

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

FINDINGS

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY
OF SCOTLAND

against

DANIEL COHEN, Solicitor,
22 Rubislaw Terrace, Aberdeen.

1. A Complaint dated 20th December 1995 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") requesting that Daniel Cohen, Solicitor, 22 Rubislaw Terrace, Aberdeen (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 they might think right.
2. The Tribunal considered the Complaint in terms of their Procedure Rules and called upon the Complainers to supply further information. A Supplementary Statement of Facts dated 26th January 1996 was lodged by the Complainers.
3. The Tribunal caused a copy of the Complaint with the Supplementary Statement of Facts to be served upon the Respondent. Answers were lodged on behalf of the Respondent.

4. In terms of their Rules, the Tribunal appointed the Complaint to be heard on 15th May 1996 and Notice thereof was duly served upon the Respondent.
5. The Hearing took place on 15th May 1996. The Complainers were represented by Mr I.L.S. Balfour SSC., Edinburgh as Fiscal and the Respondent by Mr R.E. Henderson QC, instructed by Mr William Macreath, Solicitor of Messrs Levy & McRae, Glasgow. A Minute of Amendment was lodged incorporating the facts as agreed between the parties and the Tribunal granted leave for the Complaint to be amended accordingly. No evidence was led and the Tribunal found the following facts established:-

- (1) The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He was born on 22nd May 1946. He was admitted as a solicitor on 2nd December 1971 and enrolled on the 16th of the same month. He carries on practice in partnership under the name of Messrs Cohen & Co at 22 Rubislaw Terrace, Aberdeen.

“P.1”

- (2) On 17th December 1993, “A”, a property developer for whom the Respondent acted, purchased “P.1”, for £380,000 from Mr and Mrs “B”. Mr “A” borrowed £350,000 from the “C” Bank and the Respondent's partnership contributed the balance of £30,000. The date of settlement for Mr “A's” purchase was 17th December 1993. The Respondent also acted for the “C” Bank in the loan transaction. The Respondent intromitted with the loan funds and settled the loan transaction on 17th December 1993.

- (3) On 6th January 1994, the Respondent sent to the Inland Revenue for stamping, the Disposition in favour of Mr "A". That deed was with the Inland Revenue until 28th January 1994. The Respondent recorded the said Disposition and a Standard Security by Mr "A" to the "C" Bank on 3rd February 1994.
- (4) The property was divided into ten individual plots. Mr "A" retained one of the plots on which a house which became known as "P.2" was built. Mr "A" negotiated a loan of £97,500 (representing 75% of the notional value of £130,000 of "P.2") from the "D" Building Society. The Building Society instructed the Respondent to look after its interest in securing its loan to Mr "A". In a form bearing to be signed by Mr "A" on 22nd July 1994 and the Respondent on 2nd August 1994 and subsequently sent by the Respondent to the Building Society, it was recorded that the purchase price was £130,000 and that under the heading of "Funds Available" Mr "A" had "savings" of £38,500. The Respondent stated in his Report on Title to the Building Society that the sellers were Mr and Mrs "B". By stating to the Building Society that the sellers were Mr and Mrs "B", the Respondent allowed the Building Society to believe that Mr "A" was not remortgaging.

- (5) The Respondent prepared a Feu Disposition by Mr “A” in favour of himself of the house at “P.2”. The Feu Disposition did not disclose any consideration. The loan monies were paid over and the loan transaction was settled on 4th August 1994. No stamp duty was paid on the Feu Disposition. The Feu Disposition and the Standard Security in favour of the Building Society were not recorded until 24th October 1994.

Solicitors (Scotland) Practice Rules 1986, Rule 5(1)

- (6) The Respondent's firm acted for “E”, who were property developers and builders. In particular, his firm acted in the sale and conveyance of heritable property from “E” to Mr and Mrs “F” for whom the Respondent's firm also acted. This was not a transaction to which any of the exceptions referred to in Rule 5(1) of the Solicitors (Scotland) Practice Rules 1986 applied. The business was dealt with by an employee of the Respondent's firm, Mr Orme. Mr Orme raised with the Respondent the question as to whether the firm could properly act for both a property developer and a private purchaser in the same transaction. The Respondent authorised his assistant Mr Orme to proceed with the transaction.
6. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct in that
- (a) he failed to look after the interests of his clients, the “D” Building Society in that

