiving and misleading his client, Mr A by holding himself out as a practising Scottish solicitor during a period whilst he did not hold even a Restricted Practising Certificate and thereafter his continuing to act on behalf of his client, Mr A without having secured from the Complainers a Practising Certificate allowing him to act as an assistant with an approved legal firm.
 - 10.2 His intromitting with the monies of his client, Mr A, whilst subject to a Restricted Practising Certificate.
 - 10.3 His failure to reply timeously, openly and accurately to the reasonable enquiries made of him by the Complainers in connection with the Complaint at the instance of the client Mr A.
 - 10.4 His continuing to practise as a solicitor after 15 June 2001 without having obtained a Restricted Practising Certificate from the Complainers with a condition marked thereon allowing him to work as an assistant with a legal firm approved by the Complainers.
11. Having noted two previous Findings of professional misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 11 May 2006. The Tribunal having considered the Complaint dated 9 December 2005 at the instance of the Council of the Law Society of Scotland against James Joseph McDonagh, 9 Bank Street, Dundee; Find the Respondent guilty of Professional Misconduct in respect of his deceiving and misleading his client by holding himself out as a practising Scottish solicitor when he did not hold a practising certificate, his intromitting with client monies whilst subject to a Restricted Practising Certificate, his failure to reply to the reasonable

enquiries of the Law Society for information and his continuing to practise as a solicitor after 15 June 2001 without having obtained a Restricted Practising Certificate from the Law Society; Suspend the Respondent from practice for a period of two years; 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 a solicitor and client indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

Chairman

12. 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 Complaint was first served on the Respondent on 19 December 2005. No answers were lodged and the Notice of Hearing was sent to the Respondent on 12 January 2006 with a hearing date of 1 March 2006. The day before the hearing the Respondent faxed Mr Paul Reid, the Law Society Fiscal, indicating that he had not received the Complaint and he was unable to be at the hearing on 1 March. As it did not appear that the Notice of Complaint had been sent Recorded Delivery it was agreed by the Chairman that the matter be adjourned and a fresh Notice of Complaint be sent to the Respondent. A fresh Notice of Complaint was sent to the Respondent on 2 March 2006, no answers were lodged by the Respondent and a fresh Notice of Hearing fixing a hearing date of 11 May 2006 was sent to the Respondent on 21 April 2006. On 5 May 2006 the Tribunal received a faxed letter from the Respondent asking that the hearing on 11 May be adjourned as he had ongoing commitments and was unable to attend. The Respondent then sent a fax which was received by the Tribunal on 9 May 2006 lodging answers and again requesting that the hearing on 11 May may be adjourned. A letter was sent to the Respondent on 8 May indicating that the Chairman did not agree to the hearing being adjourned and that the case would proceed as scheduled on 11 May. The Respondent did not attend the Tribunal hearing on 11 May.

Mr Reid, the Law Society Fiscal, stated that he wrote to the Respondent on 24 February 2006 enclosing the affidavits of the Law Society's witnesses and also sending the Respondent an Inventory of Productions. On the 26 April 2006 Mr Reid again sent copies of the affidavits and a copy of the Inventory of Productions to the Respondent and asked whether he would enter into a Joint Minute. The Respondent sent a letter to Mr Reid on 8 May enclosing copy answers. Mr Reid asked the Tribunal not to accept the Respondent's answers which were two months late and requested that the Tribunal allow him to lead his evidence by affidavit evidence.

The Tribunal noted the history of the Complaint. The Complaint was originally sent to the Respondent in December 2005 but as the Respondent indicated that he did not receive this (although he accepted that he had received the Notice of Hearing for the hearing on 1 March) a fresh Complaint was sent to the Respondent on 2 March 2006

