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

F I N D I N G S

in Complaint

by

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

Complainers

against

CHRISTOPHER JAMES FORREST, formerly of 10 Albert Place, Stirling, and now at Trinity, 16 Marchmont Avenue, Polmont

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 Christopher James Forrest, formerly of 10 Albert Place, Stirling, and now at Trinity, 16 Marchmont Avenue, Polmont (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 25 October 2019 and notice thereof was duly served on the Respondent. On 21 October 2019, on the unopposed motion of the Respondent, the Chair, exercising the functions of the Tribunal under Rule 56 of its Rules, adjourned the hearing fixed for 25 October 2019. The Tribunal fixed a hearing for 20 January 2020 and notice was duly served upon the Respondent.

5. At the hearing on 20 January 2020, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Douglas Mill, Livingston. A Joint Minute of Admissions was lodged. The Complainers led no evidence. The Respondent and one witness gave evidence for the Respondent. Parties made submissions.

6. The Tribunal found the following facts established:-

6.1 The Respondent is a solicitor enrolled in the Registers of Scotland. He was enrolled as a solicitor on 13 November 1973 and his date of birth is 4 April 1948. From 1 September 1974 until 3 May 2016 he was a partner in the firm of Gibson & Kennedy, Solicitors, Benview, Wellside Place, Falkirk (hereinafter referred to as "the firm"). On 1 June 2000, he was appointed as Cashroom Partner and subsequently became the Cashroom Manager. On 24 August 2005 he was appointed the Client Relations Partner. On 1 November 2010 he was appointed the Anti-Money Laundering and Risk Management Partner. He retained all of these positions and roles until 3 May 2016. On said date, the firm merged with Kerr Stirling LLP and the Respondent was appointed as a Consultant in that firm. He subsequently retired from practice on 31 May 2018.

6.2 On 8 August 2016, the Respondent was instructed by clients, VB and JM, in respect of the sale of their property. On 3 August 2016 an offer was submitted by Tait Macleod Solicitors (hereinafter "TM") on behalf of their client WW for the purchase of said property in the sum of £226,226 with a Date of Entry of 25 August 2016. Said offer incorporated the conditions contained in the Scottish Standard Clauses (edition 2) specified in the Deed of Declaration registered in the Books of Council and Session for Preservation on 15 March 2016.

In terms of Condition 9 of said Standard Clauses, it was stated that:-

"9.1 The seller warrants that neither the property nor the seller's title are effected by or are under consideration in any Court proceedings or other litigation or are the subject of any dispute.

9.2 There are no current disputes with neighbouring proprietors or occupiers or any other parties relating to access, title or common property."

By letter dated 9 August 2016 the Respondent sent a copy of said letter to his clients for their instruction and drew their attention to the said Standard Clauses. By email dated 10 August 2016, the Respondent's clients provided instructions in relation to the said offer, and in particular in relation to condition 9 of the said Standard Clauses, the clients advised "nothing either side – possible back fence will need replaced at some time – mentioned by valuer."

6.3 On 11 August 2016, a letter was received from the Estate Agents who had been marketing the said property, enclosing a letter from solicitors acting on behalf of a Residents Association. Said letter was dated 9 August 2016 and narrated that it was their clients' position that the Respondent's clients had encroached upon common space in their ownership by the erection of a fence and that the Residents Association reserved the right to take enforcement action. By letter dated 15 August 2016, the Respondent issued a Qualified Acceptance on behalf of his clients seeking to amend the Date of Entry to 30 September 2016. Said Qualified Acceptance did not qualify, nor delete, the said condition 9 of the Standard Clauses and made no reference to any boundary dispute which may have been present with the said Residents Association. By letter dated 15 August 2016, the Respondent wrote to the solicitors acting for said Residents Association and sought clarification as to the claims advanced regarding the alleged encroachment.

6.4 By letter dated 6 September 2016, the solicitors acting for said Residents Association provided further details of their client's contention regarding the alleged encroachment and sought confirmation that the Respondent's clients would re-instate the correct boundary. By letter dated 9 September 2016, the Respondent wrote to his clients enclosing a copy of the said letter and advising that "it would seem that the issue of the fence is not going to go away…", and sought their further instructions. On 13 September 2016, the Respondent obtained further instructions from his clients by email and telephone and noted that "this is starting to grow arms and legs and I have asked how difficult it would be to sort the fence and she says it would mean the store will have to be dismantled but that it would take them about a day. I have told her she should do that as we can't

have any disputes outstanding if the sale goes ahead." The clients advised that they would address the issue of the said fence. A reminder letter was received from the solicitors acting for the said Residents Association dated 14 September 2016.

