

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

D E C I S I O N

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

by

EWAN GRAHAM KENNEDY, Solicitor,
23 Royal Exchange Square, Glasgow. - APPELLANT

against

THE COUNCIL OF THE LAW SOCIETY
OF SCOTLAND - FIRST RESPONDENT

and

MRS "A",
"P.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 Ewan Graham Kennedy, Solicitor, 23 Royal Exchange Square, Glasgow ("Mr Kennedy") against a finding by the Council of the Law Society of Scotland ("the Law Society") that Messrs Faulds Gibson & Kennedy had provided inadequate professional services in relation to a former client Mrs "A" and a determination that Faulds Gibson & Kennedy should make a payment to Mrs "A" of £200 as compensation.
2. In accordance with the provisions of the Rules of the Tribunal, the Appeal was formally intimated to the Law Society and Mrs "A" and Answers were lodged on behalf of the Law Society. Mrs "A" did not respond.
3. Having considered the Appeal with the Answers for the Law Society, the Tribunal resolved to set the Appeal down for Hearing and appointed that the Appeal should be heard on 30th July 1997.

4. At the Hearing on 30th July 1997, Mr Kennedy was represented by Mr A.M. Cockburn, Solicitor of Messrs Tilston MacLaurin, Solicitors, Glasgow. The Law Society was represented by Mr I.L.S. Balfour S.S.C., Edinburgh. Mrs "A" was not present or represented at the Hearing.
5. Having considered the submissions for the parties and the productions lodged, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 30th July 1997. The Tribunal having considered the Appeal by Ewan Graham Kennedy, Solicitor, 23 Royal Exchange Square, Glasgow ("Mr Kennedy") against a finding of inadequate professional services by the Council of the Law Society of Scotland ("The Law Society) in relation to Mrs "A", "P.1" and a determination that Messrs Faulds Gibson & Kennedy should make a payment to Mrs "A" of £200 by way of compensation, and having heard parties, dismiss the Appeal; Find Mr Kennedy liable in the expenses of the Law Society 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 Mr Kennedy be given to this decision.

(Signed) IAN MAILLIE

Vice Chairman

6. A certified copy of this Decision together with a copy of the foregoing Interlocutor were sent to each party by recorded delivery post on 6th October 1997

IN NAME OF THE TRIBUNAL

Vice Chairman

NOTE

This Appeal relates to a finding by the Law Society that Messrs Faulds Gibson & Kennedy had provided inadequate professional services to Mrs "A", and a determination that the said Faulds Gibson & Kennedy should make payment to Mrs "A" of the sum of £200 as compensation.

The material facts were not in dispute. From 1st July 1994, Mr Kennedy had been in partnership with Mr Francis Collins, and they had practised together under the name of Messrs Faulds, Gibson & Kennedy at 23 Royal Exchange Square, Glasgow. Throughout, Mr Collins was a salaried partner and had no interest in the profit of the firm. At the relevant time, Mr Collins held specialist accreditation in family law from the Law Society. Mrs "A" and her former husband had been divorced in 1992.

Mrs "A" consulted Mr Collins in his capacity as a partner in the firm of Faulds, Gibson & Kennedy. Her reason for coming to Mr Collins was his reputation as a family law practitioner. Mrs "A" applied for and successfully obtained Legal Aid (subject to a nil contribution) to raise proceedings against her former husband for maintenance of her children due to a material change of circumstances. Mrs "A's" former husband lodged a late objection to the Legal Aid Application stating that Mrs "A" had sold or was selling a piece of land adjacent to her house. In reply to an enquiry, the Scottish Legal Aid Board (the "Legal Aid Board") was advised that the property had not as yet been sold but that in any event the funds were earmarked for roof repairs and would therefore not be "free capital". That information was accepted and the grant of Legal Aid with a nil contribution was confirmed. By letter dated 9th September 1995, Mrs "A" informed Mr Collins that the land had then been sold. Having ascertained from Mrs "A" that the proceeds of sale were to be utilised in replacing the roof of the property and other essential repairs such as rewiring, Mr Collins resolved not to notify the Legal Aid Board of the outcome of the

