

**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**

against

**DAVID ALEXANDER
SYMINGTON, Solicitor, Hope
Cottage, Duns Road, Gifford, East
Lothian**

1. A Complaint dated 9 February 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, David Alexander Symington, Solicitor, Hope Cottage, Duns Road, Gifford, East Lothian (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 by the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 20th April 2005 and notice thereof was duly served on the Respondent.

4. The hearing took place on 20th April 2005. The Complainers were represented by their Fiscal, Walter Muir, Solicitor, Ayr. The Respondent was not present and not represented .

5. A Joint Minute was lodged admitting the facts, averments of duty and averments of professional misconduct in the Complaint. No evidence was led.

6. The Tribunal found the following facts established
 - 6.1 The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He was born on 6th September, 1951. He was admitted as a solicitor on 29th September, 1982 and enrolled on 18th October, 1982. From 1st February 1993 until 29th November 2002 he practised as the sole principal of and traded under the name “Symington & Co”, at 19 Haddington Place, Edinburgh. He commenced employment with the firm of Taylors, Solicitors, Edinburgh sometime in or about December, 2002. He does not at present hold a Practising Certificate.
 - 6.2 Mr A
Sometime in or about June 2003 the Respondent accepted instructions from Ms B to purchase premises situated at and known as Property 1. Said premises comprised a house then being operated as a bed and breakfast business and a delicatessen shop adjoining the house. Ms B had by that stage agreed to enter into partnership with Mr A to run the delicatessen business.

She advised the Respondent of this arrangement and the Respondent prepared a draft Partnership Agreement which he sent Ms B so that she could exhibit it to her accountant. Thereafter the Respondent accepted instructions from Mr A to act in this transaction. Albeit that the Respondent was well aware of the fact that Ms B intended entering into partnership with Mr A he took no steps to advise Mr A of the consequences of entering into partnership and also that there existed the potential at least for there to be a conflict of interest between Ms B and him and that it would therefore be appropriate if Mr A obtained separate legal advice so as to fully protect his interests. In the event the business relationship between Ms B and Mr A broke down sometime in or about October 2003. By that time Ms B had not been able to fund the purchase price of the property in accordance with the agreement which she had with Mr A in relation to this funding. As a result of this Mr A required to invest money in the partnership. The Respondent had given Mr A a copy of the draft Partnership Agreement but he did not discuss with Mr A either the terms or the implications thereof. In the event a Partnership Agreement was not signed by Ms B and Mr A by the time Mr A made this investment. The Respondent failed to give Mr A, who was also his client, advice as to the entitlements of both Ms B and Mr A in the event of a dispute arising. In due course a dispute did arise between them. At that stage the Respondent continued to act for Ms B after advising Mr A that he should seek advice elsewhere. At all material times the Respondent acted for Mr A when there existed either an actual conflict of interest or, at least, the potential for such conflict.

6.3 The Law Society of Scotland

By e-mail dated 30th July 2003 Mr C invoked the aid of the Complainers in connection with the failure of the Respondent to register a title to property known as Property 2 in favour of himself and his wife. The Respondent had acted for Mr and Mrs C in the purchase of this property. On 27th October 2003 Mr C completed a Help Form sent to him by the Complainers. In this document Mr C advised the Complainers that when he and his wife came to sell the property they then learned that they were not infeft in it and also that the Respondent had failed to obtain consent from SEPA to discharge from the septic tank serving the property. Mr C went on to say that the Respondent had not offered any explanation for these failures which had resulted in additional and wholly avoidable expense to him and his wife when they had come to sell the property in March 2002. By letter dated 5th January 2004 the Complainers wrote to the Respondent in terms of Section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 seeking, *inter alia*, his written response within 21 days from that date to the complaints that Mr C had alluded to in the said Help Form. The Respondent did not reply to this letter. On 2nd February 2004 the Complainers gave notice to the Respondent in terms of Section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 requiring him to provide the Complainers with this response and an explanation for his delay in responding within 14 days from that date. The Respondent did not reply to this letter.

