

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

DECISION

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

by

DOUGLAS PETERS, 56
Slamannan Road, Falkirk of the
former firm of Douglas Peters &
Co., 61 High Street, Johnstone

Appellant

against

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

The Law Society

and

MS C

The Lay Complainer

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 Douglas Peters, 56 Slamannan Road, Falkirk ("the Appellant") against a finding by the Council of the Law Society of Scotland ("the Law Society") dated 9 December 2008 that the Appellant had provided an Inadequate Professional Service in respect of Head of Complaint 3 in relation to his client, Ms C ("the Lay Complainer"). The Appellant also challenged the amount of the award of compensation and challenged the Determination that the Appellant's fees should be abated by 35%.

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 a procedural hearing on 6 March 2009.
4. The Appeal called on 6 March 2009. The Appellant was present and represented himself. The Law Society was represented by Jim Reid, Solicitor, Glasgow. The Lay Complainer was also present and represented herself. The matter was continued to a further procedural hearing on 29 April 2009.
5. When the Appeal called on 29 April 2009 the Appellant was present and represented himself. The Law Society was represented by Jim Reid, Solicitor, Glasgow. The Lay Complainer was present and represented herself. It was clarified that the Lay Complainer did not wish to take part in the proceedings despite having lodged Answers. The matter was adjourned to a substantive hearing on 17 June 2009.
6. When the case called on 17 June 2009, the Appellant was present and represented himself. The Law Society was represented by Jim Reid, Solicitor, Glasgow. The Lay Complainer was in attendance but did not take part in the proceedings.
7. The Tribunal heard submissions from the Appellant and submissions from Mr Reid on behalf of the Law Society. A Joint Minute was lodged admitting the terms of the Productions.
8. Having considered the submissions, the Tribunal was not satisfied that head of Complaint 3 being a delay in taking Mrs A's evidence by video as requested on 2 October 2005 despite having been advised that her cancer was terminal, amounted to Inadequate Professional Service and accordingly the Tribunal Quashed Head of Complaint 3. The Tribunal also varied the award of compensation reducing it by one seventh to £1300 and varied the

Determination in respect of the abatement of fees directing that the fees should be abated by 30% rather than 35%.

9. The Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 17 June 2009; The Tribunal having considered the Appeal by Douglas Peters, 56 Slamannan Road, Falkirk (“the Appellant”) against a finding of Inadequate Professional Service by the Council of the Law Society of Scotland (“the Law Society”) in relation to Ms C (“the Lay Complainer”) and a Direction that the Appellant should pay the sum of £1500 by way of compensation to the Lay Complainer and a Direction that the Appellant abate his fees by 35%; Find that the service provided to the Lay Complainer by the Appellant in respect of Head of Complaint 3 did not amount to Inadequate Professional Service; Quash the finding of Inadequate Professional Service in relation to Head of Complaint 3; Vary the Determination in respect of payment of compensation and Direct that the Appellant shall pay the Lay Complainer compensation in the sum of £1300; Vary the Determination in respect of abatement of fees and Determine that the Appellant shall abate his fees by 30% and Direct the Appellant to refund or waive the right to charge fees to that extent; Make no finding of expenses due to or by any party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant.

(Signed)

David Coull

Vice Chairman

10. 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

Vice Chairman

NOTE

The Law Society had made a Determination and Direction that the Appellant had provided an Inadequate Professional Service in respect of 7 Heads of Complaint. The Appellant appealed in respect of Head of Complaint 3. Head of Complaint 3 was that the Appellant delayed in taking Mrs A's evidence by video as requested on 2 October 2005 despite being advised that her cancer was terminal. The Appellant also challenged the amount of the compensation awarded to the Lay Complainer. The Appellant also challenged the amount of abatement of his fees and also the basis on which the fees were abated. The Lay Complainer had lodged Answers to the Appeal but confirmed at the second procedural hearing that she did not wish to take any further part in the proceedings. A Joint Minute was lodged admitting the terms of the productions lodged both for the Appellant and the Law Society.

SUBMISSIONS FOR THE APPELLANT

Mr Peters clarified that he did not challenge any of the other six Heads of Complaint. He also clarified that he did not challenge the amount of the compensation but felt that if Head of Complaint 3 was not upheld the compensation should be reduced accordingly. Mr Peters outlined his personal circumstances and his history in the profession. He explained that in 2004 his assistant left the firm and he struggled at that time due to a lack of resources. His firm dissolved in 2005 and he had to continue as a sole practitioner and also had difficulties in his personal life. Mr Peters explained that his business had ceased and he had had a number of jobs but was now working for West Lothian Council. In response to a question from the Chairman, Mr Peters confirmed that the dispute related to a court action where Mrs A was seeking to have a Disposition to one of her daughters reduced. Mr Peters stated that his submission was that what had happened in respect of Head of Complaint 3 could have been done better but the qualitative drop in the level of service was not sufficient to amount inadequate professional service. Mr Peters referred the Tribunal to productions 1 – 17. Production 1 was a letter from Ms C, who is one of Mrs A's daughters, which advised that her mother's cancer was back and that there was no cure. The letter expressed the wish that Mrs A's evidence be taken by video. Mr Peters stated that there was no medical evidence at this stage and that he interpreted the letter as being a request for

