

**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**

**STEVEN BROWN, Independent  
Qualified Conveyancer and  
Independent Executry  
Practitioner, Scottish  
Conveyancing Services, 297 Main  
Street, Wishaw, Lanarkshire**

1. A Complaint dated 8 June 2009 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Steven Brown, Independent Qualified Conveyancer and Independent Executry Practitioner, Scottish Conveyancing Services, 297 Main Street, Wishaw, Lanarkshire (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 by the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 20 August 2009 and notice thereof was duly served on the Respondent.

4. The hearing took place on 20 August 2009. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by James McCann, Solicitor, Clydebank.
5. The Respondent pled guilty to the Complaint.
6. The Tribunal found the following facts established

6.1 The Respondent was born on 23rd February 1963. The Respondent was formerly a solicitor and was on the roll between 28th April 1987 and 31st December 2002 when his name was removed from the Roll of Solicitors at his own request. He had no disciplinary record as a solicitor. The Respondent is an independent qualified conveyancer and independent executry practitioner and qualified as such on 1st January 2003. He carries on business as Scottish Conveyancing Services, 297 Main Street, Wishaw, Lanarkshire. He is subject to the jurisdiction of the Scottish Solicitors Discipline Tribunal by virtue of the Solicitors (Scotland) Act 1980 section 51(1A).

Ms A

- 6.2 The Respondent acted on behalf of Ms A in January 2006 when she purchased Property 1. Ms A purchased the property on the basis that she understood that it had two bedrooms. The property included an attic conversion.
- 6.3 In 2007 Ms A instructed the Respondent to act in the sale of the property. An acceptable offer was submitted for the property, but was withdrawn because it became apparent that no local authority consents were available for the attic conversion. Consequently the property had only one bedroom which met the legal requirements for habitation.

- 6.4 The Respondent contacted Sprang Terras, Solicitors, Ayr, who acted on behalf of the party from whom Ms A purchased the property in 2006. They advised that they did not have a copy of any letter of comfort on file.
- 6.5 The Respondent arranged an inspection of the property by East Ayrshire Council with a view to obtaining a letter of comfort. The Council said they could not issue a letter of comfort until the following had been done:-
- (i) Door closures to be fitted to kitchen, bedroom and lounge doors on the first floor;
  - (ii) Self closing fire door with intumescent strips and smoke seals to be fitted to the entrance to the attic apartment;
  - (iii) The stairway to be within a protected enclosure and therefore, the partition at the stairwell within the attic apartment to be taken to the underside of the ceiling and suitably fire stopped;
  - (iv) Access to be provided to allow inspection to check the insulation of walls and ceiling.
- 6.6 Ms A made several appointments to meet the Respondent to find out what was happening, but each of these was cancelled by the Respondent. The Respondent asked to come to meet Ms A at her house. He advised her that he was responsible for not having noticed the situation regarding the attic conversion when the property was purchased. He then suggested two options:-
- (1) That Ms A have all the work done to the property to satisfy the Council and that he would take responsibility for the attendant expense, or alternatively
  - (2) That the Respondent either on his own or with his business partner would purchase the property from Ms A.

- 6.7 Ms A advised that she preferred the latter option. After having the property inspected by a builder, the Respondent confirmed that he would purchase the property. He also advised Ms A that he did not expect her to pay his fees as it was his mistake and that she would be reimbursed for all costs incurred. The Respondent proceeded on this basis. No letter of engagement was issued to Ms A, as is required by Rule 12 hereinafter condescended upon. There were no missives. Ms A was given no timescale for completion of the transaction. The Respondent did not advise Ms A to seek independent advice. He did not issue any advice about conflict of interest. Ms A only found out that her mortgage was repaid when she contacted her lender Northern Rock plc. She asked the Respondent to send her a statement, breaking down all costs. The Respondent only issued this after Ms A had invoked the assistance of the complainers on 11<sup>th</sup> August 2008.
- 6.8 The Respondent wrote to Countrywide Estate Agents on 7th May saying that on the instructions of Ms A he gave notice to terminate their agency to market the property, as Ms A no longer wished to market the property. On the 17th May, Ms A emailed the Respondent, confirming that the mortgage payments made since 31st January were £1,137 and asking for a summary of what money would be paid into her account.
- 6.9 Countrywide wrote to the Respondent regarding their estate agency account which amounted £1,207.89. They reminded the Respondent that although the original sale did not proceed, they had been advised by Ms A that the property had been sold privately and therefore, in terms of their Sole Selling Agreement with her they were entitled to payment. Countrywide also advised that Ms A had indicated to them that the Respondent had funds to settle the account. They indicated that if the account remained unpaid they would instruct solicitors to recover the

sums due. On 15th July 2008 the Respondent settled the Countrywide invoice. Until he did so Ms A remained personally liable in respect of the invoice.

