

**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, formerly at 26
Drumsheugh Gardens, Edinburgh and
now at Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**GERARD JAMES McCARRON,
McCarron & Co, Bank House, 17 High
Street, Airdrie, North Lanarkshire**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Gerard James McCarron, McCarron & Co, Bank House, 17 High Street, Airdrie, North Lanarkshire (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no 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 the Complaint to be heard on 16 December 2015 and notice thereof was duly served upon the Respondent.
5. At the hearing on 16 December 2015, the Complainers were represented by their Fiscal, Ms Motion, Solicitor Advocate, Edinburgh. The Respondent was present and was represented by Mr Conway, Solicitor Advocate, Glasgow.

6. An amended Complaint and a Joint Minute between the parties agreeing all of the averments of fact, duty and professional misconduct were received by the Tribunal. Additionally, in advance of the Tribunal, the Respondent had lodged four testimonials. Given the extent of the agreement between the parties, no evidence required to be led. The Tribunal heard submissions from both parties.
7. The Tribunal found the following facts established:-

7.1 The Respondent is a solicitor enrolled in the Register of Solicitors in Scotland. He was enrolled as a solicitor on 13 January 1978 and has been a Principal in private practice since 19 September 1983 as a Partner of McCarron & Co, Bank House, 17 East High Street, Airdrie, North Lanarkshire.

Mrs A -Law Society of Scotland ex proprio motu

7.2 On or around 3 November 2011 the Respondent was requested to and did accept instructions to act on behalf of Mrs A and her husband to draft a Minute of Agreement to regulate their financial affairs on separation, with a view to divorce. The Respondent had acted for Mr & Mrs A for around 30 years in relation to conveyancing matters. As at November 2011 Mrs A had already paid Mr A £20,000 as part of the settlement agreed with her husband and before the Respondent was consulted. The Respondent agreed to act for them both despite the obvious conflict of interest and having:

- (a) acted for them both for many years
- (b) no requisite expertise or competence in the family law area.

7.3 The Respondent drafted the requisite Minute of Agreement (the Minute) and provided it to both Mr & Mrs A (the parties). This Minute regulated the parties' financial affairs including payments of money; relief from debts and survivorship on death waiver. In short it comprised a full and final settlement of all financial claims and was a renunciation and discharge of all rights the parties had in the future against each other. The Minute was executed by both parties on 17 November 2011 before the Respondent as the witness. He did so on the assurance of both parties that it was an amicable separation the Respondent having been assured that all matters had been agreed between Mr and Mrs A.

- 7.4 At no time prior to the execution of the Minute did the Respondent record on file any advice to either party that he could not act for either or advise either to take separate legal advice. At no time did he seek input from a solicitor or advocate with the requisite family law expertise. In November 2011 he submitted an invoice to each party for their half share of the cost of said Minute.
- 7.5 After the Minute had been executed he continued to correspond with the parties and in particular between March and August 2013 in relation to compliance with the agreement.
- 7.6 In June 2013 Mrs A discovered that her husband was having an affair as a result of which she wished to vary the Minute, effectively seeking to reduce the assets Mr A was to receive. The Respondent subsequently corresponded separately with each party and met with them separately on a number of occasions to ascertain whether variations to the Minute could be agreed. At no time during this period did he identify a conflict or advise both parties to seek separate legal representation.
- 7.7 In November 2013 Mrs A instructed another firm of solicitors and agency was transferred from the Respondent. At that time he acknowledged to Mrs A's new solicitors that he was "not normally involved in this type of business". He asserted the parties had been told at the time to consult separate agents but had refused to do so but there is nothing on the Respondent's file to indicate such advice was given. He then continued to act for Mr A, despite a complaint having been lodged with the SLCC against him by Mrs A in relation to the conflict of interest in acting as above. The file indicates he was so acting up to 20 February 2014.
- 7.8 Accordingly during the period between at least 3 November 2011 and 20 February 2014 the Respondent proceeded to act in the matter narrated above despite the fact that he:-
- (a) Knew that he had acted for the parties as a joint instruction in conveyancing matters for many years;

- (b) Knew that he did not have the requisite expertise in the area of family law and did not seek such expert input;
- (c) Did not seek any professional external advice as to the appropriateness of his acting for either or both parties;
- (d) Did not refuse to act for either or both prior to or at the time of execution of the Minute;
- (e) Did not record any advice to the parties to seek separate legal advice either prior to or at the time of execution of the Minute;
- (f) Continued to act for both parties even after Mrs A wished to vary the executed Minute in the circumstances set out above;
- (g) Continued to act for Mr A even after a “conflict of interest” complaint had been lodged by Mrs A with the SLCC and she had instructed alternative solicitors.