asking for answers to be lodged within 14 days. On 16 March the Respondent asked for the time for lodging answers to be extended for a period of 3 weeks and this was agreed. In his letter requesting this extension the Respondent indicated various matters that he required to investigate that would go into his answers. No answers were lodged within this three week period which expired on 6 April 2006. The Respondent then lodged answers received by the Tribunal on 9 May, two days prior to the hearing. The Respondent did not give any explanation as to why the answers were late. The Tribunal noted the answers were skeletal in form and did not appear to address the matters set out in the Respondent's letter of 16 March. The Tribunal also noted that the Respondent had not seen fit to attend the Tribunal hearing. The Respondent had asked for the hearing to be adjourned due to ongoing commitments but did not advise the Tribunal what these commitments were. There was no medical evidence before the Tribunal to indicate that there was any difficulty in the Respondent attending the Tribunal. Given the lack of a satisfactory explanation from the Respondent with regard to why his answers had been lodged late and why he was unable to attend the hearing, the Tribunal, having considered matters at length, decided not to allow the answers to be lodged late and refused the Respondent's motion to adjourn. In these circumstances the Tribunal also granted permission to the Law Society to lead their evidence by way of affidavit evidence.

EVIDENCE FOR THE COMPLAINERS

Mr Reid first led the evidence of Ian Ritchie who was personally present at the Tribunal and indicated that he was a Case Manager with the Law Society. Mr Ritchie explained that he had dealt with the Respondent's case and confirmed the Respondent's professional employment history. Mr Ritchie confirmed that since 15 June 2001 the Respondent had not been employed as a practising solicitor. Mr Ritchie advised the Tribunal that Mr A had complained about the Respondent and that he had been in communication with Mr A who advised him that he had consulted the Respondent when he was employed by Paul Anderson & Company. The firm of Paul Anderson and Company ceased to exist after 15 June 2001 and thereafter Mr A received letters from the Respondent on McKenzie & Company notepaper. Mr Ritchie confirmed that the Respondent did not have the approval of the Law Society to work for McKenzie & Company. Mr A was under the impression that the

Respondent was still a solicitor with a practising certificate. The Respondent submitted an account to Mr A and he paid it. Mr A told Mr Ritchie that in late 2002 the Respondent told him that he was going to go to Legal Direct and Mr Ritchie indicated that he was personally aware that the Respondent did then go to Legal Direct. Mr Ritchie further advised that in October 2003 Mr A received correspondence from McQuitty's which surprised him as he had never instructed them. Mr Ritchie referred the Tribunal to various productions being letters from McQuitty's which indicated that they had been contacted by the Respondent and that the affairs of Mr A would be dealt with by the Respondent while he was at McQuitty's. Files had been transferred to McQuitty's without Mr A knowledge. Mr Ritchie advised that Mr A had found out from his wife's solicitor that the Respondent no longer had a practising certificate and Mr A had contacted the Procurator Fiscal in Dundee. Mr Ritchie confirmed that Mr A was dissatisfied with the service he received from the Respondent and that Mr A had paid the Respondent £1,273. Mr Ritchie referred to the productions being copy receipts in connection with the money paid. The Respondent had never provided an account to Mr A.

Mr Ritchie explained that the Respondent had become bankrupt in 1999 which had led to his practising certificate being suspended and he was discharged from bankruptcy on 2 March 2002. Due to his bankruptcy he required permission from the Law Society to work on a Restricted Practising Certificate. The Law Society approved Paul Anderson & Company as an employer but when that firm dissolved the Respondent did not seek authorisation from the Law Society to work with any other firm. Mr Ritchie also confirmed that the Respondent was subject to a ten year Restriction from the Tribunal imposed on 23 June 2000 and required Law Society's approval before he could work for a firm of solicitors. When Paul Anderson & Company dissolved on 15 June 2001 the Respondent's practising certificate became suspended as he was not then working for a firm approved by the Law Society. As he was on a Restricted Practising Certificate he was not allowed to intromit with client funds but he did so. Mr Ritchie indicated that on the 1 July 2004 Mr A complained to the Law Society and this complaint was intimated to the Respondent by Recorded Delivery notices to which he did not reply. This resulted in the Law Society being hampered and frustrated in dealing with Mr A's complaint. In response to a question, Mr Ritchie confirmed that the Respondent was involved in drafting a separation

agreement and in undertaking correspondence with Mr A's wife's solicitors. When he moved to McKenzie & Company the Respondent continued to do the same kind of work as he did while he was at Paul Anderson.

