

**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

**CERI WILLIAMS, Solicitor,
Law House, Ferguson Square,
Cupar**

1. A Complaint dated 5 February 2010 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Ceri Williams, Solicitor, Law House, Ferguson Square, Cupar (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 22 April 2010 and notice thereof was duly served on the Respondent.
4. The hearing took place on 22 April 2010. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. The Respondent was present and represented himself.

5. A Joint Minute was lodged admitting the facts and all the averments in the Complaint with the exception of those in paragraphs 4.2(a), 4.2(b) and 5.7. The Joint Minute also agreed the documents contained within the Complainer's Inventory of Productions. No evidence required to be led.
6. The Tribunal heard submissions by both parties in relation to the disputed averments.
7. The Tribunal found the following facts established:
 - 7.1 The Respondent was born on 6 November 1948. He was admitted as a Solicitor on 9 September 1987. He was enrolled as a Solicitor in the Register of Solicitors in Scotland on 28 September 1987. He was employed by Young & Co., to 30 September 1991. From 1 October 1991 to 29 April 1992 as an employee and from 30 April 1992 to 11 July 1994 as an Associate, all with McQuittys, Solicitors. He became a Partner in Williams McRae, Solicitors, Cupar, on 1 August 1994 and continues as a Partner. From 1 October 2000 to 16 January 2005, the Respondent was a Partner in Greenfox.
 - 7.2 Messrs Fyfe Ireland, Solicitors, Edinburgh, acting on behalf of Mr A Trustee of Mr A's Settlement, hereinafter referred to as the "Settlement" intimated a complaint to the Complainers by letter dated 26 September 2008 alleging inter alia misconduct on the part of the Respondent.
 - 7.3 By letter dated 15 August 2007, Mr A, a Trustee of the Settlement, of Property 1, instructed the Respondent in respect of the purchase of Property 2 described as "All the land and barren, being approximately 530 acres, currently under an Agreement between the vendor and Ms B."

Inter alia the said letter narrated that the purchase price was £800,000 plus Stamp Duty and the total consideration payable to Ms B was £1,132,000.

7.4 The letter of instruction of 15 August 2007 specified that prior to transfer, the Settlement would require a Joint Venture Agreement signed by Ms B and Mr C and that before any monies were released to Ms B, security was required as follows:-

(a) A second charge on the land and buildings known as Property 2, with a Priority Agreement between the Settlement and HBOS;

(b) The guarantee of Mr C and Ms B;

(c) Documentation prohibiting any further charges being registered on Property 2;

(d) Documentation prohibiting any party claiming any rights of residence at Property 2.

7.5 By letter dated 22 August 2007, the Respondent, who was acting for Ms B and her husband, Mr C, accepted the instructions of 15 August 2007 from the Settlement. The Respondent's letter confirmed inter alia that he held a Joint Venture Agreement signed by Ms B and Mr C. He further confirmed that the amount outstanding on the mortgage was £1,076,879.97 with monthly payments at £5,194.63 and one month being outstanding, namely, August 2007.

7.6 On or about 16 August 2006 the Respondent, acting on behalf of Ms B, offered to acquire the subjects (the entire of Property

2) and Missives were concluded with the Sellers' Solicitors on 24 August 2006.

The advance of £1,132,000 was paid by the Settlement to the Respondent. The advance was to be used:-

- (a) To purchase Property 2 on behalf of the Settlement;
- (b) £300,000 to be used to discharge the arrears due to HBOS in terms of a Finance Agreement between HBOS and Ms B in respect of Property 2 and in addition to fund renovations to Property 2.

7.7 In terms of the instructions to the Respondent and the Joint Venture Agreement, securities to be given to the Settlement consisted of:-

- (a) A second charge on Property 2 with a Ranking Agreement to be entered into between the Settlement and HBOS in respect of the part of the advance relating to Property 2;
- (b) Guarantees by Ms B and Mr C for repayment of the advance;
- (c) The execution of documents by Ms B and Mr C prohibiting any further heritable securities being registered over Property 2;
- (d) Documentation prohibiting any third party claiming any right of residence at Property 2.

7.8 On the basis of the information available to the Settlement at the time of the Respondent's acceptance of instructions from the Settlement, there was only one heritable security over

Property 2, being a Standard Security granted by Ms B in favour of the Bank of Scotland (HBOS).

