

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

FINDINGS

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY
OF SCOTLAND

against

NIGEL RODNEY DUNCAN, Solicitor,
131 Newhaven Road, Edinburgh.

1. A Complaint dated 2nd May 1997 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 Nigel Rodney Duncan, Solicitor, 131 Newhaven Road, Edinburgh (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 caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged by the Respondent.
3. In terms of their Rules, the Tribunal appointed the Complaint to be heard on 30th July 1997 and Notice thereof was duly served upon the Respondent.

4. The Hearing took place on 30th July 1997. The Complainers were represented by Mr D.C.W. Pyle W.S., Edinburgh as Fiscal and the Respondent by Mr R.C.B. Forman W.S. of Messrs McKay & Norwell W.S., Edinburgh. A Joint Minute was lodged wherein the Complaint as amended was admitted, and in respect thereof, no evidence was led by either party.
5. The Tribunal found the following facts established:-
 - (1) The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He is 54 years of age. He was admitted as a solicitor on 6th May 1969 and enrolled on 30th May 1969. From 1970 until 1st April 1994, he was a partner in the firm of Messrs Wilson Terris & Co, Solicitors, Edinburgh. From 16th January 1995 he has been a partner in the firm of Messrs Duncan & Wallace, Solicitors, Edinburgh.
 - (2) Mrs "A", residing at "P.1", was formerly the wife of "B" who died on 11th June 1994. There were two children of the marriage. Mr "B" was an undischarged bankrupt at the date of his death. He had certain prospective rights in and to an occupational pension scheme operated by his previous employers, "C". Said rights included a potential entitlement to a lump sum on death of £10,126.65.
 - (3) Following Mr "B's" death, Mrs "A" instructed the Respondent to act in order to recover the lump sum which Mrs "A" believed fell due to be paid to said children. The Respondent undertook to ascertain the entitlement of said children to the lump sum and thereafter if appropriate

to arrange for the appointment of Mrs "A" as executrix on Mr "B's" estate. The Respondent advised Mrs "A" that it would be necessary to prepare an Inventory for Confirmation, to lodge same with the H M Commissary Office and to obtain a Bond of Caution for the intromissions of Mrs "A" as executrix, all of which tasks the Respondent undertook to do.

- (4) By letter dated 29th June 1994, "C" advised the Respondent that said lump sum was indeed due to be paid to Mr "B's" estate and would be released as soon as the Confirmation was exhibited. The Respondent did not reply to this letter. A reminder letter was sent by "C" on 12th October 1994. On 21st November 1994 "A" wrote to the Respondent enclosing a copy of said letters from "C" and asking the Respondent "to advise how this matter can be resolved". Notwithstanding further promptings by Mrs "A" by telephone, the Respondent did not prepare any documents for her signature until about 10th July 1995 when Mrs "A" attended the Respondent's office and signed the Inventory for Confirmation. The Respondent advised Mrs "A" that he expected to receive a lump sum in or about four weeks. On or about 8th August and 31st October 1995, Mrs "A" telephoned the Respondent only to be advised that the Inventory was incorrect. On or about 1st November 1995, Mrs "A" signed a new Inventory prepared by the Respondent. The Respondent then advised Mrs "A" that he expected to conclude matters in about three weeks thereafter. During the course of November 1995 and January 1996, Mrs "A" contacted the Respondent by

telephone, eventually to be advised by the Respondent on 23rd January 1996 that all the necessary documents had been lodged on 16th January 1996.

- (5) On 23rd January 1996, Mrs “A” wrote a letter of complaint to the Law Society of Scotland. The Law Society wrote to the Respondent and on or about 15th March 1996 he reported that the Inventory had been lodged a few days earlier. By letter dated 5th April 1996, the Respondent undertook to let the Law Society have a full report in the week beginning 15th April 1996. He failed to provide such a report.
- (6) On 20th May 1996, the Law Society issued a Notice to the Respondent requiring him to complete the business instructed by Mrs “A” by 10th June 1996 and to report completion on or before that date, all in terms of Section 15(2)(i)(ii) of the Solicitors (Scotland) Act 1980 ("the 1980 Act").
- (7) On 18th June 1996, the Law Society issued to the Respondent a Notice requiring him to send a response as requested and an explanation for the delay within fourteen days all in terms of Section 15(2)(i)(i) of the 1980 Act and a separate Notice calling upon him to produce documents relating to Mrs “A” within 21 days all in terms of Section 42C of the 1980 Act.

