

**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**

against

**MICHAEL PATRICK GEORGE HUGHES,
residing at 11 Trinity Avenue, Glasgow**

1. A Complaint dated 17 March 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Michael Patrick George Hughes, 11 Trinity Avenue, Glasgow (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 in the form of a Record dated 29 June 2016.
4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 30 June 2016 and notice thereof was duly served on the Respondent.
5. The hearing took place on 30 June 2016. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Mr Foster, Solicitor, Glasgow. There was a joint motion by the Respondent and the Fiscal to convert the hearing to a procedural hearing. Mr Foster asked that his Answers be received late. He asked that the matter be adjourned to another procedural hearing in six

weeks' time. Mr Foster advised that there was a possibility of resolution of matters without a full hearing. Mr Lynch stated that in the circumstances he did not oppose the Answers being received late. The Tribunal agreed to allow the Answers to be lodged late but expressed its displeasure at the inconvenience caused to the Tribunal. The matter was adjourned to 9 August 2016 at 10:30am for a further procedural hearing.

6. The hearing took place on 9 August 2016 at 10:30am. The Law Society was represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Gary Allan, Q.C. instructed by Mr Foster, Solicitor, Glasgow.
7. The Fiscal indicated that the parties had an agreed position to put before the Tribunal. The Fiscal said that the Respondent would plead guilty to the averments of professional misconduct contained in paragraphs 38(a), (f) and (g) of the Record dated 29 June 2016. *Quoad ultra* the Respondent would plead not guilty. The Fiscal said that this plea was acceptable to the Complainers and they were not insisting upon the other averments of misconduct. Mr Allan confirmed that the Respondent was pleading guilty in those terms. The Fiscal noted that the averments of professional misconduct contained in paragraphs 38(a), (f) and (g) of the Record mirrored those in paragraphs 37 (a), (f) and (g) of the Complaint.
8. The Tribunal found the following facts established:-
 - 8.1 The Respondent's date of birth is 30th April 1981. He was enrolled as a solicitor in Scotland on 18th February 2010. Between 9th May 2011 and 28th May 2013 he was employed by the firm of Alex Mitchell & Sons, Solicitors, 21 Eskside West, Musselburgh. Between 3rd June 2013 and 31st December 2013 he was employed by TLT Scotland Limited, Solicitors (formerly Anderson Fyfe, Solicitors) 3rd Floor, Hobart House, 80 Hanover Street, Edinburgh. The Respondent was employed in the Edinburgh branch office of TLT. The Respondent resides at 11 Trinity Avenue, Glasgow. The Respondent was until recently employed as an estate planning consultant by W & W J McClure, solicitors, 3 Cadogan Street, Glasgow.

The Secondary Complainer

- 8.2 While employed by Alex Mitchell & Sons, the Respondent acted on behalf of the Secondary Complainer in relation to a Council Tax Dispute with East Lothian Council in 2011/2012. He was also instructed by the Secondary Complainer in connection with an action for interdict and power of arrest against the Secondary Complainer's neighbours.
- 8.3 In February 2013, a new file was opened when the Secondary Complainer contacted the Respondent in relation to a potential reparation claim against East Lothian Council as she was still experiencing difficulties with her neighbours. The Secondary Complainer owned her property which was in a block of flats, partially owned by the Council. She had previously been harassed by tenants of the Council residing in the flat above her. The tenants were evicted but the new tenants installed by the Council (who were apparently acquainted with the previous tenants) also harassed her, threatened violence and carried out damage to the Secondary Complainer's property and vehicle. Following the involvement of the police, the Secondary Complainer was advised to move out of the property to ensure her safety. She then had to sell the property at a time when the house was unmarketable due to the damage caused by her neighbours.
- 8.4 On 1 February 2013, an application for Legal Advice and Assistance for the Secondary Complainer was granted in respect of the Secondary Complainer's reparation claim which named the Respondent as the practitioner.
- 8.5 On 4 February 2013, the Respondent sent a Terms of Business letter to the Secondary Complainer, confirming that the firm had assessed her as being eligible for Legal Advice and Assistance. He explained the difference between Legal Aid and Legal Advice and Assistance.
- 8.6 On 15 February 2013, the Respondent sent an email to an Advocates' Clerk seeking an opinion from Counsel regarding the liability of East Lothian Council in the circumstances described above. He confirmed that the firm had sanction from the Legal Aid Board under Legal Advice and Assistance to incur the expense of obtaining the opinion.

