

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)**

F I N D I N G S

in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**GRAEME MILLER CUNNINGHAM, GMC
Criminal Lawyers, 100 John Finnie Street,
Kilmarnock, Ayrshire**

Respondent

1. A Complaint dated 24 August 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Graeme Miller Cunningham, of GMC Criminal Lawyers, 100 John Finnie Street, Kilmarnock, Ayrshire (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 or orders in the matter as it thinks right.
2. There was a Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 9 January 2017 and notice thereof was duly served upon the Respondent.
5. Three motions were lodged on behalf of the Respondent, one requesting that the hearing be held in private in terms of rule 43, and two inviting the Tribunal to exclude evidence in

terms of rule 42. At the request of both parties, the hearing for 9 January 2017 was converted to a procedural and preliminary hearing.

6. At the hearing on 9 January 2017, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was absent but was represented by James McCann, Solicitor, Clydebank. The Tribunal heard submissions from both parties in relation to the motion in terms of rule 43. The motion was refused. Thereafter, the parties advised the Tribunal that they had entered into a Joint Minute, agreeing the averments of fact and duties within the Complaint. The Fiscal moved the Tribunal to convert the hearing to a full hearing. This motion being consented to by the Respondent, the Tribunal granted the motion and converted the hearing to a full hearing. Thereafter, the Tribunal heard submissions from both parties.

7. The Tribunal found the following facts established:-

7.1 The Respondent was born 27 January 1964. The Respondent was admitted as a solicitor and enrolled on the register of solicitors practising in Scotland on 22 September 2003. Between on or about 2 October 2003 through to 16 July 2004 the Respondent was employed with the firm Richard J Lobjoie & Company Solicitors, Glasgow. From 19 July 2004 through to 31 March 2006 the Respondent was employed with the firm Neil F McPherson, Solicitors, Kilmarnock. Between the 10 April 2006 through to the 20 November 2014 the Respondent was a partner with the firm Douglas Wright, Solicitors, Kilmarnock. From 20 November 2014 the Respondent has been a partner and trades as GMC Criminal Lawyers to date.

7.2 The Secondary Complainer was prosecuted at Kilmarnock Sheriff Court as a result of his behaviour involving a police constable as she made her way to Kilmarnock Sheriff Court on 10 July 2013. She was walking to Kilmarnock Sheriff Court prior to facing a trial in respect of a road traffic allegation. The said police constable is related to the Respondent. On 10 July 2013 the Respondent acted as defence agent on her behalf. She was acquitted of the allegations against her. As a consequence of the behaviour of the Secondary Complainer, a complaint was made to Police Scotland which led to him being prosecuted. The Secondary Complainer conducted his own defence in a trial

before the Sheriff at Kilmarnock. He was convicted. In terms of section 201 of the Criminal Procedure (Scotland) Act 1995 sentence was deferred for the production of a social enquiry report.

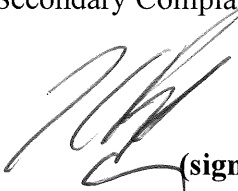
7.3 The diet of deferred sentence called at Kilmarnock Sheriff Court in July 2014. Previously as a matter of practice the local authority social work department on the morning of the deferred sentence would leave copies of the social enquiry reports at the desk of the Sheriff Clerk for collection by solicitors or accused. However on one occasion a member of the local press accessed the social enquiry report thereby accessing confidential information to which they were not entitled. The local authority social work department determined therefore that the reports should remain within the office of the social work department in Kilmarnock Sheriff Court. If an accused or a solicitor representing the accused required a copy of the report they would present themselves to the social work office and ask for the reports.

7.4 On the morning of the diet of deferred sentence involving the Secondary Complainer which called during July 2014, the Respondent was within Kilmarnock Sheriff Court. He attended at the offices of the Social Work Department. The Social Work Department was populated by two members of the administrative staff. The Respondent asked to see a copy of the Social Enquiry Report concerning the Secondary Complainer. The staff did not question why the Respondent wanted the report. The Respondent thereafter read the terms of the report and returned it to the staff. The Respondent thereafter attended at the public hearing of the deferred sentence and observed the procedure. At the conclusion of the procedure, outside the Court but still within the Court Building, the Respondent engaged with the Social Worker who was the author of the report. The Respondent was critical of the approach which she had adopted, advising her that in a number of different respects the Secondary Complainer had “pulled the wool over her eyes”.