- 7.9 That security was executed on 11 September 2006, Ms B's signature being witnessed by the Respondent. The said Security included a Consent in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, signed by Mr C and witnessed by the Respondent.
- 7.10 Subsequent to his acceptance of instructions from the Settlement, the Respondent acted for Ms B in the discharge of the Standard Security executed on 11 September 2006. He further acted for Ms B in the creation of a new Standard Security in favour of the Bank of Scotland (HBOS) executed by Ms B on 29 November 2007 with a Matrimonial Homes Consent granted by Mr C, both signatures being witnessed by the Respondent. That Standard Security was registered on 21 December 2007. This new Standard Security was for an increased indebtedness.
- 7.11 Thereafter, the Respondent acted for Ms B in the creation of a Standard Security in favour of Clydesdale Bank plc. Said Security was executed by Ms B on 5 February 2008 with a signed Matrimonial Homes Consent by Mr C. Both signatures were witnessed by the Respondent. That Standard Security was registered on 13 June 2008.
- 7.12 A Standard Security by Ms B in favour of the Trustees of Mr A's Settlement was executed on 20 August 2007. The Respondent did not register this Standard Security until 16 July 2008.
- 7.13 On 9 June 2008 Ms B and Mr C executed Statutory Declarations in the presence of the Respondent as Notary. Inter

alia the declarations were to the effect that Ms B and Mr C would not “Solely or with others, apply for any further advances or grant any further Securities over the heritable subjects, Property 2.”

- 7.14 On 6 August 2009 and 1 October 2009 the Complainers considered a complaint relating to the work that the Respondent had carried out for the Settlement. The Complainers determined that the Respondent had provided an inadequate professional service to the Settlement.
- 7.15 On 1 October 2009 the Complainers determined that in terms of the Solicitors (Scotland) Act 1980, Section 42A(2)(a)(i) that the fees and VAT to which the Respondent was entitled should be nil. The Complainers directed that the Respondent, in terms of Section 42(a)(3) of the said Act should waive the right to recover any fees and VAT from Ms B in relation to work carried out on the Settlement’s behalf and in the event that fees had already been paid by Ms B, or by the Settlement, the Complainers directed that any such fees, together with VAT thereon, should be refunded.
- 7.16 The Complainers further determined that in terms of Section 42A(2)(c) of the said Act that the Respondent should pay £1,000 of the fees incurred by the Settlement to Messrs Fyfe Ireland, Solicitors in carrying out remedial conveyancing in relation to the subjects at Property 2.
- 7.17 The Complainers further determined that in terms of Section 42A(2)(d) of the said Act the Respondent should pay the Settlement the sum of £1,350 in compensation.
- 7.18 The determinations referred to in paragraphs 7.14, 7.15, 7.16 and 7.17 above were communicated to the Respondent by the

Complainers in letters dated 2 September and 9 October 2009. The Respondent did not appeal the determinations.

- 7.19 On 18 November 2009 the Complainers sent a Notice in terms of the Solicitors (Scotland) Act 1980 Section 42B to the Respondent by recorded delivery post requiring him to provide confirmation to the Complainers of the steps which he had taken to comply with the Complainers' decision and determination and that within twenty-one days of 18 November 2009. The Respondent has not complied with the decisions and determination and refund of fees and VAT and payment of the £1,000 fees and compensation remains outstanding.
8. Having considered the foregoing circumstances, the submissions on behalf of both parties, the terms of the Joint Minute and the Respondent's Answers and the productions lodged the Tribunal found the Respondent guilty of Professional Misconduct in respect of:
- 8.1 his acting where there was a conflict of interest in that he acted for the Settlement as a lender and Ms B as a borrower in the preparation of a Standard Security, Ranking Agreement and other documents forming the terms and conditions of the sums being secured and knowing that there was a Joint Venture Agreement between the parties;
- 8.2 his accepting instructions from Ms B to draft, have executed and then register two Standard Securities when he knew or ought to have known that in doing so Ms B was in breach of the Agreement entered into with the Settlement; the Respondent had been instructed to put said Agreement into place and in terms of the Agreement he had not yet registered a Standard Security to protect the interests of the Settlement;

- 8.3 his preparation and execution of Statutory Declarations by Ms B and Mr C undertaking not to grant further securities over the property concerned when he knew or ought to have known that those clients had already granted a further two securities in breach of the Agreement with the Settlement;
- 8.4 while not having registered the Standard Security by Ms B and Mr C in favour of the Settlement, his acting where there was a conflict of interest by preparing, having executed and registering two Standard Securities by Ms B and Mr C in favour of two other lenders in the knowledge that these securities were in breach of the Agreement between Ms B and Mr C and the Settlement, the loan by the Settlement not having yet been secured by a security over the property in favour of the Settlement.
9. Having considered the foregoing circumstances, the Tribunal also found that the Respondent had failed to comply with the Determinations and Direction given by the Council of the Law Society of Scotland under Section 42A of the Solicitors (Scotland) Act 1980 in respect of the Settlement within the period specified; and the Tribunal resolved to make an Order in terms of Section 53C(2) of the Solicitors (Scotland) Act 1980.
10. Having heard the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms;
- Edinburgh 22 April 2010. The Tribunal having considered the Complaint dated 5 February 2010 at the instance of the Council of the Law Society of Scotland against Ceri Williams, Solicitor, Law House, Ferguson Square, Cupar; Find the Respondent guilty of Professional Misconduct in respect of his acting where there was a conflict of interest in that he acted for the Mr A's Settlement (hereinafter referred to as "the Settlement") as a lender and Ms B as a borrower in the

