

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

DECISION

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

by

MESSRS CAMPBELL RIDDELL
BREEZE PATERSON, Solicitors,
12 Woodside Place, Glasgow

Appellants

against

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

First Respondent

and

Mr A
Property 1

Second Respondent

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 Campbell Riddell Breeze Paterson Solicitors, 12 Woodside Place, Glasgow ("the Appellants") against a finding by the Council of the Law Society of Scotland ("the Law Society") dated 10th November 2004 that the Appellants had provided an Inadequate Professional Service in relation to their client, Mr A ("the Lay Complainer") and a Direction that the Appellants refund the whole fees charged in respect of the constitution of the security to the Lay Complainer and pay the Lay Complainer the sum of £500 by way of compensation.

2. In accordance with the Rules of the Tribunal the Appeal was formally intimated to the Law Society and the Lay Complainer and Answers were lodged on behalf of the Law Society and the Lay Complainer.
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 28th April 2005.
4. At the hearing on 28th April 2005 the Appellants were present and represented by Mr Ellis, Senior Counsel, Mr Brown, Junior Counsel and Mr W Macreath, Instructing Solicitor. The Law Society were represented by their Fiscal, Mr Paul Reid, Solicitor, Glasgow. The Lay Complainer did not appear and was 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 and the Lay Complainer, the Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 28th April 2005. The Tribunal having considered the Appeal by Messrs Campbell Riddell Breeze Paterson Solicitors, 12 Woodside Place, Glasgow (“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 A, Property 1 (“the Lay Complainer”) and the Determination and Direction that the Appellants should refund the whole of the fees charged in respect of the constitution of the security to the Lay Complainer and pay the Lay Complainer the sum of £500 by way of compensation; Quash the Determination and Direction in respect of Heads of Complaint 1 and 3, Vary the Determination and Direction in respect of Head of Complaint 2 and Direct that the Appellants should pay the Lay Complainer the sum of £500 by way of compensation; Make a finding of no expenses due to or by any party and

Direct that publicity be given to this Decision and that this publicity shall include the name of the Appellants.

(Signed) ALISTAIR COCKBURN

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 42A(7) of the Solicitors (Scotland) Act 1980 as amended against the finding of Inadequate Professional Service and Determination and Direction under Section 42A(2)(a)(i), Section 42A(3) and Section 42A(2)(d) of the said Act.

THE APPELLANTS' SUBMISSIONS

Mr Ellis asked that the Tribunal allow the minute of amendment for the Appellants. It was confirmed that this had been intimated to the Law Society and the Lay Complainer. Mr Reid, on behalf of the Law Society, indicated they had no objection to the minute of amendment and nothing had been heard from the Lay Complainer. The Tribunal accordingly allowed the minute of amendment. Mr Ellis indicated that he firstly wished to address the Tribunal with regard to the issue of time bar.

Time Bar

Mr Ellis pointed out that the work complained of had been undertaken in 1990. The first knowledge that there was a problem was clear from production 3 which was a letter dated 1 August 1990. The events which had resulted in a complaint being made had been finished by 1 August 1990. The opinions had been obtained in October and November 1990 as was also clear from production 3. The Appellants ceased acting on 18 April 1991. There was accordingly a period of eight years between the Appellants ceasing to act and a complaint being made. The Lay Complainer first asked for the file in 1996 and this revealed two different opinions. Mr Ellis referred the Tribunal to production 12(H) where the reporter had indicated that Head of Complaint 1 was time barred. Mr Ellis submitted that the Council of the Law Society was in error and had not been clear in what tests they had applied in connection with time bar. There was no statutory provision with regard to a test in connection with time bar but the Law Society used five years as a matter of policy as it was desirable that a time bar apply to avoid stale complaints. The test was akin to that used under the Prescription and Limitation (Scotland) Act 1973 which set out a five year period of prescription. Mr Ellis stated that a test with an element of objectivity was required.

Mr Ellis suggested that what should be looked at was what a complainer with reasonable diligence could have become aware of. If an individual had sustained loss they should look to see why and what they could have made themselves aware of was important. In terms of Section 11 of the Prescription and Limitation (Scotland) Act 1973 the starting point was when an individual became aware of the loss or damage or with reasonable diligence could have become aware. Actual loss would trigger a duty to investigate. Mr Ellis pointed out that Section 6 of the 1973 Act imposed a five year limit for all sorts of claims and the start date was when the claim became enforceable. Section 6(4) of the 1973 Act discounts any period in which a person is delayed from doing something due to fraud or due to being induced, by the actings of the wrongdoer, not to do anything.

