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

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, formerly at 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh

Complainers

against

WILLIAM NUGENT, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow

First Respondent

and

DAVID JAMES DRAIN, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow

Second Respondent

1. A Complaint dated 3 August 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, William Nugent, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow (hereinafter referred to as "the First Respondent") and David James Drain, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow (hereinafter referred to as "the Second Respondent") were practitioners who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

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

4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 15 November 2016 and notice thereof was duly served upon both Respondents.

5. On the unopposed motion of the Fiscal, under Rule 56 of the 2008 Tribunal Rules, the Tribunal adjourned the hearing to 6 February 2017.

6. At the hearing on 6 February 2017, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. Both Respondents were present and were represented by William Macreath, Solicitor, Glasgow.

7. A Joint Minute was lodged with the Tribunal which indicated that both Respondents a) withdrew their Answers; b) agreed the averments of fact within the Complaint; c) agreed the averment of duty and that they both failed to comply with that duty; and d) that failure constituted professional misconduct on the part of both Respondents. The Fiscal for the Complainers lodged a List of Authorities and written submissions. The Tribunal also had before it two Lists of Productions for the Complainers. The Tribunal heard submissions from both parties.

8. The Tribunal found the following facts established:-

8.1 The First Respondent's date of birth is 26 April 1955. He became a member of the Society on 19 August 1981. He was a partner in Breslin, Robertson & Co. between 1 September 1984 and 15 May 1993. He became a partner in the firm of Alexander, Jubb & Taylor (the Firm) on 16 May 1993.

8.2 The Second Respondent's date of birth is 5 November 1952. He became a member of the Society on 4 December 1975. He was a partner in Breslin, Robertson & Co. between 1 September 1984 and 15 May 1993. He became a partner in the Firm on 16 May 1993.

8.3 A mortgage broker submitted a complaint against the Respondents in May 2012. He alleged that the Firm had failed to pay him about £10,000 of commission due to him in respect of business he had introduced to the Firm over many years. He stated that he was due £100 per case he referred to the Firm. The complaint was referred on to the Complainers who commenced an investigation. In support of that claim the mortgage broker provided the Complainers with two handwritten lists. The first list was headed '7 December 2005' and listed a series of matters where he maintained commission payments had been received from the Firm.

The second list was headed "sent 30-04-08" and listed a series of matters where he considered commission payments were outstanding to him from the Firm.

8.4 In his correspondence with the SLCC the mortgage broker provided correspondence between himself and the Respondents in support of his complaint. This included the following:

8.4.1 22 July 2009 e-mail from him to them asking for their proposals for paying "the long outstanding fees";

8.4.2 the First Respondent's reply that the Firm was struggling and he had no proposals to make but would make payment as soon as their circumstances changed;

8.4.3 12 February 2010 the First Respondent's letter entitled "outstanding commission" and enclosing a cheque in the sum of £100;

8.4.4 4 March 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding commission";

8.4.5 8 April 2010 a letter from the First Respondent with two cheques for £100 each with one cheque for "introductory commission" in respect of a client (Ms L M) and the other cheque a portion of "ongoing" sums due to the mortgage broker;

8.4.6 6 May 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding commission";

8.4.7 3 June 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding commission";

8.4.8 2 September 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding commission";

8.4.9 1 October 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding balance";

8.4.10 7 December 2010 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding payments";

8.4.11 9 May 2011 a letter from the First Respondent with a cheque in the sum of £100 and entitled "outstanding payments";

8.4.12 The mortgage broker's email of 8 February 2012 to the First Respondent requesting that he make payments for "outstanding introduction fees" and the First Respondent's reply that the Firm was struggling;

8.4.13 The mortgage broker's email of 20 April 2012 to the First Respondent to ask for details of the firm's client relations partner and the First Respondent's reply headed "outstanding introducer fees" advising that he was the client relations partner and stating that the Firm was not in a position to make payment.

8.5 In June 2013 the mortgage broker withdrew his complaint and the representative of the Respondents provided a copy of an affidavit by him dated 6 June 2013 explaining his position. Said copy affidavit is referred to for its whole terms which are held incorporated herein brevitatis causa. The Complainers considered that the information available to them indicated that the Respondents may be guilty of professional misconduct or unsatisfactory conduct in that they engaged in fee sharing with the mortgage broker in breach of section 4 of the Solicitors (Scotland) Practice Rules 1991 and decided to pursue a complaint ex proprio motu. The SLCC remitted the complaint for investigation on 28 August 2012.