preparation of a Standard Security, Ranking Agreement and other documents forming the terms and conditions of the sums being secured and knowing that there was a Joint Venture Agreement between the parties; his accepting instructions from Ms B to draft, have executed and then register two Standard Securities when he knew or ought to have known that in doing so Ms B was in breach of an Agreement entered into with the Settlement, the Respondent had been instructed to put said Agreement into place and in terms of the Agreement he had not yet registered a Standard Security to protect the interests of the Settlement; his preparation and execution of Statutory Declarations by Ms B and Mr C undertaking not to grant further securities over the property concerned when he knew or ought to have known that those clients had already granted a further two securities in breach of the Agreement with the Settlement; and while not having registered the Standard Security by Ms B and Mr C in favour of the Settlement, his acting where there was a conflict of interest by preparing, having executed and registering two Standard Securities by Ms B and Mr C in favour of two other lenders in the knowledge that these securities were in breach of the Agreement with and loan by the Settlement, the loan by the Settlement not having yet been secured by the said Standard Security over the property in favour of the Settlement; Censure the Respondent; Find that the Respondent has failed to comply with the Determinations and Direction given by the Council of the Law Society of Scotland under Section 42A of the Solicitors (Scotland) Act 1980 within the period specified; Direct that an Order should be issued under Section 53C of the said Act; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Malcolm McPherson
Vice Chairman

11. 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

A Joint Minute was lodged admitting the facts and the averments in the Complaint with the exception of those in paragraphs 4.2(a), 4.2(b) and 5.7. The Joint Minute also agreed the documents contained within the Complainer's Inventory of Productions. No evidence required to be led.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid advised that there were two typing errors within the Complaint. Firstly at paragraph 2.6 on page 3 of the Complaint, the numbering 2.6 should be deleted and secondly in the same paragraph the amount outstanding on the mortgage should read £1,076,879.97.

Mr Reid advised that the background to this matter is set out in Article 2.5 of the Complaint which was that the Respondent was instructed by Mr A, a Trustee of the Mr A's Settlement in respect of the purchase of Property 2 and a loan over Property 2. Mr Reid stated that what is important is as set out in Article 2.6 of the Complaint. The letter of instruction specified that prior to transfer the Settlement would require a Joint Venture Agreement and securities signed before any funds were released to Ms B.

Details of what was required are set out in Article 2.6(a) to (d) as follows:

- (a) A second charge on the land and buildings known as Property 2, with a Priority Agreement between the Settlement and HBOS;
- (b) The guarantee of Mr C and Ms B;
- (c) Documentation prohibiting any further charges being registered on Property 2;
- (d) Documentation prohibiting any party claiming any rights of residence at Property 2.

Mr Reid stated that the instructions were accepted by the Respondent on 22 August 2007.

Mr Reid then made reference to Article 2.7 of the Complaint which stated that in August 2006, a year earlier, the Respondent acting on behalf of Ms B, had offered to acquire the entire Property 2 and missives were concluded with the seller's solicitors on 24 August 2006. An advance of £1,132,000 was paid by the Settlement to the Respondent and that advance was to be used to purchase Property 2 on behalf of the Settlement and the additional monies were to be used to discharge the arrears due to HBOS in terms of financial agreement between HBOS and Ms B in respect of Property 2 and in addition to fund renovations to Property 2.

Mr Reid stated that Article 2.8 of the Complaint gave details of the securities which were to be given to the Settlement in terms of instructions to the Respondent and the Joint Venture Agreement. These securities were -

- (1) A second charge on Property 2 with a ranking agreement to be entered into between the Settlement and HBOS in respect of the part of the advance relating to Property 2.
- (2) Guarantees by Ms B and Mr C for repayment of the advance.
- (3) The execution of documents by Ms B and Mr C prohibiting any further heritable securities being registered over Property 2.
- (4) Documentation prohibiting any third party claiming any right of residence at Property 2.