Mr Ellis stated that it was accepted that the Lay Complainer was not aware until 1996 of the fact that there were two opinions or that correspondence was missing from the Appellants' file. However the Lay Complainer was aware in 1991 that something was wrong and he should have obtained the files and had he done so he would have acquired the information at that time. Mr Ellis suggested that an analogy with the prescriptive period was useful and that the test of reasonable diligence was appropriate.

Mr Ellis also pointed out that the Law Society Committee had proceeded on the basis of erroneous facts. These had been taken from the pursuer's averments in the court actions but these averments were not proved as could be seen from the correspondence. Production 3 showed that there was a problem with the conveyancing transaction and that this was known to the Lay Complainer who expressed dissatisfaction with the Appellants at this time. It was clear that there was a suggestion, in the Lay Complainer's mind, that the Appellants were responsible. It was also clear from the letter of 15 April 1991 that the Lay Complainer did not accept the Appellants' explanation. The Appellants' withdrew shortly thereafter due to a conflict of interest. There was accordingly no question of the Lay Complainer thinking that nothing was wrong in 1991. He knew he had suffered losses and had blamed the Appellants by April 1991. He should accordingly have taken steps to investigate further at the time. In connection with Head of Complaint 1 it was clear that the Lay Complainer was aware of the problem in 1991 and there was no

explanation for the delay between 1991 and 1996 or the delay between 1996 and 1999. In connection with Heads of Complaint 2 and 3 although the Lay Complainer was not actually aware that there were two opinions and that correspondence was missing from the file until 1996 if he had used reasonable diligence he would have become aware of the whole situation in 1991. The starting time should accordingly run from 1991 and it was unfair to make the Appellants face a complaint eight years later. Mr Ellis then addressed the substantive Heads of Complaint.

Head of Complaint 1

The difficulty here was that the planning permission did not match the plan on the disposition. The reporter stated that the Appellants should have compared the plan on the planning permission to the plan on the disposition but Mr Ellis submitted this ignored the question of whether or not a competent solicitor would have been obliged to do so. The Appellants received the grant of planning permission without a plan being annexed to it. It was clear from production 3 that the practice at the time was that solicitors were not obliged to get the planning permission plan unless there was something in the planning permission which raised a concern. In response to a question from the Tribunal it was clarified that the planning permission had never been exhibited to the Law Society and was not now available. Mr Ellis stated that the Appellants' argument was that there was nothing to put them on notice that they required the plan. It was not known if it was a condition of the planning permission that there be 9 metres available or if the permission simply made reference to the plans as lodged which may have shown 9 metres being available which was less than did in fact exist.

Head of Complaint 2

Mr Ellis submitted that it was not clear why this complaint had been upheld - whether it was because the terms of the first opinion were withheld or because there was an obligation on the Appellants to withdraw from acting. The Lay Complainer's complaint was clear and that was that he was concerned with regard to the concealing of the fact that there were two opinions. Mr Ellis submitted that there was no obligation on the Appellants to disclose the first opinion with the extra paragraph to

the Lay Complainer and that there was a conflict of views within the profession with regard to whether there was an obligation to do this and it accordingly could not be inadequate professional service not to disclose the opinion.

Head of Complaint 3

Mr Ellis stated that it was accepted that there was an obligation on solicitors to maintain complete files but in this case there was no evidence that the Appellants had not kept the files. At the relevant time the Appellants were acting for the client, the Lay Complainer and the lender as was commonplace at that time. The lenders, Lender 1, were also unhappy and mandated the file to another firm of solicitors in 1991. The documents which were missing related to the security and could have been delivered up by the Appellants in terms of the mandate in 1991. The only criticism could be that the file had not been copied when mandated by the lender client and although it may have been wise for self-protection, at that time it was not common practice to do this. Mr Ellis submitted that failure to make a copy of the documentation could not amount to inadequate professional service.