- (i) he stated in his Report on Title to them that the sellers of “P.2” were Mr & Mrs “B” whereas Mr & Mrs “B” had sold the whole property, of which the site on which the house “P.2” was built was only a part, to Mr “A” on 17th December 1993.
 - (ii) he unreasonably delayed between 4th August 1994 and 24th October 1994 to record the Feu Disposition in favour of Mr “A” and the Standard Security in favour of the “D” Building Society and
- (b) he acted in breach of Rule 5(1) of the Solicitors (Scotland) Practice Rules 1986 in that he acted for both “E” and Mr & Mrs “F”, respectively the sellers and purchasers of heritable property in circumstances where “E” were Property Developers and Builders.
6. Having heard Counsel for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 15th May 1996. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Daniel Cohen, Solicitor, 22 Rubislaw Terrace, Aberdeen, find the Respondent guilty of professional misconduct in respect of his failure to look after the interests of heritable creditors in respect of two separate matters and his breach of Rule 5(1) of the Solicitors (Scotland) Practice Rules 1986; Censure the Respondent and fine him in the sum of £5,000 to be forfeit to Her Majesty; Find the Respondent liable in the

expenses of the Complainers and of the Tribunal as the same may be taxed by the Auditor of the Court of Session on a solicitor and client indemnity basis in terms of Chapter Six of the Law Society's Table of Fees for general business together with a reasonable sum for posts and incidental outlays; and Direct that publicity to include the name of the Respondent, be given to this decision.

(signed) IAN S SMITH

Vice Chairman

7. A copy of the foregoing interlocutor 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 25th June 1996.

IN NAME OF THE TRIBUNAL

Vice Chairman

NOTE

The Complaint as lodged, contained averments in relation to four separate property transactions and in addition the Respondent was charged with breach of Rules 12 and 13 of the Accounts Rules. Two of the charges averred a failure on the part of the Respondent to look after the interests of heritable creditors in that there had been delay in recording deeds in the property register. However there was no statement regarding the date when the Respondent had intromitted with the loan funds in each transaction. Acting in accordance with a request made by the Tribunal under the provisions of Rule 5 of the Procedure Rules, the Fiscal lodged a Supplementary Statement of Facts which was served on the Respondent along with the original Complaint. Answers were lodged and the Tribunal directed that the Complaint should proceed to a hearing.

At the hearing, the Tribunal granted leave to the Complainers to amend the Complaint, the effect of which was to set down the facts as agreed, and to confine the charges to three of the property transactions, with the charge based on a breach of the Accounts Rules also being withdrawn.

In relation to the property at "P.1", the Respondent acted for Mr "A" when he acquired the whole subjects from Mr and Mrs "B" in December 1993 and again in August 1994 when Mr "A" granted a Feu Disposition to himself in respect of one plot (known as "P.2"). The Respondent also accepted instructions from the "C" Bank in regard to a secured loan which was advanced at the time of the initial purchase, and the "D" Building Society in relation to a loan to be secured over "P.2".

The Respondent admitted a charge that he had failed to look after the interests of the Building Society in that he had stated in his Report on Title, in relation to "P.2", that the sellers were Mr and Mrs "B", whereas in fact the "B's" had sold the whole property of which "P.2" was only a part, to Mr "A" more than seven months previously. Counsel explained that the Respondent had made the statement to help Mr "A", as he anticipated that Mr "A" might otherwise have had difficulty in obtaining a Building Society loan on account of the existing finance from the "C" Bank.

The second charge was that the Respondent had failed in his duty towards the Building Society in that he had

allowed them to rely on a draft financial Statement, which stated that Mr "A" would provide £38,500 from his own savings, whereas Mr "A" contributed only £20,500 and a further £12,500 was transferred from the sale of other properties.

A copy of the particular statement was produced by the Respondent at the Hearing. The form was preprinted and headed "Budget Checklist" with instructions that the form was to be completed as part of an interview. There were separate sections for the applicant to set out his "initial costs" and "funds available", also regular monthly expenses and monthly income, and the form concluded with a declaration to be signed by the applicant and a separate statement to be signed by the solicitor inter alia to the effect that he had interviewed the applicant and that "the above costs have been discussed". The completed form referred to a purchase price of £130,000 and a loan of £97,500. Under "funds available" there were two heads "Savings" and "Equity from previous sale". The figure of £38,500 was set out opposite the former: the latter had no figure. The form bore to have been signed by Mr "A" on 22nd July 1994 and the Respondent on 2nd August 1994. It was not disputed that of the funds provided by Mr "A", £12,500 represented

proceeds from other properties which were in the course of being sold when the loan application was made. It was submitted by the Fiscal that such funds did not represent "savings" for the purpose of the Building Society form. Counsel represented that the form merely required the applicant to state what funds were available. As it happened, Mr "A" contributed all that was required. There had been no intention on the part of the Respondent to mislead.