6.5 By email dated 20 September 2016, the Respondent advised the solicitors TM that the clients' proposed purchase had fallen through and the clients accordingly wished to still proceed with the sale to WW but to delay the date of Entry to 30 November 2016. The Respondent went on holiday on 22 September 2016 and a colleague, AN, took over the said transaction and file. By letter dated 26 September 2016, the said solicitors TM issued a further missive seeking to amend the Date of Entry to 5 October 2016 in addition to further qualifications regarding an internal repair and the addition of an item of kitchen equipment. By letter dated 27 September 2016, bearing the Respondent's email address a further missive was issued on behalf of the clients qualifying the condition regarding an internal repair. By letter dated 28 September 2016 AN wrote to the clients enclosing a copy of the further missive and providing an update with regard to the progress towards the settlement of sale transaction. No further instructions were sought within that letter in relation to the alleged boundary dispute. By letter dated 28 September 2016, the said solicitors TM issued a missive concluding the bargain with the Date of Entry being 5 October 2016. The said sale transaction settled on that date.

6.6 By letter dated 7 October 2016, the solicitors TM intimated certain internal issues and defects ascertained by WW upon taking entry to the property and requiring to be rectified by the Respondent's clients in terms of the missives. A copy of said letter was emailed to the Respondent's clients on 7 October 2016. By letter dated 9 November 2016 the solicitors TM wrote to the Respondent's firm firstly in relation to the issues highlighted in their previous letter of 7 October but further, narrating that their client, WW, had now been made aware of the terms of the correspondence issued by the solicitors acting on behalf of the Residents Association and that in relation to the alleged boundary dispute. The solicitors TM intimated that the Respondent's clients were in breach of contract in failing to disclose the boundary dispute in terms of Clauses 9.1 and 9.2 of the said Standard Clauses. The Respondent sent a memo to AN dated 9 November 2016 in which it

is narrated "the main concern would seem to relate to the dispute between our clients and the adjoining proprietors regarding a division fence which was not disclosed.". Further correspondence was exchanged between AN and the solicitors TM dated 11, 21 and 22 November 2016, in the course of which it was maintained by the Respondent's firm that neither they nor their client interpreted the boundary situation as "a dispute". They conceded that there had been a dialogue concerning a fence line but the matter had not escalated to the point of "a dispute". Said position was not accepted by the solicitors TM nor their client WW.

6.7 From on or about 11 August 2016 until 22 September 2016 the Respondent was aware that there was a boundary issue between his clients and neighbouring proprietors namely the Residents Association. He issued correspondence and advice to his clients in relation to said matter. He did not disclose any of the correspondence or circumstances in relation to said boundary issue to the said solicitors TM, either during or prior to the conclusion of missives or settlement of the transaction. He did not make any comment or qualification to the said Clauses 9.1 and 9.2 of the said Standard Clauses incorporated into the missives of the said sale transaction. The Respondent did not disclose the nature of that dispute to the said solicitors TM and thereby their client WW.

7. Having given careful consideration to the admitted facts and the submissions made by parties, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal did not consider that the Respondent's conduct met the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

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

Edinburgh 20 January 2020. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Christopher James Forrest, formerly of 10 Albert Place, Stirling, and now at Trinity, 16 Marchmont Avenue, Polmont; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent, 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 but need not identify any other person.

(signed)

Kenneth Paterson

Vice Chair

9. 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 27 FEBRUARY 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Kenneth Paterson

Vice Chair

NOTE

At the hearing on 20 January 2020, the Tribunal had before it a Record, a Joint Minute of Admissions and an Inventory of Productions for the Complainers. The Joint Minute of Admissions admitted various statements of fact contained within the Complaint. Mr Mill clarified that he did not intend to withdraw the Answers as these would be used as the foundation for the Respondent's evidence. The Complainers led no evidence. The Respondent and Ms A gave evidence for the Respondent.

EVIDENCE FOR THE RESPONDENT
WITNESS ONE: THE RESPONDENT

The witness gave evidence on oath. He was asked to refer to a copy of the Record. He agreed that the employment history set out in that document was correct.

The Respondent confirmed that he dealt with the house sale in question while working as a consultant for Kerr Stirling LLP. He noted that he forwarded the standard offer and clauses to the clients by email and letter. He specifically drew the clients' attention to the important clauses. He had an email response from JM. He also spoke to her on the telephone and "went through everything". She was the principal point of contact. Her husband VB worked offshore. They were established clients. He had worked for them twice before.