- 8.7 The Respondent prepared a Memorial to Counsel setting out the background to the case and forwarded this to the Advocates' Clerk on 22 March 2013; he requested an opinion from Counsel and a consultation.
- 8.8 The Respondent had a consultation with Counsel and the Secondary Complainer on 8 April 2013. Counsel detailed the investigations that were required before he could determine whether the Secondary Complainer had a stateable case.
- 8.9 On 16 April 2013, the Respondent sent a letter to MB, the Secondary Complainer's bank manager, in which he wrote:
- "We have received confirmation that there is a prima facie case against East Lothian Council for causing the above noted client's property to be unmarketable and also caused her injury as a result of the neighbours moving in with the full knowledge of East Lothian Council. We understand that you are willing to give our client an overdraft based on the likelihood of success and the amount likely to be gained in this case. We can confirm that we are confident of a positive outcome in regards this Reparation Claim and our initial estimates put the claim at a minimum of £250,000".*
- 8.10 MB responded on 3 May 2013 and advised the Respondent that the bank's underwriters were unable to extend her facilities on the strength of his letter. He advised that the underwriters were looking for "*a stronger guarantee that the customer will definitely be receiving a large lump sum payment*" and an indication of when this sum would be received.
- 8.11 On 21 May 2013, the Respondent sent an email to the Secondary Complainer asking when she had sent her diaries as he wanted to look at them again and "*they didn't save to file*". The Secondary Complainer replied that her sister in law had handed in the diaries, etc., on 29 April 2013. The Respondent asked for new copies as he was unable to find them. He advised the Secondary Complainer that he was leaving the firm on 28 May 2013 and going to TLT LLP. The Secondary Complainer replied the same day, writing "*Will try and get everything copied again for you tonight but gutted they're misplaced presently (can't be helped)*". On 22 May 2013, the Respondent sent an email to the

Secondary Complainer to advise that the firm would let him take a limited number of legal aid cases with him including the Secondary Complainer's case. She replied the same day, informing him that she was on her way to his office with "*a black plastic file with some stuff for you*".

- 8.12 On 23 May 2013, the Respondent sent a letter to the Secondary Complainer and asked for copy emails and letters she had sent to East Lothian Council. He explained that "*if we do not have information such as this, then it will be difficult to show the court that East Lothian Council should have known that there would have been a risk to you specifically, by moving [PC] and her partner into 59B*".
- 8.13 The Respondent sent a further letter to the Secondary Complainer's bank manager on 28 May 2013 in which he wrote:
- "We...can confirm that our client has received a positive assessment of her reparation case against East Lothian Council. It is likely that her Reparation when taking into account her property and the psychological damage she has suffered would come in the realm of £500,000 to £750,000. The time frame is difficult to establish, however, having seen certain evidence we would hope for settlement from the Council in this regard and I foresee that the longest this case will last will be two years"*.
- 8.14 On 10 June 2013, a letter was sent by the firm to the Secondary Complainer informing her that the Respondent left the firm on 28 May 2013 and, as he (the Respondent) was the nominated solicitor for legal aid purposes, she should sign the mandate which was enclosed with the letter if she wished the firm to continue to act for her.
- 8.15 On 22 May 2013, shortly before leaving Alex Mitchell & Sons, the respondent sent the following text to the Secondary Complainer: "*They'll let me take a limited number of legal aid cases with me including this one. I could not take the council tax case with me*". The respondent started working at TLT LLP in June 2013.

