

**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**

COMPLAINER

against

**ALAN JAMES WHITE of 22
Manse Road, Milnathort, Kinross**

RESPONDENT

1. A Complaint dated 2 December 2011 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alan James White of 22 Manse Road, Milnathort, Kinross (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 10 September 2012 and notice thereof was duly served on the Respondent.

4. The hearing took place on 10 September 2012. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by Mr Macreath and Ms MacLean of Levy McRae Solicitors and Jonathan Brown, Counsel. Mr A and Ms B were in attendance as observers. A preliminary point was raised on behalf of the Respondent in respect of an eligibility issue being that professional misconduct is personal and the Respondent's position was that it was not he who failed to respond to the mandate. It was agreed that this preliminary point be dealt with first.
5. Mr Brown lodged an Affidavit from Ms H who was in Australia and unable to attend the Tribunal. Mr Brown then led evidence from the Respondent and from witness, Mr I. Due to lack of time the matter was adjourned part-heard to 21 November 2012.
6. Due to Mr I's ill-health, the matter had to be further adjourned to 5 March 2013.
7. When the matter called on 5 March 2013 the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by Ms MacLean of Levy McRae Solicitors and Jonathan Brown, Counsel. Mr A and Ms B were in attendance as observers. The Tribunal heard the conclusion of Mr I's evidence and then heard submissions from both parties with regard to the preliminary point.
8. Having considered the evidence led, the Productions lodged and the submissions made by the parties, the Tribunal upheld the Respondent's preliminary point in respect of the eligibility issue.
9. Mr Reid then invited the Tribunal to Dismiss the Complaint and Mr Brown agreed this would be the appropriate course of action.
10. After hearing submissions on publicity and expenses, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 5 March 2013. The Tribunal having considered the Complaint dated 2 December 2011 at the instance of the Council of the Law Society of Scotland against Alan James White, 22 Manse Road, Milnathort, Kinross; Having considered the preliminary point in respect of eligibility raised on behalf of the Respondent which was that the Respondent could not be guilty of professional misconduct as not only was the mandate not addressed to him personally but also it was not he who failed to implement it; Uphold the Respondent's preliminary plea and Dismiss the Complaint; Find the Complainers liable in the expenses of the Respondent 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)

Kirsteen Keyden

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

Prior to hearing from the parties, the Chairman indicated the Tribunal's concern with regard to missing documents in the Law Society Productions. Mr Reid explained that he had produced the two letters which had been asked for on the last occasion and that Mr Ritchie had not kept a note of his phone call. The Chairman pointed out that at paragraph 2-46 of his report, the Reporter refers to there being a file note. Mr Reid stated that Mr Ritchie had said that there was not one but indicated that he could investigate this. The Chairman stated that she was concerned that the Tribunal is being asked to adjudicate on a matter with a complicated history on papers without all the correspondence being produced. The Chairman mentioned the email of 11 February. Mr Reid stated that he had extracted what he thought was relevant and there was no suggestion from the other side that they required copies of further letters. The Chairman enquired as to whether the Law Society accepted that there were no documents in connection with the tenancy agreement and that the renunciation document had been produced. Mr Reid stated that a Court action had been raised and 15 files had been delivered. Turcan Connell were not aware of the full extent of the files. There were two farm purchases and also Farm 1 which was a complicated transaction involving the parents, tax planning and transfer of assets. Mr Reid indicated that it might be necessary to adjourn to obtain all the documents and that on a future date both parties could set out the agreed facts in relation to what the steps were in the particular transactions and who gave what to whom and at what point. The Chairman indicated that this would be very helpful.

Mr Brown stated that he understood that if the Tribunal was deciding whether or not the conduct amounted to professional misconduct this was a facts sensitive exercise but pointed out that the correspondence lodged so far was accepted to be what it bore to be and was accepted to have been sent when it says it was sent. Mr Brown stated that in the Law Society's view this disclosed a failure to fully implement the mandate. Mr Brown stated that if failure to implement the mandate was the only issue, it would be critical to have all the documents. However Mr Brown pointed out that the defence in this case was that professional misconduct is personal and that the Respondent's position was that it was not him who had failed to respond to the mandate. If that was shown to be the case, the rest would be academic. Mr Brown stated that he had his

witnesses present today ready to give evidence on this point and suggested that the Tribunal deal with this as a preliminary point and if necessary could then carry on and get the detailed documents and a Joint Minute in connection with the facts. Mr Reid stated that he thought that this was a sensible way forward.

The Tribunal accordingly agreed to consider the eligibility issue first and then decide what was necessary to deal with the rest of the case.

Mr Brown then referred the Tribunal to the Affidavit of Ms H. He confirmed that what was lodged was an unsigned version of the Affidavit. He stated that as it was not subject to cross examination this would affect the weight of the document but confirmed that it was genuine. Mr Brown also referred to the Opinion prepared by him which related to the Petition lodged by the Law Society. Mr Brown explained that this had been lodged to show the timing and that a sifting exercise was needed before the mandate could be complied with. Mr Brown again confirmed that although there was no Joint Minute, the Law Society's Productions were agreed to be what they bore to be. Accordingly the Law Society was not leading any oral evidence at this stage.

Mr Brown then led the evidence from Mr Alan White.

EVIDENCE FROM THE RESPONDENT

The Respondent confirmed that he had previously been an engineer but had qualified as a lawyer in 2002. He had worked with Brodies and had then joined Howat Associates as a salaried partner in 2004. Ms H was the principal partner, Mr I was a consultant and Mr J was an associate. The Respondent explained that he viewed the firm as Ms H's and his main job was going to be sorting out the IT system. The firm was located at one office.

