

**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

**GRAEME CROMBIE MILLER,
of Miller Stewart Limited,
Solicitors, 1252 Shettleston Road,
Shettleston, Glasgow**

1. A Complaint dated 7 August 2008 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Graeme Crombie Miller, of Miller Stewart Limited, Solicitors, 1252 Shettleston Road, Shettleston, Glasgow (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 29 October 2008 and notice thereof was duly served on the Respondent.
4. The hearing took place on 29 October 2008. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow. The Respondent was present and represented by Mr McCann, Solicitor, Clydebank.

5. A Record was lodged together with a Joint Minute admitting the facts and averments in the Complaint as amended. No evidence was led.

6. The Tribunal found the following facts established

6.1 The Respondent was born on 4 February 1963. He was admitted as a solicitor on 27 September 1996. He was enrolled as a solicitor in the Roll of Solicitors for Scotland on 1 October 1996. From 17 October 1996 until 11 April 1997 he was employed by the firm Lockharts, Solicitors. From 14 April 1997 until 19 January 1998 he was a consultant with the firm Sykes & Co. From 30 June 1997 until 31 May 2001 he was a partner of the firm Miller Stewart, Solicitors. From 1 June 2001 until 31 October 2002 he was a director of the organisation MSS Legal Limited. He is at present practising as a director of the organisation Miller Stewart Limited of 1252 Shettleston Road, Shettleston, Glasgow.

Mr & Mrs A

6.2 Mr and Mrs A reside at Property 1. They formerly resided at Property 2. Whilst resident there, they decided to place their property for sale. In the course of so doing they met with a number of estate agents including the Respondent's staff, who provided estate agency services as part of his professional practice. In the course of this meeting, the Respondent's staff advised Mr and Mrs A that not only would they display a property schedule advertising their property for sale in the office window then situated at Brodick, Isle of Arran but that also the property would be advertised through the auspices of the organisation GSPC including advertisement within the magazine produced by that organisation. They explained to Mr and Mrs A that they employed people to collect quantities of the magazine from Glasgow, had them transported to Arran and thereafter distributed around the island. Ultimately Mr and Mrs

A decided to employ an alternative firm of solicitors and estate agents to act on their behalf in connection with the marketing and sale of their property. This firm was Mesdames Reid Blair, Solicitors, one of only three solicitors on the Isle of Arran who dealt with the marketing and sale of properties on the island. The quotation provided by that firm in respect of the fees involved was lower than that of the Respondent.

- 6.3 The firm Mesdames Reid Blair are also members of the organisation GSPC. As such they are entitled to utilise the services of the magazine of that organisation for the display and advertisement of property for sale by them on behalf of clients. Accordingly having reached agreement with Mr and Mrs A, they arranged for their property to be advertised for sale within the GSPC magazine. Such public advertisement was of considerable significance as the firm Messrs Reid Blair do not operate an office window on the Isle of Arran. Therefore the advertisement in the GSPC magazine was critical to extent that it expanded the advertisement of the property through the Isle of Arran.
- 6.4 Historically the Respondent accepted the responsibility for attending at the Glasgow Office of the GSPC, collecting a bundle of their magazines displaying properties for sale, delivering them to the Isle of Arran and thereafter arranging for their distribution amongst various outlets on the island. This was of considerable benefit to the Respondent in that within the magazine there were properties advertised for sale by his firm. This enhanced the services provided to his clients.
- 6.5 At or about the time it was agreed that the property of Mr and Mrs A was to be advertised within the GSPC magazine, it was brought to their attention that the magazines which had been distributed amongst outlets on the island had been vandalised in that the advertisement of their property had been deliberately

defaced by a black sticker being placed thereover obscuring the advertisement of the property. This had a detrimental effect upon the advertisement of the property. It prevented readers of the magazine noticing the property was for sale. It gave the false impression that the property had been sold already thereby preventing interested parties from making enquiries regarding its availability. At all material times the responsibility for the collection and distribution of the GSPC magazine throughout the Isle of Arran was with the Respondent or staff employed on his behalf. When the practice was discovered, Mr and Mrs A intimated a complaint to the Complainers expressing their concern at the practice adopted.