8.6 The Respondents did not accept that there was any agreement to pay the mortgage broker an introduction fee and stated through their representative this was not a case of fee sharing with an unqualified party as there was "no payment of commission for introduction of business on a case by case basis". The Respondents' maintained that the payments were for services rendered to them by the mortgage broker. In response to Notices served on them the Respondents provided a substantial number of files, transaction ledger cards and on 30 January 2015 a redacted nominal ledger account. The redacted nominal ledger account showed payments made to the mortgage broker by the Firm between 15 September 2004 and 9 May 2011. The redacted nominal ledger account is referred to for its whole terms which are held incorporated herein brevitatis causa. The total payments amounted to £8,900.

8.7 The files and records produced by the Firm disclosed that in those cases where the mortgage broker provided services to clients of the Firm those clients were charged a fee by him. The Firm's files and records disclosed that in those cases where clients were charged a fee for services rendered by the mortgage broker that this was recorded on the client's ledger card. The Firm's files and records disclosed that on no occasion was a fee of £100 charged to the client for services rendered by the mortgage broker. The Firm's files and records disclose that the £100 fees were paid to the mortgage broker by the Respondents from Firm funds. The payment of £100 fees by the Respondents from Firm funds is confirmed by the contents of the redacted nominal ledger account referred to above. The £100 fees were paid by the Respondents to the mortgage broker for business referred to the Firm during the period 15 September 2004 to 9 May 2011.

9. Having given careful consideration to the agreed facts, the Productions referred to by the Complainers and the submissions made by both parties, the Tribunal found the Respondents guilty of Professional Misconduct as a consequence of the Respondents' failure between September 2004 and May 2011 to comply with Rule 4 of the Solicitors (Scotland) Practice Rules 1991.

10. Having heard further submissions from the parties in relation to mitigation, expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

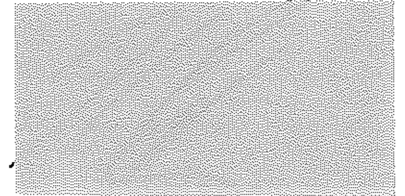
Edinburgh 6 February 2017. The Tribunal having considered the Complaint dated 3 August 2016 at the instance of the Council of the Law Society of Scotland against William Nugent, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow and David James Drain, Solicitor, Alexander, Jubb & Taylor, Solicitors, 5 Annfield Place, Glasgow; Find both Respondents guilty of professional misconduct as a consequence of their failure between September 2004 and May 2011 to comply with Rule 4 of the Solicitors (Scotland) Practice Rules 1991; Censure both Respondents; Find the Respondents jointly and severally liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be

given to this decision and that this publicity should include only the names of the Respondents.

(signed)
Kenneth Paterson
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 Respondents by recorded delivery service on 22 February 2017.

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson

Vice Chairman

NOTE

At the hearing on 6 February 2017 parties were advised that no shorthand writer was available for that date and, therefore, in terms of Rule 46(1) of the Scottish Solicitors Discipline Tribunal Rules 2008 the proceedings would only be recorded electronically.

The Tribunal had before it the Complaint, Answers, and two Lists of Productions for the Complainers. At the hearing, the Fiscal for the Complainers lodged a Joint Minute between the parties indicating that both Respondents were withdrawing their Answers, admitting the averments of fact and duty, and admitting that their conduct breached the averment of duty and amounted to professional misconduct. The Fiscal lodged a written note of his submissions and a List of authorities. Mr Macreath confirmed he had received intimation of those authorities.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall took the Tribunal through his written submissions which were as undernoted:

"Introduction

The complaint alleging professional misconduct against the respondents was originally lodged with the Tribunal in August 2016. This case concerns a referral fee arrangement which the respondents had in place with a mortgage broker, [the mortgage broker]. A Minute of Agreement has been entered into by the parties by which the respondents admit the facts, duties and averments of misconduct contained in the complaint. The respondents also admit that they are guilty of professional misconduct. That said, parties recognise that the question of professional misconduct is a decision for the Tribunal.

I am asking the Tribunal to find the *Sharp* test satisfied and find the respondents guilty of professional misconduct.

In this submission I will:-

- Summarise the complaint against the two respondents
- Refer you to the key facts in the complaint
- Consider the duty not to share fees with non-solicitors, and show that it was breached
- Submit why that breach amounts to professional misconduct

Summary of complaint

The complaint against William Nugent and David Drain is the same. The solicitors were partners in practice together in the firm of Alexander, Jubb and Tailor during the relevant time. This complaint concerns a referral fee arrangement which the respondents put in place with a mortgage broker, [the mortgage broker]. By this

agreement the respondents would pay [the mortgage broker] £100 for each client he referred to them. This arrangement was in breach of the practice rule that prohibits the sharing of fees with non-solicitors.

The period we are concerned with is 15 September 2004 – 9 May 2011. During that time the relevant practice rule was contained in the Solicitors (Scotland) Practice Rules 1991.

Rule 4 of the 1991 Rules provides that:-
"A solicitor shall not share with any unqualified person any profits or fees or fee derived from any business transacted by the solicitor of a kind which is commonly carried on by solicitors in Scotland in the course of or in connection with their practice..."