8. Having given careful consideration to the established facts, the agreed Productions for both parties and the submissions made by both parties, the Tribunal found the Respondent not guilty of Professional Misconduct and remitted the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

9. Having heard further submissions from the parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 9 January 2017. The Tribunal having considered the Complaint dated 24 August 2016 at the instance of the Council of the Law Society of Scotland against Graeme Miller Cunningham, of GMC Criminal Lawyers, 100 John Finnie Street, Kilmarnock; Find the Respondent not guilty of professional misconduct; Remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Find no expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but will not include the name of the Secondary Complainer or the other parties involved.

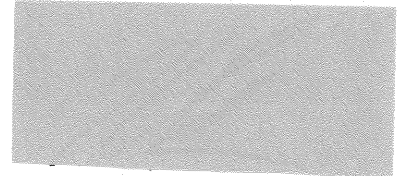


(signed)

Kenneth Paterson
Vice Chairman

10. 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 14 FEBRUARY 2017.

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson

Vice Chairman

NOTE

The 9 January 2017 was originally fixed as a full hearing for the Complaint. However, the Respondent had lodged a motion in terms of rule 43 to have the case heard in private, and two motions in terms of rule 42 to exclude evidence. Both parties had lodged Productions. The hearing was converted into a preliminary and procedural hearing for these motions to be considered by the Tribunal. Prior to the hearing, the Complainers had lodged a Record with the Tribunal office.

At the procedural hearing on 9 January 2017 Mr McCann explained that the motion in terms of rule 43 related only to the hearing of the two motions in relation to rule 42.

The Tribunal heard submissions from both parties in relation to the application to hear the other two motions in private. The Tribunal adjourned to consider these submissions and thereafter reconvened to advise the parties that the motion was refused. The parties indicated that during the adjournment they had had an opportunity to discuss matters and requested further time to continue these discussions. This request was granted. Thereafter, the parties lodged with the Tribunal a Joint Minute agreeing the averments of fact and duties in the Complaint and noting that the Productions for the Complainers were accepted by the Respondent and the Productions of the Respondent, under exception of Production 4, were accepted by the Complainers. Mr McCann confirmed that he was withdrawing his motions in relation to rule 42 and that the only issue remaining was whether the conduct admitted amounted to professional misconduct. Parties indicated a wish to have the present hearing converted to a full hearing to deal with the Complaint in its entirety. Mr McCann lodged a letter from the Secondary Complainer and Mr Reid lodged a template for a social enquiry report. It was agreed that the hearing be adjourned until later in the day to allow parties to prepare their submissions.

When the hearing was reconvened, Mr Reid confirmed he had lodged a Record incorporating both parties' pleadings. He moved to amend the dates given in paragraphs 2.2 and 2.3 to July 2014 rather than December 2014. This was not opposed by the Respondent and therefore granted. Mr Reid then went on to make a formal motion to convert the hearing into a full hearing. This motion being consented to by Mr McCann, the Tribunal granted the same and invited the parties to make their submissions.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid referred to the details of the Respondent's career as indicated in paragraph 1.1 of the Record and submitted that this disclosed that the Respondent was an experienced criminal practitioner within Kilmarnock Sheriff Court.

The Secondary Complainer was convicted of a Section 38 statutory breach of the peace and Production 6 for the Respondent was a copy of that complaint. This complaint arose out of an incident involving a police constable who had faced her own trial in relation to a complaint which was reproduced as Production 5 for the Respondent. After three days of trial the police constable was acquitted. She had been represented by the Respondent, who is also her uncle. The incident involving the Secondary Complainer had occurred on the first day of her trial. Following trial, the Secondary Complainer was convicted and sentence was deferred upon him for the court to obtain a social enquiry report. A social enquiry report is a formal document designed to provide considerable information for the sentencing judge. The fact that it is required by statute before a custodial sentence can be imposed emphasises the importance and significance of the document.