Mr & Mrs B

- 6.6 Mr and Mrs B reside at Property 3. In August 2006, they instructed the firm Mesdames Reid Blair to act on their behalf in connection with the estate agency and conveyancing sale of the heritable property 4. As members of the GSPC organisation, Mesdames Reid Blair arranged for the property to be advertised for sale in the GSPC magazine. Mr and Mrs B were anxious to ensure that the advertisement was placed prominently and in an appropriate fashion. They sought and obtained a copy of the magazine. On 8 September 2006 they obtained a copy of that week's magazine. Upon examination of the magazine they were unable to identify the advert. Later they realised a large black sticker had been placed over the advert. The magazine had been deliberately vandalised and the advert defaced. This had a detrimental effect upon the advertisement of the property. It prevented readers of the magazine noticing the property was for sale. It gave the false impression that the property had been sold already thereby preventing interested parties from making enquiries regarding its availability. They were concerned and complained to the

outlet owner who advised that this practice had taken place previously concerning a property owned by Mr and Mrs A.

6.7 Mr and Mrs B immediately contacted Mesdames Reid Blair who intimated their complaint to the GSPC organisation. They caused an enquiry to be made which confirmed that the stickers had not been placed on the magazine whilst the magazine was in Glasgow. Accordingly the vandalism of the magazine occurred after the magazine left the offices of the GSPC organisation in Glasgow. At all material times the Respondent or employees on his behalf were responsible for the collection and transport to the island and thereafter distribution of GSPC magazines throughout the island.

6.8 The GSPC magazine is the weekly magazine for the Glasgow Solicitors Property Centre and in particular those firms of solicitors who as part of their professional service act as estate agents. It is an important publication in the West of Scotland for the sale of properties. As an additional feature, certain properties, at an extra cost, can be featured more prominently. Such a feature involves a more prominent advert normally amounting to a page or two highlighting the features of the property for sale. It was agreed with Mr and Mrs B that their property would be featured within the GSPC magazine in this fashion. This was arranged for the issue of 12 September 2006. Upon publication, Mr and Mrs B sought copies of the magazine. Upon review of the magazine they identified that not only had the advert placed for sale been defaced once again but the pages which featured the property more extensively in the magazine had been removed. The impact of this act of vandalism created the wrong impression in relation to the sale of the property. It gave the impression to those reading the magazine on the Isle of Arran that the property was not for sale. It lessened interest in the property. It caused stress,

inconvenience and worry to Mr and Mrs B who were going through the conveyancing transaction.

6.9 The Respondent failed in his duty to adequately supervise employees of his firm who were responsible for the act of vandalism by deliberately defacing the magazine thereby obscuring properties for sale by competitors of the Respondent.

7. Having considered the foregoing circumstances the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

7.1 his failure to adequately supervise the conduct of his employees acting on his behalf, in particular in relation to the deliberate vandalism of issues of the GSPC magazine to the detriment of his fellow competitors and their clients.

8. Having heard a submission from the Fiscal and a submission from the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 29 October 2008. The Tribunal having considered the Complaint dated 7 August 2008 at the instance of the Council of the Law Society of Scotland against Graeme Crombie Miller, of Miller Stewart Limited, Solicitors, 1252 Shettleston Road, Shettleston, Glasgow; Find the Respondent guilty of Professional Misconduct in respect of his failure to adequately supervise the conduct of his employees acting on his behalf in particular in relation to the deliberate vandalism of issues of the GSPC magazine to the detriment of his fellow competitors and their clients; 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 agent 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 £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