Mr Ellis invited the Tribunal to quash the Determination in respect of all three Heads of Complaint.

SUBMISSIONS FOR THE LAW SOCIETY

Mr Reid set out the historical background with regard to the complaint. The help form was received on 14th January 1999 from the Lay Complainer in connection with the conveyancing transaction which took place in 1990-1991. The help form indicated that the Lay Complainer only became aware of the full facts in 1997. The Lay Complainer's position was that if he had known the full facts it would have cast a different light on his position in connection with the complaint by Lender 1. Mr Reid referred to production 2(B) paragraph 1 where the Appellants had indicated that their responsibility was in respect of the offer of loan to Lender 1 and not to the Lay Complainer. Mr Reid also referred to production 3(C) being the first opinion from Biggart, Baillie and Gifford dated 30th October 1990 which followed the letter of 8th

October 1990 being production 3(S) which stated that the Appellants were going to instruct an opinion as instructed by the Lay Complainer. Mr Reid submitted that this made it clear that the opinion was instructed on behalf of the Lay Complainer. Production 3(H) was a sanitized version of the opinion dated 16th November 1990 which was identical to the previous one but with a paragraph missing. The second opinion was delivered to the Lay Complainer. It was clear from productions 6 and 7 that matters were held in abeyance after 1997 due to the civil court action which was ongoing. Mr Reid also referred the Tribunal to production 9(G) being a minute of the meeting in April 1991 where the Appellants told the Lay Complainer that he had no reason to have concerns. Mr Reid stated that inadequate professional service was a different concept to professional negligence and there were two separate sets of rules and principles. It was clear that the Sheriff Principal recognised the conceptual differences and was of the opinion that the Appellants had a professional duty to advise the Lay Complainer in connection with the separate opinion which they had received. Mr Reid referred the Tribunal to Janice Webster on Professional Ethics and Practice for Scottish Solicitors, which identified 5 principles. The fifth principle was communicating effectively with clients. Mr Reid suggested that obtaining an opinion which was not to the liking of the solicitors because it suggested a difficulty for them, and then obtaining another one which they then delivered to the client was not effective communication with the client. The Appellants should have forwarded the first opinion to the Lay Complainer and stated why they thought it was wrong or suggested that they should stop acting due to the conflict. It was not correct to obtain a sanitised copy of the opinion and send this to the Lay Complainer.

In connection with time bar, Mr Reid accepted that there must be a cut off point and that five years was used as a matter of policy by the Law Society at that time. The Law Society were now using the period of two years. Mr Reid stated that the Law Society were not bound by the 1973 Act or by their own policies. The Law Society would still look at matters outwith the five year period if they were serious enough. In this case until the Lay Complainer had recovered the file he was unaware that there were the two different opinions and was unaware of the missing correspondence. Mr Reid accordingly submitted that, in connection with Heads of Complaint 2 and 3, the time must start from September 1997. Mr Reid referred to letter 9 attached to the Lay Complainer's Answers in connection with the missing correspondence. It became

apparent that the Appellants had not been sent a copy of the Lay Complainer's Answers and correspondence and accordingly although they had been aware of the Answers from the Record, they had not previously seen the letters as these had not been intimated to them by the Lay Complainer. The Appellants however confirmed that they had no objection to these being considered. Mr Reid stated that solicitors have a duty not to mislead their clients and to be frank and open with clients. Mr Reid submitted that failure to disclose the second opinion was inconsistent with this duty.

In answer to a question from the Tribunal Mr Ellis stated that he did not know why the passage had been taken out of the second opinion but this did not necessarily lead to the inference that there was a problem. Mr Ellis stated that the Appellants may have asked for two different sets of advice which had all come in in one letter.

DECISION

In connection with time bar, it being accepted by both parties present that there was no authority on the matter to bind or guide the Tribunal, the Tribunal considered that some comparison with the Prescription and Limitation (Scotland) Act 1973 was permissible but it would not be appropriate to have any set period for all cases or any classification of case. There would however require to be a cut off point in fairness to the solicitors concerned. In this case there is no doubt from the content of the productions lodged; that in 1991 the Lay Complainer was alert to the fact that there was something wrong in connection with the conveyancing transaction. It being the case that he was on guard that something was wrong he required to use due diligence to investigate this within a reasonable time. The letter of 15th April 1991 shows that the Lay Complainer was, or ought to have been, aware of the gravamen of what was in dispute. This placed him on alert and required him to make some investigation into the circumstances. The Appellants withdrew three days after 15th April 1991 and the Tribunal did not consider it reasonable in the whole circumstances for the Lay Complainer to make a complaint some eight years later. The Tribunal accordingly find that in respect of Head of Complaint 1 the matter is time barred.