Mr Reid referred to the template of a social enquiry report, that he had lodged with the Tribunal earlier. He explained that this template would be used by a social worker when meeting with an accused. The spaces would be filled in with a great deal of personal and private information. In particular, he drew the Tribunal's attention to paragraph 6 of the template. Although he had no knowledge of this particular social enquiry report, the Fiscal submitted that, from his own experience, such reports can contain extremely sensitive information. This document was designed to contain comprehensive information for the sentencer which was not for public dissemination.

Because of an incident where a reporter had gained access to a social enquiry report, the social work department had changed their practice so that social enquiry reports were held by a social worker in their office and if an accused or a solicitor representing an accused required to obtain a copy they required to go to the office. This practice would have been known to the Respondent as he was an experienced local criminal practitioner.

On the morning of the deferred sentence, the Respondent went to the social work office and asked for the social enquiry report for the Secondary Complainer. He read the report and returned it to the social worker. Then the Respondent attended at the hearing. He was dissatisfied with the outcome and thereafter made a remark to the social worker who had written the report.

The Fiscal invited the Tribunal to hold that misconduct had been established as this conduct was a contravention of rule B1.2 of the Law Society of Scotland Practice Rules 2011. The Respondent was not the agent acting for the Secondary Complainer and so had no right to view the social enquiry report. He was not involved in the sentencing process at all; indeed at one stage the Respondent was a potential witness. The Respondent is an experienced practitioner, knew the practice adopted by the social work department and understood the significance of the social enquiry report. Mr Reid submitted that the Respondent allowed his personal integrity to be compromised in that he took advantage of his role as a solicitor. He referred to Complainers' Production 6 and submitted that the Respondent had taken advantage of his professional standing in order to access a document to which he had no entitlement to access. Given the Respondent's relationship to the police constable concerned the Respondent had compromised his integrity. Whilst Mr Reid explained he had no knowledge about the background circumstances, it was his position that these background circumstances might be of interest to the Tribunal but did not excuse or exonerate the Respondent's behaviour. One year had passed from the date of the original incident involving the Secondary Complainer. The Respondent had not lodged anything to show any court action being taken by the police constable as a result of this incident. The Fiscal referred the Tribunal to Production 5 for the Complainers, the letter from the Respondent to the Law Society dated 11 March 2016 and submitted that the Respondent was only a member of the public at the time of this deferred sentence hearing and did not have any right or entitlement to access the social enquiry report.

The Fiscal was asked by the Tribunal if it was necessary for the Tribunal to hold that the Respondent had acted dishonestly in order to make a finding of misconduct. Mr Reid responded that it was not necessary to categorise the conduct to that extent and referred to the wording of rule B1.2. He submitted that the Respondent had acted contrary to that rule and had taken advantage of being a solicitor to gain access to a document to which he had no right. He had acted in an untrustworthy and dishonest manner and allowed his integrity to be called into question. He invited the Tribunal to make a finding of misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr McCann submitted that there was no justification within the facts for the allegations of deception, untrustworthiness or lack of integrity. He argued that it was not sufficient to say that the conduct could be construed in that way but was necessary for this to be the only possible construction if the conduct

was to be the basis for a finding of misconduct. There needed to be the clearest of evidence to make such a finding.