7.9 The Respondent’s explanation and justification for his actions were that the parties indicated the separation was amicable. At no stage prior to the date of the Complaint has there been an acceptance that his actions were inappropriate. As at 3 December 2015 there was such an acceptance.

8. Having carefully considered the established facts and the submissions on behalf of both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect of his:

8.1 accepting and acting on the instructions of clients where he had insufficient competence and appropriate skills; and

8.2 acting for two clients in the drawing up of a separation agreement where there was a clear conflict of interest at the outset and he continued to act when parties were clearly no longer in an amicable situation and thereafter continued to act for one client where the other had instructed alternative solicitors and had complained to the SLCC.

9. Having given careful consideration to the submissions made on behalf of both parties, and in particular the testimonials lodged on behalf of the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 16 December 2015. The Tribunal having considered the amended Complaint at the instance of the Council of the Law Society of Scotland against Gerard James McCarron, McCarron & Co, Bank House, 17 High Street, Airdrie, North Lanarkshire; Find the Respondent guilty of professional misconduct in respect of his accepting and his acting on the instructions of clients where he had insufficient competence and appropriate skills and acting for two clients in the drawing up of a separation agreement where there was a clear conflict of interest at the outset and he continued to act when parties were clearly no longer in an amicable situation and thereafter continued to act for one client where the other had instructed alternative solicitors and had complained to the SLCC; Censure the Respondent; 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 and may but has no need to include the names of anyone other than the Respondent.

(signed)

C Bell

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

Colin Bell
Vice Chairman

NOTE

At the hearing on 16 December 2015 the Tribunal had before it an amended Complaint, a Joint Minute between the parties agreeing all the averments of fact, duty and professional misconduct and the documentary Productions previously lodged on behalf of the Complainers. It also had before it four testimonials previously lodged on behalf of the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion indicated that the Complaint was only slightly amended. The amendments made clear that £20,000 had been paid by one client to the other prior to the Respondent being involved. Additionally, the amendments clarified that although there had been no acceptance of any misconduct as at the date of the Complaint itself, there had been such recognition since 3 December.

The Joint Minute agreed the Productions lodged on behalf of the Complainers. The Fiscal had the original file with her should the Tribunal require to see it. She submitted that this was a straightforward case involving an experienced practitioner who had tried to assist two longstanding clients and in doing so he had lost sight of his professional obligations.

The Respondent had no expertise in the matrimonial field. One of the testimonials lodged on behalf of the Respondent disclosed that generally the Respondent transferred such cases to a colleague with the appropriate experience.

The Respondent's conduct in this case had extended over a period of 24 months. There had been various stages where alarm bells should have rung indicating a conflict of interest and indicating that the Respondent should take a step back from both clients. The Complainers were concerned that there had been no awareness of these issues on the part of the Respondent. The Respondent's wish to help his clients had taken precedence over his obligations and independence. The Fiscal submitted that the risk of repetition however was not high given the Respondent's current understanding of the situation.

Ms Motion indicated that she would reserve submissions in relation to sanction for the next stage.

SUBMISSIONS FOR THE RESPONDENT

Mr Conway thanked the Fiscal for her measured terms and her submissions. He invited the Tribunal to look at the four testimonials lodged on behalf of the Respondent. He indicated that he was beginning his submissions in this way not just to give the Tribunal insight into the kind of person the Respondent is but to give some explanation of how he found himself before the Tribunal after 38 years of unblemished practice.

He referred to the testimonial by Ms B who had previously been a partner in an Airdrie firm. This testimonial indicated a common thread that the Respondent had a generous and nurturing attitude to colleagues. At a time when Ms B had been recovering from a period of illness the Respondent had taken all of her conveyancing work to complete at his home and this had allowed her a seamless transition back to work as she became well again. This had all been done on a gratuitous basis. Mr Conway had worked in the area at that time and had known that Ms B was ill but had not known what help the Respondent was giving to her. This testimonial also indicated that if there was a conveyancing matter that the Respondent could not deal with then he had no reservation in passing the matter onto a colleague.

The testimonial of Mr C also presented the same picture of a local conveyancing practitioner with a prodigious work ethic who also had a nurturing and helpful attitude to colleagues who could only be seen as “competitors”.

Mr Conway submitted that the Respondent was one of the most successful small conveyancing practitioners in Scotland and was listed amongst the top 30 in Scotland.

On a personal note, Mr D, the former MP for Monklands in his testimonial described a man of integrity and sensitivity.

The testimonial of Mr E, the Minister of the Church where the Respondent worships, confirmed that the Respondent was involved in fundraising activities. The Respondent’s firm makes monthly gift aid contributions to the charity known as Mary’s Meals.

The overall picture painted was of a person of generosity of spirit and practice.

