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

F I N D I N G S

in Complaint

by

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

against

DAVID ERIC SUTHERLAND, Solicitor, 10-16 Exchequer Row, Aberdeen

1. A Complaint dated 6 August 2010 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, David Eric Sutherland, Solicitor, 10-16 Exchequer Row, 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 it thinks right.

2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 20 December 2010 and notice thereof was duly served on the Respondent.

4. The hearing took place on 20 December 2010. The Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The

Respondent was present and represented by David Burnside, Solicitor, Aberdeen.

5. It was confirmed that the Answers admitted the facts, averments of duty and averments of professional misconduct in the Complaint. It was further clarified that the Law Society accepted the facts as set out in the Respondent's Answers. No evidence was led.

6. The Tribunal found the following facts established

6.1 The Respondent was born on 28 July 1959. He was admitted as a Solicitor on 7 September 1982 and enrolled in the Register of Solicitors on the 29 September 1982. He became a Partner in the firm of Bryan Keenan & Co., Solicitors, 12a Greenfern Place, Mastrick, Aberdeen on 5 April 1989 and left to become a sole practitioner in the firm of David E Sutherland & Co., 10-16 Exchequer Row, Aberdeen on 16 November 2009.

Mr A

6.2 On or about 9 November 2005 Mr. A instructed the firm of Bryan Keenan & Co., Solicitors, to represent him in a claim for breach of contract. The firm accepted his instructions and he was granted Legal Advice and Assistance with a contribution of £28.00 which he paid. The claim was investigated and an application for Legal Aid was submitted on behalf of the client. A legal aid certificate was issued on 18 December 2006 with a contribution of £1,281.00 payable by instalments of £35.58 over 35 months. An Initial Writ was drafted and warranted in February 2007 seeking damages of £5,000. The writ was served and the action was defended. Defences were lodged which led to amendment of the action to bring in a second defender. The second defender entered the process and the case proceeded through various hearings. The

client was kept fully informed. At a hearing on 3 October 2007 an Options Hearing was scheduled for 12 December 2007.

6.3 The case was dealt with in a competent manner by an assistant who sought and obtained instructions from the client when appropriate. The client was promptly advised of the outcome of each Hearing. The assistant left the employ of the Firm at the end of 2007. From about 30 November 2007 the Respondent assumed responsibility for the case file. The Respondent is a full-time Criminal Law Practitioner who has not carried out civil work for a considerable number of years. At the Options Hearing of 12 December 2007 a diet of debate on parties preliminary pleas was scheduled for 11 February 2008. Mr. A was not informed of this until he contacted the firm following which in the absence of the respondent Bryan Keenan wrote to him on 3 January 2008. The Respondent met with the client on 11 January 2008. He advised Mr. A that the assistant had gone and that efforts were being made to replace him. He told Mr. A that he had concerns about aspects of the court action. The pleadings were not of a high standard, an amendment was subsequently required and the sum sued for was excessive. For some time before and after the assistant left the firm, the firm made extensive enquiries with a view to recruiting a replacement who would have dealt *inter alia* with Mr. A's case. A solicitor accepted the offer of employment and then changed his mind, and a further replacement solicitor stayed for only a few days.

6.4 On or about 8 February 2008 the Respondent spoke to the defenders' agent on the telephone and intimated an intention to amend the pleadings at the diet of debate to restrict the period of the alleged contract between the parties. The Defender's Agent was a Solicitor Advocate with many years experience and had made the Respondent well aware of the defects in the pleadings. Amendment was therefore necessary and inevitable. He agreed

that the defenders would be entitled to the expenses of the discharged debate and that the claim would be restricted to one day. He did not advise his client of this and did not have his client's instructions to make such an agreement. The diet of debate was discharged but the Respondent did not inform Mr. A of the terms of the agreement. He met or attended on Mr. A on 21 February, 20 March and 15 May 2008. The defenders' agent wrote to the Respondent on 14 and 31 March, 16 April and 20 May 2008 seeking the agreed expenses and the Minute of Amendment under threat of taxation. The Respondent did not inform Mr. A of this correspondence and did not lodge the Minute of Amendment until at the bar of the court on 26 May 2008. The Minute of Amendment *inter alia* amended the sum sued for to £1,829.00. The Respondent did not advise Mr. A of this reduction nor did he have his instructions to proceed in this way. Mr. A was unaware of the amendment or the consequences of the amendment. At this time, the Respondent was having considerable difficulty in dealing with his own workload and that of the now departed assistant and there were ongoing difficulties with regard to the firm in general which was being pressed for payment from a number of sources.

6.5 The defenders' agent submitted a motion for the expenses on 29 May 2008. The Respondent did not tell Mr. A nor did he oppose the motion and on 10 June 2008 the client was found liable to the first defender in the sum of £279.65 and the second defender in the sum of £238.00. Mr. A was not informed of the awards. On 1 July 2008 the agent for the defender wrote to the Respondent's firm advising that due to the clients refusal to pay the award of expenses they would be asking the court to make an award of the costs of the action to date a condition precedent of the action continuing and would seek a remit to the Small Claims Roll. Further court hearings took place by 11 August 2008 the client had been found liable in the expenses of the amendment

procedure. The account produced on behalf of the defenders was in the sum of £407.65. The client was not advised of these. Mr A was in receipt of Legal Aid and an application could have been made to have the awards of expenses assessed against him as an Assisted Person. The defender has not sought payment of the awards of expenses and Mr A has not made payment of them.