The form contained no definition of what was meant by savings. In the opinion of the Tribunal, the question was directed to ascertain whether the particular applicant had personal resources to complete the intended purchase. There was no averment that Mr "A's" available funds were limited to the sum of £20,500. At the time of the settlement, it appears that Mr "A" had proceeds from the sale of properties amounting to £12,500 and provided the balance of £20,500 from his own resources. In any event, the requirement of the solicitor was merely to interview the applicant and discuss the costs with him. There was no suggestion that the Respondent knowingly allowed an incorrect form to be submitted. It is in these circumstances that the Tribunal does not find this charge to have been established.

The statement in the Budget Checklist that the purchase price was £130,000 was not referred to in any charge or the subject of comment by the Fiscal and the Tribunal has not taken any account of this in their consideration of the whole matter.

The following charges related to the delay in recording the relevant deeds to constitute the security in favour of the "C" Bank and the "D" Building Society. The former transaction was settled on 17th December 1993. The deeds were not presented for recording until 3rd February 1994, but the Complainers accepted that the Disposition in favour of Mr "A" was sent for stamping on

6th January 1994 and that the deed was with the Inland Revenue for that purpose until 28th January 1994 and limited the charge of culpable delay to that earlier date. This Tribunal has not infrequently emphasised the importance for solicitors to present deeds for recording as soon as possible after settlement, particularly where the solicitor is also representing the interests of a heritable creditor, as until such time as the deeds are so presented, there is no security. The Respondent undoubtedly should have acted upon the deeds significantly prior to 6th January 1994 and Counsel explained that there had been delay on the part of Mr “A” in funding the Stamp Duty on the disposition. This explanation was not accepted in that where there is an associated loan transaction, a solicitor must either ensure that he has sufficient funds to stamp the conveyance before he intromits with the loan monies, or accept personal responsibility for settling the stamp duty. However having regard to the fact that the delay coincided with a traditional holiday period, the Tribunal makes no finding in relation to this particular transaction. In relation to the second transaction however, the “D” Building Society were without security for more than eleven weeks. Counsel's explanation was that the Respondent had difficulty with the feuing plan and a problem regarding access; but these are matters which ought to have been resolved before the loan cheque was cashed, and the Tribunal finds the Respondent to have been culpable in regard to his delay in this matter.

The remaining charge of professional misconduct related to the Respondent permitting his firm to act for “E” and a Mr and Mrs “F” in relation to a sale of property. Rule 5 of the Solicitors (Scotland) Practice Rules 1986 sets out a number of exceptional circumstances where a solicitor may act for both the seller and purchaser, but in general these exceptions are not applicable in relation to residential property where the seller is a builder or developer. “E” were property developers and builders

and it was accepted by the Respondent that his breach of Rule 5 amounted to professional misconduct. Counsel explained in mitigation that “E” was owned by a Mr and Mrs “G” and that Mrs “F” was their daughter and he suggested that this was a case where the Respondent might have applied to the Council of the Law Society under Rule 9 for a waiver. However the Respondent made no such application to the Council and it is not known whether or not such an application, if it had been made, would have been granted in the particular circumstances of this transaction.

The Respondent is 49 years of age and commenced practice under his own name in 1985. The Tribunal was informed that he specialises in commercial work and is not personally involved in conveyancing. He is active in the local community and it was submitted that the circumstances giving rise to the present Complaint was an isolated lapse in 25 years of practice.

The tribunal has taken the whole circumstances into consideration. It is significant however that Building Societies and other institutional lenders rely heavily on solicitors for information to assist them in determining whether to advance funds and in the knowledge of this, solicitors have a duty to ensure that such information is, to the best of the solicitor's knowledge and belief, accurate and not misleading. In this case, the Respondent deliberately mis-stated the position in his Report on Title in the expectation that the Building Society would look favourably on an application about which they might otherwise have had reservations. As it happened, the borrower fulfilled all his financial obligations but that does not diminish the Respondent's culpability. By so misleading the Building Society, he encouraged the Society into a course of action which could have placed their funds at

risk. The Tribunal has also taken into account that by his delay in recording deeds, the Respondent further imperilled the Building Society's funds and that in a separate matter, he disregarded the precise requirements of the Solicitors (Scotland) Practice Rules 1986 which prohibit solicitors from acting in a situation where a conflict of interest can so easily arise; and the gravity of the Respondent's conduct is reflected in the substantial fine that has been imposed.

No circumstances were disclosed which might have caused the Tribunal to exercise its limited discretion regarding publicity, and accordingly publicity, to include the name of the Respondent, will be given to this decision.

Vice Chairman