This rule prohibits solicitors from sharing fees or profits with non-solicitors.

In 2004 the Law Society published guidance to highlight the particular types of arrangement that Rule 4 was intended to prohibit (**"Fee sharing: making the rules work" (2004) 49 (2) JLSS 42)**. That guidance was authored by Bruce Ritchie, then Director of Professional Practice. It stated:-
'The Committee take the view that the principal type of arrangement which the practice rules prohibit is an ***arrangement to pay commission for the introduction of business on a case by case basis****...'*

The guidance makes clear that referral fees are prohibited.

In the current matter the position is that:-

- the respondents shared fees derived from their business with an unqualified person – [the mortgage broker] the mortgage broker
- this was an arrangement to pay commission to [the mortgage broker] for the **introduction of business on a case by case basis**
- the commission was paid by the solicitors to [the mortgage broker] from their firm account
- their clients were not made aware of the arrangement – it was not referred to in client fee notes or client correspondence by the respondents
- the arrangement was in breach of Rule 4 of the Practice Rules
-

Against that background I submit that the respondents are guilty of professional misconduct.

Submission that the respondents are guilty of misconduct

The respondents admit that they are guilty of professional misconduct as a result of the breach of Rule 4 of the Practice Rules. However the Tribunal must satisfy itself that on the facts established the respondents are guilty of professional misconduct. I will make a submission to assist you with that decision.

In support of that submission I will:-

1. Set out the facts to be found;
2. Set out the relevant duty owed by the respondents; and

3. Submit why a breach of the duty amounts to professional misconduct.

1 Factual findings

The respondents have withdrawn their answers to the complaint and all of the facts averred by the Law Society are admitted. Therefore I say you can find the facts contained in the complaint admitted in their entirety. However for today's purposes I would draw your attention in particular to the following parts of the Statement of Facts:-

- Para 5.1 of the Complaint – which concerns [the mortgage broker] making the complaint in May 2012 that he was due outstanding commission in respect of business introduced to the Firm over many years. His statement that he was due £100 per case referred to the Firm. He produced one list of cases where he had received the £100 per case, and a second list where he claimed he had not received the £100 per case.
- Para 5.2 of the Complaint – which narrates the correspondence between [the mortgage broker] and the Firm, in particular Mr Nugent, in which [the mortgage broker] is pursuing payment of "outstanding commission", "outstanding introduction fees" also referred to as "outstanding introducer fees". **The relevant chain of correspondence is produced as documents 5-17 by the Law Society.**
- Para 5.4 of the Complaint – which narrates the production by the respondents of files, transaction ledger cards and a redacted nominal ledger account in response to Law Society notices. The redacted nominal ledger account showed payments made by the Firm to [the mortgage broker] between 15 September 2004 and 9 May 2011. The total payments made amounted to £8,900. **The nominal ledger is produced as document 4 by the Law Society.**
- Para 5.5 of the Complaint – which narrates that the Firm's files and records disclosed that:-

  (a) in those cases **where [the mortgage broker] provided genuine services to clients of the Firm those clients were charged a fee by [the mortgage broker]**. This was recorded on the client's ledger card.

  (b) on no occasion was a fee of £100 charged to the client for genuine services rendered by [the mortgage broker]

  (c) **the £100 fees were paid to [the mortgage broker] by the respondents from Firm funds**. The payment of £100 fees by the Respondents from firm funds is confirmed by the contents of the redacted nominal ledger account. The £100 fees were paid by the Respondents to [the mortgage broker] for business referred to the Firm during the period 15 September 2004 to 9 May 2011.

The review of files and records demonstrates that when [the mortgage broker] performed genuine services for clients he received a fee for his services which was paid by the clients. However he also received a separate £100 fee on a case by case basis which was a referral fee, paid not by the clients, but by the respondents.

The Law Society has produced a number of files to demonstrate this referral fee operating in practice and how it sat separate to fees for genuine services provided by [the mortgage broker]. **[Review of Law Society documents 18-27 together with the Nominal Ledger document 4]**.

The facts of the complaint are admitted by the respondents. In my submission the review of files supports the conclusion that:-

- there was an arrangement to pay commission to [the mortgage broker] for the introduction of business on a case by case basis – the fee was £100 per case
- the only Gilmour costs set out in solicitors' fees were for genuine mortgage services he provided – these were paid by the clients
- the commission fees were paid direct from the solicitors' firm account i.e. firm monies, to [the mortgage broker]
- the client was not aware of the arrangement

2 Summary of duty owed by the respondents

The Law Society submits that there is a duty to comply with the practice rule which prohibits sharing profits or fees with non-solicitors. (Set out at para 6.1 of the complaint). It is submitted that the facts as agreed demonstrate a breach of that duty by the respondents.