evidence to be taken on commission. Mr Peters pointed out that the letter did not say how long it was expected that Mrs A would live. Mr Peters referred the Tribunal to attendance notes with regard to telephone calls with Ms C on 13 and 14 October 2005. He indicated that the phone calls came from Ms C to him. Mr Peters accepted that there was a delay of 11 days from receiving the letter of 2 October 2005 and the first telephone call. He stated that he was not sure why there was this delay but he expected it was pressure of work. During the telephone call on 14 October 2005 it was agreed that Mr Peters would see Mrs A at the hospital on the following tuesday. Mr Peters explained that he did prepare a Will at this stage for Mrs A. The appointment was re-arranged at his request but he could not remember why. He then met Mrs A and Ms C on 20 October 2005 at the hospital and the doctor was also present. The doctor requested that Mr Peters write to him to obtain a report and this was done. A letter was sent on 24 October 2005 to the doctor and given the weekend, there was only one day delay in doing this. The doctor's report was sent on 27 October 2005 and Mr Peters sent a copy to Ms C on 2 November and also sent the application to the Legal Aid Board with a copy of the medical report on 2 November 2005. Mr Peters referred the Tribunal to the form sent to the Scottish Legal Aid Board which included the reasons for the request and Mr Peters pointed out that these reasons included the explanation with regard to the likely costs. Despite this the Legal Aid Board wrote back saying that there was missing information with regard to the costs and he gave an estimate of costs on 8 November 2005. Also on 8 November 2005 Mr Peters received a phone call saying that Mrs A was very ill and he attended a meeting with Ms C and her husband Mr B at his office on 17 November 2005 discussing matters. The letter from the Scottish Legal Aid Board refusing sanction was received after the meeting. Mr Peters explained that the diet of proof had not yet been fixed but he intended to have evidence taken on commission instead. He indicated that in his view the Legal Aid Board was wrong to refuse the request. Mrs A unfortunately died 5 days later.

Mr Peters referred to the reporter's report at production 22 and indicated that there was no dispute with regard to the facts. He stated that his position was that he accepted that matters were urgent but pointed out that nobody knew how long Mrs A would live. He stated that it was not accurate as stated in the reporter's report to say that nothing had happened for three weeks as things had been happening during that

period. Mr Peters stated that in his submission, matters could perhaps have been progressed more quickly which would have reduced the time scale by a week. His view was that there would still not have been time to obtain evidence on commission. The Law Society suggested that the Lay Complainer could have considered paying privately but Mr Peters pointed out that it was not open to him to seek private payment when a Legal Aid Certificate was in place as this was prohibited. Mr Peters stated that with hindsight it could be said that things should have been done more quickly. He asked the Tribunal to uphold his ground of appeal 1 in respect of Head of Complaint 3. Mr Reid clarified that he accepted that video evidence in effect meant taking evidence on commission as this was the only way that Mrs A's evidence could have been made available. To do this an application would have had to have been made to the Sheriff.

In connection with ground of appeal 2, Mr Peters referred the Tribunal to production 18 being his private fee note. He pointed out that he had already substantially restricted his fee from that which had been fixed by the Law Accountant and his submission was that the abatement of fee should have been applied to the original figure of £2618 rather than the restricted figure of £2000. In connection with the Legal Aid account, Mr Peters submitted that there had been no finding of inadequate professional service in respect of any of his actions prior to 18 November 2004 and yet the whole of the account had been abated by 35%. Mr Peters referred to Section 42A of the Solicitors (Scotland) Act 1980 and submitted that the Law Society could only award an abatement of fees in respect of the services which had been found to be inadequate. Mr Peters referred to production 23.3 where he had provided a breakdown of fees pre and post 19 November 2004. In respect of Head of Complaint 10, although the period referred to was July 2002 to June 2006, Mr Peters' submission was that this must mean 2004 to 2006. He also indicated that the Law Society had not provided any explanation as to why they had taken the figure of 35%. He clarified that he did not accept responsibility for expenses being awarded in the court action against Ms C.

