

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

HOWAT ASSOCIATES, Solicitors,  
5 Kilmarnock Road, Mauchline

Appellants

against

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

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 Howat Associates, Solicitors, 5 Kilmarnock Road, Mauchline, Ayrshire ("the Appellants") against a finding by the Council of the Law Society of Scotland ("the Law Society") dated 16<sup>th</sup> May 2002 and intimated on 30<sup>th</sup> May 2002 that the Appellants provided an inadequate professional service in

relation to their client Mrs “A”, “P.1” and a Direction that the Appellants should pay Mrs “A” £100 by way of compensation.

2. In accordance with 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.
3. Having considered the Appeal with the Answers the Tribunal resolved to set the Appeal down for Hearing and appointed that the Appeal should be heard on 7<sup>th</sup> November 2002.
4. At the Hearing on 7<sup>th</sup> November 2002 the Law Society was represented by Mr Paul Reid, Solicitor, Glasgow. Mrs “A” did not appear at the hearing and was not represented. Ms Howat was present for the Appellants and was represented by Mr Iain McDonald. No evidence was led.
5. Having considered the productions lodged and the submissions on behalf of the Appellants and the Law Society the Tribunal pronounced an interlocutor in the following terms:

Edinburgh 7<sup>th</sup> November 2002. The Tribunal having considered the Appeal by Messrs Howat Associates, Solicitors, 5 Kilmarnock Road, Mauchline, Ayrshire (“the Appellants”) against a finding of inadequate professional service by the Council of the Law Society of Scotland (“The Law Society”) in relation to Mrs “A”, “P.1” and a Direction that the Appellants should pay the sum of £100 by way of compensation to Mrs “A”; Find that the service provided by the Appellants to Mrs “A” was inadequate; Vary the Direction; make no Direction with regard to compensation; Order that there be no expenses due to or by either party and Direct that publicity be given to this decision and that this publicity shall include the name of the Appellants.

(Signed) G FRASER RITCHIE

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 Respondent 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 under Section 42A(1) and 42A(2)(d) of the said Act which was intimated to Messrs Howat Associates, Solicitors by letter dated 30<sup>th</sup> May 2002. The Appellants had acted for Mrs “A”, (“the Second Respondent”) and otherwise referred to as (“the complainer”) in relation to various matters. The Appellants held two files relating to Mrs “A’s” affairs which had been passed to the Appellants from previous solicitors. Mrs “A” made a Complaint to the Law Society’s Complaints Committee with regard to various matters including a Complaint that the Appellants had failed to return these files to her. The Complaint was passed to a member of the Law Society Complaints Committee. That member hereinafter referred to as “the Reporter” prepared a Report identifying the Complaint and setting out facts and circumstances. Thereafter the Reporter prepared an opinion recommending that the third head of Complaint which related to the failure to return the files should be upheld. The Reporter’s conclusions and recommendations were as follows:-

**Failure to release files**

The solicitors initially said that they would return the “B” and “C” files but retain their own file to fee it. This was acceptable to the complainer. I can only guess but it seems to me unlikely that the solicitors had carried out any work on either the “B” or the “C” files and that any work would have been on their own file. I cannot therefore understand why they felt it necessary to retain the “B” and “C” files. To retain their own file in order to fee it and to exercise their lien over it for that purpose does not seem to me at all unreasonable. To retain the “B” and “C” files seems totally un-necessary whether or not the complainer threatened not to pay the solicitors. The files could have been released subject to lien. Given the complexity of the matter I am not able to say whether or not any prejudice was suffered by the complainer through the absence of these files. The

right of lien is as I understand it a right exercisable in regard to, for example, files which have been released but must be returned on demand. To hold on to the files was to purport to exercise a right of retention which I do not think was justified. In their letter of 5<sup>th</sup> July 2000 the solicitors said they would release all but their own file and would release their own file on payment of fee. There is no reference in their letter of 21<sup>st</sup> July 2000 to their change of mind being related to the threats of non-payment nor is there anything in the file to support this statement. I therefore recommend this head of complaint be upheld

### **Disposal**

I'm unclear what prejudice if any the complainer suffered due to the absence of the "B" and "C" files. They may well have had their copy files. They were however without the files without in my view any real justification for 2 months and clearly there was some distress and inconvenience to the complainer. I therefore recommend compensation of £100 in regard to this head.

By letter dated 16<sup>th</sup> May 2002 and intimated on 30<sup>th</sup> May 2002, the Law Society intimated to Messrs Howat Associates, Solicitors that the Council of the Law Society had considered the Complaint of inadequate professional service at the instance of Mrs "A" and had found head three of the Complaint to be justified and had therefore upheld this part of the Complaint. In terms of Section 42A(2)(d) of the Solicitors (Scotland) Act 1980 there was a direction to pay to Mrs "A" the sum of £100 by way compensation. The relative Schedule recorded that the Law Society Complaints Committee had adopted the recommendations of the Reporter and concluded:-

#### Committee's Recommendation to Council

Having considered all the information before it, the Committee recommends to the Council that in terms of Section 42A of the Solicitors (Scotland) Act 1980, it upholds head of complaint 3 and determines that an inadequate professional service has been provided by Messrs Howat Associates to the complainer in relation to a failure to release files.