In my submission as a result of the breach of duty, the respondents are guilty of professional misconduct.

3 Submission as to why the breach of duty amounts to professional misconduct

The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 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.*"

The question of whether a breach of the duty identified in this case is misconduct is entirely a matter for you. My submission on this question is in three parts. I will consider:-

(a) the purpose of the practice rule;

(b) the effect of departing from the practice rule; and

(c) the fact that this was a departure by the respondents over a sustained period of time.

<u>(a) The purpose of the practice rule – transparency to protect client interests</u>

Paterson and Ritchie in *Law, Practice and Conduct for Solicitors* discuss the ban on referral fees at para 10.14:-

'Fee Sharing and Referral Fees

Solicitors cannot share fees or profits with unqualified persons (with certain limited exceptions). The statutory offence of fee sharing was repealed in 1993...although the prohibition persisted for many more years in the form of the 1991 Practice Rules, and continues as part of the 2011 Practice Rules...'

As we saw earlier the Law Society went to the length of producing specific guidance on the Practice Rule in 2004 to make clear that referral fees were prohibited. The 2004 Guidance makes two important points:-

'The Committee take the view that the ***principal type of arrangement which the practice rules prohibit is an arrangement to pay commission for the introduction of business on a case by case basis****...'*

and

'The inclusion of a commission paid to an introducer as an outlay in a solicitors fee note – and not a hidden part of the fee – would not be in breach of the rules.'

The concern with the respondents' conduct in the current matter is that they fall foul of both concerns. (1) This was 'an arrangement to pay commission for the introduction of business on a case by case basis'; and (2) The commission was not an outlay in the solicitors' fee note and so was 'hidden' from the client.

The value of this guidance is that it makes crystal clear what the practice rule is prohibiting. We can see that the prohibition on referral fees was clearly established at the time of the respondents' conduct. It had been communicated to the profession.

The sharing of legal fees with non-qualified persons through referral fees has been found to be conduct unbefitting a solicitor by the English Discipline Tribunal and that view has been upheld by the High Court.
Beresford v Solicitors Regulatory Authority

In the miners compensation case of *Beresford v Solicitors Regulatory Authority* a Tribunal decision of conduct unbefitting made against the two partners of the firm of Beresfords was appealed to the High Court. That case concerned multiple issues but for us the key findings which were appealed against were that the solicitors:-
'....breached Solicitor Practice Rules 3 and 1 and were guilty of conduct unbefitting in that they accepted referrals of business in breach of the Solicitors' Introduction and Referral Code: Allegation (4);'

and

'...breached Solicitor Practice Rule 7 and were guilty of conduct unbefitting a solicitor in that they shared their professional fees with a non-solicitor, viz. by making payments of referral fees to Walker & Co [a claims service firm]: Allegation (8).'

In that case, rejecting these appeal grounds, the High Court noted at paras 100 and 115:-
'100 ***The central (and in the end, in our view, the only) point of substance is whether these were genuine payments for genuine services. If they were not, they were referral fees.*** *If they were not [genuine payments for genuine services], it is fanciful to suppose that Mr Beresford and Mr Smith did not know they were not....In our judgment, the Tribunal was amply justified in finding that there was no evidence to support the contention of genuine services supplied....In our judgment, the Tribunal was fully entitled to find as they did on [allegation 4]...'*

And

'115 Allegation 8 was that Beresfords had, contrary to SPR 7 shared their professional fees with a non-solicitor namely Walker & Co. ***The Tribunal found that the payments to Walker & Co were clearly fee sharing. Walker & Co had provided no genuine services.*** *The grounds of appeal repeat contentions advanced under allegation 4, which we have rejected. This ground of appeal fails.'*

In that case the High Court upheld the Tribunal view that sharing legal fees by way of referral fees to non-solicitors was conduct unbecoming. We can see that the High Court focussed on whether or not genuine services had been provided. That approach supports the Law Society's submission in this matter that there is professional misconduct where we have a referral fee arrangement and no genuine service.

However in both cases there is an added element which is the **lack of transparency** in the solicitors' arrangements. In *Beresford* the solicitors dressed up the referral fee as "vetting/marketing/administration costs". In the current matter the respondents didn't dress the fee up – instead they simply didn't disclose it to clients. In my submission this failure to disclose lacks transparency in the same way that mis-describing the fee lacks transparency. It is a serious and reprehensible departure from the standards that would be expected of a solicitor and supports a finding of professional misconduct.

What is the harm of referral fees?

