

**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

**MALCOLM KEITH MACAULAY
CAMERON, Solicitor, 17 Larch Road,
Dumbreck, Glasgow**

Appellant

against

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

First Respondents

and

MR M

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 Malcolm Keith MacAulay Cameron, Solicitor, 17 Larch Road, Dumbreck, Glasgow ("the Appellant") against a Finding made by the Council of the Law Society of Scotland ("the Law Society") dated 7 June 2007, that the Appellant had provided an inadequate professional service in relation to his client Mr M ("the Lay Complainer") and a Direction that

Appellant should pay to Mr M £650 by way of compensation.

2. In accordance with the Rules of the Tribunal the Appeal was formally intimated to the Law Society and to Mr M. The Appellant intimated two separate notes of adjustments to his Note of Appeal. Answers were lodged on behalf of the Law Society. An adjusted Record as at 4 December 2007 was lodged with the Tribunal.
3. Having considered the documentation lodged, the Tribunal resolved to set the Appeal down for hearing and appointed that the Appeal should be heard on 2 October 2007. The hearing on 2 October 2007 was adjourned and procedural hearings were held on 26 October and 12 December 2007. A further hearing was fixed for 30 January 2008.
4. At the hearing on 30 January 2008 the Appellant was present and represented by Mrs Joan Cunningham. The Law Society was represented by their fiscal, Paul Reid, Solicitor Glasgow. Mr M was not present or represented. No evidence was led.
5. Having considered the productions lodged and the submissions on behalf of the Appellant and the Law Society, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 30 January 2008. The Tribunal having considered the Appeal by Malcolm Keith MacAulay Cameron, Solicitor, 17 Larch Road, Dumbreck, Glasgow (“the Appellant”) against a Finding of Inadequate Professional Service by the Council of the Law Society of Scotland (“the Law Society”) in relation to Mr M (“the Lay Complainer) and a Direction that the Appellant should pay the sum of £650 by way of compensation to Mr M; Quash the said Determination and Direction of the Law Society; Find no expenses due to or by either party; and Direct that publicity be given to this decision and that this publicity should include the name of the Appellant.

(signed)
Alistair Cockburn
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 Appellant by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

This is an Appeal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 as amended against a finding of inadequate professional service and a Determination and Direction made by the Council of the Law Society under Section 42A(1) and Section 42A(2)(d), of the said Act. The Tribunal noted that an adjusted Record as at 4 December 2007 had been lodged.

Mrs Cunningham sought leave to lodge an affidavit by Alan Stuart Paterson, Solicitor. Mr Reid objected to the lodging of the affidavit on the basis that it is unfair to allow additional evidence to be lodged which was not before the Law Society Committee. The Chairman of the Tribunal asked Mrs Cunningham what her authority was for the Tribunal considering affidavit evidence. The Chairman advised that, in his view, rule 9 of the Tribunal Rules is the only rule which applies to the leading of affidavit evidence and that rule only applies when inter alia the solicitor is not present. Mrs Cunningham stated that she could not point the Tribunal to any particular authority. Mr Reid stated that in relation to the content of the affidavit he was prepared to agree that the corrective conveyancing is still outstanding.

The Tribunal ruled that the affidavit evidence was incompetent as there was no provision in the Tribunal Rules to allow such evidence in these circumstances.

The Tribunal noted that it was agreed that the last sentence of Answer 1 of the adjusted record be deleted -

"In these circumstances it is reasonable to assume that the Appellant was negligent in the work which he carried out in connection with the purchase of the property originally."

SUBMISSIONS FOR THE APPELLANTS

Mrs Cunningham stated that the Appeal was against a finding of inadequate professional service in relation to Heads of Complaint numbers 4 and 5 of the Law Society's Determination and Direction of 7 June 2007.

In relation to Head of Complaint number 4, Mrs Cunningham stated that this related to failure to return the lay Complainer's telephone calls, made approximately every 2 weeks from June 2005 onwards. Mrs Cunningham submitted that this Head of Complaint was lacking in specification. She stated that there is a need for notice to be given to the Appellant, with enough information to allow the Appellant to answer the complaint. Mrs Cunningham stated that it was not clear what the word "onwards" meant and what specific period of time was alleged. She submitted that a period of time should have been specified in the Complaint. Mrs Cunningham submitted that the length of the time over which the failure occurred is fundamental to the complaint. She submitted that the Appellant has been prejudiced by this lack of specification and that he did not have fair notice of the case he had to answer. Mrs Cunningham stated that this lack of specification led to the Appellant originally mistaking the meaning of the Heads of Complaint and that this point was noted by the Reporter in his report, which is production 40 of the Inventory of Productions for the Respondent. Mrs Cunningham referred the Tribunal to paragraph 4 of the report at page 74 of the said Inventory. Mrs Cunningham submitted that she was concerned that the Reporter had made a mistaken assumption that the Appellant did not return the Complainer's calls during the period of time in which there was nothing to report, because there was nothing to report. Mrs Cunningham stated that that assumption was incorrect. She referred the Tribunal to production 42 of the said Inventory at page 80 paragraph 4, where the Appellant confirmed that he personally took phone calls from the Complainer during the period and explained the position to them. Mrs Cunningham submitted that the Appellant did return phone calls and told his clients that there was nothing to report.