- 8.16 Soon after the Respondent began working at TLT Scotland Limited he had a discussion with Mr Sheridan, a Partner in that firm, concerning the Secondary Complainer's case. Mr Sheridan instructed the Respondent that he was not to bring this case with him to TLT Scotland Limited.
- 8.17 Despite that, on arrival at the firm, a "New Client Form" for the Secondary Complainer's reparation case was completed by hand by the Respondent naming the Respondent as the Fee Earner and Mrs Mundy being named as the partner. A client number, "*Allocated by cash*", was handwritten in a different colour on the form which was unsigned and undated. Money Laundering checks were completed and the source of business was described as "*Transfer*". A handwritten post-it note on the form stated: "*Awaiting confirmation that insurance co. will pay. File needs to be set up. Michael Hughes*".
- 8.18 A mandate was signed by the Secondary Complainer on 2 July 2013 authorising Alex Mitchell & Sons to transfer her files to TLT. On 3 July 2013, the Respondent wrote to Alex Mitchell & Sons and, having quoted the client number, asked for "*the evidence provided by the client on the reparation file*" in the first instance and thereafter the files, after Alex Mitchell & Sons fees had been dealt with. Also on 3 July 2013, a handwritten note on the file indicates that the Respondent contacted the Secondary Complainer's insurance company (between 11.20 and 11.28); he recorded that they were "*unable to cover case under policy*". He sent a letter to the Secondary Complainer that day and confirmed that her insurance policy would not cover "*this type of action*". He then wrote that "*while this firm does not take on Legal Aid we may be in a position to do so once we have mandated your file and are able to show Counsel's opinion to the senior partners*". On 4th July 2013 the Respondent sent a text message to the Secondary Complainer in which he said that he would persuade the Partners in his firm to apply for Legal Aid to raise proceedings in the Court of Session.
- 8.19 The Respondent thereafter submitted a grant of Legal Advice and Assistance to the Scottish Legal Aid Board with the nominated respondent being Mrs Fiona Mundy of TLT Scotland Limited. Mrs Mundy was not aware of and did not agree to the making of this grant of Advice and Assistance. In making the grant,

the Respondent wrongly stated on the form submitted to the Legal Aid Board that the Secondary Complainer had not previously received Legal Advice and Assistance in relation to the particular subject matter of the grant.

- 8.20 Alex Mitchell & Son forwarded the files (and papers) relating to the Secondary Complainer's case to TLT Limited on 15 August 2013 following receipt of a signed mandate.
- 8.21 The Respondent ceased to be employed by TLT Scotland Limited in or about November 2013. He made no arrangements for a handover of the Secondary Complainer's file to other solicitors.
- 8.22 The next letter on file is dated 10 January 2014 and was sent to the Secondary Complainer by Mrs Mundy. She explained that the Respondent, had left the firm in November 2013, "*on giving several days notice for personal reasons*". She then suggested that, as she was unable to take on any more Legal Aid cases, "*it would be sensible to refer you to another solicitor to allow this application to be made as a matter of urgency*". Mrs Mundy asked the Secondary Complainer to contact her to discuss the situation as soon as possible.
- 8.23 Also on 10 January 2014, Mrs Mundy sent a letter to Alex Mitchell & Sons and advised that their file "*such as it is*" indicated that a fee note had been issued relating to a consultation with counsel while the Respondent was still in their employment. She asked them to confirm what files they held and what had been transferred to their respondent "*as we do not appear to have your full file*".
- 8.24 On 16 January 2014, Mrs Mundy sent a letter to the Secondary Complainer and, having referred to their telephone conversation earlier that day, wrote: "*As discussed, I am concerned that you appear to have been given information by my former assistant Mr Hughes about actions he was to have taken which appears to be wrong*". She advised that there was very little information in the file but the Respondent "*seems to have taken no active steps to pursue your claim since he joined TLT. I see that he did however contact Direct Line Insurance on 3 July who informed him that they were unable to cover your case under their policy*". Mrs Mundy then expressed concern that the Secondary Complainer had

“*apparently*” been given advice that she had a good claim against East Lothian Council for the injury she suffered as a result of the Council knowingly putting tenants who had threatened her in her immediate vicinity. She advised that if the Secondary Complainer had such a claim, an action would have to be raised in court no later than 3 years after she became aware of the claim and suffered the injury. As the tenants moved into the property in January 2012, Mrs Mundy explained that this meant an action must be raised before the end of January 2015.