sale of the land; and by letter dated 11th September 1995, Mr Collins advised Mrs "A" that "unless the Legal Aid Board indicated that they would wish to know the outcome of the sale of the land I do not propose to notify them of the position". By letter dated 5th January 1996, the Legal Aid Board intimated to Mr Collins that it was their intention to withdraw Legal Aid as Mrs "A" had failed to intimate a change in her financial circumstances. Mr Collins replied to the Legal Aid Board on 16th January 1996 stating that the sum of £25,223 received by Mrs "A" representing the proceeds of sale on the land was not "disposable" as it was to be spent on essential repairs to her property. Nevertheless, Mrs "A's" Legal Aid Certificate was terminated with effect from 29th January 1996. On 16th February 1996, Mr Kennedy gave notice to Mr Collins of his intention to dissolve their partnership with effect from 30th June. On 4th April 1996, Mr Collins submitted the files relating to Mrs "A" to Messrs Quinns, Law Accountants, for feeing. Quinns attended to this and on or about 17th April 1996 they returned the files with a Legal Aid account. On 25th April 1996 the partnership was de facto dissolved upon Mr Collins commencing practice on his own account from premises at 31 Wellmeadow Street, Paisley under the name of Collins & Co. Since that date, Mr Kennedy has carried on practice as a sole practitioner under the name of Faulds Gibson & Kennedy. On 2nd May 1996, Mr Kennedy received a mandate from Mrs "A" for delivery of her papers to Collins & Co. Mr Kennedy immediately implemented the mandate. Shortly thereafter, Mr Kennedy submitted the said Legal Aid account direct to the Legal Aid Board, and Mr Kennedy received the sum of £1441.70 from the Legal Aid Board in respect of the same. At no time did Mr Kennedy personally supply any services to Mrs "A".

On 13th June 1996, Mrs "A" wrote a letter of complaint to the Law Society, expressing her concern that she was without Legal Aid, that she was precluded from re-applying for Legal Aid and that she would be required to make payment for all the legal expenses incurred during the period when she had apparently been covered by her Legal Aid Certificate. On 10th July 1996 a Depute Secretary of the Law Society wrote to Mr Collins enclosing a copy of the said letter of 13th June, identifying the alleged grounds of complaint as a failure to notify the Legal Aid Board of material change of circumstances, adding

I am required to intimate this complaint both to you as an individual in respect of the allegations as to your conduct and also to the firm of Messrs Faulds Gibson & Kennedy who provided the service to Mrs "A" at the appropriate time in respect of allegations of inadequate professional service. The reason for this is that the Society takes the view that a service to a client is not provided by an individual solicitor but is provided by the firm as a whole.

A corresponding letter was also sent to "The Complaints Partner, Messrs Faulds Gibson & Kennedy" with the explanation

I understand that the service in this matter was supplied by the firm of Messrs Faulds Gibson & Kennedy prior to Mr Collins departure and as such it is appropriate for me to intimate a complaint about inadequate professional service to the firm.

Mr Kennedy replied to the last mentioned letter on 11th July 1996 pointing out

I confirm that it would appear the service in this matter was supplied by the former firm of Messrs Faulds Gibson & Kennedy which has been dissolved as at 25th April 1996 by the action of Mr Collins in withdrawing from the office on that date in order to set up his own practice. It appears that prior to 25th April Mr Collins had written to Mrs "A" advising her of his intention to establish his own practice and shortly after 25th April I received a mandate from her in implement of which the file of correspondence was delivered to Messrs Collins & Co. Accordingly I have no records which would enable me to make any comment on the substance of this matter.

I think it right to inform you that I first became aware that Mrs "A" was a client of the firm of which I was then a Partner when I received a letter from her in Mr Collins' absence on holiday and sent her an acknowledgement. Coincidentally I was personally acquainted with Mrs "A" as I have a house near to where she lives and knew her as a local resident. She had not become a client because of this. As I avoid becoming involved in family legal matters in the area in which I spend my leisure time I decided deliberately to take no interest in her case and

I informed her of my decision. Mr Collins was of course aware of my position regarding this and at no point consulted me in relation to correspondence with the Scottish Legal Aid Board referred to.