Mr Reid stated that in terms of Article 2.9 of the Complaint, at the time of the Respondent's acceptance of instructions from the Settlement, there was only one heritable security over Property 2 being a standard security granted by Ms B in favour of the Bank of Scotland (HBOS). Mr Reid said that Ms B had executed a security in September 2006 in favour of HBOS which security was witnessed by the Respondent.

Mr Reid stated that after the Respondent accepted the instructions of the Settlement he acted for Ms B to discharge the Standard Security granted in 2006 and he further

acted for Ms B in the creation of a new Standard Security in favour of HBOS granted in November 2007. That further security was for an increased indebtedness.

Mr Reid then referred to the terms of Article 2.12 of the Complaint. The Respondent then acted for Ms B in the creation of a further Standard Security in favour of Clydesdale Bank Plc. That security was executed in February 2008 and was witnessed by the Respondent. That security was registered in June 2008. A Standard Security by Ms B in favour of the Settlement was executed on 20 August 2007. That Standard Security was not registered by the Respondent until 16 July 2008.

Mr Reid then referred to paragraph 2.14 of the Complaint where it stated that on 9 June 2008 Ms B and Mr C executed Statutory Declarations in the presence of the Respondent as Notary. These Declarations were to the effect that Ms B and Mr C would not “solely or with others, apply for any further advances or grant any further securities over this heritable subject, Property 2.”

Mr Reid stated that against a background there was to be no further borrowing, the Respondent was involved in the execution and registration of additional heritable securities. Mr Reid referred the Tribunal to the averments of duty and professional misconduct as set out in the Complaint.

He referred the Tribunal to Article 4.2(a) which is disputed by the Respondent. Mr Reid stated that the Respondent was acting for both lender and borrower and that in his Answers the Respondent argues that the situation is the same as when a solicitor is acting for a separated couple where there is already a separation agreement in place. Mr Reid stated that he did not accept that this was a similar situation. Mr Reid submitted that this was a commercial transaction and there was a clear conflict of interest as evidenced by what actually happened in the transaction as outlined in Articles 2.6 to 2.8 of the Complaint. He referred the Tribunal to the relevant Practice Rules regarding conflict of interest as set out in Article 3 of the Complaint. Mr Reid stated that in this case there was a commercial security, a large loan of over one million pounds, ranking agreements and three securities of which only one is known to the Settlement. He stated that in these circumstances there is a clear conflict of

interest and that the Respondent should not have acted for both the Settlement and Ms B and Mr C.

In relation to Article 4.2(b) which is also disputed by the Respondent, Mr Reid stated that the original Bank of Scotland security was in place before the Respondent accepted instructions from the Settlement in August 2007. The Respondent then acted for Ms B in relation to the discharge of the first security and the execution of the new security despite the instructions from the Settlement regarding the prohibition of further securities. Mr Reid stated that the Respondent in his Answers argues that the second security just replaced the first which the Settlement knew of. Mr Reid submitted that this was not the case, and even if it was just a replacement, it is still a further charge over the property. It was a security covering further borrowing so it was not a like for like replacement. Mr Reid stated that the Respondent should never have acted in these circumstances and to have done so is professional misconduct.

Mr Reid then turned to Article 5.7 of the Complaint which was the final averment disputed by the Respondent; this averment deals with the inadequate professional service finding. Mr Reid stated that all the relevant averments have been admitted in relation to this but what is not agreed is the averment seeking the granting of an Order under Section 53C. Mr Reid stated that in his Answers the Respondent makes various averments regarding the Clients Relations Committee of 1 October 2009. Mr Reid stated that in his view these averments are irrelevant as neither of the two Client Relations Committee's decisions was appealed by the Respondent and so that must be an end of the matter. Mr Reid stated that Section 42A(7) of the 1980 Act contains the relevant provisions for appeal and no appeal against either decision was taken and therefore he moved the Tribunal to grant the Order as craved.

In response to a question from the Tribunal, Mr Reid confirmed that the total sum secured by the first security in favour of HBOS was the figure in Article 2.6 of the Complaint i.e. £1,076,879.97 and that the second security in their favour covered up to £1.7million.

SUBMISSIONS FOR THE RESPONDENT

The Respondent stated that in relation to Article 4.2(a) he wished to refer the Tribunal to the terms of his Answers and had nothing additional to add to what was contained therein.

In relation to Article 4.2(b) the Respondent acknowledged that he had made an error of judgement and now wished to withdraw paragraph 3 of his Answers and accept that Article 4.2(b) is correct.

The Respondent then referred the Tribunal to the remainder of his Answers in relation to the inadequate professional service matter. He advised that the Complainer's decision was intimated to him on 6 August and he was told that the Committee had reserved its position on sanction. He advised that the Complainers then asked for further information from him and others and did not cross copy that information to him.