- 6.10 The mortgage payments made by Ms A between 31st January 2008 and 23rd May 2008 were £1,137. The Respondent paid £1,000 into her bank account on 4th April 2008. The Respondent paid a further £3,000 into her account on 23rd May 2008. He also paid the Estate Agents fees of £1,207.89 as above condescended upon. The sale price of the property was £55,500 and the mortgage with the Northern Rock had an outstanding balance of approximately £50,070.
- 6.11 On 28th August 2008 Ms A wrote to the Complainers as the Respondent had now written to her with a Statement of Account, which indicated there was a balance due to her of £2,337.72 and made reference to the sum of £4,000 that had already been paid into her Account of which £1,000 was to go towards the mortgage payments of £1,137 that she had already incurred. She was concerned that the statement produced included a fee of £495 plus VAT which had been deducted from the sale proceeds in the calculation of the balance of £2,337.72. Additionally, there was an outlay of £225 for the letter of comfort, both of which Ms A was unhappy about as the Respondent told her she would not be paying any legal fees or costs and as far as she was aware, the letter of comfort had never been issued nor had she agreed to make any payment in this respect.
- 6.12 The Complainers forwarded this letter to the Respondent and sought his response.
- 6.13 The Respondent responded to the Complainers on 17th September 2008. He confirmed that he had acted for Ms A in her purchase of Property 1. He confirmed also that he was

subsequently instructed to act in the sale of the property and during the course of that transaction it came to light that a letter of comfort exhibited to his firm at the time of the purchase did not extend to the attic conversion. The prospective purchaser then withdrew from the transaction leaving Ms A re-marketing the property. He advised that at that time he and his business partner were considering the purchase of a property on a “buy to let” basis and that he agreed with Ms A that they would buy the property from her at the same price she had already agreed to sell it at and would compensate her for any loss arising from the delay in the settlement being effected, accepting that the question of the alteration to the attic should have been dealt with at the time of her purchase. He felt therefore that her only grievance at that stage related to the accounting.

- 6.14 After further discussion with Ms A and the adjustment of issues a complaint was intimated to the Respondent by the complainers on 10th October 2008. The complaint related both to service issues in relation to the purchase of the subjects at Property 1 and the subsequent sale of Property 1 and also a complaint of professional misconduct relating to the Respondent acting in a conflict of interest situation.
- 6.15 Ms A wrote to the complainers on 13th October to advise that she had been in contact with the Respondent. She stated that she no longer wished to pursue her complaint against the Respondent as matters had been resolved. She advised that she had spoken to the Respondent who had apologised for the inconvenience he had caused and that he had forwarded to her the monies that were due to her.
- 6.16 Following Ms A’s decision and the resolution of the service issues of the complaint, the Complainers wrote to the Respondent on 7th November 2008 to advise that they were taking over the

conduct complaint in terms of an amended list of issues under reference to which they requested that the respondent furnish them with a response.

6.17 The Respondent responded on 10th November 2008. He reiterated he was instructed to act on behalf of Ms A in relation to the sale which did not proceed. Again he advised that he had been considering buying a property on a buy to let basis and had discussed with Ms A the possibility that he would buy her flat. He advised she was happy to sell to him and for him to continue to deal with the conveyancing to minimise the expense. He claimed that he had advised her about a potential conflict and obtained a letter from her confirming she was happy for him to act and that also she understood he was the person purchasing the property. The letter that the Respondent referred was in the following terms:-

“I, MS A formerly residing at Property 2 and now residing at Property 1 hereby confirm the purchaser, Steven Brown of 30 Hyndford Road, Lanark is also the Steven Brown, Independent Qualified Conveyancer of 297 Main Street, Wishaw acting for me in the sale of the property 1”. This was signed by Ms A on 4th June 2008.

6.18 The Respondent continued “I was unaware that this could be deemed a matter of professional misconduct, assuming that I would only require to withdraw from acting if a conflict arose”.