He submitted that it was also wrong to say that the Respondent had no professional interest on the morning of the deferred sentence. He referred to the template social enquiry report and in particular part 5 (a). He submitted that in any view a solicitor acting for a victim of a crime had a legitimate interest in knowing the answers to these questions. It was clear that the Respondent would be concerned with what the court was going to do at the diet of deferred sentence. The sheriff had a number of options which would have protected the victim of the offence into the future and any solicitor acting for the victim would have a legitimate interest in the outcome and would know that the social enquiry report would include the accused's attitude to the victim. The consequence of the sentence imposed on this occasion was that the risk to the victim had not lessened but in fact increased. There was a legitimate role for the Respondent in considering how the victim was to be protected in the future. Mr McCann submitted that the Tribunal should go back to the date of the sentencing procedure and consider what was in the mind of the Respondent at that time. He emphasised that the Respondent was not as implied by the Fiscal acting simply as a relative of the victim but in fact he had a solicitor/client relationship with the victim. Mr McCann explained that he was not saying that the Respondent had a right to go and read all of the reports but this solicitor/client relationship reclassified the Respondent from someone who had no interest in the case to someone who had a legitimate interest. It was not the case that a solicitor acting for the victim of a crime should be excluded from the case.

Mr McCann referred to Complainers' Production 1, the anonymous letter to the Secondary Complainer advising of the comment made by the Respondent and suggested that the last line of that letter indicated a degree of malice on the part of the author. He suggested that the background to the Complaint before the Tribunal involved more than the one single offence carried out on his client on the way to her trial. The Complainer had shown no contrition, remorse or insight into his offending behaviour and referred to the terms of Production 2 for the Complainers as support for this submission.

He emphasised the Respondent had not helped himself to the report, as appears to have been suggested at an earlier stage.

Mr McCann submitted that a distinction has to be drawn between civil and criminal procedure. In the criminal courts the procedure is fast moving and flexible, and complaints are condensed. He submitted that it could not be misconduct to ask for information although he accepted that a solicitor required to

behave according to the highest principles. So long as a solicitor acted honestly then the conduct could not be misconduct.

The Secondary Complainer had appealed his conviction and leave to appeal was refused. Mr McCann referred the Tribunal to Production 6 for the Respondent, which included the detailed reasons of the High Court for refusing the appeal. Production 4 for the Respondent he said was a statement from the police constable concerned which was an indication of what she would have said in evidence in this case. It was relevant in showing the pattern of behaviour on the part of the Secondary Complainer about which she had consulted with the Respondent. This narrated multiple contacts. Productions 8 and 9 for the Respondent demonstrated that the offence of stalking was fairly common in Scotland. In situations of stalking behaviour what on the face of it seems to be innocuous behaviour can take on a very different character and be seen as something much more serious. It was Mr McCann's submission that the Tribunal had to go back to the perception and mindset of the parties on the day of the diet of deferred sentence. The Secondary Complainer had been released on bail in connection with the charge he had faced and that bail order had contained a special condition. After conviction, that special condition of bail had been continued to the diet of deferred sentence.

The sentencing date was an important date as effectively the protection to the victim had flown off. He submitted that it was unreasonable of the Law Society to try to say that there was no client relationship between the Respondent and his niece.

Although the motion to exclude evidence of dishonesty was no longer before the Tribunal, Mr McCann asked to be allowed to adopt the arguments set out within that application. He argued that the averments of deceit, untrustworthiness and lack of integrity were not warranted given that the Respondent had a central role to play as an agent for a victim. He argued that the averments of fact did not justify the allegations of dishonesty in the averments of duty although they might indicate an error of judgment, something which would not normally come before the Tribunal. He argued that, for the Tribunal to make a finding of misconduct, there had to be clear evidence of dishonesty and that had to be the only explanation. The matter before the Tribunal derived from a malicious and anonymous complaint made months after the behaviour complained of.

Mr McCann submitted that it was a solicitor's duty to ask questions. A solicitor in a criminal case might ask a procurator fiscal to see a witness statement. A solicitor might ask a police officer in the cells if his client was still staying off drugs. The Respondent was a known and trusted individual and asked a social worker who allowed him to see the report. Mr McCann referred to the authorities he had

produced and made reference to solicitors being entitled to have off the record conversations and examples where a solicitor who received an email in error might still be able to use the content of the email. He argued that the Respondent was in a much stronger position than that.

Mr McCann argued that it was a daily occurrence in criminal cases for defence agents to receive redacted statements. The agent would ask whether the information might be relevant to him and go back to the fiscal and ask what was redacted. He questioned whether it could ever be said that a solicitor could not ask for access to material within the control of a regulated individual.