(b) The effect of departure from the practice rule – lack of transparency puts client interests at risk

Paterson and Ritchie also discuss fee sharing and referrals at para 2.13:-

'***Referrals and Arrangements***

Referrals from a third party where there is no financial arrangement between the solicitor and third party related to the referral raise no special ethical issues....Where on the other hand, the referral comes from a third party with whom the solicitor has a financial arrangement, the ethical situation tends to become more problematic. First, as is the case in many other jurisdictions, there is a rule that solicitors may not share fees or profits with an unqualified person. Secondly, as fiduciary agents, solicitors may not retain commissions or payments from third parties without disclosure of the details to the client because of the rule against secret profits. ***Thirdly, if the referrals become a major source of business for the solicitor the "core value" of independence may come under threat, and a conflict may arise between the duty to act in the client's best interests and the temptation to favour the solicitor's own commercial interests***'.

In my submission the third point made by Paterson and Ritchie will assist you to find professional misconduct. It is the risk that referral fees may impact on the client's interests, particularly where the client has no knowledge of the arrangement.

The 2004 Guidance makes it clear that a lack of transparency in referral fee arrangements is the key concern. If the respondents had disclosed the fact of the referral arrangement with [the mortgage broker] to their clients, and invoiced their clients for [the mortgage broker]'s fee, the position would be different. However that did not happen.

What is the concern? It is the risk that solicitors "buy business" and the referring party is rewarded for channelling business to solicitors, while all the while the client is ignorant of the arrangement.

As Paterson and Ritchie note in their commentary at paras 10.14 and 10.14.02:-

'Proper disclosure to clients is vital....A commission or referral fee which is clearly set out as an outlay in the firm's terms of business at the outset and in the fee note at the end is not a breach of the Rules. That allows clients to see that they themselves will be paying the commission/referral fee. If the deal is that the introducer is

to get 10 per cent of the fee, the split would have to be declared to the client in both the terms of business and the fee note e.g. fees £900 and outlay of £100 (making £1,000 of which the outlay is 10 per cent).'

Of course where the client sees the referral fee the client then knows that there is an arrangement between the referrer and the law firm. That allows the client to understand why their business is being referred to a particular firm, and with the benefit of that knowledge, understand that they may choose to instruct another law firm if they wish.

That is the importance in transparency. It provides the client with knowledge to enable them to make a free and informed decision on whom to instruct. The risk in the arrangements made by the respondents in this matter, and part of the reason why I submit this is serious and reprehensible, is that the clients are not making a free and informed decision because they are unaware of the referral arrangement.

The English High Court decision of *Reed v Marriot* highlights that referral fees can impact on clients' interests, especially the freedom to instruct a solicitor of their choosing:-

Reed v. Marriot (On behalf of the Solicitors Regulation Authority)

This decision related to a referral arrangement established between the solicitor, Mrs Reed, and the insurer Norwich Union. A verbal agreement was made whereby 80% of claims over a five year period would be referred to Mrs Reed's firm. In return Mrs Reed's firm required to enter a services agreement with a Norwich Union subsidiary. Mrs Reed admitted that this scheme was set up to enable her to pay Norwich Union for each referral made. The Tribunal found this to be a breach of the Solicitors' Introduction and Referral Code which banned fee sharing between solicitors and non- solicitors. On appeal to the High Court, Sir Anthony May stated in relation to the ban on fee sharing at para 46:-

'...Referral fees were seen as objectionable because they tended to forge a commercial link of reliance between the solicitor and the referrer which was seen as inimical to the solicitor's independence and integrity; to the client's freedom to instruct a solicitor of his or her choice; and the solicitor's duty to act in the client's best interest....'

The High Court noted that the Tribunal at first instance in making a finding against the solicitor and issuing a fine of £10,000 considered that she was "*a straightforward and honest witness*" (para 15) and later "*that she had made a serious error of judgment in entering into the scheme with Norwich Union*" (para 24). The High Court dismissed the solicitor's appeal against the Tribunal's finding. I highlight these passages to show that it's not necessary for there to have been some evil intent on the part of the solicitor. The point is that the effect of the arrangement carries a risk to client interests.

Reed v Marriot assists your decision on misconduct because it highlights the dangers of referral fees where there is a lack of transparency, as there was in the matter before you now. The purpose of the practice rule is to protect client interests and their freedom to make an informed choice of solicitor. Departure from the practice rule has the potential to harm client interests by impacting on their freedom to make an informed choice. For that reason a breach of the rule amounts to professional misconduct.

<u>(c) Sustained departure from the practice rule</u>

Finally I would submit that the duration of the departure is relevant to your decision on misconduct. The Law Society guidance made clear the type of referral fee arrangements which were prohibited. This was clearly established at the time of the respondents' conduct.

The evidence recovered by the Law Society from the respondents demonstrates that the referral fee arrangement with [the mortgage broker] was in place in 2004 which was the year that the Law Society guidance was issued, and the arrangement carried on through to 2011 despite the terms of the guidance.

