

**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**

**MORGAN LEWIS WHEELER,  
Solicitor of Blackadder &  
McMonagle Solicitors, 41 High  
Street, Falkirk**

1. A Complaint dated 5 April 2010 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Morgan Lewis Wheeler, Solicitor of Blackadder & McMonagle Solicitors, 41 High Street, Falkirk (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. A copy of the Complaint as lodged was sent to the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 5 May 2010.
4. The hearing took place on 5 May 2010. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow.

The Respondent was present and was represented by Mr Summers, Solicitor, Aberdeen.

5. Mr Reid made a motion to make two amendments to the Complaint. This motion was not opposed and was granted by the Tribunal. Mr Summers, on behalf of the Respondent, admitted the facts and averments in the Complaint as amended. No evidence required to be led.

6. The Tribunal found the following facts established

6.1 The Respondent was born on 28 April 1955. He was admitted as a solicitor on 22 September 1978. He was enrolled as a solicitor on the roll of solicitors practising in Scotland on 11 October 1978. From 1 April 1983 until 31 October 2001 he was employed as a partner with the firm Marshall Wilson, Solicitors, Falkirk. From 1 November 2002 until 5 April 2003 he employed as a solicitor with the firm Blackadder & McMonagle, Solicitors, Falkirk. On 6 April 2003 he was assumed as a partner in the firm of Blackadder & McMonagle, Solicitors, Falkirk. He remains a partner in the said firm.

#### Mr and Mrs A

6.2 Mr and Mrs A formerly resided at Property 1. Their address at Property 1 was a new build property. They purchased their property from a developer, company 1.

6.3 Missives were concluded in September 2005 with Fiona Coulter acting for the Guilds and the Respondent nominally acting for the developer. The transaction settled in September 2005 when payment of the purchase price was made and the keys were delivered to Mr and Mrs A. The missives were silent on the issue of extras. Litigation ensued between the parties. The Respondent and Fiona Coulter withdrew from acting on

behalf of both parties to the litigation. Throughout the course of the conveyancing transaction, the said Fiona Coulter was employed as an assistant with the firm Blackadder & McMonagle, Solicitors, Falkirk. The Respondent was a partner in the firm of Blackadder & McMonagle, Solicitors, Falkirk. He and Fiona Coulter operated out of the same office. The Respondent was the partner responsible for the supervision of his assistant Fiona Coulter throughout the course of the transaction.

7. Having considered the foregoing circumstances and having heard submissions on behalf of both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

- 7.1 his conduct amounting to a failure on his part to adequately supervise his assistant, Fiona Coulter, then active in the course of her employment.

8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 5 May 2010. The Tribunal having considered the Complaint dated 5 April 2010 at the instance of the Council of the Law Society of Scotland against Morgan Lewis Wheeler, Solicitor of Blackadder & McMonagle Solicitors, 41 High Street, Falkirk; Find the Respondent guilty of Professional Misconduct in respect of his conduct amounting to a failure on his part to adequately supervise his assistant, Fiona Coulter, then active in the course of her employment; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis 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 in relation

to this Complaint; and Direct that publicity will be given to this Decision and this publicity will include the name of the Respondent.

**(signed)**

**Alistair Cockburn**

**Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Chairman**

**NOTE**

Mr Reid sought the leave of the Tribunal to withdraw an earlier Complaint dated 5 January 2010 against the Respondent and Ms Coulter and to substitute therefor a new Complaint dated 5 April 2010 against the Respondent alone. Mr Summers did not oppose that motion and it was granted by the Tribunal. Mr Reid advised the Tribunal that the Answers lodged on behalf of the Respondent related to the new Complaint.

Mr Reid sought leave of the Tribunal to make the following amendments to the Complaint:

1. The insertion of the word “by” between the words “submitted” and “the said Fiona Coulter” where they appear in the second sentence of Article 2.2.
2. The deletion of the words “the said Fiona Coulter did not advise her clients in writing as she was required to do so in terms of Rule 5 of the said 1986 Practice Rules.” where they appear at lines 10, 11 and 12 of the second paragraph of Article 3.1.