In the circumstances there is no further information which I can usefully supply to you at this stage.

Mr Collins wrote to the Law Society on 15th July 1996. On 5th December 1996, the Legal Aid Board wrote to Mrs "A" requesting payment of the sum of £1441.70.

On 28th April 1997, the Law Society addressed a letter to Messrs Faulds Gibson & Kennedy headed "Complaint by Mrs "A"" intimating that the Council of the Law Society "have considered a complaint of inadequate professional services against you at the instance of the above named and have found the complaint to be justified and therefore uphold the complaint." The said letter further stated that "you should pay to Mrs "A" the sum of £200 of compensation for the stress and inconvenience suffered by her as a result of the inadequate professional service having been provided." The said letter was accompanied by a copy of a Report setting out the facts and circumstances and a Disposal Schedule titled "Complaint by Mrs "A" against Messrs Collins & Co (Francis Collins)" and introduced by the following paragraph

Heads of Complaint

The complainer alleged that an inadequate professional service was given to her and also alleged that the conduct of Mr Collins, formerly of Messrs Faulds Gibson & Kennedy and latterly of Messrs Collins & Co, was not conduct becoming of a solicitor.

The Schedule recorded the deliberations of the relevant Committee of the Law Society and in relation to the Report it was noted

The Reporter also advised the Committee that, bearing in mind that the service provided to the complainer by Mr Collins took place at a time when he was a partner in the firm of Messrs Faulds Gibson & Kennedy, he was of the view that any finding of inadequate professional service should be against Mr Collins as an individual, but would welcome the views of the Committee.

It appeared that the fee for the work carried out has been rendered to the Legal Aid Board by Messrs Faulds Gibson & Kennedy which would result in the complainer being required to refund to the Legal Aid Board the sum of £1441.70. The Reporter recommended that the sum of £500 should be paid to the complainer in compensation for the stress and inconvenience caused by the inadequate professional service, but the Reporter felt that it was for the Committee to decide whether the compensation Order should be made against Mr Collins as an individual or against his former firm, Messrs Faulds Gibson & Kennedy who received the benefit of the fee from the Legal Aid Board.

The Schedule concluded

The Committee agreed with the Reporter's view that an inadequate professional service had been provided to the complainer and that compensation was appropriate. They then considered against whom the finding should be made. It was felt that, notwithstanding that the individual solicitor was no longer with Messrs Faulds Gibson & Kennedy, that firm provided the service and received fees for work done and, therefore, the finding should be against the firm.

The Committee then considered the question of the amount of compensation that was appropriate. It was noted that the Reporter had recommended the sum of £500 compensation but, after discussion, it was felt that this was not appropriate. As it appeared there had been no actual losses to the complainer the Committee agreed that the sum of £200 compensation should be paid to the complainer by the firm of Messrs Faulds Gibson & Kennedy as a result of the stress and inconvenience caused by the failure to properly advise her regarding the Legal Aid position.

On behalf of Mr Kennedy, Mr Cockburn confirmed that there was no dispute regarding the material facts, further that Mrs "A" received an inadequate professional service from Mr Collins and that the figure of £200 determined by the Law Society as compensation was not unreasonable in the circumstances. The grounds of the Appeal were that the Law Society had exceeded its power under Section 42A of the Solicitors (Scotland) Act 1980 in that the determination of the Law Society proceeded on the basis of an error in the interpretation of the word "firm" as it appears in Section 42A. Mr Cockburn reminded the Tribunal that for the purposes of that Section, the definition in subsection (8) of the word "solicitor" is said to include "...

- (a) A firm of solicitors, whether or not, since the provision of the professional services which are alleged to be inadequate -
- (i) There has been any change in the firm by the addition of a new partner or the death or resignation of an existing partner; or
 - (ii) The firm has ceased to practise ..."

However Mr Cockburn pointed out that neither Section 42A nor Section 65 of the 1980 Act contain any definition of "a firm" and consequently Mr Cockburn referred to the following meaning of a "firm" as set out in Section 4 of the Partnership Act 1890

- 4 (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.
- (2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief pro rata from the firm and its other members.