The Respondent said he received a letter from solicitors acting for a residents' association making allegations about a fence having been moved. He spoke to JM about it. He sent a copy of the clients' title to the firm acting for the residents' association. The Respondent did not know who the clients were and whether they had an interest in the matter. He asked them to confirm their locus and provide measurements of the disputed boundary as their letter contained no specification.

The agents responded by letter, but according to the Respondent, their letter did not assist. It raised issues about trees and branches. The Respondent spoke to JM again and sent her a letter. He spoke to her the following week by telephone. During the telephone conversation she was upset about an incident regarding a ladder. The Respondent told her the issue need to be resolved. The Respondent thought that if the store was the issue, as the client reported, and that was resolved, this would solve the problem regarding the harassment. She said it would take one day to remove the store. The Respondent advised she should do this. She agreed to do it.

The Respondent said he had no evidence there was any other "dispute". He would not define it as a "dispute" but obviously something was upsetting the neighbours. JM thought if she moved the shed everything would be alright. The Respondent was relying on the client because there was no evidence provided to the contrary.

The Respondent sent an email to the buyers' solicitors saying there was an issue with the sale. He suggested they concluded missives with a long-stop date of entry. The Respondent went on holiday and handed the file over to AN. She concluded missives and settled the transaction. AN was an experienced solicitor. She knew what she was doing. The Respondent had known her for many years although he had only worked with her in the same firm for a short period. The Respondent left her a "holiday note". However, it did not mention the fence because he did not think it was an issue. They would normally have had a handover chat, but the Respondent could not remember if they had a meeting before this particular holiday.

The Respondent said his next involvement with the file was in mid-November. The buyers' solicitors received a letter from the agents for the residents' association. The buyers' solicitors wanted to know why the issue regarding the fence had not been disclosed to them. The implication of the letter was that JM and VB had not carried the work JM said would be done. In the Respondent's view, if that was the case "they were on their own". They had assured him they were going to sort it out.

The Respondent was asked about his use of the word "dispute". He said that for a dispute to exist, the matter in dispute must be clear. The party doing the disputing must have title to dispute and must not just be "stirring it". The matter must remain unresolved. With regard to the circumstances of this case, the Respondent said he did not know what the issue was about, he did not know if the residents' association had title, and in any case to him, the matter was resolved.

No bargain was concluded while the Respondent was dealing with the transaction. The issue of the fence alignment had not been clarified to become an issue. There was "something" there but using the terminology of the guidance related to standard clause 9, the issue was not "self-evident" to the client.

In answer to Mr Mill's questions, the Respondent said he did not mislead the parties, AN, the purchaser's solicitor or the agent for the residents' association. If AN was not fully informed of the issue from the handover meeting, she worked it out from the file. She settled the transaction and fee'd the clients.

The witness was cross-examined. With reference to Production 2 for the Complainers, the standard clauses, the Respondent agreed that standard clause 9 refers to a "dispute" and that there is no definition of "dispute" in the document. The Respondent drew his clients' attention to clause 9 in his letter to them dated 9 August 2016 (Production 3 for the Complainers).

The Fiscal referred the witness to Production 5, the letter dated 9 August 2016 from the solicitors for the Residents Association. The Fiscal suggested that this letter described a dispute about a boundary. The Respondent said it would have been wrong of him to treat this as a dispute. The letter might imply an alleged boundary dispute but there was no specification of any dispute and the clients did not think there was a dispute.

The Fiscal asked the Respondent when an "issue" becomes a "dispute". The Respondent repeated that parties would have to have title, there should be clarification of the matter in dispute with photographs and measurements if necessary, and the matter must remain unresolved. If a client comes in and says he has a dispute with a neighbour, a solicitor must accept what he says. However, a solicitor cannot be expected to disclose a dispute on the basis of such a "wishy-washy" letter. It would not be correct to disclose without ascertaining the facts. The agents acting for the residents' association did not provide appropriate detail despite being requested to do so.

The Fiscal, with reference to the Productions, suggested that the Respondent was aware that the dispute was about the location of a boundary fence. The Respondent said he did not know what the problem was. From his conversation with JM, he though the store was the problem. He told them to dismantle it and reluctantly JM agreed to do that.

The Fiscal said the file shows there was an acceptance by JM that there was a problem with the boundary. The Respondent agreed that if JM did not move it, he was going to have to disclose it. However, the matter was resolved by her agreeing to remove the shed.

The Fiscal referred the witness to Production 12 in which the solicitors for the Residents Association said their client wanted the boundary put back to the "correct line". He suggested this clarified the issue. The Respondent said there was still no evidence of title and the solicitors did not provide specification of their issue. In his view, the matter was resolved. If it was not resolved, he would have had to disclose the issue to the purchasing solicitors.