In my submission the breach of the Practice Rule over an extended period supports a finding that the conduct is sufficiently serious and reprehensible as to amount to professional misconduct. It may be said on behalf of the respondents that they did not appreciate that they were in breach of the rule. Even if that is the case in my submission the negligence in the continued breach of the Practice Rule over a seven year period meets the test for professional misconduct as set down in *Sharp*. In support of the submission that negligence can support misconduct I rely on Lord Denning's decision as Master of the Rolls in the Court of Appeal case of *In re A Solicitor*.

Conclusion: finding

For the reasons that I have given in part 3 of this submission above, I would ask you to find that the respondents are guilty of professional misconduct in accordance with paragraph 7.1 of the complaint which states:-

"The Complainers aver that the Respondents have been guilty of acts or omissions which, taken together, constitute professional misconduct on their part within the meaning of the Solicitors (Scotland) Act 1980 (As Amended) Section 53. In particular, the Complainers aver that as a consequence of the Respondents' failure between September 2004 and May 2011 to comply with Rule 4 of the Solicitors (Scotland) Practice Rules 1991 the Respondents are guilty of professional misconduct.""

In addition to his written submissions, Mr Marshall took the Tribunal through item 18 of his Second Inventory of Productions and Production 4 of his First Inventory which he submitted demonstrated the pattern followed through the transactions involved. If the mortgage broker had provided genuine services this resulted in a fee charged to the clients. However, the referral fee of £100 was contained in the firm ledger clearly demonstrating that the firm's funds were used for payment.

In response to a question from the Tribunal regarding the dates for payment, Mr Marshall clarified that it was often the case that the fees for referral were paid in bulk. The mortgage broker would keep a list of the payments due and submit that list to the firm.

In answer to a question from the Chairman as to whether or not the client was prejudiced in any way financially, Mr Marshall indicated that this question was answered in his submissions relating to the harm of referral fees.

A member of the Tribunal asked the Fiscal if he accepted that there would be no breach of the Rule if the referral fee was included in the client fee note and disclosed to the client. Mr Marshall responded that if the fee had been included in the fee note then there would have been transparency and an outlay that the client had agreed to pick up.

SUBMISSIONS FOR THE RESPONDENTS

Mr Macreath submitted to the Tribunal that the nub of the issue was the question of transparency. He referred the Tribunal to paragraph 10.14 of Paterson & Ritchie which he submitted indicated that there was no prohibition on a referral fee so long as this was paid by the client as an outlay in the solicitor's fee note and it was disclosed in the terms of business letter to the client.

Mr Macreath emphasised to the Tribunal that the question of misconduct was ultimately one for the Tribunal. The Tribunal required to consider whether it was an inevitable conclusion that the Sharp Test had been met.

He indicated that the firm had a long and respected history dating back to 1854. The Second Respondent was 64 years old and retired from the firm on 31 December 2016, although he was still the holder of a practising certificate. He became a partner in 1982. The firm was a private client chamber practice until 1983 when another partner who was a court practitioner joined the firm. The First Respondent joined the firm in 1993, having come from another very well known and respected private client firm. In 1997, the partner who had been the court practitioner left the firm and thereafter the firm returned to mainly a private client chamber practice. The First Respondent continues as a sole practitioner, with one paralegal and supporting staff. The First Respondent is a married man with four children.

The mortgage broker had originally lodged a Complaint relating to unpaid referral fees. The Law Society took up the Complaint in its current form *ex proprio motu*. The mortgage broker had sworn an affidavit giving his description of what had taken place. Mr Macreath had agreed with the Fiscal that they would both together precognosce the mortgage broker and it was during this process that it became clear that the mortgage broker was feeing the client for actual work done for them as well as

charging this introducing fee. The mortgage broker would prepare a valuation etc, receive the offer, and pass this completed file to the Respondents' firm for the contract to be concluded. It was generally agreed, but it was not always the case, that there would be a payment of £100 for that referral.

Mr Macreath submitted to the Tribunal that the cases referred to by Mr Marshall involved the most egregious form of behaviour and should be distinguished from this case. He argued that the Beresford case had involved not only improper referral fees but illegitimate success fees. This was a firm of Yorkshire solicitors which started off in 1988 having a turnover of some £680,000, which by 2004 had increased to a gross profit of £8.75 million and by 2006 a gross profit of £36.2 million. The Beresford case, he said, was the most succinct example of dishonourable behaviour known and it had led to legislation in 2013 prohibiting referral fees in England.

Mr Macreath stated that he believed this to be the first case in Scotland relating to the issue of referral fees. He accepted that a solicitor must always act in the best interests of his client act independently and not put the interests of a major source of business before the interests of his client and must always guard against a conflict of interest situation. The Complaints Investigator in this case had indicated that she could only find one other Complaint of this nature being made to the Law Society previously but in that instance the Complaint could not proceed as the original Complainer gave contradictory statements which exculpated the solicitor.

