

**THE SOLICITORS (SCOTLAND) ACT 1980  
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL**

**D E C I S I O N**

**in Appeal under Section 42A(7) of  
the Solicitors (Scotland) Act 1980**

**by**

**MESSRS STIRLING & MAIR,  
Solicitors, 28 High Street,  
Johnstone**

**Appellants**

**against**

**THE COUNCIL OF THE LAW  
SOCIETY OF SCOTLAND, 26  
Drumsheugh Gardens, Edinburgh.**

**First Respondent**

**and**

**MR & MRS A**

**Second Respondents**

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 by Messrs Stirling & Mair, Solicitors, 28 High Street, Johnstone ("the Appellants") against a finding by the Council of the Law Society of Scotland ("the Law Society") dated 2nd October 2003 that the Appellants had provided an Inadequate Professional Service in relation to their clients Mr & Mrs A, ("the Complainers") then of Property 1, Paisley and a Direction that the Appellants should pay Mr and Mrs A five hundred pounds by way of compensation.

2. In accordance with the Rules of the Tribunal the Appeal was formally intimated to the Law Society and Mr and Mrs A and Answers were lodged on behalf of the Law Society.
3. Having considered the Appeal with the Answers, the Tribunal resolved to set the Appeal down for Hearing and appointed that the Appeal should be heard on 9 March 2004.
4. At the Hearing on 9 March 2004 the Appellants were present and represented by Mr David Clapham, Solicitor, Glasgow. The Law Society were represented by their Fiscal Mr Sean Lynch, Solicitor, Kilmarnock. Mr and Mrs A did not appear and were not represented. No evidence was led.
5. Having considered the productions lodged and the submissions made on behalf of the Appellants and the Law Society, the Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 9 March 2004. The Tribunal having considered the Appeal by Messrs Stirling & Mair, Solicitors, 28 High Street, Johnstone (“the Appellants”) against a finding of Inadequate Professional Service by the Council of the Law Society of Scotland (“the Law Society”) in relation to Mr & Mrs A then of Property 1, and the Determination and Direction that the Appellants should pay the sum of £500 by way of compensation to Mr & Mrs A; Quash the said Determination and Direction; Find no expenses due to or by either party and Direct that publicity be given to this Decision and that this publicity shall include the name of the Appellants.

(Signed) Peter W Rockwell  
Vice Chairman

6. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Appellants by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Vice Chairman

**NOTE**

This is an Appeal under the provisions of Section 42 A(7) of the Solicitors (Scotland) Act 1980 as amended against the finding of Inadequate Professional Service and Determination and Direction under Section 42 A(1) and 42A(2)(d) of the said Act.

**THE APPELLANTS' SUBMISSIONS**

Mr Clapham stated that the Appellants had instructed the Appeal because the issue was a matter of principle for them. Mr Clapham stated that it was not clear why the report prepared by the first reporter, the lay reporter, was not accepted. A second report was obtained by a qualified reporter and the Committee then considered that, due to the representations made by the Appellants, a supplementary report would be required. The qualified reporter who had prepared the second report then resigned and it was necessary for a third reporter to prepare a report. Mr Clapham alleged that this procedure was flawed because the third reporter should have considered matters of new rather than providing a supplementary report to the second reporter's report. Mr Clapham stated that it was wrong for the third reporter to take account of the second reporter's report but not to have before him the first reporter's report. Mr Clapham emphasised that in the interests of justice, the third reporter should either have considered both the first and second reporter's reports or neither of them. Mr Clapham stated that justice in this case had not been seen to be done because the Law Society had not followed full and fair procedures.

With regard to the actual finding of inadequate professional service made by the Law Society, Mr Clapham emphasised that this finding was that the Appellants had failed to prepare adequately and to ensure that the complainers would be able to park on common property. This finding by the Committee of the Law Society was different from what the third reporter stated in his report about the Appellants being unaware of the rights of the proprietor of Property 2. Mr Clapham referred the Tribunal to page eight of the land certificate for Property 1, which clearly stated that the owner of number Property 2 had sole and exclusive use of the areas coloured yellow and hatched in blue on the plan attached to the land certificate. This was seen by the Appellants prior to the conclusion of missives and there was accordingly no factual

basis on which to base a finding that the Appellants did not know about this. Mr Clapham also pointed out that the land certificate did not say that the owners of Property 1 could not park on common property, it just stated that the owner of number Property 2 and exclusive use of the two pieces of ground coloured yellow and hatched blue. Mr Clapham stated that the Law Society had not made it clear why they were alleging that the rights of number Property 2 had been missed.

Mr Clapham referred to the expert report by Donald B Reid and asked that this be incorporated into the grounds of appeal. There was no objection from Mr Lynch and this was agreed. The Tribunal allowed the evidence of the experts report under reservation as to its competency, it being fresh evidence which was not available to the Law Society Committee when the decision was made. Mr Clapham referred the Tribunal to page four of Mr Reid's report which suggested that the Appellants would have no reason to think that the parking prohibition could possibly give their clients any cause of disquiet.