In connection with the family's transactions, Ms H dealt with the family business. There was a conditional option in place to sell the land at Farm 1 to house builder Company 1 with a value of over £10,000,000. The land was owned by Mr and Mrs C. Mr A was their son. There was another son Mr D and a daughter Mrs E. The

Respondent explained that he was made aware of the previous transactions carried out by Ms H but there was no ongoing active work when he joined the firm in 2004. Before that some conveyancing had been carried out when Mr and Mrs C transferred parts of the land to their children for tax planning purposes. The Respondent stated that he assisted Ms H from time to time as requested by her but at no time did he ever deal with any transaction relating to the family on his own. In connection with the renunciation of the tenancy in respect of Farm 1, he explained this was done before he joined the firm. Mr A occupied Farm 1 and it was debatable whether or not there was an agricultural tenancy in place. Company 1 wanted the property unencumbered and so Mr A was asked to renounce any possible tenancy and this was done prior to 2004.

The Respondent explained that Deloittes advised the family about tax planning via Ms H. The missives between Mr and Mrs C and Company 1 were amended to include their children and also to extend the option period. The Respondent stated that he was not involved with that transaction but he knew about it and might have reviewed a draft. The transaction settled and the money was paid to the children. The Respondent explained that he acted for Mr A in respect of two purchase transactions in respect of Farm 2 and Farm 3 in June 2006. The sale of the development land took place at around the same time.

Mr Brown referred the Respondent to Production 2, being a letter dated 5 June 2006 reference AJW/EG. The Respondent confirmed that AJW was his reference and EG was the secretary. In June 2007 new solicitors were instructed to act for Mr A. The Respondent stated that he knew that Ms H had written to Mr A to say that she was no longer prepared to act in late 2006. He understood that the reason for this was that Mr A had made offensive personal remarks to Ms H.

Mr Brown then referred the Respondent to Production 3, being a letter dated 20 June 2007 enclosing the mandate. The Respondent indicated that he knew that this had been received as it was a small firm. He assumed that Ms H would deal with it. The letter enclosing the mandate was marked for her attention. In connection with Production 4, (the mandate) the Respondent confirmed that he had no involvement in the generation of any of the documents covered by the mandate. He stated that at some point he would have seen the Dispositions and the conveyancing documentation

but that the titles themselves would have been given to the purchasers at settlement. The Respondent confirmed that the title was land registered. Mr Brown referred the Respondent to Production 5 and he confirmed that the reference on it was his reference and that of Mr J. He explained that there was no real practice with regard to references but the secretaries usually used the previous letter written the same day as a starting point. The Respondent explained that Mr J had nothing to do with this transaction and this reference must have been a mistake. The Respondent stated that the signature on the letter was that of Mr I and that he did not frame the letter. The Respondent further explained that Mr I and Mr J signed their own mail and this was not checked by a partner unless they asked for this to be done. Ms H trusted her employees.

The purchase files in respect of Farm 2 and Farm 3 were sent separately. The Respondent stated that he thought a separate mandate was received in respect of these.

The Respondent explained that incoming mail was opened by Ms H, himself or Mr I who was often in earlier and physically opened the mail but left it for Ms H or himself to see.

Mr Brown then referred the Respondent to Production 6, the Respondent stated that he was aware of the response from Turcan Connell but that the matter was dealt with by Mr I or Ms H. The Respondent stated that he could not recall whether Ms H was in the office that day. He submitted that there was no partnership discussion with regard to the letter. Ms H would decide on the response and Mr I would draft it. In connection with Production 7, he stated that the signature was that of Mr I and that he was not involved in this response. In connection with Production 8, the Respondent stated that he could not recall seeing the letter, the letter was AJW/IM and IM was Mr I's reference. In connection with Production 9, he stated that this was not done by him and he presumed it was done by Mr I.

The Chairman pointed out that the headings on the letters seemed to change and that the letter of 26 July 2007 was missing.

In connection with Production 10, the Respondent explained that he had received a phone call from Bruce Ritchie of the Law Society in connection with the mandate on or about 14 August in connection with the family. Mr Ritchie said that he had spoken to Turcan Connell but did not know the circumstances and did not want to know the details. However, he advised that the mandate should be implemented and that if there was a concern about breaching matters confidential to other clients this should not prevent the mandate being implemented. Mr Ritchie stated that he would send a letter of comfort which could be used if there was a complaint by the other clients which would not be upheld. The Respondent stated that Mr Ritchie would not engage him in conversation and would not let him speak. He indicated that he did not know whether Mr Ritchie phoned to speak to him or just someone at the firm. The Respondent stated he then spoke to Mr I who was dealing with matters and also told Ms H about the phone call. At that time Ms H was not in the office. Production 10 was a letter stating that the other clients could not veto the implementation of the mandate. The Respondent explained that he believed that Mr and Mrs C's response was that it was their affair and their decision and none of their children should have any interest. They opposed the release of the files in terms of the mandate. He was aware of this via Ms H.

In connection with Production 11, the letter of 28 August was not in the papers. The Respondent confirmed that he did not send any response to Mr Ritchie but understood that one was sent. He was aware that Mr Ritchie had written but did not recall specifically reading the letter.

In connection with Production 12, the Respondent stated he had not seen it before. He was Client Relations Partner but matters were generally dealt with by Mr I and Ms H.

In connection with Production 13, the Respondent confirmed that he dealt with the conveyancing in respect of the two purchases but not in respect of Farm 1 although he assisted Ms H in revising draft documents.

In connection with Production 14, the Respondent did not draft this or become involved in discussions about it. The signature was Mr I's. In connection with

Production 15, the letter addressed to Mr White as Managing Partner, the Respondent indicated that he was aware of it but was not involved in the reply.