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

A Record was lodged together with a Joint Minute in which the facts and averments in the Complaint as amended were admitted. No evidence was led.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid advised that the Respondent has practised as a solicitor for twelve years and is currently a sole practitioner trading in Glasgow. Difficulties arose in relation to the office he formerly had on the Isle of Arran. He was approached by Mr and Mrs A to market their property for sale. They met with him for a quotation but obtained another quotation from Reid Blair Solicitors and that second quotation was more competitive. The Respondent was a member of the GSPC and to assist that organisation he collected the GSPC magazine and brought it to the island. There was a cost involved for the Respondent doing this and when Reid Blair joined GSPC, they offered to contribute but that request was declined. The magazine was placed at various outlets on the island for collection by the public. Mr and Mrs A got a copy of the magazine and found that it had been defaced. They obtained information that this had happened on two consecutive weeks. This had an impact on the marketing of Mr and Mrs A's property as the deletion of the adverts may have given potential buyers the wrong message that the property was no longer for sale.

Mr Reid advised that the second aspect of the Complaint related to Mr and Mrs B. They instructed Reid Blair to act for them in the sale of their property. They agreed that the property would advertise through GSPC. They got a copy of the magazine and were horrified to find that their advert had been defaced by black stickers identical to the ones used in Mr and Mrs A's case. They were concerned about the negative impact on the sale of the property and made a complaint to Reid Blair who in turn complained to GSPC. Enquiries were made and it was discovered that when the magazine left GSPC, it was in perfect condition. Mr Reid made reference to the Complainer's Productions 1 and 2 showing the defacement of adverts. Mr and Mrs B obtained a copy of the GSPC magazine and found that the special feature detailing their property had been removed. This caused considerable upset and information was received that the Respondent's firm were responsible for the defacement and the removal of pages from the magazine. Mr Reid confirmed that when the Complaint

was first brought it was alleged that either the Respondent was responsible or he failed to supervise his staff. Mr Reid advised that Mr McCann has produced evidence that it was a member of staff who was responsible and hence it was possible to agree the amendments to the Complaint.

Mr Reid referred to Smith and Barton's book entitled "Procedures and Decisions of the Scottish Solicitors Discipline Tribunal" at Page 151. He referred to Case 736/ 88 which is quoted on page 151 as follows:

"As previously indicated, it is always open to a solicitor to employ an unqualified assistant for procedural work within his practice; but it is essential that the solicitor maintains a high level of supervision to ensure that the standard of work is not less than that which is expected of a qualified solicitor".

Mr Reid then referred to Paterson and Ritchie's book entitled "Law, Practice and Conduct for Solicitors" at Page 17 where it states:

"...the Tribunal expects a reasonable degree of supervision to be exercised by principals in relation to trainees or unqualified staff. Whilst accepting the propriety of delegating work to such individuals, the Tribunal has indicated that it is essential that the solicitor maintains a high level supervision to ensure that the standard of work is not less than that expected of a qualified solicitor".

Mr Reid also referred to the case of MacColl-v-Law Society of Scotland 1987 SLT 524. In that case the Court held that the Tribunal were well entitled to find a solicitor guilty of professional misconduct, at Page 527 paragraph D Lord President Emslie stated:

"Be all that as it may, however, the tribunal's view clearly appears to have been that even if the petitioner had been entirely ignorant of all that had allegedly been done by Mr Ferguson alone, he was still guilty of professional misconduct. The question is whether in expressing that view, the tribunal misdirected themselves in any material respect. We are of the opinion that they did not. As we read their findings and their note, they were well aware of

the test which should be applied – the Sharp Test – in deciding whether a solicitor against who a complaint is made ought to be found guilty of professional misconduct.”

Lord Emslie continued at paragraph H of page 527:

“The picture which emerges clearly from the decision as a whole is that if the petitioner really did not know what had been done, he had no possible excuse for his remarkable ignorance. On the alternative basis, the failure of supervision was serious, reprehensible and inexcusable”.

Mr Reid stated that applying these principles to the present case, the Respondent had a number of estate agencies and he visited Arran only once a week despite there being a high volume of work carried out there by staff. Mr Reid stated that the behaviour complained of was repeated and spread over a period of time and adversely affected Reid Blair and their clients. Mr Reid urged the Tribunal to find that professional misconduct had been established and to award expenses in favour of the Complainers.

