

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

**FINDINGS**

**in Complaint**

**by**

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

**against**

**JOHN GERARD O'DONNELL,  
14 Winton Drive, Glasgow**

1. A Complaint dated 31 January 2011 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, John Gerard O'Donnell, 14 Winton Drive, Glasgow (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. No Answers were lodged for the Respondent.
3. The Respondent intimated a preliminary plea alleging that the Law Society were personally barred from proceeding with the Complaint against him.
4. The matter was set down for a Proof before Answer on 16 May 2011. The Respondent made a motion to adjourn the Proof Before Answer which after discussion was not opposed by the Complainers and the matter was accordingly adjourned to 17 June 2011.

5. On 16 June 2011, a message was received indicating that the Respondent was not fit to attend the hearing on 17 June 2011. A soul and conscience medical certificate was provided. The matter was adjourned to a procedural hearing on 20 July 2011 to ascertain when the Respondent would be fit to continue with the Proof before Answer.
6. When the case called on 20 July 2011 the Respondent was not present or represented. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. No medical certificate had been produced indicating when the Respondent might be fit to continue with the Proof before Answer. The matter was adjourned to a Proof before Answer on 28 October 2011 and this was duly intimated to the Respondent.
7. When the case called on 28 October 2011, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented himself.
8. The Respondent made two further preliminary pleas. The Respondent's second preliminary plea was to the effect that the reference in the Complaint to his previous convictions when referring to his practising certificate being restricted for a period of five years was prejudicial to the hearing of the case because the Tribunal would be aware that he had previous convictions before a finding of guilt had been made. The Respondent's third preliminary plea was to the effect that as the legal members of the Tribunal had been nominated by the Law Society, there was potential prejudice because there was a connection between the Law Society and the two legal members sitting. The Tribunal repelled these preliminary pleas.
9. The Tribunal then heard evidence in respect of the Proof before Answer and found the following facts established:

- 9.1 Elaine Motion was the Fiscal for the Complainers acting in respect of three Complaints against the Respondent which had come before the Tribunal over the past few years. On the last occasion the Respondent's practising certificate was restricted for a period of five years concurrent to an existing restriction imposed on 17 February 2009. Since 2002 the Respondent has been suffering from clinical depression.
- 9.2 In December 2009, Elaine Motion and Steven Gold, Solicitor were both at a Law Society's Christmas Drinks Party. They were involved in a conversation with regard to the health and welfare of the Respondent. Mr Gold made representations on behalf of the Respondent to Elaine Motion to the effect that it would be humane and advantageous to everyone involved if a way could be found to allow the Respondent to hand in his practising certificate without having to undergo the ordeal and expense of an appearance before the Tribunal. Elaine Motion was sympathetic to the representations but indicated that she would require to discuss matters with the Law Society of Scotland who would make the decision. There was no undertaking given at this meeting to Steven Gold that if the Scottish Solicitors' Discipline Tribunal struck the Respondent's name from the Roll of Solicitors in Scotland no further Complaints would be brought against the Respondent and no undertaking was given that if the Respondent accepted pleas of guilty to the outstanding Complaint, no further proceedings would be brought against him.
- 9.3 It is the practice of Fiscals where Respondents are unrepresented to make contact with Respondents and try and engage with them. Elaine Motion contacted the Respondent with regard to having a meeting to discuss the Complaint. A meeting took place on 13 January 2010 between Elaine Motion

and the Respondent. What took place at this meeting is detailed in Elaine Motion's Attendance Note dated 13 January 2010.

- 9.4 At this time Elaine Motion had five files of other matters which the Law Society had referred to her which concerned the Respondent. One was ready to be progressed but she held this back pending the outcome of the Tribunal hearing in January 2010. Elaine Motion anticipated that the Tribunal may strike the Respondent's name from the Roll of Solicitors when it dealt with the Complaint in January 2010.
- 9.5 At the end of the meeting on 13 January 2010, on the way out Elaine Motion and the Respondent had a chat about the fact that if the Respondent was struck off by the Tribunal in January 2010 that would probably be the end of matters. It is the Law Society's view that if a solicitor has been struck off the Roll there would usually be no public interest in continuing with further Complaints against the same solicitor.
- 9.6 After the Tribunal hearing in January 2010, Elaine Motion indicated to the Respondent that the outcome was not the outcome she had anticipated and that the Respondent may be hearing from her again.
10. After having heard submissions from both parties. The Tribunal found that Elaine Motion had not made a declaration of relinquishment or discharge of the right to prosecute and accordingly the Law Society is not personally barred from proceeding with the Complaint against the Respondent.
11. The Tribunal pronounced an Interlocutor in the following terms:-
- Edinburgh 28 October 2011. The Tribunal Repelled the Respondent's second and third preliminary pleas and after hearing evidence in

connection with the Proof before Answer, also Repelled the Respondent's first preliminary plea and adjourned the case to a procedural hearing on 15 December 2011; The Tribunal Reserve the question of expenses until the outcome of the substantive hearing and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

**(signed)**

**Malcolm McPherson**

**Vice Chairman**

12. 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 12 DECEMBER 2011.