In connection with Production 16, it was not his signature and it was probably Mr I's and was the style of letter written by Mr I. In connection with Production 17, this was written by Mr I. The Respondent explained that he left Howat Associates on 30 May 2008. He discussed this with Ms H in February 2008 saying that he would leave at the financial year end. In connection with Production 18, an identical letter was also sent to Ms H. They discussed matters and it was agreed that Ms H and Mr I would respond. The Respondent explained that the complaint was discussed broadly and that the mandate had been addressed to Ms H which was correct as she was responsible for the Farm 1 transaction.

In connection with Production 19, the Respondent explained that he was not Client Relations Partner by then. He was the Cashroom Partner and Client Relations Partner but in preparation for him leaving the roles were taken on by others between March and May 2008.

In connection with Productions 20 and 21, Mr I made the Respondent aware that they had been received. In connection with Production 22, the letter asked if Mr I was authorised to respond on his behalf. Production 25 was the Respondent's reply that Howat Associates could reply on his behalf and that he had no documents. In connection with Production 27, he discussed this with Mr I. In connection with Productions 28 and 29, the Respondent stated that he did not know if he had seen these before the reply was sent. After he left Howat's he explained that he was on a sabbatical and rarely at home. He would not be copied on all the letters after he had left but he was aware in general terms of what was going on.

The Respondent said that he believed that the files were ultimately made available to Turcan Connell after advice from Mr Brown.

The Respondent explained that he had no say in how Mr I and Ms H responded to the subsequent complaint because they all took the view that the complaint was directed at Ms H. Ms H directed the responses which were implemented by Mr I. The

Respondent was not in a position of any authority in relation to that matter. The Respondent explained that Mr I was previously Client Relations Partner as Ms H was abroad quite a lot. She asked him to take the role on.

In response to a question from the Chairman, the Respondent stated that he could not say whether Ms H was out of the office when the mandate arrived in June 2007. He suspected that she was at the office in July. The Respondent explained that Ms H was now resident full time in Australia and was no longer in private practice in Scotland. He further explained that when he joined the firm, Ms H took extended holidays in Australia for four to six weeks at a time and then came back for a couple of months. When she was away she would be in regular contact and he spoke to her once a week. Ms H also spoke to the cashier and was still running the firm.

In response to a question from the Tribunal regarding why the Respondent was not more concerned about the correspondence, he indicated that he was clear in his own mind that it was Ms H was dealing with it.. In response to a further question from the Tribunal as to why the Respondent did not email Mr Ritchie after the phone call to say that it was not him that was involved in the non implementation of the mandate, the Respondent indicated that with hindsight this may have been wise. The Respondent however indicated that he did not have the impression that Mr Ritchie's advice was directed at him personally. He confirmed that Ms H was not there at the time and that he contacted her in the Australia by phone about it. Mr Ritchie did not want to know the facts but stated that the other clients could not veto the implementation of the mandate. He indicated that he thought Mr Ritchie was setting the firm straight that they did not need to get a mandate from the other clients. The Respondent explained that although he was nominated as the Client Relations Partner, the firm's practice was that it was Mr I who dealt with matters relating to client relations. The Law Society's regulations state that the firm needed a Partner to be Client Relations Partner. Mr I was not a Partner and that was why the Respondent was appointed Client Relations Partner. Mr I was 60 when the Respondent joined the firm and had been in practice a long time. He was winding down and working four days a week. The Respondent indicated that he was reassured that matters were being attended to by Mr I on behalf of Ms H.

CROSS EXAMINATION OF THE RESPONDENT BY MR REID

The Respondent confirmed that although he was Managing Partner, Client Relations Partner, Cashroom Partner and Money Laundering Partner the implementation of the mandate had nothing to do with him. He stated that the main person dealing with the family transactions was Ms H. He confirmed that from time to time and on the specific instruction of Ms H he did attend meetings with Mr and Mrs C and on occasion assisted with some of the conveyancing. In relation to Mr and Mrs C deponing land to their children, Howat Associates acted for the seller and the purchaser but this was before the Respondent joined the firm. The Respondent explained that although Ms H was away a lot, she made sure she was at home at the important points in the agricultural and rural transactions. The Respondent stated that the replies which sent by the firm in respect of the mandate were not discussed with him. However, he was broadly aware of the correspondence but did not have any input in to the terms of the letters despite Ms H being away abroad a lot and Mr I only working four days a week. The Respondent explained that when he said that Mr I was winding down, he meant he was not pursuing new business but he was dealing with ongoing work as required. He did research on his day off. The Respondent confirmed that mail was left for him to read. The correspondence sent in connection with implementation of the mandate was in the style of Mr I. The correspondence from Turcan Connell was addressed to Ms H.

In respect of Mr Ritchie, he took him to be advising the firm generally and not the Respondent as an individual. The Respondent stated that he told both Ms H and Mr I about the phone call. When the letters from the Law Society in connection with professional misconduct came in to Messrs. Howat Associates, the Respondent explained that he was on a career break but he replied as soon as possible. He did not have any papers. When misconduct was mentioned he spoke to Mr I about it and was reassured by him that it was being dealt with by him. He took the view that his interests were the same as Howat Associates' interests and the firm took advice from Mr Brown. The Respondent confirmed that he consulted Mr Brown before lodging Answers to the Complaint. The Respondent accepted that the first time that he blamed Mr I was when his Answers were lodged. He indicated that he did not know what the Law Society's reception to this claim would have been if he had raised it earlier. The

Respondent stated that he did not know whether Ms H and Mr I were beyond the boundaries of the regulatory side of the profession. He indicated that Mr A was a difficult client. The Respondent stated that Mr A's tenancy of Farm 1 was renounced before he came to the firm. The Respondent indicated that he was involved with the family because Ms H spoke to the parents and passed information to him which he passed on to Mr A. He indicated that in connection with Production 37, the property manager dealt with the rents. Mr Reid referred the Respondent to the Law Society's Decision and to the Respondent being mentioned as acting in a number of complaints that were raised. The Respondent indicated that none of the complaints went forward. The Respondent accepted that he assisted Ms H and acted in two purchases for Mr A.

