

**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

**JOHN GERARD O'DONNELL,
15 Clarkston Road, Glasgow**

1. A Complaint dated 16 October 2009 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, 15 Clarkston Road, 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. In terms of its Rules the Tribunal appointed the Complaint to be heard on 25 January 2010 and notice thereof was duly served on the Respondent.
4. The hearing took place on 25 January 2010. The Complainers were represented by their Fiscal, Elaine Motion, Solicitor-Advocate, Edinburgh. The Respondent was present and represented himself.

5. When the Complaint called on 25 January 2010 a substitute Complaint was lodged with the Tribunal together with a Joint Minute admitting the facts and averments in the amended Complaint. No evidence was led.
6. The Tribunal found the following facts established
 - 6.1 The Respondent is a solicitor enrolled in the Registers of Scotland. He was born on 14.9.50. He was admitted on 25.3.77 and enrolled in the Register of Solicitors in Scotland on 15.4.77.
 - 6.2 He formerly practised as a partner of firm of O'Donnell Vaughan ("the former firm"). He became a partner in that business on 01.10.79 and ceased to be a partner on 31.10.02. He commenced practice on his own account as John G O'Donnell & Co on 1.11.02 ("the firm").
 - 6.3 Effective as of 1 June 2009 the Respondent's practising certificate was restricted in terms of an Interlocutor of this Tribunal dated 17 February 2009. On 29 June 2009 the Respondent voluntarily relinquished his practising certificate to the Law Society of Scotland.

Inspections 2-4 June and 3,4 & 21 November both 2008

- 6.4 The Complainers attended to inspect the books of John G O'Donnell & Co on 2-4 June 2008 ("the June 2008 inspection"). This inspection flowed directly from and as a result of this Tribunal's Interlocutor and Findings of 16 January 2008.
- 6.5 In the course of the June 2008 inspection the Complainers discovered, *inter alia*, that the firm's financial position had deteriorated from the previous inspection with PAYE/NIC

arrears of £87,489.35; that arrears of £12,842.75 and personal tax arrears of approximately £11,000.

- 6.6 The Complainers attended further to inspect the books of John G O'Donnell & Co on 3, 4 & 21 November 2008 ("the November inspection"). The November inspection the disclosed that, *inter alia*, the Respondent had borrowed £60,000 from a client, Mr A, on or about 26 June 2008. That sum was part of the net free proceeds of sale of a property of Mr A. It was further noted that the said sum of £60,000 was used by the Respondent to pay some of the firm's PAYE/NIC arrears. Said borrowing occurred in the face of a pre-existing irrevocable mandate and personal bond put in place by the client, Mr A, and witnessed by the Respondent. That irrevocable mandate instructed the proceeds from the client's property sale to be paid to his brother Mr B. No evidence was available during the inspection or in the office during the inspection of any authority from Mr B agreeing to the arrangements or indeed his awareness of the position. Despite requests no such clarification has been obtained by the Respondent.
- 6.7 Mr A was not in the business of lending money nor was there any evidence that he had been independently advised in regard to making the loan referred to in paragraph 6.6 above.

Law Society – Mr C

- 6.8 Mr C, a client of the Respondent, lodged a service complaint with the Complainers in relation to the service provided by the Respondent arising out of the transfer of the title of Property 1.
- 6.9 On 10 February 2009 the Complainers considered Mr C's complaints of inadequate professional service and determined

in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980, to uphold the complaint that the Respondent had provided an inadequate professional service to Mr C in respect of:-

- (1) A delay between approximately 3 April 2007 and date unknown in registering the Disposition signed by Mr C on 3 April 2007 to transfer the title of the property to his son;
- (2) Attempting to mislead Mr C, in a letter dated 11 June 2007, by stating that the titles “had been sent off” to the Registers and in a letter dated 30 August 2007 by stating that the titles “had been sent to the Registers at the end of June 2007” when the Registers of Scotland stated to Mr C on 15 April 2008 that they had received no trace of the application at that date and
- (3) The Respondent’s failure to communicate adequately with Mr C to keep him informed of the progress of the transfer.

6.10 Following on from paragraph 6.9 above the Complainers determined:-

- (1) in terms of Section 42(A)(2)(a)(ii) that the amount of fees to which the Respondent was entitled to for the work invoiced in relation to the will and transfer of title was reduced by 50%;
- (2) in terms of Section 42A(3)(b) that the Respondent waive the right to recover 50% of the invoiced fees and;

- (3) in terms of Section 42A(2)(c) that the Respondent should at his own expense meet any fees and outlays incurred by Mr C in having the transfer of the title completed by a firm of solicitors of his choice and;
- (4) in terms of Section 42A(2)(d) that the Respondent pay the total sum of £600 compensation to Mr C.