The Respondent knows his area of competence. It was his rule of thumb to pass matters on. The Respondent's business was based on word of mouth. The Respondent does not act on instructions from building firms. He does not offer incentives to clients. He has acted for three generations of families locally. These particular clients were second generation clients, the Respondent having acted for both sets of parents previously. In general, Mr Conway submitted that the local community is no respecter of a division of competence. In general people will assume that the Respondent was "Mr Fixit" and could do anything. It was against this background that the Respondent was approached by these clients. The Respondent's initial instinct had been to turn them away but the clients had insisted that he act for them and he had been prevailed upon to act on the assurance that all matters were agreed between the parties. In truth, the Respondent should have followed his own instincts. This was not an area of law in which he had ever practised. It was disastrous judgment to agree to help people in an area where he was not competent.

This was a fatal blind spot. He saw his role as articulating and putting in legal form what the parties had agreed. What could go wrong? Now we know.

The email exchange between the Respondent about this matter showed a disarming candour on his part where he was initially bewildered and wondered what he had done wrong.

This flowed from his decision to act in an area where he was not competent to act.

Even after a Complaint had been made to the SLCC the Respondent was trying to fix things. His only motivation had been to fix things. He had continued to act for Mr A. On Mr Conway's reading of the Complaint he was actually continuing to act for both. He continued to look to find a way to implement the transfer of the matrimonial home.

There was no suggestion that either client had been disadvantaged. All of the Respondent's actions had been in plain view. This disclosed a dreadful naivety on the part of the Respondent.

The Respondent had taken a style separation agreement from another transaction. His fee in connection with the matter had been £100 plus VAT.

The Respondent has an unblemished record of 38 years – *“all of which has now gone up the spout.”* Mr Conway submitted that this would not happen again.

Mr Conway submitted that in his own unostentatious way, the Respondent had been a credit to the profession. He invited the Tribunal to exercise leniency.

SUBMISSIONS FOR THE COMPLAINERS REGARDING PENALTY

At the conclusion of Mr Conway’s submissions, the Fiscal asked the Tribunal if she should address it now in relation to penalty, given that the Respondent’s submissions had related principally to disposal. The Tribunal confirmed that she should make her submissions at this stage.

She indicated that much of what she had said earlier with regard to the question of misconduct was also relevant to disposal. She confirmed that the Respondent had no previous disciplinary record.

She had had to prepare for the hearing today as there had only been real cooperation from the Respondent from approximately 10 November 2015 after he had instructed representation.

She submitted that there had been an impact on one of the Respondent’s clients as Mrs A had had to seek advice from another firm of solicitors.

She submitted that it was for the Tribunal to decide where on the scale of misconduct this particular case rested.

DECISION

Although the Respondent was clearly conceding that his conduct amounted to professional misconduct, the Tribunal required to consider itself whether or not the conduct met the standard required.

The issues of conflict of interest are fundamental to a solicitor’s practice. It is for the solicitor to identify any conflict of interest, not a client. It should have been clear from the outset that there was a conflict of interest between both clients in the drawing of the

separation agreement. Whilst it has been said that the solicitor was persuaded to act for both parties on the basis that the clients had stated that they were in agreement with regard to the content of any separation agreement, any experienced solicitor should have recognised the potential for a conflict of interest. Thereafter, when things between the clients were no longer amicable, the Respondent had continued to act for both of them. This conduct was clearly inexcusable and clearly fell below the standard to be expected of a competent and reputable solicitor to a degree that could only be considered serious and reprehensible.

Separately, the Respondent had agreed to act in an area of law where he had no experience whatsoever. This had no doubt contributed to his failure to identify a blatant conflict of interest. This should emphasise the importance of a solicitor only accepting instructions in an area of law where he has some experience and competence. This element of the Complaint separately in the Tribunal's view represented conduct falling below the standard of conduct to be expected of a competent and reputable solicitor.

Accordingly, the Tribunal found the Respondent guilty of professional misconduct.

In considering disposal, the Tribunal accepted the Respondent's explanation that he had had the best of intentions in becoming involved in these matters. The Respondent has a considerable previous record of good conduct. The testimonials disclosed an individual who in normal practice did not hesitate to pass on clients or transactions which he felt unable to deal with. Whilst the Respondent may well have taken on these instructions as a result of a desire to help both clients, a desire to help a long established client cannot justify a departure from his professional obligations, duties and standards.

Whilst it may have been well through the proceedings before the Tribunal before the Respondent recognised his misconduct, he had nonetheless entered into a Joint Minute agreeing all the facts, averments of duty and professional misconduct. The finding of professional misconduct in itself will have a significant effect on the Respondent, tarnishing a previously good record.

In all of these circumstances, the Tribunal concluded that the matter could be dealt with appropriately by way of a Censure.

The Fiscal had moved the Tribunal for an award of expenses and publicity in the normal course. The Respondent confirmed that he had no objection to either motion. Accordingly the usual orders were made.

Colin Bell
Vice Chairman