Mrs Cunningham stated that the second part of her submission in relation to Head of

Complaint 4 is that the Client Relations Department failed to cross-copy the Lay Complainer's post report submissions and further submissions by the Reporter to the Appellant, which denied him a full right of reply and a fair hearing. Mrs Cunningham referred the Tribunal to the Answers from the Law Society at page 3 of the adjusted Record, where it states that the post-report submissions received from the Lay Complainer were considered by the Case Manager and the author of the report. They both took the view that the material contained therein did not contain issues of substance or materiality to allow for the Appellant to be afforded a right of reply. Mrs Cunningham submitted that productions 41 and 45 contradict that statement as it is clear that it is not Law Society policy to copy the Lay Complainer's comments on the report to the Appellant prior to the Committee deciding the Complaint.

Mrs Cunningham submitted that the post-report submission by the Lay Complainer at production 46 of the said Inventory is material to the complaint as it contains an admission by the Lay Complainer that the Appellant did return phone calls. Mrs Cunningham submitted that the Appellant should have had an opportunity to respond to the Lay Complainer's comments. Mrs Cunningham referred the Tribunal to paragraph 6 of production 46 of the said Inventory, where the Lay Complainer states that calls were returned intermittently. Mrs Cunningham submitted that the Lay Complainer's letter refers to the Appellant providing inaccurate information which suggests dishonesty or untruthfulness. She stated that a solicitor would want an opportunity to refute such an allegation. Mrs Cunningham accepted that it is not part of Heads of Complaint 4 or 5 that the Appellant provided inaccurate or false information; however she stated that the inference has to be that the Committee did take account of these comments in making its decisions.

Mrs Cunningham submitted that the Reporter may have considered irrelevant matters which were outwith the knowledge of the Appellant. Mrs Cunningham referred the Tribunal to the terms of production 45 of the said Inventory at page 84. This is an e-mail from the Reporter to the Case Manager. In the e-mail the Reporter discusses the case file with the Case Manager. Mrs Cunningham submitted that the Appellant is concerned that

this indicates that the Reporter was taking evidence from the Case Manager when she refers to telephone conversations that the Case Manager has had with the Appellant. Mrs Cunningham stated that the file notes of these three telephone conversations are outwith the knowledge of the Appellant and he has had no opportunity to comment on the accuracy of these. Mrs Cunningham stated that the Case Manager should not say anything to contradict the Appellant's position, because that is not her role. The dialogue should have been conducted openly. It would appear that the Client Relations Office file was introduced into evidence at this stage. Mrs Cunningham submitted that at this stage the Client Relations Office attendance notes are not a proper source of evidence and the Appellant did not have access to them. Mrs Cunningham submitted that the Client Relations Office file should have been copied and sent to the parties, if it was being sent to the Reporter.

Mrs Cunningham submitted that the Reporter was wrong in concluding that paragraph 7 at page 57 of the said Inventory meant that the Appellant admitted to not returning phone calls. The Appellant had originally confused the Heads of Complaint and Mrs Cunningham stated that this was clear from that paragraph. She submitted that the Appellant makes clear in his letter of 11 May 2007, which is production 42 at page 80 of the said Inventory, that he took telephone calls from the Lay Complainer and explained the situation to him. Mrs Cunningham submitted that the Committee, in its decision, did not fully address the Appellant's objection regarding lack of specification. She submitted that the second sentence in the third paragraph of the Committee's decision, at page 94 of the said Inventory, is an opinion rather than an explanation for their decision. Mrs Cunningham submitted that the Committee did not quantify the length of the period which the complaint should have libelled. Mrs Cunningham submitted that the complaint as libelled contained an open ended period.