6.11 By letter of 25 February 2009 the Complainers intimated the decision narrated above to the Respondent. No response was received. By recorded delivery letter of 15 April 2009 the Complainers served a Notice in terms of Section 42B of the Solicitors (Scotland) Act 1980 upon the Respondent. No response was received from the Respondent. The Respondent has not complied with the finding of inadequate professional service set out above.

Law Society – Ms D

6.12 Ms D, a client of the Respondent, lodged a service complaint with the Complainers in relation to the service provided by the Respondent arising out of the executy of the late Mr E.

6.13 On 23 September 2008 the Complainers considered Ms D's complaint of inadequate professional service and determined, in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980, to uphold the complaint that the Respondent had provided an inadequate professional service to the executy in respect of:-

- (1) Failure to provide Ms D with a cash statement in relation to the winding-up of the executy.
- (2) The Respondent failed or delayed between 19 April 2007 and 11 September 2007 in implementing the

Complainer's mandate to deliver papers to Messrs. Leonards.

- (3) Failure/delay in providing Messrs. Leonards with a copy of the audit certificate.

6.14 Following on from paragraph 6.13 above the Complainers determined:-

- (1) In terms of Section 42A(2)(a)(ii) of the 1980 Act that the Respondent's entitlement to his fees and VAT be reduced by 25% to £1125 plus VAT (totalling £1321.88);
- (2) Directed in terms of Section 42A(3) of the 1980 Act that the fees to this extent as specified above be refunded to the estate in order to comply with this Direction;
- (3) In terms of Section 42A(2)(c) of the 1980 Act that the solicitors should deliver a copy of the Audit certificate to Messrs. Leonards, solicitors within 28 days of the date of notification of the decision; and
- (4) in terms of Section 42A(2)(d) of the 1980 Act that compensation of a total of £650 be paid by the Respondent to the estate.

6.15 By letter dated 3 October 2008 the Complainers intimated the decision narrated above to the Respondent. By recorded delivery letter of 31 October 2008 the Complainers served a Notice in terms of Section 42B of the Solicitors (Scotland) Act 1980 upon the Respondent. The Respondent has complied with the determinations 1, 2 and 4 in paragraph 6.14 above. The

Respondent has failed to deliver a copy of the audit certificate to Messrs. Leonards in terms of 6.14(3) above.

Law Society – Abbey National

- 6.16 Abbey National, represented by DLA Piper, lodged a service complaint with the Complainers in relation to the service provided by the Respondent arising out of the subjects at Property 2.
- 6.17 On 14 October 2008 the Complainers considered Abbey National's complaint of inadequate professional service and determined, in terms of Section 42(A)(1) of the Solicitors (Scotland) Act 1980 to uphold the complaint that an inadequate professional service had been provided by the Respondent in respect of:-
- (1) Failure to confirm that the subjects were secured by a First Ranking Standard Security as instructed by the Abbey National on 14 November 2003;
 - (2) Failure to respond to correspondence from the Complainers' representative dated 18 June, 6 July, 2 August, 14 August, 18 September and 3 December all 2007 and also a telephone call on 18 July 2007 in connection with the matter and;
 - (3) Failure to implement a mandate dated 2 August 2007 in terms of which the Abbey National's representative requisitioned the Respondents files in connection with the matter.
- 6.18 Following on from paragraph 6.17 above the Complainers determined that in terms of Section 42(A)(2)(c) of the 1980 Act

the solicitor should meet any cost of any necessary remedial conveyancing.

- 6.19 By letter of 24 October 2008 the Complainers intimated the decision narrated above to the Respondent. No response was received. By recorded delivery letter the Complainers served a Notice in terms of Section 42B of the Solicitors (Scotland) Act 1980 upon the Respondent. No response has been received from the Respondent. The Respondent has not complied with the determination set out above.

Law Society-Mr F and Ms G

- 6.20 Mr F and Mr G, clients of the Respondent, lodged a service complaint with the Complainers in relation to the service provided by the Respondent arising out of the Executry of the late Ms H.
- 6.21 On 17 July 2008 the Complainers considered Mr F and Ms G's complaint of inadequate professional service and determined, in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980 to uphold the complaint that the Respondent had provided an inadequate professional service in respect of:-
- (1) The Respondent delayed in dealing with the administration of the executry.
 - (2) The Respondent completed the sale of the executry house without having obtained confirmation.
 - (3) Failure to obtain or produce the grant of confirmation for the Complainers as executors or to their new solicitors Miller Hendry.