However the Lay Complainer did not discover that there were two opinions nor that correspondence was missing from the file until 1996. The Tribunal consider that the

onus on the Lay Complainer to investigate depends on what the suspicion is. It was clear that in 1991 there was suspicion with regard to the conveyancing transaction. There is however nothing to suggest that the Lay Complainer would have had any suspicion that there were two opinions or that correspondence from the file was missing. The Appellants state that the Lay Complainer was not entitled to the first opinion and accordingly even if the file had been delivered to him in 1991 this may not have been in it and he may accordingly not have seen it at that time even if he had asked for the file then. The Tribunal accordingly do not consider that the Lay Complainer was on guard that something was wrong with regard to the two opinions and missing correspondence until 1996 and accordingly do not find that Heads of Complaint 2 and 3 are time barred. As Head of Complaint 1 had been held to be time barred there was no necessity for the Tribunal to consider the merits of this Head of Complaint.

In connection with Head of Complaint 2 the Tribunal accept that there may have been no obligation on the Appellants to disclose an opinion which indicated that they were at fault. However the Appellants argue that the paragraph in the first opinion is not prejudicial to them as there was nothing in the planning permission which put them on notice that they needed to look at the plans. If this was the case there should have been no difficulty in the Appellants providing the Lay Complainer with a copy of the first opinion but explaining that they had done nothing wrong. What the Appellants did do however was to provide the Lay Complainer with a sanitised copy of the opinion. The Tribunal consider that they set out to deceive the Lay Complainer by providing him with this doctored opinion. This is contrary to the duty to properly communicate with the client and is damaging to the relationship of trust between the solicitor and client. There was some suggestion that there were two letters sent to Messrs Biggart Baillie one asking for advice for the Lay Complainer and one asking for advice concerning the Appellants position. This would however not seem logical as it would suggest that the Appellants were already aware that there may be a conflict of interest situation. The Tribunal was satisfied on the balance of probabilities that the Appellants failure to communicate to the Lay Complainer that the opinion sent was a sanitised version of an opinion which had been issued thereby depriving the client of the knowledge of a potential conflict of interest situation between the client and the Appellants amounted to provision of an inadequate professional service. The

Tribunal accordingly varied the determination of the Law Society and found that the Appellants provided an inadequate professional service in that they issued an abridged version of an expert report and deprived the client of knowledge of potential conflict of interest.

In connection with Head of Complaint 3 it is clear that the papers were only missing from the file because they had been mandated by Lender 1 and accordingly the only criticism of the Appellants could be the failure to copy the papers sent. The Tribunal was not satisfied on the balance of probabilities that the practice in 1991 of a competent solicitor would have been to make a copy of the file in a situation such as this. The Tribunal accordingly do not find that the Appellants provided inadequate professional service in connection with Head of Complaint 3.

Mr Ellis confirmed on behalf of the Appellants that no fees had ever been charged in connection with the conveyancing transaction and no fees could now be charged. He suggested that as compensation of £500 had been imposed in respect of all three Heads of Complaint a lesser sum would be appropriate for Head of Complaint 2 alone. Mr Ellis also asked the Tribunal to take account of the fact that no loss had actually flowed. Mr Ellis asked for an award in favour of the Appellants of some of the expenses as two Heads of Complaint had been quashed. Mr Ellis sought sanction with regard to employment of Counsel. Mr Reid asked for a finding of no expenses due to or by and asked that the £500 compensation be confirmed as Head of Complaint 2 had been the most serious matter.

The Tribunal considered that Head of Complaint 2 was the most serious matter and accordingly considered that a finding of no expenses due to or by any party would be appropriate. The Tribunal also considered that Head of Complaint 2 was serious enough on its own to merit the imposition of £500 compensation to the Lay Complainer. The Tribunal made the usual order with regard to publicity.

Vice Chairman