Mrs Cunningham then turned to Head of Complaint 5. She stated that this was narrated as a failure to pass the file to Messrs Frazer Coogans Solicitors timeously in order for the outstanding work to be completed. Mrs Cunningham submitted that this is a specific libel and that it is fundamentally flawed in two ways. Firstly, the libel contains a

fundamental inaccuracy. Frazer Coogans were not completing any outstanding work on behalf of the Lay Complainer. Frazer Coogans were merely retaining the £2000 retention money. Mr & Mrs A, the Lay Complainer's former neighbours, were disposing part of their path to the new owners of the Lay Complainer's former property. The professional services in connection with this matter were carried out by Messrs Goldsmith & Hughes and Frazer Coogans had no role to play in the corrective conveyancing transaction. Mrs Cunningham submitted that the libel cannot be separated. She argued that it is a specific complaint that the file required to be delivered in order for the outstanding work to be completed. Mrs Cunningham submitted that the libel was fallacious, as Frazer Coogans were not involved in any outstanding work.

Mrs Cunningham referred the Tribunal to page 28 of the Tribunal's Decision in the case of the Appeal by Messrs MacRoberts and Richard Barrie from 19 September 2005. Mrs Cunningham stated that in that case, the Tribunal had said that it was not for it to expand or vary the charge of which Appellants have been given notice. Mrs Cunningham submitted that paragraph 1 on page 95 of the said Inventory, makes it clear that the Client Relations Committee did not find the exact wording of the Head of Complaint to be upheld but went on to determine that that the Appellant's failure to comply with his undertaking could amount to an inadequate professional service. Mrs Cunningham referred the Tribunal to the Appellant's post report comments sent on 6 June 2007 to the Law Society. She referred the Tribunal to paragraph 7 of production 49 on page 89 of the said Inventory, in which the Appellant points out the Reporter's error in this regard. Mrs Cunningham submitted that it was likely that the file was already with Stuart Paterson, as he took over the Appellant's conveyancing practice. Mr Paterson probably had the file but did not initially know that he had it as it was with a number of other files. She stated that it was not in dispute that the Lay Complainer had an interest in the corrective conveyancing. However, he had no locus in the corrective conveyancing and Frazer Coogans could not be involved. The new purchasers and sellers were both represented by Messrs Goldsmith & Hughes. She submitted that it was open to the Lay Complainer to go to Messrs Goldsmith & Hughes to get information and stated that in actual fact he did. Mrs Cunningham submitted that the file was not relevant and was not asked for at

any stage by any party.

Mrs Cunningham then turned to the second part of her submission in relation to Head of Complaint 5. She stated that the Complaint was served on the Appellant on 5 February 2007 and by that time the Appellant had been retired from professional practice for some 4 months. He had advised the Law Society of this on 30 October 2006 and had also advised in advance, in August 2006, of his intention to retire. He did not renew his practising certificate. Mrs Cunningham submitted that he was therefore no longer someone who could be subject to the inadequate professional service provisions in Section 42A of the Solicitors (Scotland) Act 1980. Mrs Cunningham submitted that although he was still on the Roll of Solicitors, by February 2007 he was retired from practice therefore there could be no solicitor client relationship and he was not carrying out professional services.

In response to a question from the Tribunal as to the terms of Section 42A, Mrs Cunningham conceded that it does not mention practising solicitor in that section, however, she submitted that the words "practising solicitor" must be read into the phrase "professional service". She submitted that this must mean someone engaged in the provision of legal services as a means of livelihood. Mrs Cunningham submitted that the Appellant is accused of providing an inadequate professional service to a client at a time when he is no longer engaged in the provision of legal services as a means of livelihood. She stated that it may be the case where a solicitor on the Roll engages in behaviour which brings the reputation of the profession into disrepute and can therefore be before the Tribunal in relation to that but she argued that such a solicitor cannot provide an inadequate professional service. She submitted that there must be a cut-off point as regards to the specific nature of the sanction which may be brought against him in relation to the Complaint. Mrs Cunningham submitted that the promise to produce the file was given some time after he retired from practice and therefore could not give rise to a finding of inadequate professional service. Mrs Cunningham submitted that if there were grounds to establish the complaint it should have been formulated under a misconduct complaint.

