

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

FINDINGS

in Complaint

by

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

against

**DOUGLAS WILLIAM SPENCE,
Solicitor, Cimarec Cottage, Fintry,
GLASGOW**

1. A Complaint dated 16 January 2012 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Douglas William Spence, Solicitor, Cimarec Cottage, Fintry, 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 Secondary Complainer is Mr A on behalf of Company 1 (hereinafter referred to as "the Secondary Complainer").
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules the Tribunal appointed a preliminary hearing to be heard on 19 March 2012 and notice thereof was duly served on the Respondent.

5. The hearing took place on 19 March 2012. The Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was present and represented himself.
6. At the commencement of the hearing the Chairman indicated that he and the Respondent had previously worked in the same firm and asked if either party had any comments to make regarding his sitting on the Tribunal in this case. Both parties confirmed that they were content for the Chairman to deal with this case.
7. A Joint Minute was lodged agreeing a number of amendments to the Complaint and admitting the averments of fact, duty and misconduct in the Complaint as amended. Ms Johnston advised that the Secondary Complainer had originally sought compensation but no longer wants to make such an application. No evidence was led.
8. The Tribunal found the following facts established
 - 8.1 The Respondent is a Solicitor enrolled in Scotland. The Respondent was born on 15 August 1970. He was enrolled on 12 January 1995. He was employed by the solicitors firms of Golds, Henderson Boyd Jackson and Miller Becket & Jackson between 3 February 1995 and 30 June 2002. On 1 July 2002 he became a partner in the firms of J.B. Soutar Son & Main and Miller Beckett & Jackson and remained a partner until 31 December 2009. He is not currently the holder of a practising certificate.
 - 8.2 On 29 April Mr A made a complaint on behalf of Company 1 to the Scottish Legal Complaints Commission (SLCC) about the Firm of Miller Beckett & Jackson, 190 St. Vincent Street, Glasgow and three solicitors of that firm including the Respondent. In particular the complaint related to failures in representing Company 1 in their defence to a court action and misleading Company 1 in connection with the progress of the

case. The SLCC considered the Complaint and, issued a Determination on matters relating to the service. Thereafter on 18 August 2010 in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6, the SLCC remitted the complaint to the Complainers to investigate in relation to the professional conduct of the Respondent.

- 8.3 Freelands Solicitors on behalf of Company 2 raised an action against Company 1 at Hamilton Sheriff Court. A warrant to serve the writ was granted on 15 December 2008. On 17 December 2008 a sheriff granted an interim attachment order and assigned 24 December as a hearing. That same day Freelands Solicitors served the writ on the defenders by recorded delivery with a copy of the interlocutor, a motion and a form G4A, intimating the hearing of 24 December. On 18 December 2008 Company 1 sent the service copy documentation to the Respondent's firm with instructions to defend the action. On 19 December a sheriff granted a warrant to arrest on the dependence of the action. On the same day Sheriff Officers served a copy of the writ on the defenders with a certified copy of that interlocutor, a form O7 and a form G7 intimating that the motion for arrestment on the dependence would call on 24 December. The sum of £21,800 was arrested in the hands of Company 3 one of Company 1's main clients with whom they had a substantial contract.
- 8.4 The Respondent was instructed to act for Company 1 and to obtain recall of the arrestment as soon as possible due to the cash flow implications and the potential damage to the company's reputation. On 22 December he signed and lodged the notice of intention to defend and a form G9 opposing the motion for arrestment on the dependence. He stated that his clients were closed for Christmas and he was out of the office until 5 January 2009. His clients' representatives waited in their premises until late on Christmas Eve for confirmation from him that the

arrestment had been recalled. He took no urgent steps to seek recall of the arrestment.