The original Complaint from the mortgage broker was one of unpaid commissions. Then the mortgage broker gave an affidavit suggesting that he had provided legitimate services. On precognition however it became apparent that he charged for these services separately.

Mr Macreath suggested to the Tribunal that the mischief in this particular case was that the Respondents failed to tell their clients that they were paying a referral fee. He submitted that transparency would have been sufficient to avoid these proceedings. There was a perception that the business was being referred to the Respondents on the basis that much of the work had been done by the mortgage broker. The reality was that the broker had already charged the client.

The money paid by the Respondents to the broker came out of the firm's money. The fees being charged by the Respondents to their clients were very reasonable. Looking at the cash accounts on files, what was being paid to the broker for his fees can be seen. These fees are not inconsiderable. At precognition the broker indicated that his usual fee for these services would be £200-500, irrespective of the size of mortgage. It is evident from the files that some of his fees were even higher than that.

Mr Macreath stated that he had reviewed some 98 files where clients had been referred to the Respondents by the mortgage broker and of these files 21 had involved no payment of a referral fee. He submitted that the fee was a discretionary matter, not always paid and sometimes billed six months in arrears.

Mr Macreath submitted that if the payments had been disclosed in a cash statement to the client then there would have been no breach of the Rules.

He asked the Tribunal to distinguish the case of Reed-v-The Solicitors Regulatory Authority. In that case the solicitor had entered into a complicated agreement with insurances brokers where she would receive 80% of claims for a period of five years. Norwich Union had set up two subsidiary companies to be part of this scheme. He suggested that on any view this was a sophisticated scheme created by the solicitor in order to get around the Rules. The court had described it as a device to obscure what was taking place and that as a result of this agreement, the solicitor was overly dependent on the business from the Norwich Union.

Mr Macreath suggested that Mr Marshall had referred to these two cases in order to draw points to demonstrate the mischief struck at. He argued that those cases were quite different. Those cases had involved personal injury claims. The case before the Tribunal was one involving domestic conveyancing and relatively modest fees. From those modest fees, the Respondents paid the mortgage broker £100 in some cases.

Mr Macreath emphasised that it was a matter for the Tribunal to assess if professional misconduct had been established. He reminded the Tribunal that solicitors are allowed to pay for marketing. Firms are allowed to pay a fee to be on a panel of solicitors so long as that is a flat fee and not per case or a percentage of fees. Solicitors are entitled to pay for the provision of services. If the services are done by the referrer then the referrer is entitled to be paid for that.

In England following the Jackson report, referral fees in personal injury cases have been completely banned. In Scotland, in his report, Sheriff Principal Taylor concluded that there was no evidence that referral fees in personal injury cases led to unmeritorious cases being raised.

Mr Macreath submitted that the mischief struck at here was the lack of transparency. If the clients involved had known that they were being referred to the Respondents in return for payment of a

referral fee, these clients may have said that they would prefer to be represented by another solicitor. In reality there was no evidence of any prejudice being suffered here. He conceded however that the Law Society was entitled to raise a case where it felt that a mischief needed to be addressed and a message sent to the profession.

The guidance note produced in 2004 was issued as a result of changes in England, opening up the profession. The Scottish Rules did not change. The guidance note confirmed that solicitors (a) could pay for marketing (b) could pay to be on a panel so long as it was a flat fee and (c) could pay for real services.

Solicitors should always be in the driving seat when dealing with their clients affairs. In this case the facts disclose that on occasion a referral fee of £100 was paid to the mortgage broker. Whilst there was no evidence of any likelihood that the Respondents independence was prejudiced, Mr Macreath conceded that clients must be able to make informed decisions.

Mr Macreath stated that in this particular case the total payments made amounted to £8,900 over a seven year period. He raised the question of whether or not that was egregious enough to meet the Sharp Test. He argued that there was no evidence that any advice given to clients was tainted by the relationship between the Respondents and the mortgage broker. He submitted that there was no evidence of any pressure being put to bear on anyone, any undue influence being imposed and no one being misled. Mr Macreath questioned whether the breach of the Rule was extensive enough to satisfy the Tribunal that the Sharp Test had been met. He argued that this was a genuine cost to the Respondents' firm and if they had included it in their terms of business letter then they would not be appearing before the Tribunal.

He asked the Tribunal to take into account that due to circumstances outwith anyone's control the clients had had to live with this outstanding Complaint for some time. He conceded that prejudice to the client was only one factor to be taken into account. He accepted that negligence, if egregious, could amount to misconduct. An error in the heat of court proceedings may be different to the payment of 89 referral fees over seven years, but ultimately it was a question for the Tribunal.

In response to a question from the Tribunal, Mr Macreath confirmed that the referrals from this particular mortgage broker made up approximately 10% of the Respondents' business.