Mrs Cunningham then advised that she had one further submission to make regarding the delivery of the file. She stated that the Client Relations Committee made a determination that the Appellant did not deliver the file within a reasonable period. She submitted that in order to do that there required to be a finding in fact that there was a delay between the undertaking and the delivery of the file to Frazer Coogans. She stated that there needs to be a firm basis for that determination and not just an assumption in the findings in fact. She stated that the report deals with this in two places. Firstly she referred the Tribunal to production 39 of the said Inventory at page 72, paragraph 24. That paragraph refers to a telephone conversation between the Appellant and the Client Relations Office on 6 February 2007 where it stated that the Appellant advised that he was "about to pass the file to Frazer Coogans". Mrs Cunningham stated that the Reporter's sole basis for this finding in fact was production 29, a Law Society file note, which the Appellant did not see until after the inception of this procedure, when the file note was included in the productions. Mrs Cunningham submitted that the file note referred to in paragraph 24 is crucial and stated that had the Appellant seen this document prior to giving his comments on the Complaint, he would have disputed it because the conversation he had with the Law Society on that date was regarding the transfer of retained funds, not the file. Mrs Cunningham stated that the Appellant raised concerns that certain of the Reporter's findings in fact appear to emerge from entries in the Case Manager's file. He raised this in his response to the report at paragraph 3 of production 42 of the said Inventory at page 81.

In conclusion, Mrs Cunningham stated that in relation to both Heads of Complaint she has two main criticisms of the manner in which the Client Relation's Committee reached its decision. Firstly, the Client Relations Committee took no account of the post report submissions made by the Appellant. Mrs Cunningham submitted that the Reporter made a leap in logic and assumed that because the Appellant admitted that there was nothing to report, he was admitting not returning the telephone calls. She stated that the Client Relations Committee did not explain in their reasoning, why they preferred the Lay Complainer's evidence to the Appellant's evidence. Secondly, Mrs Cunningham

submitted that the lack of specification in relation to Head of Complaint 5 was not addressed by the Client Relations Committee. The Client Relations Committee gave no explanation of how it reached its decision. The comments of the Committee in relation to Head of Complaint 5 are a statement and do not state over what time period the failure occurred. Mrs Cunningham submitted that the Client Relations Committee made an irreconcilable statement. The decision states that the Committee was satisfied that the Complainer had made at least some telephone contact in the period specified which had not been returned by the Appellant and yet their finding was that the Appellant had failed to return the lay Complainer's telephone calls made approximately every two weeks from June 2005 onwards. In relation to this Head of Complaint the Client Relations Committee did not explain why they preferred the evidence of the Lay Complainer to the evidence of the Appellant. In addition there was no explanation of how the Committee considered that the burden of proof had been discharged. Mrs Cunningham referred the Tribunal to the case of McKinstry –v The Council of the Law Society of Scotland 1997 SLT 191 at page 200 where Lord Osborne stated that -

“Here I am dealing with a decision of a complaints committee of the respondents and with a resolution of the council of the respondents. Having regard to the fact that these bodies are organs of the respondents, the statutory body representing the solicitors’ branch of the legal profession in Scotland, it does respectfully appear to me that the court is entitled to look for clarity and cohesion in the expression of its decisions. In particular, it appears to me entirely reasonable to suppose that, in decisions of these bodies in relation to matters of professional misconduct, express reference will be made to the criterion which has been applied.”

Mrs Cunningham submitted that solicitors should expect such clarity and cohesion of the law society’s decisions in relation to inadequate professional service too. Mrs Cunningham submitted there was a lack of reasoning by the Client Relations Committee in relation to Head of Complaint 5 and a lack of coherence regarding the decision in Head of Complaint 4. She stated that there was no reasoning why the Committee upheld an

inadequate professional service claim in relation to a retired solicitor.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid made reference to the McKinsty case. He submitted that the Law Society is not a professional judicial body and must be given some leeway in formulating its reasoning. Mr Reid submitted that the Committee's decision indicates that lengthy letters from the Appellant were considered by the Committee. Mr Reid submitted that the issue in this case is a complaint of inadequate professional service regarding the sale of Property 1. He submitted that the Tribunal had to look at the background and take the matters in context. Mr Reid stated that the Lay Complainer in production 1, his help form, makes clear his complaint that numerous phone calls were not returned. Then over a period of 16 months there were three promises by the Appellant that he would deliver the file. Mr Reid submitted that seeking the help of the Law Society was an act of frustration on the Lay Complainer's part. Despite an assurance on three occasions that the Appellant would progress matters, he singularly failed to do so.

Mr Reid submitted that as averred in the adjusted record, the post-report submissions were not material. He submitted that the Case Manager and the Reporter considered the lay Complainer's representations and took the view that they were of no significance. Mr Reid submitted that there was recognition in the Carruthers case, a Decision of the Tribunal in a Section 42A Appeal from 14 June 2007, that there must be a closure to the process. In this case the submissions were considered and were not viewed as being material.