- (4) Failure to keep the Complainers informed as to the reasons for confirmation not being obtained.
- (5) The Respondent delayed in responding to the repeated requests from the Complainers solicitors Miller Hendry for accounting of their intromissions with the estate as well as the estate funds they were holding.
- (6) The Respondent failed to respond to Miller Hendry's enquiries as to whether they had intimated the claim regarding the lost Will to their professional indemnity insurers.
- (7) Failure to timeously lodge the Inheritance Tax form IHT 200 with HM Revenue & Customs and failure to settle the Inheritance Tax liability and
- (8) The Respondent lost Ms H's Will.

6.22 Following on from paragraph 6.21 above the Complainers determined:-

- (1) In terms of Section 42(2)(a)(i) that the fees relating to the executry which the Respondent is entitled should be reduced to nil.
- (2) In terms of Section 42(a)(3) of the said 1980 Act to repay to the estate of Ms H the said fees in order to comply with this determination.
- (3) In terms of Section 42A(2)(b) the Respondent should produce the share certificate and Building Society passbook held by him or alternatively be responsible for any costs incurred in obtaining duplicates of the same.

- (4) In terms of Section 42A(2)(c) to pay any penalty due to HM Customs & Excise in respect of the late submission of the IHT 200 and to pay the fees and outlays of the agents acting on behalf of Mr F and Ms G in respect of an action to prove the tenor of the Will with said fees and outlays to be taxed on a solicitor/client basis.
- (5) In terms of Section 42A(2)(d) that the Respondent pay to the estate of Ms H the sum of £4000 compensation.

6.23 By letter of 17 July 2008 the Complainers intimated the decision narrated above to the Respondent. No response was received. By recorded delivery letter of 26 August 2008 the Complainers served a Notice in terms of Section 42B of the Solicitors (Scotland) Act 1980 upon the Respondent. No response has been received from the Respondent. The Respondent has not complied with the finding of inadequate professional service as set out above.

Law Society – Mr I

6.24 Mr I, a client of the Respondent, lodged a service complaint with the Complainers in relation to the service provided by the Respondent arising out of the lease of commercial premises.

6.25 On 1 October 2009 the Complainers considered Mr I's complaints of inadequate professional service and determined in terms of Section 42A(1) of the Solicitors (Scotland) Act 1980 to uphold the complaint that an inadequate professional service was provided by the Respondent in relation to:-

1. Failure/delay in transferring the lease of Property 3 into the name of Mr I.

2. Failure to provide Mr I with adequate advice in relation to the Stamp Duty requirements and liabilities in relation to the lease.
3. Failure to ensure Stamp Duty on the lease was paid timeously.
4. The Respondent making an appointment for Mr I to call at the solicitor's office at 11am on 20 October 2009 and then failing to attend the same or inform Mr I of his inability to attend.
5. Failure/delay in returning and making calls to Mr I.
6. Failure to make contact with Mr I following the meeting arranged on 20 October 2009 despite leaving a message with the staff that he would do so.
7. Failure/delay in keeping Mr I advised as to the progress of the lease transaction.

6.26 Following on from paragraph 6.25 above on 1 October 2009 the Complainers determined that :-

1. In terms of Section 42A(2)(a)(i) that the fees and VAT to which the Respondent shall be entitled should be restricted to nil.
2. In terms of Section 42A(3) of the Solicitors (Scotland) 1980 Act that the Respondent repay to Mr I the said abated fees plus VAT.

3. In terms of Section 42A(2)(d) of the Solicitors (Scotland) Act 1980 that compensation in the total sum of £1200 be paid by the Respondent to Mr I comprising compensation of £1000 and the penalty stamp duty land tax of £200.

6.27 By letter of 14 October 2009 the Complainers intimated the decision narrated above to the Respondent. By recorded delivery letter of 24 November 2009 the Complainers served a Notice in terms of Section 42B of the Solicitors (Scotland) Act 1980 upon the Respondent. The Respondent has failed to comply with any of the determinations detailed above.