The Respondent advised that he was formally notified of the decision in October 2009 but did not wish to question the decision, only the sanction imposed. He advised that he wrote to the Complainers but did not get a reply within sufficient time in which to appeal the decision.

The Respondent stated that he realised now that he should have appealed but he was confused over his right of appeal and the time limits. The Respondent submitted that the Complainers have failed in their own policy as they say in their own published policy that in the spirit of openness they will cross copy correspondence and they failed to do so in this case. The Respondent stated that the Complainers have awarded compensation and have never explained to him what that was for. He submitted that there was no loss to the Settlement and if there was loss it would be covered by his professional indemnity insurance. The Complainers also awarded fees in respect of corrective conveyancing. However, the Respondent submitted that no corrective conveyancing was required and it would have been a requirement for the Keeper to have contacted him in relation to any corrective conveyancing so he would have known if any had been required.

In response to a question from the Tribunal the Respondent stated that he tried to appeal the decision late but was told by the Clerk to the Tribunal that there is no possibility of extending the time limit. The Respondent lodged a copy of a Law Society leaflet entitled “Complaints Against Solicitors” where it states “Transparency and Confidentiality – In line with the Society’s policy of openness and transparency, copies of correspondence will be copied between parties, subject to confidentiality issues.” The Respondent stated that this leaflet was enclosed with Complainer’s Production 10, the letter from the Law Society to the Respondent dated 4 November 2009.

DECISION

The Tribunal considered the terms of the Joint Minute, the Respondent’s Answers, the submissions made by both parties and the productions lodged. The Tribunal was satisfied from the submissions heard and the agreed productions that all averments of fact contained in the Complaint were proved beyond reasonable doubt. The Tribunal did not accept the Respondent’s argument that at the point that he was acting there was no conflict of interest. The Tribunal noted that this transaction involved a large loan over heritable property and considered that it was not similar to a transaction involving acting for a separating couple in the sale of a former matrimonial home. The Tribunal noted that this transaction did not fall within the exception contained in Rule 5(1)(f) of the 1986 Practice Rules and therefore was one where a solicitor should not have acted for both parties.

The Tribunal had regard to the definition of professional misconduct as outlined in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC 129. The Tribunal considered that acting for both parties in this transaction involved a clear conflict of interest and breach of the 1986 Practice Rules. The Tribunal considered that the Respondent having acted for both parties in a commercial transaction involving such an obvious conflict of interest amounted to a serious and reprehensible departure from the standards expected of a competent and reputable solicitor. The Tribunal therefore considered that the Respondent’s conduct amounted to professional misconduct.

The Tribunal was also satisfied beyond reasonable doubt on the basis of the agreed productions that the Determinations and Direction had been made and had not been complied with. The Tribunal accordingly proceeded to make the requested Order under Section 53C of the Solicitors (Scotland) Act 1980.

The Tribunal invited submissions from both parties prior to considering sanction.

SUBMISSIONS ON BEHALF OF THE COMPLAINERS IN RELATION TO SANCTION

Mr Reid indicated that he had little to add to his previous submissions. He stated that as set out in Article 4.20 there was a clear conflict of interest in this case and the subsequent standard securities should not have been granted when the interest of the Settlement was unprotected.

SUBMISSIONS ON BEHALF OF THE RESPONDENT IN RELATION TO SANCTION

The Respondent indicated that he had no further submissions which he wished to make. In a response to a question from the Tribunal regarding his financial circumstances he stated that his practice has been badly affected by the financial downturn and asked that in all the circumstances the Tribunal could consider not imposing a financial penalty.

EXPENSES

Mr Reid moved for expenses on the usual basis and the Respondent indicated that he had no objections to that. The Respondent indicated that he had no submissions to make regarding publicity.

DECISION ON SANCTION

The Tribunal took into account that this matter involved a failure in relation to one complex single transaction, but noted that it was a continuing failure subsisting for a

considerable period of time. However, the Tribunal had regard to the Respondent's lengthy experience as a solicitor and his previously unblemished record. The Tribunal took into account that the Respondent cooperated with the Complainers and had shown insight into his error of judgement. The Tribunal also noted that the Respondent had appeared before the Tribunal and admitted his failure and that no loss was averred. The Tribunal considered that the Respondent's failure was towards the lower end of the scale of professional misconduct and that the appropriate sanction was a Censure. The Tribunal ordered that the Respondent be liable for the expenses of the Tribunal and of the Law Society in respect of this Complaint and made the usual Order with regard to publicity.

Vice Chairman