Mr Reid submitted that at page 37 of the said Inventory, the Appellant e-mailed the Case Manager to say that he was sending the file to Frazer Coogans. At that stage the transaction was not at an end. The £2000 retention was still outstanding and the Lay Complainer still had an interest in resolving the issue. Mr Reid submitted that there was sufficient within the papers for the Law Society to reach the finding in fact that the file was required for the completion of the outstanding work. Mr Reid submitted that the

essence of the complaint is the Appellant's failure to pass the file after having agreed to do so.

In relation to the MacRoberts case, Mr Reid submitted that it would be unfair if the Appellant could be found guilty of a completely different libel on a different aspect of inadequate professional service. However that had not happened in this case. In response to a question from the Tribunal as to where in the Committee's reasoning indicated that it had taken account of the post-report submissions from the Appellant that phone calls had been made, Mr Reid submitted that these comments were taken into account. He stated that the Law Society could not be expected to produce lengthy detailed reasons as it was not a judicial body.

In relation to Mrs Cunningham's submission regarding the ending of the solicitor client relationship and the possibility of a complaint of inadequate professional service after such a relationship has ended, Mr Reid submitted that the sale of the property was not fully completed. There was no evidence that the Appellant had dispensed with the Lay Complainer as a client. He stated that the Appellant had undertaken to sort out the matter. Mr Reid submitted that it is reasonable to deduce from the Appellant's correspondence at page 35 of the said Inventory, that Frazer Coogans were doing more than just holding the monies on deposit receipt.

In response to a question from the Tribunal, the Appellant stated that in September 2006 he had advised the Lay Complainer that he was retiring in the next month. The Appellant stated that he gave the Lay Complainer contact details for Frazer Coogans.

DECISION

In relation to Head of Complaint 4 the Tribunal considered that this Head of Complaint was specific enough to allow the matter to be responded to and noted that both the Appellant and the Lay Complainer were able to send in comments to the Law Society. The Tribunal therefore found no merit in the submission that the complaint regarding the

phone calls was so lacking in specification that it was unfair to expect the Appellant to respond to it. However, in relation to that complaint the Tribunal found that the Law Society received information from two sources after the Reporter's report was finalised and intimated to the parties. The first piece of information received was from the Lay Complainer who varied his position to accepting that some phone calls were returned by the Appellant. The second piece of information received was from the Appellant who asserted that some phone calls were made to the Lay Complainer. The Tribunal noted that there is nothing in the Client Relations Committee's decision as to how this contrary position was reconciled with the wording of Head of Complaint 4 to enable the Law Society to make the decision that it did. The Tribunal considers that for that reason the decision was flawed.

In relation to Head of Complaint 5 the Tribunal considered that, in the particular circumstances of this case and without intending this to be regarded as a general authority, as the Appellant had retired from practice and the promise to deliver the file post-dated his retiral there is a sufficient time period in this case between the cessation of the solicitor client relationship and the breach of promise for the failure not to amount to an inadequate professional service. However, the Tribunal considers that such a failure could amount to a conduct matter.

The Tribunal therefore quashes the Determination and Direction of the Law Society in relation to both Heads of Complaint.

SUBMISSIONS REGARDING EXPENSES

Mrs Cunningham made a motion that the expenses of the substantive hearing and indeed of the whole Appeal process before the Tribunal should be awarded to the Appellant. She advised that although she was not a practising solicitor she was employed by a firm of solicitors and her firm had been instructed in this matter by the Appellant. She advised that she could provide the Tribunal with information as to her hourly charge out rate which her firm charges for her services. She advised that in terms of her firm's terms of

engagement the Appellant would be required to pay for her services in representing him this matter.

Mr Reid objected to Mrs Cunningham's motion and submitted that no expenses should be due to by either party.

There were no submissions made in relation to publicity.

The Tribunal advised the parties that it would reserve its decision on expenses and publicity and issue that decision in due course along with its written decision in this case.

DECISION RE EXPENSES AND PUBLICITY

The Tribunal required to acknowledge that the Law Society of Scotland as a regulatory body were under a duty in terms of Section 42 of the 1980 Act to investigate complaints and in this particular case the Tribunal had regard to the reasoning in Baxendale-Walker v-Law Society [2007] 3 ALL ER 330. The Law Society were certainly not assisted by the paucity of information in the initial response to a request for information in respect of the issues raised. If the Appellant had made a full and detailed response initially, the decision might well have been different. The Tribunal also took into consideration that although they found in the particular circumstances that the decision in relation to the breach of promise which related to the transfer of the file, did not amount to inadequate professional service, there were concerns as to how that conduct might be viewed against the label of conduct. On balance therefore, the Tribunal considered that justice would be served by a finding of no expenses due to or by either party.

The Tribunal ordered that publicity should be given to the decision in this case.

Chairman