Mr Reid’s motion was not opposed and the Tribunal agreed to the Complaint being amended as detailed above. On behalf of the Respondent Mr Summers indicated that the averments of facts, duty and professional misconduct in the Complaint as amended were admitted. It was accordingly not necessary for evidence to be led.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Reid advised that the Respondent has 31 years experience in the profession and has never previously appeared before the Tribunal. He stated that the background to this Complaint was that the Respondent’s firm acted in a conveyancing transaction which involved a clear conflict of interest. The Respondent acted on behalf of the sellers of a new build house, Company 1. Ms Coulter was the Respondent’s assistant and she acted on behalf of the purchasers of the house, Mr and Mrs A. At the time the missives were concluded the house was still in the course of being built.

Mr Reid submitted that from the perception of the purchasers the missives were defective. A dispute arose regarding extras. In her complaint to the Law Society Mrs A referred to the construction of decking which she did not want and which the builder had built and was seeking to charge extra for.

Mr Reid stated that the Respondent was the partner responsible for conveyancing in the firm and Ms Coulter worked under his supervision. Ms Coulter accepted instructions from the A's and failed to notice the conflict of interest. The Respondent failed to adequately supervise his assistant in that she carried on acting for Mr and Mrs A despite the obvious conflict of interest.

Mr Reid invited the Tribunal to find the Respondent guilty of professional misconduct. Mr Reid stated that he wanted to emphasise that the plea was adjusted at a very early stage and that the Respondent had not previously appeared before the Tribunal or had any matters outstanding.

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

Mr Summers indicated that the background to this matter was as set out in the Answers which had been lodged. He advised that he had a number of points of clarification to make in relation to Mr Reid's submission.

Firstly in relation to paragraph 2.1 of the Complaint, he advised that as far as the Respondent is aware the A's first contacted the builders regarding purchasing the property in February 2005. They paid a deposit of £10,000 at that stage and a further £1,000 was paid in August 2005. The instructions to Ms Coulter were received around 14 September 2005 with a settlement date of 26 September 2005. Mr Summers stated that he wished the Tribunal to take into account that there was therefore not a great deal of time for the missives and conveyancing to be completed.

Secondly, Mr Summers submitted that the A's instructed the Respondent's firm in the knowledge that other solicitors in that firm acted for the builders. Mr Summers stated that this fact was clear from the contents of a letter of 21 February 2005 which acknowledged receipt of their cheque for the deposit which advised the A's that

Blackadder & McMonagle were the solicitors acting on behalf of the builders. Mr Summers stated that in making this point he intended no criticism of the A's but thought this matter was of relevance. He stated that the A's were not to know what consequences were to flow from instructing the same firm of solicitors. Mr Summers accepted that the firm should not have acted for both parties. Mr Summers submitted that the Respondent has always accepted that fact. Mr Summers stated that the Respondent was in practice when the 1986 Rules were promulgated and was fully aware of them. However, in this case the Respondent did not identify that in the particular circumstances the rule regarding conflict of interest applied.

Mr Summers stated that the Respondent has always taken responsibility for supervising his assistants very seriously. He emphasised that the Respondent greatly regrets that he allowed his assistant to act in a conflict of interest situation. Mr Summers explained that this was the first builder/developer client for whom the Respondent had acted. He stated that in the words of the Respondent the potential for the conflict "did not cross his radar". Mr Summers stated that the Respondent fully recognises that the conflict of interest should have been noticed by him. Mr Summers stated that the Respondent has now put procedures in place at the firm to ensure that this failure will not be repeated.

Thirdly, in relation to the question of whether the missives were defective, Mr Summers submitted that this is only of tangential relevance to the Tribunal. Mr Summers stated that the Respondent was not aware of any issue regarding decking. He stated that the missives used were the standard Falkirk Faculty missives which made reference to a deed of conditions. He submitted that this was not a case of a builder attempting to induce a purchaser into entering into a patently unfair deal. Mr Summers submitted that the A's paid a fair price for the property. Mr Summers stated that the A's were clearly aware that the firm of Blackadder & McMonagle were acting on behalf of both parties.