The Respondent said it was too long ago to know whether if it crossed his mind to check with the client that the situation was resolved. The Fiscal suggested clause 9 exists to prevent exactly this situation. The Respondent said this was only if there was certainty regarding the dispute and evidence of title. The Fiscal asked whether, with hindsight, it would have been preferable to disclose. The Respondent disagreed that he should have disclosed, but accepted there are always things which could have been done better. For example, he ought to have confirmed his telephone call with JM in a letter.

The Fiscal noted that the Respondent referred in correspondence to "the dispute" (Production 21 for the Complainers). The Respondent said he was summarising the letter from TM. The Fiscal suggested that the Respondent did consider this to be a dispute. The Respondent disagreed. He interchanged "issue" and "dispute" in the correspondence. The Fiscal queried whether the whole matter turned on the definition of dispute. The Respondent replied that he thought most conveyancers would agree with his interpretation. The Respondent said he knew that the Secondary Complainer claimed loss but said he did not know why the claim was so high or so late.

The witness was re-examined. He confirmed he had a telephone conversation with JM after the email of 13/09. She said she would do what it took to solve the problem.

WITNESS TWO: AN

The witness gave evidence on oath. She was admitted in 1987. She works in private practice specialising in property law. She has known the Respondent for many years. He is thorough and diligent. Her firm took over the Respondent's firm. After that, they worked together in the Falkirk office. She provided holiday cover for the Respondent.

On 20 September 2016, the Respondent went on holiday and she was passed the file for the transaction in question. It seemed like a routine sale. She familiarised herself with the file. She was aware that an issue had been raised regarding a boundary fence. She saw from the file that the Respondent had responded to the initial letter from the solicitors for the Residents Association by providing the title plan. The solicitors had not sent any photos or measurements or returned the plan with annotations. She had a conversation with JM. She understood the issues had been resolved. It was hard to remember the exact specifics. To the best of the witness's recollection JM said that the items on the wrong side of the fence had been removed and the matter was resolved.

The witness explained that the transaction was in a chain which paused. Timescales became protracted.

The transaction went "off the boil" and then got going again. Nothing specific was received during this time from the solicitors for the Residents Association. In her view there was insufficient to characterise this issue as a "dispute". The plan had not been returned. The purchasing solicitors had raised no issues about boundaries.

She did not consider that there had been any misleading of the buyer's solicitor. Post-settlement, the firm received a claims letter. It was largely spurious and was rebutted. In her judgement, there was no dispute.

The witness was cross-examined. The Fiscal asked what the Respondent told her about the boundary issue before he went on holiday. She said he drew her attention to the letter from the solicitors for the Residents Association which was in the file. She looked at all the correspondence in the file.

The Fiscal referred the witness to Production 8 for the Complainers which was letter from the solicitors for the Residents Association dated 6 September 2016. She said she had received this letter. The Fiscal noted this letter raised a concern about a boundary. The witness said that the clients told her this had been dealt with. The fence had been in poor condition and parts needed replaced.

With reference to various Productions, the Fiscal suggested that there was an unresolved despite extant. The witness said that there was no evidence of a discrepancy between the fence and the title plan. The client said the matter was resolved.

The Fiscal noted that there was no note on the file regarding a telephone call with the client. The witness said she would not have issued a missive without specific instruction from the client. She noted that her letter to JM referred to a recent telephone conversation. The witness said she had several telephone conversations with JM. If the issue had not resolved, she would have disclosed it. However, it was not her interpretation that this was a dispute. A dispute requiring disclosure would be supported by photographs showing the discrepancy of the original line and the new fence or a letter containing measurements or annotations on a plan. This could have been followed up and resolved or disclosed. The client told her the fence was in its original position, give or take a few centimetres. The issue had not crystallised into a dispute. Her judgement was based on her experience. She had a clearer recollection of her later conversation with JM post-settlement but she remembered that it echoed the conversation pre-settlement regarding the replacement posts. She could not recollect when the posts were removed.

The Fiscal noted the Respondent's use of "dispute" in his memo. The witness said in her view this was a common use of the word and there was no dispute requiring disclosure. The clients assured them the issue had been resolved.

The witness indicated that most discussions with the clients took place by telephone but the witness also met them for the purpose of taking copies of their identification documents.