The Respondent confirmed that he wrote the letter at Production 2. As regards Production 7, his reference is on the letter because the secretary put his initials on it. The Respondent confirmed that he did not dictate any reference, this was left to the secretaries. Ordinarily the reference would be the reference of the partner, then the assistant and then the secretary. The Respondent accepted that his reference was not on the letters typed by the same secretary after he left the firm. The Respondent stated he was familiar with the guidelines on the Accounts Rules. He indicated that the family transaction was Ms H's transaction from the start to finish and it was the firm's practice that Mr I dealt with matters relating to client relations.

In connection with the phone call with Mr Ritchie, the Respondent immediately spoke to Mr I and then emailed Ms H who phoned in response. In reply to a question from the Tribunal in connection with whether the Respondent was not concerned about his professional reputation, he indicated that he knew it was not him. In response to a further question from the Tribunal with regard to whether or not the Respondent wanted to sort matters out, he indicated that he had many sleepless nights. The Tribunal enquired as to why the Respondent did not write to Mr Ritchie and explain it was not him. He indicated that he assumed that Mr I would reply for Ms H and there was no need for him to respond. He did not ask to see any of the correspondence that Mr I sent out despite Mr I being a Consultant and him being a Partner. The Respondent stated that he did not give Mr I any instructions. He said that he did not recognize the gravity of the situation.

In connection with the letter of 1 June 2011 from Mr I at page 137 of the Productions, the Respondent stated that he did not ask him to show him the letter.

RE-EXAMINATION OF THE RESPONDENT

The Respondent confirmed that there were a lot of Inadequate Professional Service issues and conduct issues all handled centrally by Mr I and that he viewed it as cumulative. The Respondent stated that he broadly aware of the distinction between IPS and professional misconduct. He had not discussed the possibility of any conflict between himself and the firm of Howat Associates. The Respondent stated that he understood Howat Associates were no longer trading. He confirmed that his Answers were revised by Mr Brown on Mr I's instructions. Mr Macreath then assumed agency. Mr Brown's position was to defend the failure to respond to the mandate. The firm delivered what Ms H and Mr I thought should be delivered in terms of the mandate. It was Ms H's decision with regard to what was released from the firm. It had always been the case that it was Ms H's responsibility.

In response to a question from the Chairman, the Respondent stated that he did not think that Ms H was in the office when the mandate came in. If the mail had been opened by Mr I, the Respondent must have picked up the letter and then passed it to Mr I to respond to on behalf of Ms H. The Respondent stated that he thought Ms H was back in the office between June 2007 and the phone call from Mr Ritchie, probably during the month of July. On her return she would discuss things with Mr I. The Respondent knew that meetings took place but had no real input and did not ask because he thought Ms H was dealing with matters. The Respondent confirmed that he did discuss matters with Ms H before she went back to Australia in August but that Mr I was dealing with issues. He explained that he was not sleeping due to the volume of work.

In connection with Production 10, he would have seen this. In response to a question from the Tribunal, the Respondent confirmed that he was not seeking partnership when he joined Howat Associates and that he understood that he was an employee as a salaried partner and was not liable for the debts of the firm. The Chairman pointed out that although he may have had a back letter this did not absolve him of liability to

third parties. The Respondent confirmed that he attended a new partners course. Mr F joined the partnership a year before he left and took on some of the Respondent's roles.

EVIDENCE FROM MR I

Mr I confirmed that he had qualified in 1975 and had been a Consultant with Howat Associates since 2000. In 2007 he was a Consultant and Mr White and Ms H were partners. He was authorised to sign his own mail and he would not get mail approved unless he thought it was necessary. Ms H was in charge of the firm. Although the Respondent was the Managing Partner he did not give directions. He ran the office and dealt with some of the conveyancing. Mr I stated that there had been two previous complaints from clients which had gone to the Law Society. Ms H handled complaints and if she was away Mr I had the duty to do this. He did not report routinely to the Respondent but could discuss matters with him if he thought it was necessary. The family transactions were dealt with by Ms H with assistance from the Respondent. Mr I stated that Ms H was always contactable. Mr I opened the mail and distributed it. If a solicitor is required it would be passed to the Respondent or left for Mr I to deal with.

In connection with the mandate, Mr I stated that he dealt with it. He learned of the fall out with Mr A subsequently. Mr I stated that he did not remember if Ms H was in the country when the mandate came in. The day after, he received a phone call from Ms H and he was asked to deal with it. Her secretary, Ms G must have told Ms H about the mandate. She said that the family parents had said that their files were not to be released to Mr A. Mr I stated that he had no idea what files there were but then learned that there were 12 files. He knew that there was no written formal lease in respect of the tenancy because he had represented Mr A in the past in connection with this. He discovered a copy of the deed of renunciation in one of the files.