6.6 The client contacted the firm on 23 July 2008 to complain about receiving little communication and hardly any of his calls being returned. He expressed concern about appointments with the Respondent being changed and on one occasion amounting to no more than a nice chat as there were no papers available. Mr A was advised that the Respondent was a Criminal Court Practitioner and as such was in the habit of being in court everyday and many afternoons having to visit clients in prison. It is a common situation that solicitors involved in criminal work find that court appearances and meetings do run over time which makes it difficult to schedule appointments within the office. On 6 August 2008 the Respondent wrote to him stating that he had been concerned for some time that the lack of an experienced civil litigator was affecting the quality of the service provided.

7. Having considered the foregoing circumstances and submissions by both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

7.1 His between 8 February and 26 May 2008, while representing his client in the client's court action, entering into an agreement to reduce the principal sum sued for from £5,000 to £1,829.56 a figure out with the ordinary court and legal aid levels, his agreeing that his client would be liable for the expenses of a discharged diet of debate and his proceeding to amend the writ without advising his client that he was doing so and of the

consequences of the reduction and his doing so without his client's instructions.

7.2 His between 26 May and 6 August 2008, while representing his client in the client's court action, failing to inform his client that he had amended the principal sum sued for from £5,000 to £1,829.56.

7.3 His between 8 February and 6 August 2008, failing to inform his client that in the client's court action the Respondent had agreed that the client would be liable for expenses of a discharged diet of debate, that a motion had been lodged seeking expenses against him, that there had been awards made against the client for expenses in favour of his opponents in the sums of £279.65 and £238.00 on 10 June 2008, and that the client had been found liable for the expenses of the amendment procedure entered into by the Respondent without the client's instructions in the sum of £407.65.

8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 20 December 2010. The Tribunal having considered the Complaint dated 6 August 2010 at the instance of the Council of the Law Society of Scotland against David Eric Sutherland, Solicitor, 10-16 Exchequer Row, Aberdeen; Find the Respondent guilty of Professional Misconduct in respect of his between 8 February and 26 May 2008 while representing a client in a court action, entering into an agreement to reduce the principal sum sued for to a figure outwith the ordinary court and legal aid levels; his agreeing that his client would be liable for the expenses of a discharged diet of debate and his proceeding to amend the writ without advising his client that he was doing so and the consequences of the reduction and his doing so without his client's instructions; his between 26 May and 6 August

2008 while representing his client in the court action failing to inform his client that he had amended the principal sum sued for; and his between 8 February and 6 August 2008 failing to inform his client that he had agreed that his client would be liable for expenses of a discharged diet of debate, that a motion had been lodged seeking expenses against the client and that there had been awards made against the client for expenses in favour of his opponents and that his client had been found liable for the expenses of the amendment procedure entered into by the Respondent without the client's instructions; Censure the Respondent; Fine the Respondent in the sum of £1,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)
Kirsteen Keyden
Vice Chairman

9. A copy of the foregoing 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

IN THE NAME OF THE TRIBUNAL

Kirsteen Keyden
Vice Chairman

NOTE

The Respondent had lodged detailed Answers to the Complaint. These Answers admitted the facts, averments of duty and averments of professional misconduct in the Complaint and provided an explanation. It was clarified with the Law Society Fiscal that the Law Society accepted the facts as set out in the Answers. No evidence was led and the Tribunal heard submissions from the Law Society Fiscal, the Respondent and the Respondent's representative.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston explained that the Respondent's firm had paid compensation to Mr A and had not charged any fees. It had also been confirmed that Mr A had not been pursued by the defenders for the expenses awarded against him. Ms Johnston stated that this case was an example of a criminal practitioner having difficulty in dealing with civil cases because he was involved at court so much dealing with criminal matters. The Respondent continued to represent Mr A after his assistant left and there was an abrupt cessation of communication. Ms Johnston explained that Mr A had since taken matters to the Small Claims Court but had been unsuccessful. In response to a question from the Chairman it was clarified that expenses had not been sought in respect of the original case.

SUBMISSIONS FOR THE RESPONDENT

The Respondent advised the Tribunal that he had joined the firm of Bryan Keenan in 1998 as an assistant and became a partner in 1989. He was in charge of the branch office at Mastrick doing civil and criminal court work but he then realised that due to the nature of the criminal work, which kept him at court all day, it did not combine well with civil work and he accordingly employed an assistant to deal with the civil matters. The Respondent stated that he had not done any civil work since mid to late ninety's. When his assistant left the firm there were problems in getting a replacement. The Respondent explained that one individual had been offered the job but he did not come and then they took a person on but he left shortly thereafter due to pressure of work. The Respondent explained that he inherited Mr A's file in

November 2007 and he spoke to Mr Littlejohn about the matter. The Respondent explained that Mr Littlejohn was considered by him to be the sharpest civil practitioner in Aberdeen. It was as result of discussions with him that the Respondent amended the pleadings. The Respondent explained that, at this time, he was still looking for someone to replace his assistant but due to legal aid rates there were few firms that did civil legal aid and there was no one else in his firm who could it. He explained that although Mr Keenan was dealing with one large civil case, there was no one else within the firm who had experience of civil work. The Respondent clarified that he accepted that he continued to deal with Mr A's case for longer than he should have done but he had expected to find another assistant to take it on.