- 8.25 Mrs Mundy then invited the Secondary Complainer to attend a meeting the following month and offered to go through the papers the Secondary Complainer’s possession “*with a view to deciding whether I am in a position to act for you or whether it would be better for you to instruct an alternative solicitor who can devote potentially more time to this in the immediate future*”. She then stressed that it was “*vitally important*” that the Secondary Complainer was able to attend the meeting and she advised that if she was unable to take the claim forward, she would identify an appropriate solicitor to act for the Secondary Complainer.
- 8.26 On 3 February 2014, Alex Mitchell & Sons wrote to the firm and, after confirming that they were liable for payment of counsel’s fee, asked for an update on the case so they could try and recover payment from SLAB. They then confirmed that the only file they still held was a closed file relating to another matter.
- 8.27 On 10 March 2014, Mrs Mundy had a meeting with the Secondary Complainer. The handwritten note of the meeting records Mrs Mundy’s concerns about the behaviour of the Respondent. She advised the Secondary Complainer that she could not act for her as there was a potential conflict of interest, given the Secondary Complainer might have a claim against the firm. With regard to the Secondary Complainer’s claim against the Council, Mrs Mundy doubted that there was a “*claim in law*” but if there was such a claim, she advised that it should be progressed urgently. She gave the Secondary Complainer the details of two solicitors and confirmed that she would copy the loose papers in the file.

- 8.28 On the same date TLT Scotland LLP carried out a search on SLAB's website and discovered the existence of the grant of Legal Advice and Assistance mentioned in Article 24 of Condescendence.
- 8.29 On 17 March 2014, the Secondary Complainer sent a letter of complaint to the Client Relations Partner of TLT. She referred to the meeting she and the Respondent had with counsel in April 2013 where, she said, counsel had indicated that she had sufficient evidence to link the evicted tenants with the replacement tenants. She explained that she had handed all the relevant documents relating to her case to the firm in April 2013 and again in May 2013 "*after Mr Hughes denied receiving the first set*". The Secondary Complainer then referred to the sum of £25,000 which she had borrowed "*on the strength of Mr Hughes letter to the bank manager*". Between July and November 2013 the respondent did nothing to advance the claim of the Secondary Complainer. He misrepresented the value of the claim to the Secondary Complainer's bank manager. On the strength of that misrepresentation the bank lent money to the Secondary Complainer.
9. The Tribunal heard submissions from the Complainers to the effect that the facts were sufficient to amount to professional misconduct in terms of the averments contained within paragraphs 38(a), (f) and (g) of the Record. The Tribunal heard submissions from Counsel on behalf of the Respondent to the effect that the Respondent pleaded guilty to professional misconduct in terms of those averments. The Tribunal confirmed that whether or not the behaviour amounted to professional misconduct was a matter for the Tribunal.
10. After considering the facts in the Complaint, the Answers in the Record and the submissions made by both parties, the Tribunal did not consider that the Respondent's conduct was sufficiently serious and reprehensible so as to meet the test for the professional misconduct but considered that the Respondent's actings may amount to unsatisfactory professional conduct in relation to paragraphs 37(a) and (g) of the Complaint and accordingly decided to remit the matter under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society. The Tribunal were satisfied that the facts in relation to paragraph 37(f) did not support a finding of even

unsatisfactory professional conduct. Accordingly, this paragraph was not remitted to Council under Section 53ZA of the Solicitors (Scotland) Act 1980.

11. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 9 August 2016. The Tribunal having considered the Complaint dated 17 March 2016 at the instance of the Council of the Law Society of Scotland against Michael Patrick George Hughes, 11 Trinity Avenue, Glasgow and the Record produced by the Respondent dated 29 June 2016; Find the Respondent not guilty of professional misconduct; Remit the Complaint as far as the averments contained in paragraphs 37(a) and (g) are concerned to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but specifically shall not name the Secondary Complainer.

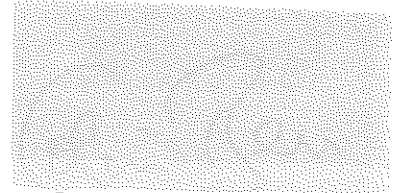
(signed)

Colin Bell

Vice Chairman

12. 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 8 SEPTEMBER 2016.

IN THE NAME OF THE TRIBUNAL



Colin Bell

Vice Chairman

NOTE

The Respondent had lodged Answers to the original Complaint and a Record had been lodged with the Tribunal. It was a matter of agreement between the parties that the Respondent was going to plead guilty to the averments of misconduct contained in paragraph 37(a), (f) and (g) of the original Complaint which were reproduced as paragraphs 38(a), (f) and (g) in the Record. The Chairman confirmed with both parties that this was indeed the agreed plea and that the Fiscal was prepared to accept pleas of not guilty in relation to all other averments of misconduct contained within the Complaint before the Tribunal.