In connection with Production 5, a reply of 25 June 2007, Mr I indicated that the squiggle told him that it was he who had signed this letter. The reference was that of Mr J but that must be wrong as he was not involved in the transaction. Mr I confirmed that he drafted and signed the letter. Mr I's view was that he required mandates from

Mr and Mrs C and this was the line that he took. This was not discussed with the Respondent or Ms H. It would be unusual to ask the Respondent to look at any mail he sent out. He confirmed that the heading in the letter was an error. Mr I stated that there was a separate mandate in connection with Farm 2 and the files in respect of this were sent immediately.

In connection with Production 7, Mr I indicated that this was his reply with his reference and that he drafted it and signed it and no one else was involved or saw it. In connection with Production 8, he indicated that he did not think that he discussed this letter from Turcan Connell which said that the Law Society said Howat Associates were wrong. Production 9 was his letter that he drafted and signed. He spoke to Ms H about this and must have spoken to the Respondent in connection with the third paragraph of the letter. The issue of the gifts were however a separate complaint.

In connection with Production 10, Mr I stated that he was aware of the phone call because it was made after a weekend when he was off and there was a file note left by the Respondent. Mr I thought that there was common ownership of the files. Mr Ritchie said that Mr and Mrs C could not veto the implementation of the mandate. There was discussion with the Respondent with regard to this and why Mr I was sure he was right in connection with his view in respect of the mandate. Mr I stated that he interpreted the guidelines differently from Mr Ritchie. Mr I stated that he did not phone Mr Ritchie but replied in letter form. Production 14 was his letter and his signature on one of his better days. He did not discuss this letter with his colleagues and with the Respondent in particular. Production 15 is the Law Society letter. Production 16 was drafted by Mr I and signed by him with no input from anyone else. Production 17 was Mr I's letter and his signature.

In connection with Production 15 he was not sure whether or not he passed this letter on to the Respondent because at this time there was no complaint from Mr A and he might have dealt with it himself. When Production 18 came in however this was a formal complaint and he did advise the Respondent. In response to a question from the Chairman as to why he did not discuss the matter with the Respondent as Managing Partner, Mr I stated that it was perhaps remiss of him.

In connection with Production 19, this was passed on to the Respondent and he assumed it was passed to Ms H as well.

Mr I stated that he told Ms H on the phone but he could not say whether she was present or in Australia. He confirmed that he would only refer the matter to the Respondent if there was a major problem. Otherwise he would deal with it himself. Mr I stated that he assumed that the Respondent was a salaried partner because Ms H was a one man band who controlled everything.

Mr I understood that there was an agreement between them in connection with liabilities but that the Respondent would have unlimited liability to third parties. The Respondent left with effect from 30 May (2008), he did not discuss the response to the complaint before he left. He would have taken the complaint with him. The Respondent took time out after he left and then resumed contact with the Law Society via Howat Associates. Mr I stated that he did not discuss this with Ms H. They defended the firm's response to the mandate. He did not recall discussion between the Respondent, himself and Ms H in connection with individual responsibility. There was no discussion in connection with the Respondent's defence.

Mr I stated that he accepted responsibility for his correspondence and that he was not falsely accepting responsibility. Production 22 referred to a letter of 24 June sent by Mr I which was not with the papers. Mr I said he did not know when Ms H stopped accepting responsibility.

At this point the case was adjourned part-heard due to lack of time. Mr I was advised not to discuss his evidence with anyone between now and the next calling. The matter was adjourned to 21 November 2012 at 10:30am.

The Chairman directed that the documents requested should be lodged with the Tribunal two weeks before this.

Due to Mr I's ill-health the scheduled hearing on 21 November 2012 was re-scheduled for 5 March 2013.

When the case called on 5 March 2013 Mr Reid clarified that he had lodged a third Inventory of Productions which included all the documents that he had managed to locate as requested by the Tribunal. Mr Reid clarified that Bruce Ritchie did not make a file note of his conversation with the Respondent. Mr Brown stated that it was not known exactly where the files were at the moment as the firm no longer exists. However Mr Brown produced the hand-written file note made by the Respondent contemporaneously after his telephone call with Mr Ritchie. The Tribunal was then invited to proceed on the basis of the documentation lodged as it was not possible to provide copies of any further documents.

Mr Brown clarified that he had concluded Mr I's evidence in chief.

CROSS EXAMINATION OF MR I BY MR REID

Mr I confirmed that the correspondence sent out by Howat Associates after the mandate came in was drafted and sent by him. He indicated that he did not know whether the Respondent was aware of what he had written. Mr I accepted that the Respondent was the managing partner and cashroom partner on the headed paper. Mr I however stated that he did not discuss the mandate with the Respondent at all at this stage.

Mr I explained that because the family were substantial clients matters were only discussed with Ms H. All the family had been represented by Ms H and the Respondent was only involved in the purchase of Farm 2 on the other side of the transaction. Mr I confirmed that his own involvement with Mr A was in respect of a dispute with Lanarkshire Council in connection with the existence of a lease. Mr I stated that he asked Ms H about the mandate over the phone but he could not recall where she was at this time. Mr I clarified that his view was that he had regard to the Law Society guidance on the ownership and destruction of files but did not agree with them. Mr I accepted that when Counsel's Opinion was obtained in respect of the Law Society's Petition, Counsel advised that there was not a defence and that the files better be delivered due to it being a statutory demand.

Mr I stated that the first communication he had with the Respondent was after he (the Respondent) got the call from Mr Ritchie – the Respondent explained the conversation and gave Mr I a copy of the file note which he had made. Mr I confirmed that the handwritten note lodged was this file note. The Respondent enquired of the nature of the issue and Mr I told him what he had done and showed him the correspondence. He believed Ms H was in Australia at the time.

