

**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

**ALASTAIR OGSTON
ROBERTSON, Solicitor, Messrs
Burnett & Reid, Solicitors, 15
Golden Square, Aberdeen**

1. A Complaint dated 18th October 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alastair Ogston Robertson, Solicitor, Messrs Burnett & Reid, Solicitors, 15 Golden Square, Aberdeen (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged by the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 24th January 2006 and notice thereof was duly served on the Respondent.
4. When the Complaint called on 24th January 2006 the Complainers were represented by their Fiscal Paul Reid, Solicitor, Glasgow. The Respondent was present and represented by Mr F Lefevre, Solicitor, Aberdeen.

5. A Record was lodged with adjusted answers. It was confirmed that the facts in the Complaint were not disputed and accordingly no evidence was led.

6. The Tribunal found the following facts established

6.1 The Respondent was born on 13th July 1946. He was admitted as a solicitor on 4th November 1969. He was enrolled as a solicitor in the Register of Solicitors of Scotland on 26th November 1969. The Respondent became a Partner in the firm Burnett & Reid, Solicitors, 15 Golden Square, Aberdeen on 1st January 1972.

6.2 Ms A and Ms B

Ms A and Ms B both reside at Property 1. They formerly were clients of the firm of Burnett & Reid, Solicitors, 15 Golden Square, Aberdeen. The firm acted on their behalf in connection with certain conveyancing matters. They were dissatisfied with the level of service provided by that firm. They consulted an alternative firm of solicitors and requested that the firm act on their behalf in particular in connection with the sale of two flatted properties belonging to them. The alternative firm wrote to Messrs Burnett & Reid requesting that files and Title Deeds in connection with the flatted properties owned by Ms A & Ms B be delivered to them. In general Ms A & Ms B were unhappy with the manner in which Messrs Burnett & Reid, Solicitors dealt with their affairs. As a consequence by e-mail transmission dated 11th August 2004 they invoked the aid of the Complainers. The Complainers obtained from Ms A & Ms B sufficient information to allow a formal complaint to be intimated to Messrs Burnett & Reid, Solicitors. It was not possible to identify the actual solicitor who was responsible for the majority of the work carried out on behalf of Ms A & Ms B. Accordingly on 20th November 2003 a letter was sent by the Complainers to each Partner in the firm of Messrs Burnett &

Reid, Solicitors providing them with the identified Heads of Complaint and inviting them to forward a response. By letter dated 25th November 2003 the Respondent replied on behalf of the Partners indicating he felt it unnecessary that a formal Complaint should be made against each of the nine Partners of Messrs Burnett & Reid. The Respondent suggested that the Complaint should be directed to him personally as he was the designated Client Relations Partner whereupon he would reply after investigation. This suggestion was accepted by the Complainers.

- 6.3 Having been identified as the designated Client Relations Partner, on 19th December 2003 the Complainers wrote to the Respondent asking for a reply to the original Complaint. No reply was received. On 18th January 2004, by recorded delivery, a Statutory Notice was intimated to the Respondent in terms of Section 15(2)(I)(I) of the Solicitors (Scotland) Act 1980. This Notice prompted a response from the Respondent dated 26th January 2004. Thereafter the Complainers decided to pass the matter to a Reporter for his opinion. On 17th March 2004 the Complainers wrote to the Respondent requesting that he forward the file of papers relating to Ms A & Ms B for this to be considered by the Reporter. This request was ignored and a reminder was intimated on 2nd April 2004. Still the request was ignored and a further reminder was intimated on 28th April 2004. Still this was ignored and a further reminder was intimated on 10th May 2004. Eventually with a view to progressing the Complaint, on 28th May 2004 the Complainers wrote to the Respondent advising that what paperwork they had, had been passed to a Reporter, who after consideration had requested copies of certain statements and fee notes from a period in 1999 until the date when Messrs Burnett & Reid ceased to act on behalf of Ms A & Ms B. This request for further information was ignored by the Respondent. A reminder was intimated to the Respondent on 16th June 2004 which was ignored. A further

reminder was intimated on 8th July 2004 to the Respondent which was ignored. Further reminders were intimated to the Respondent on 20th August 2004 and 1st September 2004, both of which were ignored. To forward the Complaints process, further information was received from Ms A & Ms B which was copied to the Respondent with a request that he provide a response to the matters contained therein to allow the Reporter to have as much of the necessary information before him prior to completion of his report. Again this request for a reply was ignored by the Respondent. Reminders were intimated to the Respondent on 29th November 2004 and 13th December 2004, both of which were ignored by the Respondent. By recorded delivery, a further Statutory Notice in terms of Section 15(2)(I)(I) of the Solicitors (Scotland) Act 1980 was intimated to the Respondent on 7th January 2005. This Statutory Notice was ignored by the Respondent. On 8th February 2005 the Complainers wrote to the Respondent advising that if a response was not received then they would instigate a Formal Complaint concerning his failure to reply to their correspondence. This request was ignored by the Respondent. On 7th March 2005 the Complainers intimated a Formal Letter to the Respondent which set forth a Formal Complaint alleging a failure on the part of the Respondent to reply to their enquiries. This letter was ignored by the Respondent. On 21st March 2005 with a view to progressing the Complaint, the Respondent was advised by the Complainers, that they were proceeding to instruct the Reporter to complete his Report. The Reporter considered the paperwork available and requested further information again from the Respondent. This request for information was intimated to the Respondent by letter dated 30th March 2005. This request was replied to by the Respondent on 3rd May 2005. Eventually after considerable delay, the original Complaint was considered by a Committee of the Complainers which determined that an inadequate

professional service had been provided to them and awarded compensation.