The Respondent explained that it was necessary to reduce the sum sued for because it was clear, after he had talked matters through with Mr Littlejohn, that Mr A was only entitled to damages for a week's loss plus outlays. This then took the sum down to a small claims level and the Respondent stated that he accepted that this should have been discussed with Mr A at the time. The Respondent however explained that things were not going well in his firm at the time with only the criminal court work meeting the fee targets. The Respondent explained that he had discussions with Mr Keenan with regard to cut backs but this did not happen. The Respondent stated that the firm was at risk of sequestration and he was having to work very long hours because no steps were taken to cut the overheads and the partnership was eventually dissolved. The Respondent explained that he had since set up on his own doing purely criminal court work and that he could not undertake civil legal aid work and if any came in he would pass it to another firm. The Respondent emphasised that he would never allow what had happened to happen again and that he had learnt his lesson. The Respondent also confirmed that if expenses had been claimed against Mr A, these would have been paid by either his firm or himself personally.

In response to a question from the Chairman, the Respondent confirmed that he had had some meetings with Mr A and they had discussed the merits of the case and the lack of corroboration. He however accepted that he did not discuss amending the pleadings.

In response to a question from one of the members, the Respondent stated that he did explain to Mr A that an assistant had left and that he was looking for someone else. He also confirmed that he was registered to do civil legal aid work at that time.

Mr Burnside then addressed the Tribunal on behalf of the Respondent and submitted that this was not a case where a solicitor took on work in an area where he did not have expertise, due to greed. This was different because it was an existing client with an ongoing case. The assistant dealing with the case left and the Respondent made efforts to get a replacement. This situation went on too long and the Respondent should have disengaged himself but it was not easy to get solicitors who do civil legal aid work. Mr Burnside pointed out that the Respondent did have some knowledge with regard to civil work and was able to identify defects in the pleadings of his colleague. Mr Burnside emphasised that the Respondent was a well known criminal practitioner of some repute and referred the Tribunal to the references lodged. He asked the Tribunal to look at the facts against the background of the firm's problems and the risk of sequestration. The Respondent was now working within his comfort zone and there would be no repetition of what had happened. Mr A had not suffered any loss and if any one tried to claim expenses from Mr A at this late stage the Respondent would pay them. Mr Burnside pointed out that Mr A had already received £2,000 compensation and had not had to pay any fees. Mr Burnside advised the Tribunal that the Respondent had learnt his lesson and was contrite and invited the Tribunal to consider the Respondent's actions as being at the lower end of the scale of professional misconduct. It was a misguided attempt to keep the matter going for the client.

DECISION

The Tribunal considered that the Respondent's conduct clearly amounted to professional misconduct. He took steps in a court action which led to an amendment of the pleadings reducing the sum sued for and resulting in an award of expenses against the client without taking his client's instructions. There was also a serious problem of lack of communication to the client as to what was going on. The Tribunal noted that there had been difficulties within the firm at the time but this was not the client's fault and the Tribunal did not consider this an excuse. The Tribunal accept

that the Respondent may well have been right in reducing the sum sued for but do not consider that this significantly reduces the Respondent's culpability in amending pleadings without his client's instructions.

The Tribunal accept that the Respondent's conduct was not acquisitive or born out of greed. Nonetheless the Respondent's actions did result in a fundamental change to Mr A's court action which resulted not only in a reduction in the sum sued for below that applicable in the ordinary court and any implications that may have for his legal aid application but also resulted in an award for expenses against Mr A all without taking Mr A's proper instructions. The Tribunal has to take a serious view of this.

The Tribunal however took account of the fact that the Respondent had accepted his culpability from an early stage and had attended the Tribunal and been genuinely contrite with regard to what had happened. The Tribunal further took into account the fact that Mr A was not financially disadvantaged and the Respondent did not deliberately go into an area that he was not familiar with in order to earn extra income. The Respondent was misguided in continuing to act for the client in respect of a matter where he did not have the necessary expertise but the Tribunal accept that at the time he thought it would only be for a short period as he was actively trying to obtain another assistant to replace the one who had left. The Tribunal also consider that the Respondent has learned his lesson and that it is extremely unlikely that anything similar will happen again in the future. The Tribunal also took account of the fact that the Respondent's firm has already paid Mr A £2,000 compensation and the firm's fees were disallowed.

In the whole circumstances the Tribunal considered that a Censure plus a fine of £1,000 was sufficient penalty. The Tribunal made the usual order with regard to publicity and expenses.

Vice Chairman