The witness was not re-examined.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal said the facts in the case were agreed. AN gave evidence of a conversation with the client pre- and post-settlement which indicated to her that the matter was resolved. The Tribunal would have to take a view of the credibility of her evidence and that of the Respondent. It was for the Tribunal to determine whether, up to 20 September 2016, the circumstances amounted to a dispute which should have been disclosed in terms of the missives. He noted the Respondent's memo of 9 November 2016 in which he referred to the matter as a dispute and also highlighted the lack of follow-up by the Respondent with his clients. The Fiscal said the Complainers relied on a lack of integrity but did not aver dishonesty. In his submission, the behaviour was a serious and reprehensible departure from the standards of competent and reputable solicitors. However, his fall-back position was that if professional misconduct was not established, the Tribunal should consider remitting the matter to the Council as unsatisfactory professional conduct under Section 53ZA of the 1980 Act.

SUBMISSIONS FOR THE RESPONDENT

Mr Mill noted the trend within law for "bottom covering" but said that life is not a game of perfection. He invited the Tribunal to consider the evidence from two very experienced conveyancers. Missives had not concluded when the Respondent went on holiday. Nothing had crystallised into a dispute. The solicitors for the Residents Association were given every opportunity to specify their issue. However, it remained very "muddy" with reference to fence posts, ladders and trees.

The Respondent got reassurance from his longstanding client that everything was alright. He was entitled to rely upon that. To suggest that the Respondent should have followed up with the client was a counsel of perfection. Six days passed at most. The fact was, the Respondent was misdirected by the

client. He ought to have written to her to confirm the telephone conversation, but this was not misconduct.

Mr Mill noted the terms of the Sharp test. He said that the Tribunal had heard evidence of the practice of competent and reputable solicitors. The Respondent's conduct fell way short of misconduct. There was no culpability at all. No conveyancer would consider the conduct to be disgraceful or dishonourable. He invited the Tribunal to find the Respondent not guilty of professional misconduct and to decline to remit the matter to the Council under Section 53ZA of the 1980 Act.

DECISION

The Tribunal carefully considered the facts agreed by the Joint Minute and the evidence of the Respondent and AN. It considered the witnesses to be credible and reliable. Their evidence was clear. They appeared to be doing their best to tell the truth.

An issue was raised with the Respondent regarding his clients' fence. He sought further specification of that issue which was not provided. He spoke to the client and advised her to remove the store, which the client said was creating the problem. The client, for whom the Respondent acted twice before, agreed to remove it. No dispute was disclosed to the buyer's solicitor.

The Tribunal considered the test for professional misconduct as set out within Sharp v The Law Society of Scotland 1984 SLT 313. There are certain standards of conduct to be expected of competent and reputable solicitors and a departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. The Respondent's conduct did not constitute a serious and reprehensible departure from the standard of competent and reputable solicitors. There was insufficient specification of the issue to categorise it as a dispute. In any case, the Respondent considered that the matter was resolved and was entitled to rely upon the client's reassurance in that regard.

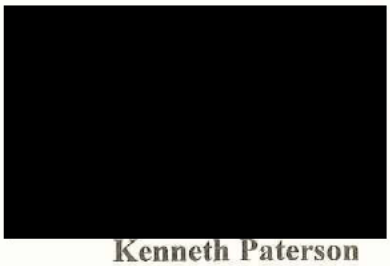
Many competent and reputable solicitors would have taken the same course of action as the Respondent. It was therefore inappropriate to remit the Complaint to the Council under Section 53ZA of the 1980 Act as the Tribunal did not consider that the behaviour constituted professional conduct which was not of the standard which could reasonably be expected of a competent and reputable solicitor.

It is important that a solicitor is candid with those on the other side of a transaction. However, in this case, having heard the Respondent's rationale, the Tribunal was satisfied that he was not aware of the "terms and nature of a boundary dispute" as alleged in the Complaint. It would not have been correct to disclose a "dispute" without an understanding of the specifics of what was alleged. The issue was never clarified. The Respondent's belief that any issue had been resolved was reasonable. The fact that AN held a similar belief lent credibility to the Respondent's account. The Respondent knew he would have to disclose the matter if it escalated to a dispute. This was noted by him in the file note of his telephone call with his client on 13 September 2016 contained at Production 11 for the Complainers. In that document he notes *"I have told her she should do that as we can't have any disputes outstanding if the sale goes ahead"*. He had therefore told her the matter would require to be disclosed if not resolved.

The Tribunal invited submissions on expenses and publicity. The Fiscal made no motion in relation to either issue. Mr Mill moved for expenses of the basis of success. He asked that the matter was not given publicity.

The Tribunal awarded expenses to the Respondent. He had been successful in respect of both averments of misconduct. The Tribunal had not thought it appropriate to remit the matter to the Council under Section 53ZA. The Fiscal had not opposed the motion for expenses.

The Tribunal determined that publicity should be given to the decision and should include the name of the Respondent. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.



Kenneth Paterson

Vice Chair