- 8.5 The hearing was continued to 7 January 2009. On 6 January 2009 Mr A contacted the Respondent who told him the case had been continued as the court had not matched up returned documents with the paperwork. The Respondent appeared on 7 January and continued the case to 21 January for instructions. On 8 January the Respondent wrote two letters to Company 1 one a terms of business letter, the other confirming the new date and that the continuation was caused by the court not having marked up returned documents with paperwork lodged. He sought a meeting with the representatives of Company 1 which took place on 12 January. He was provided with letters, plans and documents for the defence to the action and was told how important it was that the arrestment be recalled on the next date. He was provided with updated company accounts demonstrating solvency. He led the Company 1 representatives to believe that he would attend court on 21 January to seek the recall but he did not. He instructed local agents. He did not provide instructions to the agents to seek recall of the arrestment. On 21 January on the pursuer's motion of consent the warrant to arrest was continued and Company 1 were found liable for the expenses of the two hearings in January. An order for defences to be lodged within 14 days was made and a timetable assigned with adjustment to 27 March and an Options Hearing on 9 April. The Respondent wrote to Company 1 on 23 January but did not advise them of the outcome of the hearing. He did not tell them that a local agent had appeared, that an award of expenses had been made against them or of the timetable set and the implications of that. He stated that he was trying to have the arrestment recalled but he took no steps to do so in spite of intimation from Company 1 that it was urgent that he do so.

8.6 Mr A and Mr B on behalf of Company 1 regularly called and e-mailed the Respondent between 22 December 2008 and 1 April 2009 seeking information and advice. On each occasion that a court hearing took place they had to contact him several times to find out what had happened. Numerous e-mails were sent to him seeking advice on procedure and updates on progress and in which the financial difficulties being caused to Company 1 by the arrestment were made clear. An urgent response was often sought. The Respondent issued only three letters to Company 1, the two on 8 January and one on 23 January 2009. He did respond to emails and calls but failed to reply to e-mails of 17 February, 2, 3 and 11 March and failed to return phone calls on over thirty occasions. On 13 February he led Mr A to believe that there was a court hearing on 16 February. Mr A was told that a security payment of £8,000 lodged with the court may allow the arrestment to be lifted and he instructed the Respondent to offer £5,000. There was no hearing on 16 February. The Respondent prepared and intimated a motion for recall of the arrestment on 13 March under increasing pressure from Company 1. He advised Company 1 that it would call on 25 March at Hamilton Sheriff Court and sought a meeting. On 18 March Mr A followed up a telephone call with an e-mail seeking contact with the Respondent who did not reply. Mr. B also e-mailed that day expressing exasperation at the failure of the Respondent to communicate with Company 1 and seeking advice. The Respondent did not reply.

8.7 On 20 March 2009 the Respondent met the directors of Company 1 and senior managers. He admitted he had served the company badly and promised to improve. He told them that he would arrange representation for them by counsel at the hearing on his motion for recall of the arrestment on 25 March. He agreed to fax Company 3 on 25 March to indicate that the arrestment was to be lifted. He advised that the directors would meet counsel Mr

Jonathon Brown on 24 March to finalise their defence. On 23 March 2009 the Respondent confirmed to Mr A that there was to be a hearing at Hamilton Sheriff Court on 25 March and that Jonathon Brown, Advocate would attend to represent Company 1. There was no meeting with counsel arranged by the Respondent. The Respondent prepared a fax to Company 3 in which he stated he was confident that the matter would be determined on 25 March to allow the funds to be released. He provided a hard copy letter for Mr A to take to Company 3 on 25 March in anticipation of the lifting of the arrestment. Mr A drove 300 miles to Buckie to await the fax. Mr. B e-mailed the Respondent on 25 March asking to be informed of the outcome so he could tell Mr A. He made calls to the Respondent's office on his mobile phone. He heard nothing from the Respondent. There was no hearing arranged for 25 March and no counsel was instructed in the action. Mr A e-mailed the Respondent three times on 26 March asking him to call him back. He did not do so. On 31 March 2009 an e-mail was sent to Mr Jackson a senior partner of the firm for his and the Respondent's attention referring to the unexpected calling of the case on 1 April, making it clear that it was imperative that the arrestment be recalled and confirming Mr A's mobile phone number for contact to discuss the hearing. No contact was made with Mr A in advance of the hearing. On 1 April when the defender's motion called in court the Respondent was unprepared, a local agent appeared for the pursuer and the Sheriff rebuked him for attempting an appeal by a back door. His motion was allowed to drop from the Roll for want of insistence. Company 1 thereafter instructed a new firm of solicitors to act on their behalf.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