**IN THE NAME OF THE TRIBUNAL**

[REDACTED]

**Vice Chairman**

[REDACTED]

**NOTE**

After the Complaint was served the Respondent lodged a preliminary plea alleging that the Complainers were personally barred from proceeding with the Complaint against him on the basis of an undertaking given to him by Elaine Motion, Fiscal during the proceedings involving the last Complaint against him before the Tribunal. The Tribunal fixed a Proof before Answer in respect of this matter. Given that Elaine Motion would be a witness in the Proof before Answer a different Fiscal, Paul Reid, dealt with the proceedings on behalf of the Law Society.

The Respondent then raised another two preliminary pleas which were decided by the Tribunal prior to evidence being led in the Proof before Answer.

**THE RESPONDENT'S SECOND PRELIMINARY PLEA****Submissions by the Respondent**

The Respondent stated that because there was reference in Article 1.3 of the Complaint to his practising certificate being restricted in terms of the Tribunal's Interlocutors of 17 February 2009 and 25 January 2010 the Tribunal was aware that he had previous convictions before it decided on his guilt in respect of this particular Complaint. The Respondent submitted that this raised potential prejudice. The Respondent accordingly invited the Tribunal to discharge themselves on the basis of prejudice and asked that the Complaint be re-served without reference to any previous convictions.

**Submissions by the Complainers**

Mr Reid explained that it was necessary to include the information in the Complaint as it was relevant to the allegations in Articles 29.7 and 29.12 where the Respondent was accused of misleading clients by indicating that he was a partner when he was subject to a restriction on his practising certificate. It was accordingly a necessary aspect of the Complaint.

## **DECISION ON THE RESPONDENT'S SECOND PRELIMINARY PLEA**

Given that some of the allegations in the Complaint relate to the Respondent holding himself out as being a partner when he was subject to a restriction on his practising certificate, the Tribunal consider that it is necessary in order for the Law Society to prove this aspect of the case that information is provided with regard to the fact that the Respondent's practising certificate is subject to a restriction imposed by a previous Tribunal. The Tribunal consider that the case is analogous to a criminal case where the accused is charged with driving while being disqualified and it is necessary to have information with regard to the disqualification in order to prove the charge. The Tribunal accordingly repelled the Respondent's second preliminary plea.

## **THE RESPONDENT'S THIRD PRELIMINARY PLEA**

### **Submissions for the Respondent**

The Respondent stated that as the two legal members of the Tribunal were nominated by the Law Society this raised potential prejudice. The Respondent referred to the analogy with temporary Sheriffs and stated that those who paid the temporary Sheriffs also paid the Crown. He submitted that there was a connection between the Law Society and the legal members and given that the Law Society were prosecuting before the Tribunal, this did not give the appearance of independence from the Law Society.

### **Submissions by the Complainers**

Mr Reid pointed out that the legal members of the Tribunal were nominated by the Law Society but were appointed by the Lord President and were not paid. He stated that it would be ridiculous if a member of the Law Society could not sit on the Tribunal.



## **DECISION ON THE RESPONDENT'S THIRD PRELIMINARY PLEA**

The Tribunal consider that by being a member of the Law Society the Respondent accepts the terms set out by the Law Society which include regulation and the process of the Tribunal. The Tribunal is set up as constituted under the Solicitors (Scotland) Act 1980 and the Tribunal considers that it is properly constituted under the legislation and rules pertaining to the process. The Law Society recommends solicitors for appointment, but solicitors are appointed by the Lord President and are not paid. The Tribunal accordingly saw no merit in the Respondent's argument. In any event, there is a appeal route from the Tribunal proceedings to the Court of Session which would cure any defect in terms of Article 6 of the Human Rights Act.

## **PROOF BEFORE ANSWER**

### **EVIDENCE FROM THE RESPONDENT**

The Respondent stated that in 2009 he received a Complaint at the instance of the Law Society. The first time he appeared before the Tribunal he was fined £500, the second time he voluntarily gave up his practising certificate and was restricted for a period of five years and the third time he had a concurrent restriction. The Respondent stated that he had an incapacity and was on anti-depressant medication daily. This had been referred to during his last three appearances before the Tribunal. The Respondent stated that Elaine Motion spoke to Steven Gold at a Christmas Party and the Respondent took from what Mr Gold told him that if he plead guilty that would be the end of matters. The Respondent stated that he however accepted that what not what Steven Gold said.