Accordingly, the Committee recommends to Council that it determines in terms of Section 42A(2)(d) of the said Act that Howat Associates be ordered to pay to Mrs "A" the sum of £100.00 by way of compensation.

The Schedule recorded a decision of the Council of the Law Society as follows:-

..... Accordingly after full consideration of all the information available to it the Council ACCEPTED the Committee's recommendation and for the reasons set out in the Committee Minute DETERMINED in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980 to uphold the third head of complaint and DETERMINED that an inadequate professional service had been provided by Messrs Howat Associates to the complainer in relation to a failure to release files. Council also ACCEPTED the Committee's recommendation and DETERMINED in terms of Section 42A(2)(d) of said Act that Messrs Howat Associates pay Mrs Cole the sum of £100 by way of compensation. ...

#### THE APPELLANT'S SUBMISSIONS

Mr McDonald stated that the Appellants had written to Mrs "A" on 5<sup>th</sup> July 2000 intimating that if Mrs "A" was dissatisfied with the service the Appellants would be pleased to return the two files to her. However after this Mrs "A's" husband indicated that he had no intention of paying the Appellants' fees and accordingly the Appellants decided to exercise their legitimate right of lien over the files. Mr McDonald pointed the Tribunal to the Appellants' letter of 4<sup>th</sup> August 2000 to Mrs "A" in which the Appellants stated that until the files were released they would co-operate fully in providing whatever information was required to any agent that Mrs "A" instructed in the meantime and that the complete files would be forwarded on payment of the firm's fee. The Appellants would have released the files to any solicitor whom Mrs "A" had instructed if they had been asked to.

Mr McDonald also submitted that even if the Appellants had provided an inadequate professional service it was not competent for the Law Society to have awarded compensation to Mrs "A" because Mrs "A" had suffered no prejudice or loss. The Reporter in his opinion had stated that he was unclear whether or not any prejudice had been suffered by Mrs "A". Mrs "A" had dealt with matters herself and had won her case. There had been no prejudice or loss and accordingly compensation was not appropriate.

#### SUBMISSIONS FOR THE LAW SOCIETY

Mr Reid pointed out to the Tribunal that the Appellants had sent a letter on 21<sup>st</sup> July 2000 stating that they would not release the files until their account had been paid. They did not prepare their account and send it to the Law Accountants until 30<sup>th</sup> August 2000. The account was not sent to Mrs "A" until the 13<sup>th</sup> September 2000. Mr Reid accepted that the Appellants sent a letter on 4<sup>th</sup> August 2000 offering to make information available to any agent instructed by Mrs "A" but Mrs "A" did not find this offer acceptable. Mr Reid emphasised that the Law Society had powers in terms of the statute to award compensation and there was no restriction on this. The Reporter had found that Mrs "A" had suffered stress and inconvenience by the two month delay in the return of the files. As was clear from the case of Martin v Bell 1986 SC 208 stress and inconvenience were perfectly acceptable reasons for awarding compensation.

DECISION

The Tribunal considered that it was perfectly proper for the Appellants to hold on to Mrs “A’s” files in exercise of their right of lien until their fees had been paid. However the Appellants indicated to Mrs “A” by letter of 21<sup>st</sup> July 2000 that the files would not be released until their fees were paid but the fee account was not sent to the Law Accountants until 30<sup>th</sup> August and not sent to Mrs “A” until 13<sup>th</sup> September almost two months later. This meant that Mrs “A” was during this period unable to pay the Appellant’s fees and accordingly unable to secure the release of the files. The Tribunal considered that in the circumstances the delay by the Appellants in producing the fee note was unreasonable and was not what could reasonably be expected of a competent solicitor. However the Appellants had quite properly intimated to Mrs “A” in their letter of 4<sup>th</sup> August 2000 that they would fully co-operate and provide whatever information was required to any agent instructed by Mrs “A” until such time as the files were released, an offer which Mrs “A” declined to accept. The Appellants accordingly cannot be held responsible for any stress and inconvenience caused to Mrs “A” by the failure to accept this offer and no Direction was made with regard to payment of compensation.

Due to the fact that the Tribunal had varied the Determination and Direction of the Law Society it is appropriate that no expenses be due to or by either party. The usual order was made with regard to publicity.

Two members of the Tribunal dissented with regard to the decision in respect of whether or not the Appellants had provided an inadequate professional service. They considered that the delay in the Appellants producing their fee account was not of such a length as to be beyond what should reasonably be expected of a competent solicitor.

Chairman