Mr Cockburn emphasised that Mr Kennedy was a sole practitioner trading under the name "Faulds Gibson & Kennedy" and that he was appearing on behalf of Mr Kennedy as an individual. He submitted that although, in terms of Section 4(2) of the said Partnership Act, a firm in Scotland has a separate persona, Mr Kennedy was merely a sole practitioner exercising his right to trade under a business name; and in such circumstances, Faulds Gibson & Kennedy was not a separate legal person as Mr Kennedy himself was not a firm. Mr Cockburn added that whereas it was open to the Law Society to utilise the provisions of Section 42A(8) of the 1980 Act where there was a change in a firm, that Section was not available to the Law Society in this case as the firm of Faulds Gibson & Kennedy had ceased on 25th April 1996 and it was therefore not open to the Law Society to impose a sanction on a firm which did not exist. Mr Cockburn referred to the following authorities in support of his submission that there was a distinction between a firm and its constituent partners

Gloag & Henderson the Law of Scotland 9th Edition page 335 (para 24.9 and 24.20)
Miller on Partnership 1994 Edition 155
Mair v Wood 1948 SC 83 at page 86

and Mr Cockburn questioned how the Law Society could find Mr Kennedy liable as an individual.

In reply, Mr Balfour for the Law Society raised the matter whether it was competent for Mr Kennedy as an individual to appeal and suggested that it was perhaps only the former or dissolved firm of Faulds Gibson & Kennedy that could appeal in this case. Mr Balfour referred to the reasoning of the Law Society Committee as set out in the Disposal Schedule above and declared that the determination by the Law Society was against the former firm of Faulds Gibson & Kennedy. He acknowledged that upon dissolution of the partnership, the firm technically ceased but pointed out that Section 38 of the said Partnership Act specifically provides

After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Mr Balfour submitted that it was the advice contained in the letter of 11th September 1995 which constituted the inadequate professional service. This was a service provided by the then firm of Faulds Gison & Kennedy and it was that firm which had a duty to compensate in respect of the inadequate service. The Law Society therefore targetted the former firm, and the determination was properly addressed to Mr Kennedy. Mr Balfour observed that although Mrs “A” had been wrongly advised in September 1995, the matter only became significant when an account was rendered to the Legal Aid Board. Mr Kennedy elected to render the account and he was the only person to benefit under the same.

In reply, Mr Cockburn pointed out that Mr Collins had been on a fixed salary and he questioned whether it was possible to conclude that Mr Kennedy had indeed benefited without examining the profitability of the firm at the time. The intimation by the Law Society had merely been addressed to Mr Kennedy's trading designation of "Faulds Gibson & Kennedy" and there had been no reference to the former firm. Indeed the Disposal Schedule was headed with reference to "Collins & Co".

In the course of the submissions, reference was made to a recent decision of the Tribunal in relation to the firm of Messrs Peter T. McCann & Co. Mr Balfour particularly referred to the objective test applied in that decision in determining whether an individual or a firm was the particular "solicitor" for the purposes of Section 42A. However Mr Cockburn distinguished the present case in that unlike Mr McCann, Mr Kennedy had no dealing whatsoever with Mrs "A". He also pointed out that in the earlier case, the question whether the expression "a firm" in Section 42A(8) of the 1980 Act applied to a single practitioner, had not been considered.

This Appeal has been taken under the provisions of Section 42A(7) of the 1980 Act which provides that

A solicitor in respect of whom a determination or direction has been made under this section may appeal to the Tribunal against the determination or direction.

In this case, the Disposal Schedule recorded the decision of the appropriate Committee of the Law Society to the effect that

The solicitor's failure to properly advise the Complainer (Mrs "A") as to the Legal Aid position amounted to an inadequate professional service in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980. In terms of Section 42A(d) of (sic) the Committee ordered Messrs Faulds Gibson & Kennedy to pay to the Complainer the sum of £200 as compensation ...

The Council of the Law Society endorsed that decision and the relevant notice dated 28th April 1997 intimating the determination was addressed to "Messrs Faulds Gibson & Kennedy". The finding of inadequate professional service and the appropriateness of the compensation of £200 were not challenged and the only question before the Tribunal was whether the Law Society had exceeded its powers under Section 42A of the 1980 Act in making a determination against "Faulds Gibson & Kennedy".