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

7.1 his failure to advise Ms A about conflict of interest.

- 7.2 his acting for Ms A where there was a conflict of interest between him and Ms A in two respects namely, a potential claim for damages for professional negligence in respect of his actings in the purchase of the property and failure to deal then with the unauthorised alterations, and secondly in relation to his personal interest in the purchase by him from Ms A.
- 7.3 his failure to issue a Terms of Business letter as required by Rule 12 of the Independent Qualified Conveyancers (Scotland) Regulations 1997.
8. Having heard the solicitor for the Respondent in mitigation and having noted a previous finding of misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 20 August 2009. The Tribunal having considered the Complaint dated 8 June 2009 at the instance of the Council of the Law Society of Scotland against Steven Brown, Independent Qualified Conveyancer and Independent Executry Practitioner, Scottish Conveyancing Services, 297 Main Street, Wishaw, Lanarkshire; Find the Respondent guilty of Professional Misconduct in respect of his failure advise his client about a conflict of interest, his acting for his client where there was a conflict of interest between him and his client in two respects namely a potential claim for damages for professional negligence and in relation to his personal interest in the purchase by him from his client and his failure to issue a terms of business letter as required by Rule 12 of the Independent Qualified Conveyancers (Scotland) Regulations 1997; Censure the Respondent; Fine him in the sum of £1500 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; 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**

**Vice Chairman**

**NOTE**

Mr McCann confirmed that the Respondent was pleading guilty to the Complaint as libelled. Mr McCann indicated that there was no need to withdraw the Answers and advised that he would be referring to a written plea in mitigation and to an Inventory of Authorities. There was accordingly no requirement for any evidence to be led.

**SUBMISSIONS FOR THE COMPLAINERS**

Mr Lynch advised that the Respondent had formerly been a solicitor but was now in practice as an Independent Qualified Conveyancer and the Tribunal had jurisdiction in terms of Section 51(1A) of 1980 Act. The Tribunal's powers were set out in Section 20 of the Law Reform Miscellaneous Provisions Act 1990 as amended. Mr Lynch lodged previous findings against the Respondent dated 3 June 2008. Mr Lynch explained that the Respondent had acted for his client in January 2006 when she had brought the property. He had been instructed by the same client to sell the property in 2007 but an offer to purchase fell through when it was discovered that there was no Local Authority consent for an attic conversion. There was no letter of comfort in respect of this. The Local Authority was unable to issue one but did set out steps that they required to be taken for the property to comply. Mr Lynch stated that the Respondent should have advised his client to seek independent advice. However, instead, he proceeded to purchase the property from his client without any missives and without any letter of engagement. There had been a delay in that transaction which led to a complaint from the client. There was a period when the client was exposed in respect of liability for the mortgage. Mr Lynch however confirmed that the Respondent had met all the liabilities. Mr Lynch explained that the client had withdrawn her complaint but the Law Society had continued with it due to the risk to the client prior to matters being resolved.

**SUBMISSIONS FOR THE RESPONDENT**

Mr McCann referred to his written plea in mitigation. He pointed out that although there was a previous finding of misconduct, the present matter was already in the pipeline and was not something that occurred after the first Tribunal hearing. Mr

McCann outlined the Respondent's present office situation and explained that due to the current climate it had been necessary to downsize. Mr McCann emphasised that the Respondent's motive was to find a solution for his client. His actions had been well intended. Mr McCann pointed out that if matters had gone to mediation this was exactly the type of solution that would have been applauded as it was a win win situation and this type of thing was encouraged outside the profession. Within the profession the problem was that there were no rules which allowed for this. Mr McCann emphasised that the Respondent's client never complained about the deal that she got, it was the delay and uncertainty that had caused the problem. Even once the client had received independent legal advice, she did not complain about what had happened. Mr McCann stated that if the Respondent had done what the Law Society had suggested the result would have been worse for the client. Mr McCann explained that the proper consents had been obtained in respect of the extension but the paperwork had not been completed. Mr McCann pointed out that if an insurance company had been involved they would have insisted that the loss be minimised and if the client had had to be sent to a separate lawyer this would have taken longer. Mr McCann stated that the Respondent knew his client well and there was nothing sinister about what had happened. He advised that the Respondent did verbally advise his client that she could go elsewhere but this was not put in writing. Mr McCann pointed out that the reporter had thought what had happened was a reasonable compromise. Mr McCann also explained that it was not clear that the Respondent's firm was to blame for what had happened as when the Respondent's firm brought the property, the firm selling had confirmed that there had been no alternations and this was not in fact true. Mr McCann confirmed that the client had been put back in the position that she had been in before. Mr Lynch confirmed that the client had benefited because she had not been charged any fees. Mr McCann stated that it was accepted that the Rules stated that a solicitor could not conciliate with the client without sending the client for independent legal advice. He referred to the List of Authorities lodged. He however indicated that in practice clients often did not want to go elsewhere. He advised that he himself had been involved in cases where there was a complaint against the solicitor which was settled when the lawyer had an advisor but the client did not have separate advice. Mr McCann suggested that the Law Society's Rules perhaps needed to be updated to reflect current practice. Mr McCann emphasised that there was a strong growth outside the profession with regard to