The Chairman of the Tribunal highlighted to the parties that it is always a matter for the Tribunal whether or not the circumstances of a particular case are sufficiently serious and reprehensible so as to meet the test of professional misconduct in terms of the Sharp Test.

SUBMISSIONS FOR THE COMPLAINERS

Mr Lynch took the Tribunal through the Complaint. He told the Tribunal that the background to this case concerned the Secondary Complainer. The Respondent's actions occurred during periods of employment with two firms, namely Alex Mitchell & Sons and TLT Solicitors. It was narrated in the Complaint that the Secondary Complainer first instructed the Respondent when he was an employee of Alex Mitchell & Sons regarding a council tax dispute with East Lothian Council. That matter concerned an interdict with powers of arrest. In February 2013 a new file was opened regarding a potential reparation claim against East Lothian Council by the same Secondary Complainer.

The Fiscal referred the Tribunal to Article 6 of the Complaint. The Secondary Complainer owned property. This property consisted of a flat which was one of a number within a block. The Secondary Complainer had been harassed by the council tenants who lived in the flat above her property. They had been convicted of crimes against her. The council had replaced those tenants with new tenants who behaved in a similar manner towards the Secondary Complainer. The police became involved in the situation between the Secondary Complainer and the new tenants living above her. The Secondary Complainer was advised to move out. She had to sell her property which had become unmarketable due to the damage which had been caused to it. The Secondary Complainer wanted to claim against East Lothian Council. The Respondent and the Secondary Complainer met with Counsel in February 2013 but no written opinion was provided following this meeting. According to the information

contained in the Secondary Complainer's file, Counsel had said further information and enquiries were required.

Mr Lynch said that the Secondary Complainer went to a bank seeking a loan. The bank invited comment from the Respondent. Mr Lynch said that it was now accepted by the Respondent that there had existed a possibility of an award of damages being made against East Lothian Council for physical damage only but not economic loss. The Respondent now accepted that his view at the time regarding a claim for economic loss had been wrong.

On 16 April 2013 a letter was written by the Respondent to the bank manager in the terms which are set out in Article 12 of the Complaint (and reproduced at paragraph 8.9 of the Tribunal's Findings). This letter can also be found in the Complainers' Productions at page 163. Mr Lynch said that the sequence of letters which he wished to refer to the Tribunal began on page 163 which was a letter from the Respondent to the bank manager dated 16 April 2013. The next letter was found on page 170 of the Complainers' Productions. This was a letter from the bank manager to the Respondent dated 3 May 2013. The next letter was found on page 169 of the Complainers' Productions and was a letter from the Respondent to the bank manager dated 28 May 2013. Mr Lynch invited the Tribunal to consider the terms of the letter of 28 May 2013 contained on page 169 of the Complainers' Productions with the letter found on page 168 of the Complainers' Productions. The letter contained on page 168 was a letter from the Respondent to the Secondary Complainer dated 23 May 2013 and appeared to caveat considerably the Secondary Complainer's prospects of success. Mr Lynch highlighted that there was no indication in the file that anything had happened in the intervening five days between 23 May 2013 and 28 May 2013 to account for the difference in the opinions expressed in the last letter to the bank manager in terms of the prospect of success and the quantum of the claim. It was Mr Lynch's submission that when the letter at page 169 was read in the context of the letter of page 168, that the information contained in the letter at page 169 was plainly misleading. Mr Lynch said there was no significant attempt to quantify damages and that these had gone from £250,000 in the first letter to £500,000-£750,000 in the second letter. On the basis of the letters produced by the Respondent, the bank was persuaded to make an advance of £25,000 to the Secondary Complainer. She had little hope of being able to repay this loan.

The Respondent moved to TLT Solicitors. He was told that he should not take the Secondary Complainer's case with him. Mr Lynch told the Tribunal that he had been provided with a copy of an email dated 26 June 2013. This email was from Mrs Mundy of TLT Solicitors and it instructed the Respondent that he was not to take on any new cases without her express permission. Mr Lynch noted

that the Respondent left TLT Solicitors in November 2013. After his departure the Secondary Complainer met Mrs Mundy. The Secondary Complainer was told to take separate legal representation. Mr Lynch understood that she did this but does not know the progress of the case thereafter.