6.4 The Complaint intimated to the Respondent was one made ex proprio motu by the Complainers against the Respondent individually as Clients Relations Partner of his firm. It was expressly stated by the Complainers to be that

(a) Mr Alastair Robertson, a partner in the firm (i.e. Messrs Burnett & Reid, Aberdeen), has failed to respond to Law Society correspondence, in particular that he failed to respond to a formal Notice dated 7th January 2005, and

(b) failed to reply to correspondence dated 22nd November, 29th November and 13th December, 2004

This refers to four specific letters the first of which sought a Response to a Memorandum enclosed and the next two reminders. The bulk of the Complainers' averments dealt with other matters and correspondence which stem from a separate complaint made by clients, Ms A and Ms B against the said firm of Burnett & Reid which were dealt with between 11th August 2003 and 21st June 2005 at which date the Complainers' Clients Relation Committee J made a finding of inadequate professional service against the said firm and in each of two instances of complaint made maximum awards against the firm with an order for repayment of certain fees and outlays. Part of the basis of these awards is stated in the findings of said Committee to include '...stress and inconvenience suffered by the complainers ...' which was regarded as 'very serious'. The Respondent had had no personal involvement in the Ms A & Ms Bs' business, but as a partner in said firm was properly subject to the penalty imposed.

7. Having considered the foregoing circumstances and having heard submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct in cumulo in respect of 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 Ms A & Ms B.

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

Edinburgh 24th January 2006. The Tribunal having considered the Complaint dated 18th October 2005 at the instance of the Council of the Law Society of Scotland against Alastair Ogston Robertson, Solicitor, Messrs Burnett & Reid, Solicitors, 15 Golden Square, Aberdeen; Find the Respondent guilty of Professional Misconduct in cumulo in respect of his failure to reply timeously, openly and accurately to the reasonable enquiries made of him by the Law Society; Censure the Respondent; 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 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

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

On the morning of the Tribunal a Record was lodged containing adjusted answers. It was noted that all the productions lodged were agreed and that the facts in the Complaint and answers were not in dispute. There was accordingly no evidence led. The solicitor for the Respondent indicated that he wished to make two preliminary pleas. His first plea was that proceedings before the Tribunal were quasi criminal and the burden of proof was beyond reasonable doubt. Mr Lefevre accordingly stated that the Respondent must be in a position to know exactly what the Complaint against him was. Mr Lefevre indicated that the decision of the Professional Conduct Committee of the Law Society was that the Respondent had failed to respond to Law Society correspondence, in particular he failed to respond to a formal Notice dated 7th January 2005 and he failed to respond to correspondence dated 22nd November 2004, 29th November 2004 and 13th December 2004. Mr Lefevre accordingly argued that the dates prior to this when the Respondent failed to respond should not have been included in the Complaint before the Tribunal as the Respondent had never had any chance to respond to the Law Society in connection with his failures to respond prior to this. In response to a question from the Chairman, Mr Lefevre however indicated that he was not able to put this proposition into a legal principle. Mr Lefevre's second preliminary point was that the correspondence from the Law Society had indicated that the Respondent would be given a further chance to respond which he did on 3rd May 2005 and he accordingly should not have been made subject to the Complaint which was now before the Tribunal. In response to a question from the Chairman as to what the actual preliminary plea was, Mr Lefevre indicated that he was saying that having determined the lack of response to the initial letter and taking into account the fact that the memorandum had not been received by the Respondent, once it had been re-sent and the Respondent having been awarded a final opportunity to respond, the Respondent actually did respond on the 3rd May.