In summary, Mr Clapham stated that he felt that the procedure followed by the Law Society was flawed, the factual basis for the decision had not been adequately set out, the conclusion that the Appellants had failed to pick up the rights of number Property 2 was not based on any evidence, the conveyancing expert's view was that the Appellants had not provided an inadequate professional service and the fact that the first reporter's report had been disregarded was a breach of natural justice. Mr Clapham referred the Tribunal to the case of Wordie Property Company Ltd-v-Secretary of State for Scotland SLT 1984 page 348 and 356 where it was stated that clear reasoning must be given for a decision which leaves the informed reader in no real doubt as to what the reasons were and what has been taken into account in reaching the decision. Mr Clapham submitted that this test had not been met in this case. Mr Clapham also submitted that it was unclear how the penalty of £500 compensation had been arrived at. Mr Clapham pointed out that the inadequate professional service finding had not been made in respect of the Appellant's failure to fully report on title but had been made in respect of the Appellant's failure to prepare adequately and to ensure that the complainers would be able to park on common property. Mr Clapham said that the Tribunal had to decide whether or not this decision of the Law Society Committee was sustainable.

## **SUBMISSIONS FOR THE LAW SOCIETY**

Mr Lynch referred the Tribunal to the Law Society Committee extract of 3 April 2003 which clearly stated that it had been decided to obtain a supplementary report because the Committee felt that the report prepared by the first reporter was not in sufficient detail. Mr Lynch submitted that the Committee were perfectly entitled to proceed in this manner. Mr Lynch further submitted that the Committee was entitled to obtain a third supplementary report in response to the Appellants' representations made on the second reporter's report. It was clear that the third reporter did consider matters afresh because he states in his report that he found the second reporter's findings to be accurate. Mr Lynch also pointed out to the Tribunal that the decision was not the reporter's decision but the decision of the Committee. The third reporter's conclusions were based on the Appellants' file of papers. A letter was sent on 5 September 2001 by the Appellants to Mr & Mrs A enclosing a photocopy of the land certificate and plan but that was the extent of the report on title done by the Appellants. There were only two attendance notes in the file with regard to any discussion on this matter with the clients. Mr Lynch stated that the facts found by the third reporter were clearly set out in his report and opinion. The land certificate included a burden on the property and this was not brought to the attention of Mr & Mrs A. It was clear that the reporter did not accept that the land certificate had been discussed in detail with Mr & Mrs A prior to the conclusion of missives. Mr Lynch stated that Mr Reid's opinion was useful in that it set out the duties incumbent on a solicitor in these circumstances. Mr Lynch did not disagree with the expert conveyancer's opinion. Mr Reid in his opinion stated that it was not good practice for solicitors just to copy the land certificate and send it to the client with no report. Mr Lynch referred to Tribunal to the definition of inadequate professional service contained in S65 of the Solicitors (Scotland) Act 1980 and particularly referred the Tribunal to the words "in any respect" included in this definition. Mr Lynch stated that the Committee were entitled to conclude that the service in reporting on title was not of the quality to be expected of a competent solicitor. Mr Lynch submitted that although the Committee's reasoning was not as good as it might have been, there were a number of authorities which made it clear that the decisions of domestic tribunals should not be overzealously scrutinised.

With regard to the penalty, Mr Lynch stated that the Committee used their discretion and unless it could be said that this was unreasonable, it should stand. In response to a question from the Tribunal, Mr Lynch stated that there was no reason why the third reporter should have had the first reporter's report as the second reporter's report was supplemental to this.

## **DECISION**

The Determination made by the Law Society was that the Appellants had provided an inadequate professional service in that they had failed to prepare adequately (a phrase the meaning of which was unclear to the tribunal) and to ensure that the complainers would be able to park on common property. The Tribunal had to decide whether on the facts found and on the basis of the reasons given, the Committee was entitled to reach this decision. On the somewhat unsatisfactory evidence available to the Tribunal it appeared that the complainers may have been able to park on part of the common property contrary to the finding of the Law Society. It was however also apparent to the Tribunal that the inadequacy of the service provided by the complainers (if any) did not lie in the preparation of the work carried out for the complainers, but in reporting generally on the transaction to their clients, and in particular reporting to their clients on the parking rights on the feu and that part of the feu owned in common by Property 1 and Property 2. There was no evidence led before the tribunal of inadequate work preparation, and that work preparation is a separate and different matter from communication with clients, and thus distinguishable. The Tribunal took a view that, when reporting on the transaction to the complainers by sending out the copy Land Certificate, the Appellants could and should, but did not, explain in general terms the impact of the restrictions in the burdens clause (see *infra*) on parking within the feu. As the expert report prepared by Mr Reid and lodged on behalf of the Appellants makes it clear, it is not enough for a solicitor, in reporting on title, just to send out a copy Land Certificate without making full explanation to his clients of any matters requiring explanation. The Tribunal accept that view expressed by Mr Reid and agree with it. It was not clear to the Tribunal whether the Appellants had or had not been aware of the rights of the proprietor of Property 2 in the areas owned in common within the whole feu. Even if