Mr Reid stated that he wished to record his gratitude to Mr McCann for his co-operation in agreeing the Joint Minute.

In response to a question from the Tribunal, Mr Reid stated that he could prove that issues of GSPC were defaced on two separate occasions over a period of two weeks i.e. there were two separate papers defaced in consecutive weeks each containing two adverts each which amounted to a total of four defacements.

SUBMISSIONS FOR THE RESPONDENT

Mr McCann stated that this was a unique situation where the Respondent’s practice had a shop front and he collected the GSPC’s magazine for circulation on the island. He advised that in a very short period of time, a practice in competition with him which was operating from a domestic property was able to use his offices, his staff and his copies of the GSPC magazine to take over one hundred per cent of the estate agency work on the island by deliberately undercutting him. Mr McCann stated that

the failures occurred against this highly unusual background and advised that the Respondent accepts that the behaviour of his staff was completely inappropriate.

Mr McCann advised that the Respondent has been a solicitor for approximately twelve years, having been admitted in 1996. He carries on practice as sole principal of Miller Stewart Ltd at Shettleston and Dennistoun, Glasgow, and previously on the Isle of Arran, in estate agency and general legal business. His record with the Law Society is clear of any prior professional conduct finding.

Mr McCann advised that in about the year 2000 the Respondent opened up an estate agency office in Brodick on the Isle of Arran. At that time GSPC had no presence on the island and the market there was dominated by a couple of independent estate agents. From 2000 onwards and for approximately 6 years the Respondent, having joined GSPC, steadily built up the GSPC presence on the island. The Respondent had arranged to fit out his business premises with the appropriate display facilities and for advertising material and publications to be made easily accessible to the public at suitable shop or hotel sites around the island. He had invested time and money in ensuring compliance with the standard requirements before admission of any legal practice unit to GSPC as an appropriate estate agency display centre.

Mr McCann advised that throughout the next five or six years the arrangements provided by the Respondent to GSPC were successful, leading to a situation by about 2006 where approximately 65% of the Arran property market went through GSPC, when they 5 or 6 years previously had no presence whatsoever. The market on Arran is unusual, being very small with perhaps only 45 – 50 property transactions in an average year, rising during market peaks to 80-90, shared amongst two or three solicitors and a similar number of independent estate agents.

Mr McCann advised that throughout this entire period the Respondent received no financial contribution or support from GSPC. He purchased and set up his own display materials, paid for all GSPC stickers, signs and sale flags, and employed his own staff to install sale flags and other material to enhance the profile of Solicitors' estate agency, and generally financed the entire promotion and operation of GSPC on the Isle of Arran. Every week for 6 years he employed a van driver to travel to Glasgow to collect quantities of GSPC presentation material which were delivered to

his Alexandria Parade office. The Respondent had contacted various shopkeepers and other places of business on Arran to seek to persuade them to accept the GSPC material, so that by 2006 some 18 outlets on Arran were taking the GSPC advertising material on a weekly basis. The costs of the van, the driver, and the ferry to Arran for delivery and weekly distribution were paid for entirely by the Respondent out of his own pocket, at a cost of about £4,400 annually for the transport arrangements alone, and without any contribution at any stage from GSPC.

Mr McCann advised that during this period of time that the Respondent was building up the GSPC presence on the Isle of Arran under the arrangements previously described, there had been no direct competition for estate agency business from Reid Blair, the solicitors who initiated the complaint leading to the present prosecution. The circumstances immediately leading to this prosecution arise from difficulties encountered by the Respondent's staff on Arran, in respect of certain steps taken by this other Arran firm Reid Blair.

Mr McCann advised that the Respondent understood that GSPC normally apply certain requirements for admission of a firm, including suitable premises, adequate staff, telephone and other contact arrangements, display facilities, and so on. Reid Blair had twice been refused admission to GSPC because of lack of these available skills and facilities to provide a proper estate agency service. The Directors of GSPC however decided to admit Reid Blair & Co to GSPC in about the summer of 2006.