- 9.1 between 22 December 2008 and 1 April 2009 he delayed unconscionably and ultimately failed altogether to properly represent the interests of, or carry out instructions of his client, Company 1, in court proceedings against them; he failed to keep his clients informed as to the progress of the action, to advise them in a way which allowed them to make informed decisions, to prepare himself for and to conduct hearings on their behalf, to properly instruct local agents or to apply to the court for the recall of an arrestment on the dependence;
- 9.2 between 1 January and 1 April 2009 he failed or delayed unconscionably to reply to emails or return phone calls made to him by the representatives of his client, Company 1;
- 9.3 on 6, 8 and 23 January 2009 he provided his client Company 1 with misleading information about the conduct of their case. On 23 January 2009 he led them to believe that the application for recall of an arrestment on the dependence was a live issue before the court, well knowing that the warrant had been continued of consent, that an award of expenses had been made against his clients and that he was taking no steps to have the warrant recalled.
- 9.4 on 13 February 2009 he misled his client Company 1, he told them that there was a hearing in the court action at Hamilton Sheriff Court on 16 February at which the arrestment could be lifted if a financial bond in security was lodged with the court well knowing that no such hearing was scheduled and that there was no motion before the court for recall of the arrestment on the dependence;
- 9.5 between 20 and 23 March 2009 he misled his client Company 1, he told them that there was a hearing in the court action at Hamilton Sheriff Court on 25 March, that an advocate Jonathon

Brown would attend to represent the company and that a consultation with counsel would take place on 24 March to finalise the defence well knowing that there was no hearing on 25 March 2009, that counsel was not instructed and that there was no consultation arranged for 24 March 2009.

10. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 19 March 2012. The Tribunal having considered the Complaint dated 16 January 2012 at the instance of the Council of the Law Society of Scotland against Douglas William Spence, Solicitor, Cimarec Cottage, Fintry, Glasgow; Find the Respondent guilty of Professional Misconduct in respect of (1) his unconscionable delay and ultimately his failure to properly represent the interests of or carry out instructions of his clients in court proceedings against them, (2) his failure to keep his clients informed of the progress of the action, to advise them in a way which allowed them to make informed decisions, his failure to prepare for and to conduct hearings on their behalf, his failure to properly instruct local agents or to apply to the court for the recall of an arrestment on the dependence, (3) his failure or unconscionably delay in replying to emails or in returning phone calls made to him by the representatives of his clients, (4) his misleading his clients about the conduct of their court action by leading them to believe that an application for recall of an arrestment on the dependence was a live issue before the court well knowing that the warrant had been continued of consent, that an award of expenses had been made against his clients and that he was taking no steps to have the warrant recalled, (5) his misleading his clients by advising them that there was a hearing fixed at which an arrestment could have been lifted, when he was aware that no such hearing was scheduled and that there was no motion before the court for the recall of the arrestment, and (6) his misleading his clients about the conduct of their court action by advising them that there was a hearing fixed when an

advocate would attend to represent the company and that there would be a consultation the day before the finalise the defence, when he knew that there was no such hearing and that counsel was not instructed and therefore no consultation was arranged; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for a period of two 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 Sub Committee of the Council of the Law Society of Scotland and that for an aggregate period of at least two years; 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

The Chairman indicated that he and the Respondent had previously worked in the same firm and asked whether parties were content that he should deal with this case. Both parties confirmed that they had no issues with the Chairman dealing with this case.

This Complaint was originally set down for a procedural hearing however a Joint Minute was lodged amending the Complaint and admitting the averments of fact, duty and misconduct in the Complaint as amended. No evidence required to be led.

Three letters were lodged as productions by Ms Johnston.

SUBMISSIONS FOR THE COMPLAINERS

Ms Johnston stated that it had not been possible for her and the Respondent to meet prior to the hearing date to discuss matters. However, she advised that they had been able to reach agreement earlier that morning and a Joint Minute had been lodged agreeing to delete a number of averments in the Complaint and agreeing the averments of fact, duty and misconduct in the Complaint as amended.

Ms Johnston stated that she had lodged three letters written by the Respondent as productions.

Ms Johnston advised that the Complaint arose from a situation where from the very start the Respondent did not deal appropriately with a court action. He misled his clients and did not properly advise them. The result of this was that his clients did not properly understand how the court procedures worked and this was compounded by the fact that the Respondent did not deal with the action appropriately and give proper advice on a clear basis. The recall of the arrestment on the dependence was a significant issue for the Respondent's clients. This had a significant effect on their cash flow and also caused potential damage to the company's reputation whilst they were seeking to attract other business. The company had explained to the Respondent the reasons why they needed to take immediate steps to get the matter resolved.