alternative dispute resolution and conciliation. He pointed out that Scottish Legal Services Complaints Commission Rules provide for the Complainer to be sent back to the practitioner. Mr McCann also pointed out that Paterson and Ritchie “Law Practice and Conduct for Scottish Solicitors 2006” indicates that there can be a pragmatic basis for departing from the conflict of interest rules for example, acting for both sides in conveyancing transactions. Mr McCann also referred the Tribunal to the case of Law Society-v-J 1991 SLT 662 where the Court of Session had overturned the Tribunal and held that it was professional misconduct as it was a breach of the Rules. Mr McCann pointed out that his position was not an attempt to mount a defence to professional misconduct was but this was being put forward in mitigation. He suggested that the Tribunal deal with the matter by way of fine and Censure. In response to a question from the Tribunal, he clarified that his client had used his own funds to purchase the property and that no letter of engagement had been put in place with regard to the purchase by the Respondent from his client but that he had not really been acting for her, he had more been conciliating with her. In response to another question from the Tribunal, Mr McCann stated that if the Respondent had got another solicitor to act for his client, this may have worked but then there would have been the issue of the fees of the other lawyer.

Mr Lynch reminded the Tribunal that whether or not it was conciliation, the Respondent had pled guilty to continuing to act as a practitioner in a conflict situation. Mr Lynch also pointed out that if there was a very serious problem and the matter went to the Scottish Legal Service Complaints Commission it would probably go straight to the Law Society and that conciliation was encouraged mainly in respect of service matters. Mr Lynch pointed out that in this case that there was a possibility of a negligence claim and there was a clear conflict of interest.

Mr McCann stated that it could not be right that if it was a small complaint, conciliation was appropriate but not if it was a serious complaint. He submitted that there is a growing need for conciliation and a requirement for there to be an allowance of contact between the solicitor and client in that situation.

## **DECISION**

It was clear that the Respondent accepted the Rules and that he had acted in breach of the Rules. The Independent Qualified Conveyancers (Scotland) Regulations 1997 are there to prevent potential risk. The Tribunal considered Mr McCann's submission with regard to the Law Society Rules not keeping up with what was happening in practice in respect of conciliation and alternative dispute resolution. The Tribunal however consider that this is ultimately a matter for the Law Society and the Tribunal has to consider the position as it is at present and the applicable Rules currently operating at this time. The Respondent acted in a conflict of interest situation when there was a potential claim for damages for professional negligence. He also acted for his client in relation to his personal interest in the purchase by him of the property from her. The Tribunal however accept that the Respondent was trying to put his client back in to the position that she would have been in before. The Tribunal also accept that the Respondent was trying to keep his client happy and had the right motive. It was clear to the Tribunal that the Complainer had not complained about the deal that she received but only about the delay and that the Complainer was not in any worse position and that the deal that she had achieved was not unreasonable. The Tribunal however considered that it was an error of judgment for the Respondent to act in the way that he did. He was acting as part-practitioner and part-buyer in the transaction. He had to be a practitioner in order to carry out the conveyancing and accordingly should have had a terms of business letter in place. The Tribunal noted the previous findings against the Respondent where he had been Censured but also noted that this was not a situation where the circumstances of the Complaint arose after the previous finding of the Tribunal. The Tribunal also took into account the fact that the Respondent had pled guilty to the Complaint and co-operated with the Law Society Fiscal. In the whole circumstances the Tribunal considered that a Censure plus a Fine of £1500 was sufficient penalty. The Tribunal made the usual Order with regard to expenses and publicity.

**Vice Chairman**