Mr Reid indicated that there was no proper plea before the Tribunal and he had no further comments to make. The Tribunal did not consider there to be a properly formulated preliminary plea before it and accordingly found that the Complaint should proceed.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid indicated that the Ms A and Ms B had complained with regard to the way that the Respondent's firm had dealt with conveyancing matters. It had not been possible to identify the solicitor who had been dealing with matters and the Respondent took responsibility as Client Relations Partner. Mr Reid referred the Tribunal to a letter of 20th November 2003 which intimated the Complaint. Reminders were then sent and then a warning that if there was not a reply within 7 days a statutory notice would be sent. On 8th January 2004 a statutory notice was sent which led to a response from the Respondent indicating that he regretted the delay. Mr Reid stated that the delay at this stage was ten weeks. The Respondent's response was passed to the Ms A and Ms B who were not happy and accordingly a Reporter was appointed. Mr Reid referred the Tribunal to a letter dated 17th March 2004 to the Respondent asking for files. Then a letter was sent as a reminder and on 28th May 2005 the Reporter asks for letters and various fee notes. Another letter was sent saying that these were urgently required and other letters were sent reminding the Respondent. On the 27th August 2004 there was a response from the Respondent but no explanation as to why there had been a delay. The delay here was 23 weeks. The Respondent was then sent a letter explaining the next step in the procedure and then sent a letter asking for a response. As there was no response the Respondent was warned that a statutory notice would be served if no response was received. The statutory notice was served on 7th January 2005. The Respondent was then sent a letter warning him that there would be a complaint by the Society in connection with his failure to respond. Various phone calls were made to encourage the Respondent to provide a response. In one phone call he promised a response by the next day but this was not forthcoming. The Respondent sent a letter on 21st March responding. Mr Reid indicated that this segment of the delay was 17 weeks. Mr Reid stated to the Tribunal that the total delay involved was 50 weeks and 20 letters were sent to the Respondent requesting a response plus two statutory notices and some phone calls. The Respondent was also sent the formal Complaint. In response to a question from the Tribunal Mr Reid accepted that the letter of 22nd November 2004 could not have included all the information as the letter of 29th November sent an additional letter.

SUBMISSIONS FOR THE RESPONDENT

Mr Lefevre indicated that the Respondent had no argument with the documents referred to by Mr Reid. Mr Lefevre averred that his client had been misled by the communications from the Law Society in connection with the period of delay that was being dealt with. In connection with the failure to reply to the earlier correspondence Mr Lefevre asked the Tribunal to consider the original answers lodged by the Respondent. Mr Lefevre pointed out that the Committee that had considered the Complaint against the Respondent had decided not to refer the matter for prosecution but the Professional Conduct Committee had changed this decision. Mr Lefevre indicated that this was unfair as the Respondent had not been given any opportunity to respond. Mr Lefevre also indicated that the decision of the first Committee was discretionary and should not have been overturned unless it could be established that no reasonable committee could have come to that decision. The Professional Conduct Committee considered referring it back to the first Committee but did not do so. Mr Lefevre asked the Tribunal to decide whether or not the Respondent's conduct was serious enough in the whole circumstances to amount to professional misconduct and referred the Tribunal to the test in the Sharp case. Mr Lefevre also outlined the difficulties that the Respondent was facing at that time in dealing with the problem of a dishonest employee who had stolen money from the firm and who had also removed papers from the files. Mr Lefevre advised the Tribunal that the Respondent had an impeccable past history and had been a past president of the Society of Advocates. He also referred the Tribunal to medical evidence lodged.

DECISION

The Tribunal considered that the wording of the finding of the Professional Conduct Committee was perhaps unfortunate as it indicated to the Respondent that the Law Society were concentrating on a particular period of time. The Tribunal however was satisfied that the fiscal for the Law Society was not precluded from putting forward a Complaint which was not in exactly the same form as the decision to prosecute. Once served with the Complaint the Respondent had a chance to respond to everything in the Complaint and the Tribunal considered that he had fair notice of what he had to answer before the Tribunal. The Tribunal also considered that it was unfortunate for the Respondent that the Professional Conduct Committee had overruled the previous Committee decision but this was something that they were entitled to do. The

Tribunal was concerned by the catalogue of the Respondent's failure to reply over a period of time. The Tribunal accepted that the Respondent had been having difficulties at this time but he should have written to the Law Society and explained the position. The Respondent had made himself responsible as Client Relations Partner and had to accept responsibility. There were numerous letters sent to the Respondent as detailed in the Inventory of Productions lodged with the Tribunal. The Tribunal also noted that on one occasion the Respondent had given a verbal commitment that he would respond the next day and then did not do so. The Respondent had explained this in his answers but the Tribunal did not consider it satisfactory. The Tribunal has made it clear on numerous occasions that failure to respond to the Law Society hampers them in the performance of their statutory duty and is prejudicial to the reputation of the legal profession. In this case the Respondent had been sent 20 letters, two statutory notices and one formal complaint and the total period involved was some 50 weeks. Accordingly the Tribunal, by a majority decision, was satisfied beyond reasonable doubt that the Respondent's conduct *in cumulo* amounted to professional misconduct. One member of the Tribunal dissented and considered that the Respondent's conduct was not serious and reprehensible enough to amount to professional misconduct in terms of *Sharp-v-Council of the Law Society of Scotland 1984 SC 129*. This view was based on the fact that the Respondent was Client Relations Partner and had been assigned to dealing with matters of which he had no personal knowledge. This was made more difficult by the fact that a dishonest employee had removed papers from the files and the Respondent had difficulty getting the information required to answer the Complaint. The Respondent was also extremely busy at the time dealing with other business matters including delivery of seminars to others in the profession which related to his specialism in Agricultural Law.

After hearing mitigation from the Respondent's solicitor the Tribunal considered that a Censure would be a sufficient penalty taking account of the difficulties faced by the Respondent and his firm at that time, the difficulties caused by the dishonest employee removing items from files and the Respondent's busy professional life and health difficulties. The Tribunal was satisfied that the Respondent was unlikely to allow himself to get into such difficulties again. The Tribunal made the usual order regarding publicity and expenses.

Chairman