Mr I stated that he was usually in first in the morning and worked two days a week but this was flexible. Unless letters were addressed to him he would not take the letter away. Mr I stated that he had seen Production 10 which articulates the terms of the note done by the Respondent. The advice from Mr Ritchie, the Law Society's Director of Professional Practice was given but Mr I stated that he did not recall discussing it with the Respondent and confirmed that he did not agree with the opinion of the Director of Professional Practice.

In connection with Production 11, Mr I stated that he was aware of this letter but he did not recall discussing it with the Respondent. Correspondence between Mr I and the firm of Turcan Connell had ended by that time.

Mr I stated that there was discussion from time to time with the Respondent after the phone call from Mr Ritchie and that Mr I told the Respondent what Ms H's position was on the matter. Mr I stated that his view was authorised by Ms H and that the Respondent was not asked for his view.

Mr I stated that from time to time it was suggested that either Mr I or the Respondent should do something about complying with the mandate but Ms H's position was that the file was held for the clients Mr and Mrs C and should not be released.

Mr Reid referred Mr I to Production 18 being the letter from the Law Society intimating a complaint of professional misconduct which was sent to the Respondent. Mr I stated that he did not know if he discussed this with the Respondent. He indicated that he thought that by this date the Respondent had left the firm. Mr I stated that the letter would have been passed on to the Respondent and put in his pile. Mr I further stated that the only discussion was with regard to how to respond. Mr I

clarified that the response was sent after there had been discussions between himself, Ms H and the Respondent. Ms H was back in the office in August and he gave her a draft letter for approval. Mr I stated that the Respondent was not involved to any great extent. He had gone elsewhere. He however did give instructions as to how he wanted to answer the Complaint. Mr I stated that he would circulate a draft reply to the Respondent and Ms H and would incorporate any changes that they wanted. The input from the Respondent was that there was no failure to comply with the guidelines. Production 25 showed that Howat's had authority to act for the Respondent in the matter. Mr I stated that he ran the reply past the Respondent before sending it to the Law Society.

In connection with Production 44, this was the response which was instructed by the Respondent and sent by Mr I. He made sure that the Respondent was aware of the background and the response adopted by the firm. Mr I accepted that the response did not say that it was not the Respondent but was Mr I.

RE-EXAMINATION OF MR I BY MR BROWN

Mr I stated that the transactions in connection with the family were ongoing and had been dealt with by Ms H prior to the Respondent joining the firm. The Respondent only acted for Mr A because it was an internal transaction and Ms H was acting for the seller. Ms H was acting in the main transaction. In connection with the mandate for Farm 1, this was referred to Ms H as it was her transaction. The mandate relating to Farm 2 was complied with immediately. Mr I confirmed that the response to the mandate was decided on by him in conjunction with Ms H. Ms H was adamant about her position. Mr I stated that when the Respondent got the phone call in August 2007 he thought that the Respondent asked to see the correspondence. After August 2007 there was no change of mind or change in personnel who were dealing with the letters in connection with the mandate. Mr I stated that Productions 18 and 19, being the letters of complaints sent to the Respondent, were wide ranging and the firm answered them in a cumulo fashion to defend the position of the firm. Mr I stated that the firm did not think that they had done anything wrong because their clients were Mr and Mrs C. A response was lodged on 21 June 2008. Mr I confirmed that he wrote the letter at Production 55 but could not recall if he spoke to the Respondent prior to

sending it. Mr I stated that he might have written Production 55 without reference to the letters that were sent to the Respondent. He had explained that Ms H got a letter in identical terms. Mr I explained that the firm required to know if there was any substance in the claim in connection with conflict of interest and required the files for this. It was clarified that the complaint from the Law Society came in on 21 May 2008 and the Respondent had left the firm by 30 May. After he left he was only contactable by email.

Mr I confirmed that there was no discussion of a distinction between the Respondent's and Ms H's individual responsibilities. No external advice was taken. Mr I explained that the first complaint came in by email of 11 February 2008 from Mrs C and nothing was done about this because their view was that she had no interest to complain.

In response to a question from a Tribunal member, Mr I confirmed that the letter at Production 44 was written after getting instructions from the Respondent.

In response to a question from the Chairman, Mr I confirmed that Ms H's secretary would contact her and get her to call Mr I early in the morning. Mr I had no direct line to Ms H. Mr I stated that he did not recall whether or not he saw Productions 18 and 19 and that the letters would have been passed to the Respondent. He then conceded that he must have discussed them with the Respondent. The letter addressed to Ms H, being a similar complaint, would have come to Howat Associates and would have been sent on by email to Ms H. Mr I stated that Ms H would have been incensed and would have instructed him to look at the files and consider a reply. Mr I stated that he did not think that he mentioned to Ms H that the Respondent had received similar letters but she would have known this due to the complaints system in the firm. Mr I confirmed that he was instructed by Ms H to draft replies which suited the firm of Howat Associates. He thought that the Respondent was aware of his role although this was not expressly discussed. Mr I confirmed that he was instructed to reply to the correspondence in respect of the mandates and that he dictated the letters. He stated that the firm was in fact Ms H. The Respondent was a partner and Mr I accepted that it was important to discuss matters affecting the firm with him.

In response to a question from the Chairman in respect of the handwritten file note made by the Respondent of the phone call on 14 August 2007, Mr I stated that he thought he may have put the question marks and underlines on this as it was the kind of thing that he would have done.