The Secondary Complainer made an application to the Scottish Solicitors Discipline Tribunal for compensation. She has a very significant physical disability and also has mental health problems. She had been prepared to come to the Tribunal hearing on the last date to give evidence as a witness. However because the hearing on 9 August 2016 was supposed to be a procedural hearing she was not required to come. Mr Lynch had tried to reach her by telephone on 8 August 2016 to advise her that the case was going to resolve. He left her a message but was unable to speak to her. His understanding was that the Secondary Complainer still wanted to pursue the compensation matter.

SUBMISSIONS FOR THE RESPONDENT

Mr Allan told the Tribunal that it was a sad and shameful day for the Respondent. He was a third generation solicitor and had been brought up with a clear picture regarding the duties and the integrity required of the profession. He accepted that he had let the profession and his family down by his actions. He was very sorry for his actions which had effects for the Secondary Complainer and the bank. Mr Allan said that the Respondent's actions were deplorable and fell far short of what should be expected of a solicitor. However, the Respondent had potential and general strength of character. Mr Allan believed that the Respondent could restore his own professional reputation and bolster and maintain the reputation of the profession in general. The Respondent was in the most difficult professional place that he could find himself. However, the Respondent hoped that the Tribunal could find a way to understand why he did what he did.

Mr Allan asked the Tribunal to consider that whatever else this case involved, there was no sense of the Respondent gaining any personal advantage except in the most oblique way. As an employee of the firms of solicitors, he had no direct gain to make from the actions he took.

Mr Allan said that the Respondent had considerable abilities. However, these were relatively raw and untrimmed. The Respondent was a very inexperienced solicitor. He qualified in 2010. These events started in 2013. At that time he had been qualified for about three years. He mostly worked in branch offices. He had a considerable degree of autonomy and a remarkable lack of supervision. The correspondence in this case bears witness to this lack of supervision. The Respondent was a newly

employed solicitor but was signing mail on behalf of the firm. Mr Allan referred the Tribunal to the Complainers' Productions at pages 167, 168 and 169 in this regard.

Mr Allan said that the Respondent was a confident young solicitor who had done well academically. The Secondary Complainer had come to him with a number of different issues. The Respondent had struck up a good professional rapport with her. The Respondent found that he was able to give her a degree of service which appeared to satisfy her and gave him professional satisfaction. The circumstances concerned a neighbourhood dispute taken to him when he was working largely unsupervised on his own. He had a significant caseload. He formed a view regarding the legal position and sought to find a way to help his client. Mr Allan submitted that this was all entirely laudable. The Respondent researched the law and came to a view. In retrospect having regard to a wider consideration of the law, Mr Allan has little doubt that the Respondent would revise his view. However at the time this view was honestly held. The Respondent gave certain advice to the Secondary Complainer. It was plain that the road ahead was not likely to be without difficulty. The Respondent sought the assistance of Counsel and took from the meeting on 8 April 2013 that it appeared that Counsel was broadly positive about the prospects of a successful claim. It was a matter of great regret that no written opinion was provided. Whether the Respondent took from the discussion more than he was entitled remained a real possibility. It was clear that there were properly a number of hurdles to be addressed which potentially could have stood between the Secondary Complainer and a successful outcome. The letter to her sets out at least some of these. The Respondent accepted in hindsight that he proceeded with an unrealistic and overly optimistic view. The law was against him when looked at in more detail than he did at the time. However, at the time, his view was honestly held, although erroneous.

So far as the bank is concerned, the Respondent had no dealings with the bank until the bank wrote to him. There was no relationship with the manager. The Respondent had nothing to gain. The bank wrote to him asking about the action in contemplation. He said to the bank what he had said to the Secondary Complainer. With hindsight, what he had said to the Secondary Complainer was wrong. The bank wrote back seeking further assurances. The Respondent found himself sucked into a situation where the bank was asking him to strengthen the Secondary Complainer's case and in due course they got the letter that they sought. The second letter was stronger regarding the likelihood of success and in terms of quantum, higher. If the letter had been couched with the caveats sent in the letter to the client there would be little to say about misconduct. Perhaps there would be issues arising of professional negligence because the case had proceeded on the basis of an error regarding the law. However, this was about the Secondary Complainer wanting a loan and then getting a loan. The bank was misled

regarding the prospects of litigation in terms of positive outcome and quantum. This had proceeded on the basis of mistaken view of the law.