7. Having heard submissions from the Complainers and the Respondent, the Tribunal found that the Respondent had failed to comply with the Determinations and Directions given by the Council of the Law Society of Scotland in terms of Section 42A of the Solicitors (Scotland) Act 1980 in respect of Mr C, Ms D, Abbey National, Mr F and Ms G and Mr I within the respective periods specified and resolved to make Orders under Section 53C(2) of the Solicitors (Scotland) Act 1980.

8. The Tribunal also found the Respondent guilty of Professional Misconduct in respect of:

- 8.1 his permitting his own personal interest to influence his acting on behalf of Mr A;

- 8.2 his failure to act on his client's (Mr A) irrevocable instructions and in direct conflict with those irrevocable instructions by his borrowing £60,000 from Mr A rather than paying said sum to B.

- 8.3 his borrowing £60,000 from Mr A in breach of rule 21 of the Solicitors (Scotland) Accounts, etc Fund Rules 2001.

9. Having heard mitigation on behalf of the Respondent and having noted two previous Findings of professional misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 25 January 2010. The Tribunal having considered the substitute Complaint dated 16 October 2009 at the instance of the Council of the Law Society of Scotland against John Gerard O'Donnell, 15 Clarkston Road, Glasgow; Find the Respondent guilty of Professional Misconduct in respect of his permitting his own personal interest to influence his acting on behalf of a client, his failure to act on his client's irrevocable instructions and in direct conflict with those irrevocable instructions by his borrowing £60,000 from his client rather than paying the sum to the brother of the client in terms of the mandate and his borrowing £60,000 from his client in breach of rule 21 of the Solicitors (Scotland) Accounts, etc Fund Rules 2001; Direct that Orders be issued under Section 53C(2) of the Solicitors (Scotland) Act 1980 in respect of Mr C, Ms D, Abbey National, Mr F and Ms G and Mr I; Censure the Respondent and Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for a period of five years any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council or the Practising Certificate Committee of the Council of the Law Society of Scotland, said restriction to run concurrent with his existing restriction; 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.

(signed)

David Coull
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

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

When the Complaint called for hearing a substitute Complaint with various amendments was lodged with the Tribunal. A Joint Minute was then lodged admitting all the facts and averments in the substituted Complaint. A number of minor amendments to correct typing errors were made to the substitute Complaint and there was no objection by the Respondent. No evidence was led.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion stated that the most serious aspect of the Complaint was the £60,000 that the Respondent had borrowed from his client. The rest of the Complaint related to inadequate professional service Determinations which had not been complied with.

SUBMISSIONS FOR THE RESPONDENT

The Respondent advised that this was a victimless crime as it involved a mandate prepared by one brother in favour of another brother which required to be placed on file. He explained that nobody was missing £60,000 and that both brothers were happy with the Respondent's conduct. Neither had complained to the Law Society. The Respondent thanked Ms Motion for her co operation in dealing with the matter. He advised that this was his third occasion before the Tribunal and that he had previously been fined £500 and had had his practising certificate restricted for a period of five years. The Respondent explained that he had had no blemish on his legal career for 26 years until 2002 when he had a breakdown. The Respondent advised the Tribunal of his medical difficulties and explained that in June 2009 he had had to make his staff redundant and wind up his business. The Respondent indicated that he hoped in future his health would improve and he may be able to do something in the profession. He advised that he felt he should attend the Tribunal in person and face up to what had happened.

Ms Motion stated that there was clearly a mandate in the file and that she had not seen any evidence to show that the amount had been repaid.

DECISION

The Tribunal noted that the Respondent was already subject to a Restriction on his practising certificate for a period of five years from June 2009. The Tribunal took a very serious view of the borrowing by the Respondent of a large sum of money (£60,000) without the consent of the clients and in clear breach of the Accounts Rules. Although this fell short of theft, it had potentially serious consequences and was certainly not, as had been contended by the Respondent, a victimless crime. The Tribunal only refrained from striking the Respondent's name from the Roll because the clients did not themselves complain and had suffered no loss, there were significant extenuating circumstances in regard to the Respondent's age and health, and the Respondent had co-operated fully with the Complainers and had entered into a Joint Minute. In these exceptional circumstances it was felt that a further Restriction on the Respondent's practising certificate, to run concurrently with the existing restriction, would provide adequate public protection.

The Tribunal was also satisfied that the Respondent had failed to comply with the Determinations and Directions made by the Law Society and that it was appropriate to issue Orders under Section 53C in respect of these matters. The Tribunal made the usual order with regard to expenses and publicity.

Vice Chairman