SUBMISSIONS FOR THE LAW SOCIETY

Mr Reid stated that the Law Society's decision involved an exercise of discretion and that the Tribunal should not interfere with this decision just because they took a

different view. The Tribunal would have to be satisfied that the Law Society's exercise of discretion had been wrong in principle or that the decision was so wrong that it should not have been made. In connection with Head of Complaint 3, there was no suggestion that the Law Society had not considered all the information available. The letter from Ms C of 2 October 2005 implied that there was a problem. Mr Reid indicated that this had to be looked at against the background of no contact by the Appellant with Ms C between January and October 2005. Mr Reid submitted that any solicitor receiving this letter in the circumstances should have treated it as urgent. There was a danger that the evidence of Mrs A would be lost. The Appellant did not respond to the letter and the Lay Complainer had to phone him. Mr Reid stated that the letter written by the doctor dated 27 October 2005 did not indicate a time scale in respect of possible death. Mr Reid stated that the Appellant should have obtained an idea of time scale as it was critical in the circumstances. Mr Reid stated that the Law Society were entitled to find that the service fell well short of that expected of a competent solicitor. The application to the Scottish Legal Aid Board did not give an indication of how urgent the situation was. It did not convey that it was critical that the evidence had to be obtained as soon as possible. Mr Reid indicated that it was accepted that Mr Peters was correct that a solicitor could not receive private payment for work if a Legal Aid Certificate was in force.

In connection with ground of appeal 2, the Law Society considered the determination as a whole and it was always a bit arbitrary as to exactly what figure was used. In connection with Section 42A of the 1980 Act, Mr Reid submitted that the Appellant had misinterpreted this. Mr Reid referred to paragraph 42A(3)(a) which referred back to the professional service in general. Mr Reid submitted that the situation could not be otherwise because this would mean that it was possible to have a situation where an inadequate professional service was provided on one day which affected the whole action and it would be nonsense if the fees could only be abated in respect of the work done on this one day. Mr Reid submitted that the Law Society were entitled to look at the position overall and look at the effect of the inadequate professional service at whatever point it occurred during the provision of the service and then abate the fee for the whole of the service reflecting the result of the inadequate professional service. Mr Reid indicated that it was irrelevant that some of the work was legal aided so far as an abatement of fees was concerned. Mr Reid submitted that the Law Society had

exercised their discretion with regard to the compensation and abatement of fees and there were no grounds to interfere with this. In response to a question from the Tribunal, Mr Reid indicated that it was accepted that the letter of 2 October 2005 made no reference to a time scale and that neither did the doctor's report of 27 October 2005. Mr Reid however submitted that the Appellant should have made an enquiry with regard to this matter and that the doctor's report reflected the Appellant's letter of instruction. Mr Reid accepted that there was no information available to say whether or not there was information available at the time with regard to the time frame of any possible death. Mr Reid stated that he would have expected a comment to have been made on life expectancy.

Mr Peters indicated that he had not been given fair notice of the reference to the Law Society's discretion as this was not mentioned in the Answers. Mr Reid indicated that this was a matter of the law.

DECISION

The Tribunal considered that it was unfortunate that the Appellant did not respond to the Lay Complainer's letter of 2 October 2005 until prompted by the Lay Complainer's phone call on 13 October 2005. However the letter of 2 October 2005 did not give an estimate of life expectancy and the delay was only a period of eleven days. After this the Tribunal do not consider that the Appellant delayed in dealing with matters. He had a meeting with Mrs A at the hospital on 20 October 2005 and within a day or two, provided the written request asked for by the doctor, who was present at the meeting, for a report from the doctor. He then sent this report on to the Legal Aid Board with an application for sanction to take evidence on commission on 2 November 2005. The Tribunal does not consider that the Appellant can be criticized for not giving an estimate of life expectancy in his application to the Legal Aid Board as the report from the doctor did not contain this. The Appellant quite properly sent the doctor's report with his application. The Tribunal consider that the Appellant's delay between 2 October and 13 October 2005 was certainly not good practice but do not consider that it was sufficiently serious to amount to inadequate professional service. If the Appellant had acted more quickly, a few days might have been saved but it is unlikely that it would have been realistically possible to obtain the evidence

on commission even if the Appellant had acted slightly more quickly. The Tribunal accordingly quashed Head of Complaint 3.

The Tribunal did not accept the Appellant's submissions in respect of the abatement of fees only being appropriate in respect of the services that were inadequate. In the Tribunal's view, the Act clearly allows for an abatement of fees in respect of the service provided but the amount of any abatement of fees will reflect how much of the service was inadequate and what effect this had on the overall provision of the service. The Tribunal also do not accept the Appellant's submission with regard to the abatement only applying to the original fee before it was restricted. The fee is what the Appellant was charging which was £2000. This accordingly has to be the fee that was abated. The Tribunal also do not consider it relevant that part of the fee was Legal Aided. The Tribunal consider it unfortunate that the Law Society did not provide more detailed reasoning as to why they chose a figure of 35%. The Tribunal however does not consider that it has sufficient information to substitute a different figure. However given that there were seven Heads of Complaint in respect of which a finding of inadequate professional service was made and that the compensation and the abatement of fees were awarded in respect of all seven, and given that the Tribunal has quashed one of the Heads of Complaint, the Tribunal consider it reasonable to reduce the compensation and also the abatement of fees by one seventh.

In respect of expenses, given that the Appellant has been partially successful, the Tribunal consider it appropriate to make no award of expenses due to or by any party. As the decision is a decision of the Tribunal, publicity requires to be given and the Tribunal made the usual order with regard to publicity.

Vice Chairman