A member of the Tribunal asked Mr Macreath what the mechanics were in the referral taking place. Mr Macreath responded that any answer he could give would be supposition but his clients believed that the mortgage broker would pass to them clients who had no connection with another solicitor and that they would be referred to the Respondents with the pre-contract work completed, for the Respondents to then complete the bargain.

In response to Mr Macreath's submissions, Mr Marshall drew the Tribunal's attention to the Joint Minute and emphasised that it was agreed in the Joint Minute that the Respondents were guilty of professional misconduct.

With regard to the Beresford case, whilst he accepted the case involved wider issues, it nonetheless considered the specific issue of fee sharing and concluded that on its own that amounted to conduct unbecoming of a solicitor.

He invited the Tribunal to bear in mind the scale of the conduct in the present case. Although the total figure involved was £8,900, this involved 89 separate instances of referral fees being paid to the mortgage broker.

This payment of referral fees without disclosure represented prejudice to the clients interest to make free and informed choices. He argued that the purpose of this Practice Rule was to protect the clients right to make a free and informed choice. He submitted that beyond the immediate prejudice described the Rule was designed to deal with a wider range of dangers. The purpose of the Rule was to prevent this type of referral fee arrangement coming into existence in the first place. The Rule sets out a standard to be adhered to and this standard was not met by the Respondents for a period of some seven years.

Mr Macreath responded that ultimately the matter of professional misconduct was one for the Tribunal, whatever was agreed between the parties. He stated to the Tribunal that, although on the face of it, the Respondents had breached the Rule for a period of seven years, the matter was ultimately one for the Tribunal to conclude.

DECISION

The Tribunal had been presented with a Joint Minute which had agreed (a) the factual nature of the conduct (b) the duty that had been breached and (c) that that breach amounted to professional misconduct.

The question of whether conduct amounts to misconduct is always one to be answered by the Tribunal. The Tribunal require to measure the admitted conduct against the test set out within the Sharp case in order to decide whether or not the appropriate standard has been met.

Here the Tribunal was faced with two very well experienced solicitors who had repeatedly over a number of years breached a well known Rule for the profession. As had been pointed out, prior to the Practice Rules 1991 this conduct had in fact amounted to a criminal offence.

Whist the Tribunal accepted that in this case there was no suggestion that the Respondents' clients were put at risk, the Rule that was broken involved a significant matter of principle. The solicitors regulatory body had, within the Rule, set out a standard of behaviour to be observed by the members of the profession. This standard of conduct was set by the regulatory body in order to provide protection to the public. It clearly cannot be acceptable for a member of the profession to repeatedly ignore such Rules. How can the public be expected to have faith in a regulatory body if members of the profession are permitted to ignore standards of conduct.

This repeated breach of the Practice Rules for a period of seven years can only be described as a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor. Accordingly the Tribunal unanimously concluded that the Respondents were guilty of professional misconduct.

In mitigation, Mr Macreath conceded that he had himself appreciated that the period of time involved was always an issue for the Respondents. He asked the Tribunal to take into account that both men had been in practice for a long time with no stain on their characters. The Second Respondent was now retired having had a lengthy career. The First Respondent was now in his 60's and continued in practice. The competition in the field of conveyancing was acute. He asked the Tribunal to take into account that it was common knowledge that many firms deal with domestic conveyancing in a very different way where it has become almost commoditised. This finding in itself was a damage to the reputation of the two men and as a result they faced at the very least an award of expenses.

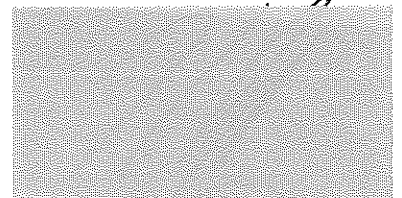
Mr Marshall asked the Tribunal to make an award of expenses against the two Respondents on a joint and several basis. With regard to publicity, Mr Marshall asked the Tribunal to take steps to ensure that the identity of any clients was not inadvertently disclosed within the findings but otherwise had no submissions.

SANCTION

The Tribunal considered that given the figures involved and the fact that there was no suggestion that any client had actually been placed at risk that this case could be considered at the lower end of the scale. Both solicitors had had long and unblemished careers. The finding of misconduct itself was a significant black mark on their otherwise unblemished record cards. Both men had cooperated with the proceedings and had entered into a Joint Minute. In these circumstances, the Tribunal concluded that the appropriate penalty was one of a Censure.

The Fiscal had moved for expenses and this had not been opposed. There seemed to be no reason to depart from the general rule that expenses go with success and accordingly the appropriate order was an award of expenses against both Respondents on a joint and several basis.

With regard to publicity, the Tribunal accepted that there was no interest to the public or the profession in including the identities of any clients. Additionally, the Tribunal concluded that there was no purpose to be served in naming the mortgage broker. The Tribunal made an order for publicity that would only include the names of the Respondents.



Kenneth Paterson
Vice Chairman