Mr Balfour stated that the decision of the Law Society was to be regarded as a determination against the firm of Faulds Gibson & Kennedy prior to the departure of Mr Collins on 25th April 1996, and it is on this basis that the Tribunal has to consider whether the determination of the Law Society was properly made. Indeed, in the Disposal Schedule it is recorded that the Reporter considered it to be for the Committee to decide whether the compensation order should be made against Mr Collins as an individual "or against his former firm, Messrs Faulds Gibson & Kennedy who received the benefit of the fee from the Legal Aid Board". In the Committee's own considerations, it is stated that "... notwithstanding that the individual solicitor was no longer with Messrs Faulds Gibson & Kennedy, that firm provided the service and received fees for work done and, therefore, the finding should be against the firm" and further that "the sum of £200 compensation should be paid to the complainant by the firm of Messrs Faulds Gibson & Kennedy .." .

Although the partnership of Mr Kennedy and Mr Collins was dissolved on 25th April 1996, Section 38 of the said Partnership Act provides that the obligations of partners continue notwithstanding a dissolution so far as may be necessary to wind up the affairs of the partnership. The event giving rise to the finding of inadequate professional service was the unsatisfactory advice contained in Mr Collins' letter to Mrs "A" of 11th September 1995. The obligation arose from that date. Mr

Collins wrote the letter in the first person and would appear to have signed the letter with his own name, but the letter was written on the notepaper of the then firm of Messrs Faulds Gibson & Kennedy and the Tribunal is satisfied that Mr Collins was writing that letter in his capacity as a partner of the firm. It was therefore reasonable that the determination was made against the former firm. Indeed Section 10 of the said Partnership Act so provides

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

In addition Mr Collins' emoluments from the firm were confined to a fixed salary. He had no interest in the profit of the firm nor liability of any losses. It was therefore in order for Mr Kennedy, following the dissolution of the firm, to seek payment of the particular account from the Legal Aid Board and although the monies received would in practical terms have been retained by Mr Kennedy as the only partner entitled to profits from the firm, strictly the funds would have constituted an asset of the former partnership.

The Law Society's letter of 28th April 1997, intimating the determination was addressed to "Faulds Gibson & Kennedy" and sent to Mr Kennedy's ongoing place of business. However Section 16 of the said Partnership Act states that "Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm ..." It is accordingly appropriate that the notice dated 28th April 1997 was addressed to Mr Kennedy's present place of business and that the notice can be regarded as relating to the partnership of Mr Kennedy and Mr Collins which subsisted until 25th April 1996.

The Tribunal is therefore of the opinion that the Law Society in making a finding of inadequate professional services and the determination which was intimated on 28th April 1997, did not exceed the powers conferred on them by Section 42A of the 1980 Act.

It is accordingly not necessary for the Tribunal to respond to the question whether a former partner who continues to carry on business as a sole practitioner under the business name of the former partnership, is a "firm" for the purposes of Section 42A(8) of the 1980 Act.

The Tribunal also reserves its opinion on the competency of the Appeal proceeding in the name of Mr Kennedy as an individual in the circumstances where the determination was made against "Faulds Gibson & Kennedy"

Mr Kennedy opposed any award of expenses in view of the suggested degree of confusion and the lack of care on the part of the Law Society in communicating their decision. However the Schedule set out fully the reasoning of the Law Society's Committee, and it was Mr Kennedy's decision to proceed with this Appeal. The Tribunal does not accept Mr Kennedy's criticism of the decision of the Law Society. In such circumstances it is appropriate that expenses should follow success and that the Law Society and the Tribunal are indemnified by Mr Kennedy.

Mr Kennedy also invited the Tribunal to withhold publicity to this decision. However under paragraphs 14 and 14A as extended by paragraph 23 of the Fourth Schedule to the 1980 Act, the Tribunal only has limited discretion and as no circumstances were disclosed which might have enabled the Tribunal to exercise its discretion under paragraph 14A, it is proper that publicity be given to this decision and that such publicity shall contain the names of the parties.

Vice Chairman