Although instructed in late December 2008 it was not until March 2009 that the Respondent took steps to enrol a motion to recall the arrestment and the clients were severely prejudiced and misled during that period. It transpired that court hearings which the Respondent had stated were scheduled in February and March had not actually been fixed by the court.

Ms Johnston referred the Tribunal to the two letters of 8 January 2009 and the letter of 28 January 2009 which had been lodged.

Ms Johnston advised the Tribunal that the Secondary Complainer was originally seeking compensation. However, she advised that she had spoken to Mr A's solicitor who had confirmed that she had provided advice to the company and that they no longer wished to apply for compensation.

SUBMISSIONS FOR THE RESPONDENT

The Respondent stated that there was little that he could add to what had been said by Ms Johnston. He advised that he very sincerely regretted the failures which led to his appearance before the Tribunal. He stated that this was a file which he did not deal with properly from the very outset. His recollection was that the instructions came in from a colleague on 22 December 2008 which was the day he was due to commence his Christmas break. He stated that he had indicated that he would not be able to deal with the matter until the New Year. However in the New Year he was dealing with an Employment Tribunal hearing and as a result did not have enough time to properly deal with the file. He stated that this was a classic case of his not being able to cope with his workload. He advised that he was the sole court practitioner and he had no secretarial support so he was responsible for preparing all documentation and correspondence. He stated that with the varied nature of the firm's business he was required to undertake all the court work and simply took on too much work and was not coping with the workload.

He advised that since then he has taken himself out of the profession and that he left the firm on 31 December 2009. He stated that it was not his intention to return to the profession as he does not think he could go back to practising law again. He advised

that when he left the practice about £75,000 of money due to him was retained by the firm. He stated that this money will be used to meet the liabilities which he incurred, including a compensation award made by the Scottish Legal Complaints Commission in relation to this matter. He advised that in leaving the money with the firm he has tried to disburden his colleagues of any financial penalty for his failings.

The Respondent stated that he was truly sorry for what happened in this case and stated that if he had been able to devote time to it a different conclusion would have been achievable. He advised that he regretted not being in a position to deal with the file properly.

In response to a question from the Tribunal, the Respondent advised that he was working part time in a gardening business approximately two days a week. The rest of the time he is doing voluntary work with a local sports club and is looking after his children. He is relying on his wife for financial support.

In response to a question from the Tribunal as to whether he would expect to receive any money back from his former firm, the Respondent replied that there may be around £10,000 to be returned to him, however other claims may be made.

DECISION

The Tribunal noted that the Respondent had delayed and ultimately failed to properly represent the interests of his clients in a court action. He had also failed to keep them informed of progress in the action and misled them about how the action was being conducted. The Tribunal considered the test in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC 129. The Tribunal considered that given the Respondent's failure to deal with this file appropriately and the fact that he had misled his clients, the Respondent's actions could be regarded by competent and reputable solicitors as a serious and reprehensible departure from the standards expected from those within the profession. Having considered all the circumstances, the Tribunal concluded that the Respondent's actions constituted professional misconduct.

In considering sanction, the Tribunal noted that the misconduct involved only a single file and was committed over a short period of time. The Tribunal took into account the Respondent's previous unblemished record in the profession and the fact that he has shown insight into his failures by voluntarily leaving the profession. The Tribunal also noted that the Respondent had appeared before the Tribunal, had candidly admitted his failures and had shown a keenness to have the matter resolved. In all the circumstances the Tribunal considered that the Respondent's conduct was at the lower end of the scale of professional misconduct. However, the Tribunal was concerned about the risk of these failures being repeated should the Respondent decide to return to the profession at a later date. Accordingly the Tribunal considered that it was necessary for the protection of potential future clients that, in addition to censuring the Respondent, his practising certificate should be restricted and he be supervised for a period of two years if he returns to practice. The Tribunal did not consider it necessary to impose a fine in addition to the restriction given that the Respondent has already paid compensation to the Scottish Legal Complaints Commission in relation to a complaint made by his clients arising out of this matter. The Tribunal made the usual order with regard to expenses and publicity.

Vice Chairman