Mr Allan said that the Respondent accepted that there had been an instruction that the Respondent must not take this file to TLT. There were a number of other cases which he did take with him with permission. Mr Allan said there appeared to have been “chain of command issues” at TLT Solicitors and Mrs Mundy was absent from the office for an extended period due to personal reasons. The Respondent had nothing to gain from disobeying the instructions. He considered that he had a good grasp of the issues. This was a worthy case that he wanted to pursue for the client. These are laudable objectives if managed properly in a disciplined way. However, he accepted that they were not managed properly in this case.

Mr Allan said the Respondent had made a mess of this case. Were he to set out on this path again he would be more careful regarding the law and correspondence going out in the name of his employers. Mr Allan submitted that there were issues regarding the supervision of inexperienced staff and whether this particular inexperienced staff member (the Respondent) was really up to the job.

The Respondent recognised that he might be struck from the Register. Mr Allan suggested that this consequence might be a step too far to recognise the failings of a very inexperienced solicitor who had not developed the skill of telling clients what they do not want to hear. The Respondent had been too ready to be optimistic regarding the chances of success. The Respondent should have told the Secondary Complainer that this was a long shot and should not have been sucked into the bank’s problems and basically ending up acting as collateral for a loan.

The Respondent was keen to show that was simply an aberration. He was a solicitor of only three years standing at the time in question. He was young and immature. However, he had persuaded people that he was worthy of the title of Young Solicitor of the Year the previous year. Mr Allan said that the Tribunal must balance those views when coming to a decision regarding the Respondent.

DECISION

The Tribunal carefully considered the evidence before it, the agreed plea, and the submissions made on behalf of the Complainers and the Respondent. The Respondent accepted that the facts relied upon to support the admitted averments of professional misconduct could amount to professional misconduct. However, this was a matter reserved to the Tribunal.

The Tribunal was aware that the test for professional misconduct is laid out in *Sharp v Council of the Law Society of Scotland* 1984 S.C. 129. Lord President Emslie observed that

“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.”

The test to meet professional misconduct is a high one and the case must be proved beyond reasonable doubt.

The original complaint had made seven allegations of misconduct but only three of these were insisted upon by the Complainers and admitted by the Respondent. The first averment of misconduct before the Tribunal was that contained in paragraph 38(a) of the Record which was as follows:

“The respondent failed to act in the best interest of [the Secondary Complainer] as having been advised by Mr Sheridan that he should not bring the case to TLT Scotland Ltd he continued to act on [the Secondary complainer’s] behalf without the knowledge or approval of the partners at TLT Scotland Ltd and without informing his client that he had not been authorised by his employers to transfer the case to TLT Scotland Ltd.”

The Tribunal were of the view that the Respondent should not have continued to work on the Secondary Complainer’s case when he moved to TLT Solicitors. However, he did not hide the file from his new employers. The file was set up appropriately within the firm’s case management system and there was even present in the file a letter from a partner of the firm (p99 of the Complainers’ productions). This letter enclosed TLT Solicitors Terms and Conditions of business. This was an isolated incident involving only one file. While not condoning the Respondent’s actions, the Tribunal were of the view that this behaviour was not serious and reprehensible enough to be properly categorised as professional misconduct, but might be sufficient to constitute unsatisfactory professional conduct.

The Tribunal considered together the averments of misconduct contained in paragraphs 38(f) and (g) of the Record since they both involved allegations of misleading behaviour. The averment of misconduct contained in paragraph 38(f) of the Record was as follows:

“The respondent misled [the Secondary Complainer] as to the prospect of her claim which he assessed as being worth between £500,000 and £750,000”.

The averment of misconduct before the Tribunal contained in paragraph 38(g) of the Record was as follows:

“The respondent wrote misleading letters to [the Secondary Complainers’] bank manager in connection with the prospects of success and the valuation of the claim as a consequence of which [the Secondary Complainers] borrowed money on the strength of the claim.”