The Respondent explained that Elaine Motion had been the Fiscal in connection with the previous Tribunal appearances and was aware of his medical history. She was also aware that for health and financial reasons he could not go on. She was supportive of him. At the meeting in January 2010 the words "strike off" were not used. The Respondent referred to Elaine Motion's letter of 22 March 2010 and pointed out that the only issue that Elaine Motion took with what he had stated in his letter of 10 March 2010 was that she indicated that there had been a question of strike off. The

Respondent stated that he thought that if he pled guilty to the Complaint in January 2010 that would be the end of matters. If he had thought that this was conditional upon him being struck off he would not have attended the Tribunal and would not have signed the Joint Minute agreeing to everything without amendments. The Respondent stated that Elaine Motion did not take issue with what he stated in his letter of 10 March 2010 in connection with what she said to him after the Tribunal. The Respondent submitted that the words "strike off" were not used at the meeting in Glasgow or on the morning of the Tribunal. Elaine Motion reached the agreement with him because of his mental ill health and financial state. The Respondent pointed out that until 2002 he had no difficulties but at that time his life imploded and he was diagnosed with depression.

In cross examination, the Respondent stated that his condition did not make him forget things but did affect his mental capacity. He stated that he could remember very well the meeting with Elaine Motion. He stated he was surprised to hear that she had reneged on her agreement. He indicated that he did not say at any time that Elaine Motion had acted dishonestly. She had indicated to him that if he pled guilty to the four Complaints he would not hear from her again. When she said after the Tribunal hearing in January 2010 that he would hear from her again he thought she had changed her mind. She was opening a door he thought was shut. The Respondent explained that he waited until the written decision of the Tribunal was issued before writing his letter of 10 March 2010. He pointed out that Elaine Motion's letter of 22 March 2010 only stated that he quoted her slightly out of context.

The Respondent accepted that Production 16, being Elaine Motion's note of their meeting on 13 January 2010 was correct. This note however made no mention of the question of him being struck off which was a crucial omission. The Respondent agreed that there was no mention of the agreement in any of the correspondence. It was however for Elaine Motion to tell him what the agreement was going to be.

In response to a question from the Tribunal, the Respondent stated that he would not have pled guilty to the Complaint un-amended if he had known that it was conditional upon him being struck off.

## **EVIDENCE FOR THE COMPLAINERS**

Evidence was led from Elaine Motion, Ad-Hoc Fiscal for the Law Society. She confirmed that she had been involved in prosecutions of John O'Donnell in respect of three Complaints so far. In January 2010 there was one conduct Complaint and a number of IPS matters all in one Complaint. There were not four Complaints. She explained that she had been a Fiscal for a number of years and as a matter of practice if a solicitor was not represented, Fiscals would try and engage with them. Production 13 was a letter to Mr O'Donnell to arrange a meeting. Production 16 was the Note of the Meeting of 13 January 2010. The purpose of the meeting was to see if the issues could be narrowed down. Ms Motion explained that she prepared a Joint Minute and asked him to consider it at the end of the meeting. At the start of the meeting the Respondent said that he was giving up and did not want to go on any further and would agree to everything. He admitted the conduct issue and she took him through each of the Inadequate Professional Service issues and it became clear that he did not agree to pay the compensation in advance of the Tribunal. She confirmed that there was no discussion with regard to other matters except that she might have referred to outstanding matters because she had five files which had been sent to her by the Law Society in respect of other matters. She was holding the one which was ready back awaiting the outcome of the January 2010 hearing because she anticipated that he might be struck off. If he was struck off there would have been no point in proceeding with the other Complaints. Ms Motion stated that it was not in her gift to give an undertaking that if he pled guilty that would be the end of it. She stated that she didn't, wouldn't and couldn't have agreed because she would have required to have obtained instructions from the Law Society. She explained that if a solicitor was struck off there was no public interest in continuing with further Complaints against them.

In cross examination, Ms Motion stated that she remembered that at the end of the meeting on 13 January 2010 when she was leaving the building with the Respondent there had been a general chat about the fact that if he was struck off that that would probably be the end of it. She stated that her letter of 22 March 2010 was responding to the central issue in the Respondent's letter of 10 March 2010. She stated that at the beginning of the meeting on 13 January 2010 her understanding was that the

Respondent had acknowledged that he expected to be struck off. She stated that she remembered the meeting well and even remembered what the Respondent was wearing. She stated that there was no reference in the Note of the meeting in connection with their conversation about the strike off because it had taken place on the way out and she did not have her note book out. It had also not been the point of the meeting which was to try and agree the matters in dispute. Ms Motion stated that she did remember at the end of the Tribunal that she indicated her surprise at the outcome and that she told the Respondent this and that he would be hearing from her further. She denied that she had an agreement with him that if he pled guilty he would not hear from the Law Society further. She pointed out that there was nothing in the correspondence with regard to this and that it would not have been within her gift.