Mr McCann advised that the Respondent had by this time decided to minimise his presence on the island because of a separate and unusual aspect of professional life on Arran, namely a distressing situation that had arisen between himself and Elizabeth Reid Blair who was the sole principal of the firm of Reid Blair. The Respondent had no particular difficulty with Ms Blair previously, but encountered in about 2002 the sudden onset of a sustained personal malice and hostility which made it impossible to carry out the usual professional contacts and negotiations essential for all kinds of legal work, and especially in conveyancing where a high degree of courtesy and co-operation is necessary in the clients' interests, in relation to dates of entry, adjustments of missives, settlements, and all the matters which require professional contact between agents, in the business of adjusting conveyancing missives and completing transactions. The Respondent knows of no reason for this and to this day

cannot explain the apparently sustained hostility and malice. Client complaints began to appear. The Respondent received information from others on the island that Ms Blair was going round the doors of ex-clients during her social time and trying to initiate from them Law Society complaints. The Respondent initially had not consulted the LDU or other professional independent advice, and tried to deal with these complaints by offering each complainer immediately the sum of £250 in return for a formal discharge. The Law Society asked him to stop doing that as, although they do favour conciliation, none of these conciliatory offers were being accepted anyway. The Society's view was that all these matters had to enter in to the appropriate complaints process. The Respondent himself lodged a formal complaint against Ms Blair, but the Law Society elected not to take the matter further by prosecution, or by warning or any other intervention.

Mr McCann advised that the events in September 2006, which led immediately to the circumstances of certain adverts being deleted from GSPC material, arose when Reid Blair Solicitors inserted adverts in the local newspaper the "Arran Banner" to attract estate agency business, after being admitted to GSPC. The adverts contained the wording "Why pay for expensive shop fronts and office staff?" Further, the Respondent's staff reported to him that a free service he had been offering to potential clients was in their view being abused. The free service which the Respondent offered to potential clients of the firm of Miller Stewart on Arran was an estate agency 'appraisal', including a visit to the house to be sold and an appraisal of the house, how the Respondent's staff would describe its best features for the market, and in particular the starting price to be attached in the local market, which is an important and indeed crucial matter for all house sellers. The Respondent's staff reported that in a number of cases it emerged that Reid Blair had accepted instructions from the client, including Mr and Mrs A and Mr and Mrs B, but not having expertise, or staff, to appraise and value a house, had sent them along to the Respondent's office for a free inspection and appraisal as potential clients, with instructions to disguise the fact that they had already instructed the firm of Reid Blair. The Respondents' staff then recognised their appraisals for properties appearing in the adverts inserted by Reid Blair. Further, the information the Respondent and his staff were receiving was that having advertised in this way through a GSPC facility, using the Respondent's office and distribution and his staff, Reid Blair were quoting a fee of one half percent as against the Respondents' normal quote in the region of 1.5%, and much below the rate

of such fees generally recognised in the normal operation of GSPC as being within a fair, and reasonably competitive, range.

Mr McCann advised that the Respondent immediately contacted GSPC and explained his predicament. He felt it was unreasonable to continue to be left without guidance or intervention from GSPC, when as a matter of practicality all incoming estate agency clients without exception were now instructing Reid Blair. That appeared to be achieved because of the very considerable reduction in fee which Reid Blair could achieve, and, as explicitly stated in their newspaper advert, based on the proposition that you didn't need a display office or experienced staff to do estate agency. There were however no rules at the time, and it is thought that GSPC had never produced rules to govern this kind of situation until February 2008.