SUBMISSIONS FOR THE LAW SOCIETY

Mr Reid stated that the Respondent had failed to implement a mandate and this amounted to professional misconduct. He referred the Tribunal to Paterson and Ritchie - Law, Practice and Conduct for Solicitors, Thomson, W Green [2006] at Page 207. He also referred to Smith & Barton Procedures and Decisions of the Scottish Solicitors Discipline Tribunal, T & T Clark [1995] and to the duty on solicitors to comply with mandates. Mr Reid stated that in this case there were multiple clients and work was being done for the family. The mandate was received and then correspondence with regard to the mandate was sent out with the Respondent's reference on it. Mr Reid stated that the Law Society accepted that the mandate was addressed to Ms H but that it was unusual, if correspondence was in Mr I's name, for it not to have his reference on it. Mr Reid stated that the reliability and credibility of the witnesses was a matter for the Tribunal.

After the phone call received from Mr Ritchie, the Respondent was clearly aware of the mandate and was in the frame. The mandate was still not implemented after this and the Respondent knew of the position adopted in the correspondence by the firm. This position was wrong and it was only after the Petition to the Court of Session that the files were delivered. Mr Reid stated that the Law Society did not accept that the Respondent was not involved in the position taken by the firm of Howat Associates. The important letters sent in reply to the complaints from the Law Society were sent out after being revised by the Respondent. The Respondent held all the major positions within the firm being the managing partner, the client relations partner and the cashroom partner. Mr Reid submitted that it was not credible that the Respondent distanced himself from the process which involved the firm's biggest clients.

The letter at Production 44 was addressed to him personally and Mr I replied on his behalf after having taken instructions from him. This suggested that the Respondent was involved in the process and contributed to the stance adopted by the firm.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown invited the Tribunal to hold that there was no Complaint made out against the Respondent personally. Whether the complaint was made out against anyone else was a hypothetical question. Mr Brown referred to the Sharp-v-The Law Society of Scotland [1982] and quoted from Page 134:

“There are certain standards of conduct to be expected of competent and reputable solicitors. 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. Whether or not the conduct complained of is a breach of rules, or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made.”

Mr Brown stated that the Tribunal needed to consider the question of the Respondent's culpability and that of his colleagues. In the Sharp case the same point arose, all the partners were prosecuted and the Court said that it was necessary to look at the individual culpability of the partners. There was no dispute in this case that Ms H was the senior partner. The Respondent had given a detailed account of how he came to get the job. He was only two years qualified and was not looking for a partnership. Mr I was a consultant who was at the end of a long career and was senior in terms of age and experience. This meant that the reality of the situation was that the Respondent was nominated as client relations partner etc and discharged these duties in respect of run of the mill things. However when a complaint came in which was directed substantially at the senior partner and in respect of business which had done before the Respondent even started at the firm, Ms H had a strong opinion with regard to the matter and therefore it was not surprising that she took a keen interest in

responding. Mr Brown stated that it was only to be expected that Ms H would take a close and direct interest in what was happening.

The mandate was addressed to Ms H and was passed to her and a response was sent as directed by her. There was no basis on which to fix any liability on the Respondent at this stage. The Respondent was entitled to assume that the matter was being dealt with. There was active correspondence from Howat Associates about the mandate. Mr A's entitlement to the documentation was disputed by Howat Associates. If this position was wrong it was not the Respondent's fault.

Mr Brown asked the Tribunal to ask itself when the Respondent came in to play. It was not on 20 June 2007 when the mandate came in as the correspondence in reply was written by Ms H and Mr I. The earliest point that he could be in the frame was when Mr Ritchie phoned him on 14 August 2007. Mr Brown stated that Mr Ritchie was being paternalistic and trying to prevent an escalation of the problem. Mr Ritchie was reassuring Howat Associates that even if there was a fallout between the parties there would be no breach of confidentiality if the mandate was complied with and the family did not have a veto. This was the position if Mr A and Mr and Mrs C were clients. The Respondent at this time makes an accurate contemporaneous note and gives it to his colleagues who are dealing with the matter.

The position of Howat Associates was that Mr A was not a client and was not entitled to the papers. The Respondent had no involvement in the correspondence after the phone call. Then nine days before he left the firm a complaint from the Law Society covering a wide number of issues came in. The mandate was just a bit at the end of the letter. The primary complaint was in connection with a conflict of interest in connection with Farm 2.

A decision was taken, without expert advice, that there should be a cumulo response from Howat Associates. This response was sent after the Respondent left the firm and it could be inferred that no draft reply was done prior to the Respondent leaving. After he left no one considered that they could be wrong with regard to the obligation to comply with the mandate. It was accordingly not considered whether or not the Respondent could incriminate others. This did not mean that it was not a defence. The

Respondent could not be responsible after he left the firm and the failure continues even after he left on 30 May 2008.

Mr Brown emphasised that the mandate was not addressed to the Respondent and related to files which went back 10 years prior to his involvement with the firm. The Respondent was accordingly entitled to assume that his boss would deal with matters. The firm was collectively liable for complying with the mandate but not for professional misconduct. If Ms H and Mr I got it wrong then it was on them. The initials on the letters were there because it was established practice that the partner reference would be first on the letter. As Ms H was out of the country and Mr I was a consultant, the Respondent's reference was put on the letters. After the Respondent left his initials were replaced with AS, the initials of the partner who took over from him. Mr Brown stated that the Tribunal needed to consider whether or not the Respondent was in control and whether matters were in his hands. Mr Brown submitted that it was not the Respondent's decision not to implement the mandate and if he had stated that it should be implemented, would this have made a difference? Mr Brown submitted that it was not necessary for the Respondent to actively disassociate himself from the firm's position on the mandate. Mr Brown pointed out that there had been consistency between the witnesses in connection with who dealt with the correspondence. Mr Brown submitted that the individual responsibility of the Respondent had not been made out.