In response to a question from the Tribunal, Ms Motion explained that most of the meeting on 13 January 2010 was spent going through the conduct and IPS matters. Ms Motion was adamant that she did not use the words "if you plead guilty there will be no further prosecutions". In response to another question from the Tribunal, she clarified that no Complaints had at that time been issued in respect of any of the five files. She stated that the Law Society was trying to get the result it wanted with the least cost and did not wish to proceed with other matters if it was not necessary. All these other matters were now in the current Complaint before the Tribunal. She confirmed that she had no discussions with the Respondent with regard to any of the five files. The Respondent was however aware that there were matters in the pipeline.

#### **SUBMISSIONS FROM THE RESPONDENT IN RESPECT OF PRELIMINARY PLEA ON PERSONAL BAR**

The Respondent submitted that whether or not it was in Elaine Motion's gift, at the meeting in Glasgow there had been an agreement between the Respondent and Ms Motion. What Ms Motion stated about what had been said on the way out was not the Respondent's position. His position was that an offer was made, an agreement was reached and that the only issue that Ms Motion had taken issue with was whether there was reference to strike off. The Respondent's position was that there was no such conversation. The Law Society were accordingly personally barred from proceeding.

## **SUBMISSIONS FROM THE COMPLAINERS IN RESPECT OF THE RESPONDENT'S PRELIMINARY PLEA ON PERSONAL BAR**

Mr Reid invited the Tribunal to prefer the evidence of Elaine Motion who was an experienced Fiscal and had prepared an attendance note at the time. She had given her evidence in a forth right fashion and her version was corroborated by what followed i.e. the sending of the Joint Minute which was then signed and after the Tribunal she expressed surprise when the Respondent was not struck off. It was not in Ms Motion's gift as Fiscal to decide whether or not to bring cases. Mr Reid referred to the authorities lodged with the Tribunal and stated that the test was as set out in the case of Thom-v-H M Advocate [1976] GC48. It required a declaration of relinquishment or discharge of the right to prosecute. This was not present in this case. Mr Reid pointed out that the Respondent had conceded that he misunderstood what he had been told by Steven Gold and Mr Reid invited the Tribunal to take the view that the Respondent had also misunderstood what was discussed at the meeting on 13 January 2010.

## **DECISION**

The Tribunal found Elaine Motion to be a credible and reliable witness and accepted her account. Her account is corroborated by the note of meeting which she prepared at the time and there is nothing in the correspondence between Elaine Motion and the Respondent during the time between the meeting on 13 January 2010 and the Tribunal hearing on 25 January 2010 which makes any reference to any agreement. The Respondent accepts that he misunderstood what he was told by Steven Gold and the Tribunal consider it possible that he also misunderstood what was said at the meeting on 13 January 2010. The Tribunal found it surprising if the Respondent thought that such an agreement had been reached that he did not put anything in writing between the meeting of 13 January 2010 and the Tribunal hearing on 25 January 2010. The Tribunal found Elaine Motion's explanation that she would in any event have had no authority to have made such an agreement to be entirely plausible. The Tribunal can

also understand why Ms Motion would have indicated to the Respondent that if he was struck off in respect of the Complaint dealt with in January 2010 there were unlikely to be any further proceedings against him due to the fact that this would not be in the public interest. The Respondent has not denied that he wanted all matters to go away and the Tribunal find on balance of probabilities that it is far more likely that a conversation took place with regard to no further proceedings being likely in the event the Respondent was struck off.

The Tribunal further consider that even if Elaine Motion had indicated to the Respondent that if he signed the Joint Minute he would not be hearing from her again, this would not be sufficient to amount to a declaration of relinquishment or discharge of the right to prosecute by the Law Society.

The Tribunal accordingly repelled the Respondent's third preliminary plea in respect of personal bar by the Law Society. The matter was adjourned to a procedural hearing on 15 December 2011 at 11am. There was no discussion with regard to expenses and expenses are reserved until the outcome of the substantive hearing. As this is a Decision of the Tribunal, in terms of Schedule 4 Section 14 publicity requires to be given to the Decision and this publicity will include the name of the Respondent.



**Vice Chairman**