the Appellants were aware of the rights of the proprietor of Property 2 in those areas to which there was a title in common it seemed to the Tribunal from extracts quoted from a letter from the appellants to the complainers (referred to in the Reporter's report- Respondent's production number 29 -33) dated 10<sup>th</sup> October 2001, that the Appellants had concluded that there "No designated parking areas as such for the owners of Property 1 and Property 2" - a statement which, though it might be accurate in as much as no parking space was actually designated as such, could have been misleading in that it failed to reflect the true parking position that the proprietor of No Property 2 had "sole and exclusive use of the areas hatched blue on the said plan (which hatched areas lay within the area owned in common) and shall be entitled to erect in the more northerly of the two areas a suitable car port structure..." (as per the Land Certificate purpose FOURTH- Appellant's production number 8). The clear effect of this restriction was that the owners of No Property 1 could not have parked within the areas for which the other proprietor had the exclusive use. There was clearly some confusion and if the Appellants had reported in more detail on the title to the complainers, the problem which led to the complaint may not have arisen.

In the circumstances of this case, given that there was no objection by the fiscal, the Tribunal allowed the lodging of the report from Mr Reid. Mr Reid points out that the Agreement made in 1983 only restricted parking in the area between the east end gable of the house and the boundary and did not impose any general prohibition on parking by either number Property 1 or Property 2 on the common area as a whole. But his report fails to draw attention to the burdens clause mentioned above and the exclusive rights of the proprietor of Property 2 to use the areas within the common ground hatched blue on the plan. . Mr Reid's opinion is that the Appellants, by not expressly mentioning the parking in their reporting letter, could not be considered to have provided an inadequate professional service. It is clearly not best practice to omit mentioning the details with regard to the parking, but an inadequate professional service means a professional service which is in any respect not of the quality which could be reasonably be expected of a competent solicitor. Given that there appeared to have been a complaint about parking on the feu, it was a matter on which the Appellants ought to have reported and on which they did not report and in the view of the Tribunal that could have amounted to an inadequate professional service. But there was no finding by the Law Society of an inadequate professional service of

reporting to clients. In terms of S53B the Tribunal can quash, vary or confirm the Law Society's determination. In this case the Tribunal were concerned with regard to the quality of the Law Society's determination in that it failed to identify the true grounds of the inadequate professional service provided by the Appellants. The Tribunal were concerned that unless the determination of the Law Society was varied by the Tribunal, the complainers might suffer prejudice. The Tribunal considered that it may well have been that the Appellants did provide an inadequate professional service to the complainers for the reasons outlined above but the Tribunal was not in possession of sufficient papers or facts to make any finding consistent with that of the Committee or for the reasons put forward by the Committee. The determination made and the reasons put forward by the Law Society to support a finding of inadequate professional preparation service was/were not sustainable on the facts. The Tribunal felt that although it was competent to vary the determination of the Law Society, any variation would have been so extensive that it would have to completely rewrite the Decision and it had insufficient information from the evidence available to do this. Further any such re-writing of the decision by the Tribunal would be likely to have found that the inadequate service provided by the Appellants was one of reporting to the complainers on the title terms (as opposed to an inadequate preparation service). Such a rewriting would be prejudicial to the Appellants as they would have had no notice of this ground of complaint..

In the circumstances the Tribunal's only option was to Quash the Determination of the Law Society and Sustain the appeal.

The Tribunal were also concerned that the third reporter considered the second reporter's report but was not apparently made aware of the first reporter's contradictory report in favour of the Appellants. The Committee taking the decision also had before it only this final report and that of the Second Reporter and there was no evidence that consideration at this final determination was given to the report prepared by the first lay reporter. The Tribunal considered that this was contrary to natural justice and that all reports should have been considered by the Committee when it took its final decision.

Expenses would normally be awarded in accordance with success. However in this case the Tribunal considered that although the Appeal had been upheld, the Appellants' report on title to their client was not as full as it could and should have been and accordingly the Appellants' conduct in the matter had contributed to the case coming to the Tribunal. The Tribunal accordingly considered it appropriate that each party pay their own expenses. The Tribunal ordered that publicity be given to the decision in terms of S14 of Schedule 4 of the Solicitors (Scotland) Act 1980. The exemption in S14A of the said schedule does not apply and accordingly any publicity will include the name of the Appellants.

Vice Chairman