- (8) The Respondent failed to comply with the requirements of each of said notice. On the instructions of the Respondent it was conveyed to the Law Society by letter dated 4th December 1996, that his file relating to Mrs “A” had been missing from January 1995 to April 1996 causing his failure to complete the business instructed by Mrs “A”.
 - (9) The Respondent did not lodge the Inventory on 16th January 1996 as represented by him to Mrs “A” or in March 1996 as represented by him to the Law Society.
 - (10) Mrs “A” subsequently instructed another solicitor who has fully investigated the claim of her and her children to said lump sum and ascertained that the said lump sum is likely to form part of Mr “B's” estate in bankruptcy and would therefore be applied for the benefit of Mr “B's” creditors to the exclusion of the family.
6. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct in that
- (i) he deliberately misled Mrs “A” by representing to her on or about 23rd January 1996 that he had lodged the Inventory on 16th January 1996 when he knew that he had not so done,
 - (ii) he failed timeously and fully to provide the Law Society with a full and accurate explanation of the steps he had taken to carry out the business instructed by Mrs “A”,
 - (iii) he deliberately misled the Law Society by advising that he had lodged said Inventory when he knew that he had not so done, and

- (iv) he failed to comply with the terms of notices sent to him by the Law Society under Sections 15(2)(i)(i) and (ii) and Section 42C of the Solicitors (Scotland) Act 1980.
7. The Tribunal further found that the Respondent had provided an inadequate professional service to Mrs "A" in that he did not carry through her instructions or communicate adequately with her and particularly that he failed properly and timeously to complete and lodge the Inventory for Confirmation.
8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 30th July 1997. The Tribunal having considered the Complaint dated 2nd May 1997 at the instance of the Council of the Law Society of Scotland against Nigel Rodney Duncan, Solicitor, 131 Newhaven Road, Edinburgh, find the Respondent guilty of professional misconduct in that he misled his client and the Law Society and otherwise failed to communicate with the Law Society regarding the progress of an executry; Censure the Respondent and fine him in the sum of £1000; Find that the Respondent provided an inadequate professional service and in respect thereof Direct the Respondent in terms of Section 53A(2)(d) of the Solicitors (Scotland) Act 1980 to pay to his client Mrs "A", "P.1", the sum of £500; 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 MAILLIE

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 28th August 1997.

IN NAME OF THE TRIBUNAL

Vice Chairman

NOTE

The facts relating to this Complaint are set out in the foregoing findings.

In addressing the Tribunal, the Fiscal acknowledged that as a result of the late Mr “B's” insolvency, the benefit from the lump sum of £10,126.65 passed to Mr “B's” Trustee in Bankruptcy and accordingly Mr “B's” two children would not receive any benefit from the same.

The solicitor for the Respondent referred to the practical difficulties experienced by the Respondent after he left the firm of Wilson Terris & Co on 1st April 1994. The Respondent found himself without secretarial assistance and sharing inadequate premises. At about the same time, the Respondent also had personal difficulties. It was in these circumstances that Mrs “A” consulted the Respondent shortly after her former husband's death in June 1994. The Respondent retained the instructions and transferred the papers when he commenced practice in the new firm of Messrs Duncan Wallace on 16th January 1995 but it was noted that for more than a year thereafter, the Respondent was unable to trace the file relating to Mrs “A”. It was stated that during the period, the Respondent obtained decree appointing Mrs “A” as executrix dative to her former husband's estate but it was acknowledged that the Respondent's conduct was not otherwise of the high standard to be expected of a solicitor. At the time, the Respondent had been under considerable strain which had affected his judgement; and his failure continued even after the formation of the new firm. However the solicitor for the Respondent explained that procedures had been introduced within that firm which should preclude any matter being similarly neglected in the future. The Tribunal noted that the Respondent had limited capital resources.

The Tribunal has carefully considered the whole circumstances of this Complaint including the fact that Mr “B's” creditors had a prior claim to the lump sum and that his children would not receive any benefit from the same. Nevertheless it was that very matter which Mrs “A” instructed the Respondent to investigate and the Respondent's extended and inexcusable delay was compounded by his failure to respond to enquiries and latterly also in misleading both Mrs “A” and the Law Society into the progress of the matter. It is with these considerations that the Tribunal take a serious view of the Respondent's conduct and a significant fine has accordingly been imposed.

The Complaint contained a separate charge under Section 53A of the Solicitor (Scotland) Act 1980 to the effect that the services provided by the Respondent were inadequate. In terms of the Joint Minute, the matters to which this charge was addressed were confined to a statement that the Respondent had failed "properly and timeously to complete and lodge the Inventory for confirmation". This delay undoubtedly caused distress to Mrs “A” and it is with this background that the Tribunal has ordered the Respondent to make payment to Mrs “A” of the sum of £500 as compensation for such distress.

There were no circumstances 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