The Tribunal was troubled by the Complainers’ allegation that the Respondent had “misled” the Secondary Complainer and the bank manager. The Tribunal therefore sought clarification from the Complainers’ Fiscal as to whether he alleged that there was any element of dishonesty involved in the Respondent’s communications with the Secondary Complainer and the bank manager. The Fiscal indicated that the most he could say was that the Respondent had been reckless in his assessment of the Secondary Complainer’s case and likely award of damages.

The Tribunal noted that the Secondary Complainer had been present at the meeting with Counsel. The Respondent had also heavily caveated the letter to the Secondary Complainer dated 23 May 2013 contained at p168 of the Complainer’s file of productions. While the Respondent admitted that he had misled the Secondary Complainer regarding the value of the claim, the Tribunal noted that there was no evidence put before it that the Respondent had told the Secondary Complainer that the claim was worth any particular value. There was no information available regarding the progress of the claim or what, if any, damages had in fact been awarded at the conclusion of the Secondary Complainer’s case.

The Tribunal noted that while there can be an overlap between professional negligence and professional misconduct, professional negligence does not of itself constitute professional misconduct. The test for negligence is different to that of misconduct. The Tribunal accepted the submission made on behalf of the Respondent that the representations made by the Respondent were based on an honest belief, albeit that it was mistakenly held.

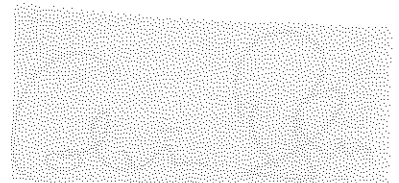
The test for misconduct is stringent. The Tribunal had to assess the degree of the Respondent’s culpability, described by the Law Society Fiscal as “recklessness”, in providing mistaken information to the Secondary Complainer and the bank manager regarding the Secondary Complainer’s claim. The Tribunal was of the view that given all the circumstances of the case there was insufficient information before it for the members to be satisfied beyond reasonable doubt that the Sharp test had been met.

Therefore, the Tribunal was satisfied that the Respondent’s behaviour in terms of the averments of misconduct contained in paragraphs 38(a), (f) and (g) of the Record was not sufficient either individually or *in cumulo* to amount to professional misconduct. However, the Tribunal considered that the actions of the Respondent might represent unsatisfactory professional conduct which is subject

to a lower standard of proof and accordingly remitted subsections (a) and (g) of paragraph 37 the Complaint under Section 53ZA to the Council of the Law Society of Scotland. The Tribunal was of the view that the averment of misconduct in subsection 37(f) of the complaint was insufficient to amount even to unsatisfactory professional conduct and accordingly did not remit this subsection of the Complaint under Section 53ZA to the Council of the Law Society of Scotland.

The Tribunal asked for submissions on publicity and expenses and enquired as to whether or not there were any circumstances which would require the Tribunal to refrain from giving publicity in full to its decision. Mr Lynch asked for publicity in the normal manner and he indicated that he saw no reason to believe that anyone's name should be excluded from the publicity. In connection with expenses, Mr Lynch stated that the Law Society had a duty to bring cases before the Tribunal and that it was the Respondent's conduct which had led to him being before the Tribunal. He therefore asked that expenses be awarded against the Respondent. Mr Allan had no submissions to make on publicity. Mr Allan said that in principle he had nothing to argue against what was said by Mr Lynch on expenses. However, he invited the Tribunal to mitigate to nil the expenses due by the Respondent since he had no assets whatsoever. Mr Lynch indicated that he did not think the Tribunal's discretion was so wide as to allow it to follow the course of action suggested by Mr Allan and that the means of the Respondent was not the proper basis for determining liability for expenses.

The Chairman asked Mr Lynch if it might be appropriate to depart from the usual position regarding publicity given the particular circumstances of the Secondary Complainer as described to the Tribunal by Mr Lynch earlier in the day, namely that the Secondary Complainer had allegedly been the victim of crime perpetrated by her neighbours, that she had sold her property and moved away to avoid them and that she might be described as a vulnerable person, with physical and mental health difficulties. Mr Lynch indicated that he had no difficulty with the Tribunal adopting that position. Mr Allan had no objection to this course of action. The Tribunal confirmed that there was no requirement for the Secondary Complainer to be identified in the Findings however publicity should be given to the decision and the publicity should include the name of the Respondent. The Tribunal considered that an award of no expenses due to or by either party would be the correct award of expenses in this case.



Colin Bell
Vice Chairman