Mr McCann advised that the Respondent indicated quite openly to GSPC that he felt he could not go on, because Reid Blair appeared to be achieving 100% of the Arran market, and that they would have to be excluded from the Respondents' part of the operation, or otherwise controlled, or he would have to close down his entire Arran operation, whereby his four staff members would lose their employment. GSPC pointed out that if the Respondent stopped collecting and distributing the GSPC material in the way that he had always done, then existing clients of Miller Stewart who had not yet sold their houses would have a cause for complaint. Otherwise GSPC were unable or unwilling to offer any help or intervention. Possible options, including the exclusion of Reid Blair's properties from the only available display window, or excluding their adverts from the GSPC publications, were openly discussed by the Respondent with GSPC, without any resolution emerging.

Mr McCann stated that the Respondent advised his staff, as he was bound as an employer to do, of the effect of his discussions with GSPC, and that the ongoing situation would lead to the termination of their employment very quickly, as there was no way out, unless some means could be found of establishing a reasonable system on the Isle of Arran whereby potential clients would recognise who was in fact funding and providing the available service.

Mr McCann advised that the Respondent did not instruct the deletion of adverts from the written publications coming through his office, and instructed the cessation of any

such measures as soon as the complaint was brought to his attention. He ascertained that one of his staff had via the internet found a provision for stickers to an exact specified size, which coincided with the size of adverts within the GSPC material, and had ordered up a quantity, with the intention of applying these to certain adverts. The intention of the staff, as explained subsequently to the Respondent, was that they feared for their jobs, and intended only to make it clear that these particular properties were not being marketed through Miller Stewart's operation insofar as they had organised and funded it on the Isle of Arran. The Respondents accepts that as owner of the estate agency and employer of the staff, he is the only person responsible for their supervision.

Mr McCann stated that the Respondent eventually accepted that he could not win the battle on the Isle of Arran, as there was no prospect of reasonable professional relationships being achieved, and sold his estate agency in June 2007. Although GSPC continued to have a presence on Arran, it is believed that no-one took it up with the commitment that the Respondent and his staff had shown, and that the entire GSPC presence on the island of Arran, built up for some 6 years, had been reduced by October 2008 to only three houses out of 122 on the market, with all other business now controlled by non-solicitor agencies.

Mr McCann advised that the Respondent, after intimation of the Law Society complaint offered an unqualified apology and financial compensation to each of the complainers, but these were declined and followed by various demands for significantly higher amounts of financial compensation,

In response to a question from the Tribunal, Mr McCann advised that Reid Blair's properties were not shown in the display window but in the magazines in the display cases.

In response to another question from the Tribunal, Mr McCann advised that the GSPC are now only represented on Arran by Mesdames Reid Blair and that firm are currently only marketing 3 out of 122 properties on the island. The remaining properties are being marketed by estate agents.

In response to another question from the Tribunal, Mr McCann advised that his client was not consulted when Reid Blair was admitted to GSPC in August 2006. Mr McCann stated that GSPC could have solved this problem and that they could have taken more steps to address the difficulties. Mr McCann stated that his client had tried to sort out the problems with Ms Blair but it was impossible to do so. He advised that the situation got so bad that he was unable to correspond with Ms Blair even on a professional basis. Mr McCann advised that if an offer came into the Respondent, he took the view that he couldn't act on behalf of a purchaser if the selling agents were Reid Blair and he referred the work to other solicitors on the mainland. Mr McCann advised that the Respondent sold his estate agency business to his senior estate agency manager on an employee buy-out but the other three members of staff lost their jobs.

DECISION

The Tribunal had regard to the unusual circumstances of this case. The Tribunal noted the authorities quoted by the Fiscal and considered that the Respondent had a duty to oversee the actions of his staff. The Tribunal considered that the fact that the Respondent's offices were some distance apart did not have any effect on that duty. The Tribunal noted that the actions of the Respondent's employees caused distress and were to the detriment of Mesdames Reid Blair and the interests of their clients. However, the Tribunal noted that the defacement of the magazines stopped instantly when the matter was drawn to the Respondent's attention. The Tribunal also noted that the Respondent had an unblemished record within the profession. Accordingly, the Tribunal considered that the appropriate sanction was a Censure. The Tribunal made the usual order for expenses and publicity.

Chairman