7. Having considered the foregoing circumstances and having heard submissions from the Fiscal for the Law Society, the Tribunal found the Respondent guilty of professional misconduct in respect of:

7.1 His failure to properly protect the interests of his client, Mr A, when he acted for him and his client, Ms B in circumstances where there was either an actual conflict of interest or a potential conflict of interest between them. In particular he failed to advise Mr A of the consequences of investing money in a partnership where Mr A and Ms B were the partners in circumstances where they had not entered into a written Partnership Agreement or where the terms and implications of a draft of the Partnership Agreement had not been fully discussed between the Respondent and Mr A prior to this investment.

7.2 His failure to respond at all to the reasonable requests of the Complainers for information in consequence of which the Complainers were unable to respond in any meaningful way to Mr C who had invoked their aid.

8. Having noted two previous findings of professional misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 20th April 2005. The Tribunal having considered the Complaint dated 9th February 2005 at the instance of the Council of the Law Society of Scotland against David Alexander Symington, Solicitor, Hope Cottage, Duns Road, Gifford, East Lothian; Find the Respondent guilty of professional misconduct in respect of his failure to protect the interests of his clients where there was an actual conflict of interest or potential conflict of interest between them, his failure to advise his client of the consequences of investing money in a partnership where his client and another client were partners in

circumstances where they had not entered into a written partnership agreement and where the terms and implications of a draft of the partnership agreement had not been fully discussed and his failure to respond to the reasonable requests of the Law Society for information; 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 Law Society's Table of Fees for general business; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed) Alistair Cockburn
Vice 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

Vice Chairman

NOTE

The Respondent did not appear at the Tribunal but a Joint Minute was lodged admitting the facts, averments of duty and averments of professional misconduct in the Complaint.

SUBMISSIONS FOR THE COMPLAINERS

Mr Muir emphasised that the Respondent had co-operated with the Law Society from the start and had entered into a Joint Minute agreeing everything in the Complaint. Mr Muir indicated that he had nothing to add to the Complaint but that the Respondent had asked him to say something on his behalf and to set out the background which would be useful to the Tribunal. Mr Muir referred the Tribunal to the two previous sets of findings against the Respondent and indicated that he had visited the Respondent in September 2002 at his offices when the Respondent was dealing with a great deal of ongoing conveyancing business and was operating as a sole practitioner and was overwhelmed with work. In 2002 the Respondent's practising certificate was restricted by the Tribunal for a period of five years. The Respondent then went to work for the firm of Taylors, and although he had been assured that he would be given assistance he had continued to have to work 70-80 hours per week without assistance. The Respondent left Taylors in April 2004. Since July 2004 he has been working three days a week as an unqualified assistant and not as a solicitor. In connection with the failure to respond Mr Muir indicated that the Respondent wished him to apologise on his behalf and indicate that he meant no disrespect to the Law Society. In February 2004 the Respondent had been off work which was the time when some of the letters from the Law Society had been sent. Mr Muir indicated that it was the volume of transactions that the Respondent had been trying to cope with which had led to the problems, and that the Respondent was a decent, hard-working and competent solicitor.

In response to a question from the Chairman, Mr Muir accepted that the averments of duty in the Complaint should be amended to reflect the fact that in any potential conflict of interest situation, the duty was not to act without advising the individual

clients as to what would happen in the event of conflict arising. Mr Muir suggested that the Respondent be Censured.

DECISION

The Tribunal was satisfied that the Respondent's conduct amounted to professional misconduct. Rule 3 of the Solicitors (Scotland) Practice Rules 1986 provides that 'a solicitor shall not act for two or more parties if interests conflict'. It is important in order to maintain the reputation of the legal profession that solicitors properly protect the interests of their clients to ensure that a conflict of interest situation does not arise. The Tribunal has also 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 profession.

The Tribunal however noted that the Respondent had fully co-operated with the Law Society and entered into a Joint Minute. The Tribunal further noted that the Fiscal for the Law Society had suggested that a Censure would be sufficient penalty. The Respondent's practising certificate is already subject to restriction until December 2007. The Tribunal considered that this would provide sufficient protection for the public. In the circumstances the Tribunal were of the view that a Censure would be sufficient penalty. The Respondent will also have to pay the expenses of the Complainers and the Tribunal. The usual order was made with regard to publicity.

Vice Chairman