DECISION

The Tribunal noted that the complaint of misconduct was that the Respondent unreasonably delayed in failing to implement a mandate which was received by him from another firm of solicitors who were acting on behalf of a former client of the Respondent. It was clear from the evidence that the mandate was not addressed to the Respondent; it was marked for the attention of Ms H. It also related to Ms H's client rather than the Respondent's client. It was clear from the evidence that Ms H had been acting for the family for an extended period prior to the Respondent joining the firm and that she carried out the majority of the work for the family, the Respondent only doing little bits of work when necessary. It appeared to the Tribunal that the Respondent did not do work for Farm 1 as a principal but only to assist Ms H. It is

quite clear from the evidence that although the Respondent's initials were on the correspondence which was sent from Howat Associates relating to the mandate, the letters were in fact written by Mr I on the instruction of Ms H.

The Tribunal accept the evidence of Ms H and Mr I that when the mandate came in on 20 June 2007 it was discussed between them and Ms H made a decision that the mandate should not be complied with because she did not consider Mr A to be a client and because Mr and Mrs C had not given consent for the documentation to be sent. The Tribunal was satisfied on the basis of the evidence that the Respondent had no involvement with the mandate between it coming in to the firm on 20 June 2007 and the phone call that he received from Bruce Ritchie at the Law Society on 14 August 2007. From the evidence it would appear that Mr Ritchie phoned the firm to speak to somebody about the mandate and ended up speaking to the Respondent. This may well have been because Ms H was in Australia at the time and Mr I was not in that day. After the phone call the Respondent prepared a contemporaneous note of what had been discussed and gave this to Mr I. The Tribunal consider this consistent with the evidence that Mr I was dealing with the mandate issue on behalf of Ms H. At this stage the Respondent did become aware of the previous correspondence about the mandate and was aware of the firm's position on the mandate.

The Respondent was client relations partner, managing partner and cashroom partner but the Tribunal, on the basis of the evidence, considered that although he had these titles he had no real authority within the firm and it was more of a notional role. Mr I although a consultant rather than a partner was senior in age and experience to the Respondent and it appears to the Tribunal that the line taken by the firm of Howat Associates was decided by Ms H and Mr I regardless of the Respondent's opinion.

Although the Tribunal had concerns with regard to aspects of Mr I's evidence, Mr I, Ms H and the Respondent were all consistent with regard to the fact that Mr I dealt with the correspondence in respect of the mandate instructed by Ms H.

When the letter at Production 44 comes in, being a complaint from the Law Society addressed to the Respondent, it is only nine days before the Respondent is due to leave Howat Associates. Mr I was vague with regard to whether or not this letter was

discussed with the Respondent when it came in. It appears that Ms H received a letter in similar terms. Given the terms of Production 55 it is pretty clear to the Tribunal that no substantive response to the letter of complaint was sent prior to the Respondent leaving the firm. By this stage the behaviour of failing to respond to the mandate had already happened. The failure to respond to the mandate carries on after the Respondent has left the firm which adds weight to the Respondent's claim that he had little to do with the firm's position on responding to the mandate.

It is clear to the Tribunal that the line taken by Howat Associates in respect of whether or not the mandate should be complied with was driven by Ms H and Mr I. Mr I's evidence was that he felt that the Law Society guidance was wrong and did not agree with it.

The Tribunal considered that at no point in any of the process was the Respondent in control of the responses sent on behalf of Howat Associates in respect of the mandate. Others made an active decision in respect of the mandate but there is no collective responsibility in connection with professional misconduct.

The Tribunal accordingly was not satisfied that the Law Society had proved beyond reasonable doubt that the Respondent was personally responsible for the unreasonable delay in implementation of a mandate sent to Howat Associates marked for the attention of Ms H dated 20 June 2007.

The Tribunal particularly notes that the mandate was not addressed to the Respondent or marked for his attention. The Tribunal was satisfied that the client in question was Ms H's client and that the bulk of the transactions had taken place prior to the Respondent joining the firm. Although having reservations about some of the evidence it heard, the Tribunal accepts that there is consistency between Ms H, the Respondent and Mr I that Ms H controlled the responses in respect of the mandate and instructed Mr I accordingly.

The Tribunal is not satisfied that the Respondent, notwithstanding his various appointments as cashroom partner, managing partner and client relations partner, was ever in control of this matter. The Tribunal places little weight on the fact that the

Respondent's initials appear in correspondence. The Tribunal accept Mr I's evidence that he drafted and signed the letters on the instructions of Ms H in respect of her client. The Tribunal accept that the Respondent was the ultimate recipient of the phone call from Mr Ritchie and following thereon he prepared a file note which he passed to Mr I to enable him to continue to deal with the matter in conjunction with Ms H.

In all the circumstances the Tribunal finds that as a junior partner the Respondent had no control over his firm's response to the mandate and consequently insufficient culpability to warrant a finding of professional misconduct being attached to him in respect of the unreasonable delay and failure to implement the mandate.

Mr Reid then invited the Tribunal in light of this finding to dismiss the Complaint and make a finding of no expenses due to or by either party.

Mr Brown agreed that dismissal of the Complaint was the appropriate course of action but moved for expenses to be awarded against the Law Society because the Respondent's position was set out in his Answers. Mr Reid referred the Tribunal to Baxendale Walker-v-The Law Society [2007] EWCA Civ 233 (15 March 2007) and asked that no award of expenses be made against the Law Society. In this case it was only at a late stage that the defence of it not being him personally was raised.

The Tribunal did not consider that in this case the Respondent brought the proceedings on himself and accordingly awarded expenses against the Law Society in favour of the Respondent. The Tribunal however did not consider that this was an appropriate case for the sanction of Counsel. No submissions were made with regard to publicity and the Tribunal ordered publicity in the usual way.

Vice Chairman