He asked the Tribunal to adopt the content of his motion to exclude probation as a written submission in support of his current argument. He submitted that the case of professional misconduct had not been made out by the Fiscal, although it could be seen as a lesser case.

Mr McCann was asked by the Tribunal if he accepted that the Respondent was not entitled to see the report. He responded that he was not inviting a ruling from the Tribunal but was asking the Tribunal to look at the conduct in the context that the Respondent faced. The Respondent would have expected the question of risk to the victim to be included within the social enquiry report. The protections of privilege and confidentiality apply to court but not where there is a continuing risk. He had a reason to want to find out how the judge's decision would affect his client. He stated that the Respondent had taken advantage of the informality at the local sheriff court. He argued there was no evidence that the Respondent had abused that informality.

In response to questions from the Tribunal, Mr McCann accepted that the social enquiry report was intended for representatives of the accused and that the Respondent was aware of that. He said he could not say whether or not the social worker would have allowed the Respondent to see the report if the social worker had known that the Respondent represented the victim. Mr McCann described the conduct as "calling in a favour". The report could be considered confidential but so could the information held by the police and doctors etc. He accepted that the conduct was not acceptable but argued that it fell short of professional misconduct.

In response to his submissions, Mr Reid suggested that the Respondent had an interest in the outcome of proceedings that day but not a role in them.

DECISION

The Tribunal had before it a Joint Minute agreeing the averments of fact and duties in the Complaint, and parties had made submissions directed to whether or not the conduct admitted amounted to professional misconduct. In particular, the Complainers had invited the Tribunal to find that professional misconduct was established as a result of a contravention of rule B1.2 of the Law Society of Scotland Practice Rules 2011. The Fiscal had invited the Tribunal to hold that the Respondent had acted in an untrustworthy and dishonest fashion and had allowed his personal integrity to be called into question.

The conduct complained of is that the Respondent, an experienced local criminal practitioner, asked to see the Secondary Complainer's social enquiry report. The social work staff did not question why, but allowed him to access the document. The Respondent was not the agent representing the Secondary Complainer at his deferred sentence.

The standard of proof for the Tribunal is one of beyond reasonable doubt. The question for the Tribunal on this occasion was whether the agreed facts were sufficient for the Tribunal to make a finding that the Respondent had acted in an untrustworthy, or dishonest, or fraudulent, or deceitful manner. The Tribunal unanimously concluded that the facts before it were not sufficient to make such a finding. That being the case, the Tribunal found the Respondent not guilty of professional misconduct. However, the Tribunal concluded that the Respondent may be guilty of unsatisfactory professional conduct and so it was appropriate to remit the Complaint to the Council of the Law Society in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

EXPENSES AND PUBLICITY

The Tribunal invited submissions on publicity and expenses.

Mr McCann invited the Tribunal to make an award of expenses in favour of the Respondent. He submitted that as soon as he had been instructed by the Respondent he had invited the Fiscal to report the matter back to the Complainers to consider the question of unsatisfactory professional conduct.

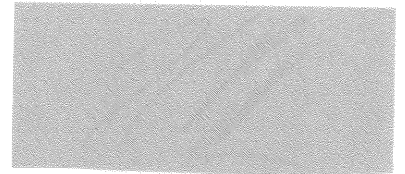
Mr Reid invited the Tribunal to make an order of no expenses due to or by either party. He submitted that the Society should not be deterred from bringing cases such as these, which as he put it it was not a "stonewall" one and so the Complainer should not be penalised.

Mr McCann invited the Tribunal not to include the name of the client of the Respondent in its Findings given the personal nature of the matters before it.

DECISION ON EXPENSES AND PUBLICITY

The Tribunal concluded that the appropriate order was one of no expenses due to or by either party, given the nature of the admitted conduct and the importance of the Law Society not being inhibited in their ability responsibly to raise matters before the Tribunal.

Given the personal nature of the background circumstances, it considered it appropriate not to have the name of the client of the Respondent, or the Secondary Complainer, included in its findings.



Kenneth Paterson
Vice Chairman