Mr Summers referred the Tribunal to Article 4.1 of his Answers. He advised that the Respondent has practised as a solicitor for more than 30 years and has never been the subject of a conduct complaint to the Law Society or the Discipline Tribunal. The Respondent accepts that there was a breach by his assistant of the 1986 Practice



Rules. This breach was a genuine error by a competent and reputable solicitor. The Respondent accepts responsibility for this error. He accepts that his error was culpable but it was not malicious. The builders were not developers in the conventional sense. There was no obvious conflict in the transaction. The Respondent dealt with the matter appropriately as soon as the conflict arose. He accepts that ignorance of the rule is no excuse for his failure to adhere to it. He accepts for the purposes of these proceedings that no blame should attach to his assistant and has always accepted that. He sought to persuade the Law Society that any proceedings in relation to alleged misconduct should be brought only against him. He sought to persuade the Law Society not to insist on proceedings against Fiona Coulter.

Mr Summers stated that the Respondent accepts responsibility for failing to properly supervise his assistant. Mr Summers submitted that not every breach of the Practice Rules is sufficiently serious and reprehensible to amount to misconduct. That notwithstanding, he advised that the Respondent is prepared to accept that in the particular circumstances of this case, his conduct does amount to professional misconduct.

Mr Summers lodged a copy letter dated 29 April 2009 as a production. That letter was from Mr Summers on behalf of the Respondent to the Law Society's Complaints Investigator. Mr Summers advised that in the penultimate paragraph of that letter he had stated that the Respondent's view was that any blame should rest with the Respondent and not with Ms Coulter. Mr Summers asked the Tribunal to take into account that as soon as the conflict arose the firm immediately referred both parties to other solicitors.

Mr Summers referred the Tribunal to the character reference received from Sheriff Robb on behalf of the Respondent.

In conclusion, Mr Summers asked the Tribunal to take into account four factors. Firstly, that the Respondent has been in practice for nearly 32 years with a previously unblemished record. Secondly, the Respondent has always accepted responsibility for this matter and he dealt with the Complaint properly and responsibly. Thirdly, Mr Summers submitted that not every breach of the Practice Rules amounts to

professional misconduct. He submitted that the Respondent's failure should be viewed in isolation against a backdrop of his previous unblemished record. Mr Summers submitted that the Respondent's failure was at the lower end of the scale of professional misconduct. Fourthly, Mr Summers asked that in imposing a sanction the Tribunal take into account that this matter has been outstanding for a long time. The complaint was made in September 2007 and there was a delay of nine months when the file was mislaid. The Respondent has found the fact that this matter has been ongoing for a long time to be extremely stressful. Essentially he has been living with that stress for three years. Mr Summers asked the Tribunal to take into account that the Respondent's defence is being privately funded and he will be bearing significant costs in relation to this matter and to accept that that may be a sufficient financial penalty.

In response to a question from the Tribunal, Mr Summers stated that the Respondent conceded that the property was not finally constructed when missives were concluded but stated that the Respondent does not have any further information as to the detail of that.

## **DECISION**

The Tribunal considered the Complaint as amended, the Answers lodged on behalf of the Respondent and the submissions made by both parties. The Tribunal had regard to the definition of professional misconduct as outlined in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC129. The Tribunal considered that this matter involved a clear conflict of interest and breach of the 1986 Practice Rules. The Tribunal considered that the Respondent's failure to supervise his assistant and point out the obvious conflict of interest was a serious and reprehensible departure from the standards expected of a competent and reputable solicitor. The Tribunal therefore considered that in the particular circumstances of this matter the Respondent's conduct did amount to professional misconduct.

However, the Tribunal had regard to the Respondent's lengthy experience as a solicitor, the terms of the character reference lodged and his previously unblemished record. The Tribunal accepted that this was an isolated failure which was not persisted

in for any length of time. The Tribunal noted that the Respondent had shown insight into his failure by immediately accepting responsibility both when the complaint was initially investigated by the Law Society and again when this matter came before the Tribunal. The Tribunal noted that changes have been made to the Respondent's practice to ensure that this failure will not be repeated. The Tribunal considered that the Respondent's failure was at the lower end of the scale of professional misconduct and that the appropriate sanction was a Censure. The Tribunal ordered that the Respondent be liable for the expenses of the Tribunal and of the Law Society in respect of this Complaint and made the usual Order with regard to publicity.

**Chairman**