Mr Reid then referred the Tribunal to the affidavit evidence from Mr A which confirmed that the Respondent was acting on his behalf in a legal capacity. Mr A indicates that the Respondent told him that he was an assistant with McKenzie & Company and Mr A was under the impression that the Respondent was still operating as a solicitor. Mr A also confirms in his affidavit that he received invoices from the Respondent and paid monies in respect of the invoices. Mr A states in his affidavit that he was misled by the Respondent. Mr A, in his affidavit, also refers to correspondence being the various productions lodged. Mr Reid also referred the Tribunal to the affidavit of Ms B who confirms that she was Mr A's partner and that she understood that the Respondent was acting for Mr A as a solicitor. She also confirms that Mr A received invoices from the Respondent and paid them. She confirms that she often accompanied Mr A to meetings with the Respondent.

Mr Reid moved to amend the averment of professional misconduct contained in Article 4.1 (a) by substituting "their deceiving and misleading" for "The Respondent deceived and misled" where they occur in line 1 and substituting "did not hold even" for "initially held only" where they appear in line 2 and this was agreed.

DECISION

The Tribunal found Mr Ritchie to be a credible and reliable witness and accepted his evidence. The Tribunal also accepted the affidavit evidence from Mr A and Ms B. It was clear from this evidence and the productions lodged that the Respondent was an assistant with Paul Anderson & Company. He was also on their notepaper designated as a solicitor. It was clear that Mr A thought that the Respondent was acting on his behalf as a solicitor and when the Respondent stopped working for Paul Anderson and went to work for McKenzie & Company he did not advise Mr A of the fact that he no longer held a practising certificate. Due to the fact that the Respondent was subject to a Restricted Practising Certificate he required his firm to be approved by the Law Society before he could work for them. When Paul Anderson & Company ceased to

exist in June 2001 the Respondent ceased to have a practising certificate. He did not obtain authority from the Law Society to work for McKenzie & Company but he continued to act for Mr A who thought that he was still a practising solicitor. The Tribunal accordingly was satisfied beyond reasonable doubt that the Respondent after 15 June 2001 held himself out as being a practising solicitor when he no longer held even a Restricted Practising Certificate and he deceived and misled his client, Mr A. It is also clear from the evidence and productions lodged that the Respondent invoiced Mr A who paid monies in settlement of the invoices. The Tribunal was accordingly satisfied beyond reasonable doubt that he intromitted with monies of his client, Mr A, whilst subject to a Restricted Practising Certificate. It was also clear from the evidence of Mr Ritchie and the productions lodged that the Respondent failed to reply to the reasonable enquiries of the Law Society. The Tribunal did not find that there was sufficient evidence to establish that the Respondent had acted contrary to Rules 4 and 6 of the Solicitors (Scotland) Accounts Rules 1997 and the Fiscal for the Law Society indicated that he would not insist on this averment of professional misconduct. The Tribunal also considered that the Respondent's ignoring of a single request from his client for a full and detailed accounting was not sufficient to amount to professional misconduct.

The Fiscal then lodged two previous Findings of professional misconduct with the Tribunal. Mr Reid also advised the Tribunal that so far as he understood it the Respondent was now out of the profession.

PENALTY

Being a solicitor provides a client with the protection of regulation by the Law Society and cover under the professional indemnity insurance policy. The Respondent's failure to advise Mr A that he was no longer a solicitor and accordingly no longer covered by these protections denied Mr A the opportunity to make an informed decision as to whether or not to continue instructing the Respondent. The Respondent holding himself out as being a practising solicitor when this was not the case is damaging to the reputation of the legal profession. The Tribunal noted that the Respondent was presently subject to a Restriction on his practising certificate for a period of ten years imposed by the Tribunal in August 2003. The Tribunal noted that

these Findings related to analogous matters. The Tribunal also noted that even after the Tribunal Findings were issued in August 2003 the Respondent still did not tell his client that he did not have a practising certificate. The Tribunal accordingly considered that the Respondent should be Suspended from practice for a period of two years. The Tribunal made the usual order with regard to publicity and expenses.

Chairman