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

ROBERT JUDE PETER KERR, Solicitor, The Robert Kerr Partnership Limited, 12A Moss Street, Paisley

Respondent

1. A Complaint dated 16 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, Robert Jude Peter Kerr, Solicitor, The Robert Kerr Partnership Limited, 12A Moss Street, Paisley (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

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

4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 11 May 2016 and notice thereof was duly served on the Respondent. Subsequently, agents for the Respondent requested an adjournment of the hearing due to the lack of availability of Counsel instructed for the Respondent. There being no objection by the Complainers in terms of rule 56 of the 2008 Rules the Chairman agreed to the hearing of 11 May 2016 being discharged and a fresh hearing fixed for 30 June 2016 at 10:30am.

5. Notice of the hearing for 30 June 2016 was duly served upon the Respondent. Prior to that hearing a potential conflict of interest on the part of one of the members of the Tribunal was identified and intimated to both parties. The agents for the Respondent objected to this member of the Tribunal sitting on the case. There being no objection taken by the Complainers, in terms of rule 56 of the 2008 Rules, the Chairman agreed to adjourn the hearing to 20 September 2016 at 10:30am. Notice of this hearing was duly served upon the Respondent in terms of the Tribunal's Rules.

6. At the hearing on 20 September 2016, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Jonathan Brown, Esq. Advocate.

7. The Tribunal had before it the Complaint, Productions for the Complainers and a Joint Minute between the parties agreeing the averments of fact and duties within the Complaint and agreeing the documentary productions. The Answers for the Respondent were also before the Tribunal, but were not part of the Joint Minute. The Fiscal sought to lodge an additional documentary production which she confirmed had been intimated to the Respondent. No objection being taken to that motion, the Tribunal allowed the production to be received. A List of Authorities was lodged on behalf of the Complainers. No evidence was led. The Tribunal heard detailed submissions from both parties.

8. The Tribunal found the following facts established:-

8.1 The Respondent's date of birth is 5 November 1957. He was enrolled as a solicitor on 19 August 1981. He was a partner in the Firms of Robertson & Ross from 1 August 1984 and from 17 April 1989 Downie Aiton & Co., each until 4 September 1991, thereafter in Kerr Chambers Lynch & Co. from 3 September 1991 to the 10 March 2000 and Robert Kerr & Co. between 31 March 2000 and 31 March 2001. On 1 June 2001 he became a consultant with Robert Kerr & Co. and Stirling & Mair before becoming an employee of Stirling & Mair on 29 September 2001 where he remained until 9 March 2009. On 26 March 2009 he became a partner then Director in The Robert Kerr Partnership limited.

8.2 The Respondent submitted a complaint to the Scottish Legal Complaints Commission against a fellow solicitor Mr B on 6 May 2014. He complained that

Mr B had acted inappropriately in seeing and persuading Mr A, who was a client of the Respondent, to sign a mandate in favour of Mr B and thereafter had refused to pass on the client's papers in terms of a mandate signed by the client in favour of the Respondent. The SLCC considered the Complaint and, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6, remitted the Complaint to the Complainers to investigate.

8.3 By letter dated 22 July 2014 the Complainers wrote to the Respondent intimating their obligation under the 2007 Act Section 47(1) to investigate complaints relating to the conduct of enrolled Solicitors and enclosing the leaflet explaining conduct of complaints and the Complainer's powers. The letter advised that the complaint was based on consideration of the summary of complaint as agreed by him with the SLCC which had passed on paperwork received from him and he was asked if he held any other information or documentation relevant to the issues to forward that by 5 August 2014. He was told that there may be requests made for further information within specified time limits. On 13 August 2014 he was copied the response provided by Mr B and told that if he wished to comment he should do so by 2 September 2014. The Respondent did not respond to either letter.

8.4 The Complainers wrote to him on 9 September 2014 advising that specific information was required in order to progress the inquiry. He was asked to provide potential witness details, the original client's contact details and any other information he held on the issues within 14 days. He did not respond. Enquiries were made of Police Scotland, the Security Firm responsible for the cell area at Paisley on the date in question, and named solicitors who had contact with the client Mr A. On 23 September he was sent copies of the earlier letters, advised that the Complainers required the information to thoroughly investigate and given until 26 September to reply failing which the case would proceed on the basis that he did not intend to submit any supporting information. That day a fax from his Firm advised that the information was not all available and sought a continuation of one week. The Complainers agreed to continue consideration to 2 October but noted that they had to balance the interests of the party complained about.

8.5 On 2 October the Complainers were contacted by telephone and told that the Respondent had lost the letter requesting the information. A copy was e-mailed to him that day. On 3 October the Complainers telephoned the Respondent's Firm to check if he had replied. Staff confirmed that he had been told of the request for the information but was seldom in the office. Copies of the information obtained were sent to the Respondent on 10 November. He was asked to respond by 17 November if he wanted to comment or add information. Further information was sent to him for comment on 2 December. He did not respond. On 16 January 2015 the Complainers wrote to the Respondent noting that he had still given no substantive response to any request made of him for information. He was asked to provide the information requested in the letter of September 2014 by the 23 January and advised that the Complainers were considering serving a Notice on him. He was asked to confirm if he wished to proceed with his complaint. He did not reply.

8.6 On 2 February 2015 a formal Notice under section 48 of the Legal Profession and Legal Aid (Scotland) Act 2007 was served on him. He did not respond. On 11 March he was advised that although he had not replied the matter would proceed to consideration by a sub committee on the basis of the information available. On the 12 March he replied with the "only relevant paperwork we have in this case." and provided a statement by the client Mr A with no contact address. He gave no details of any other witnesses.

8.7 The Complainers Professional Conduct Sub Committee met on 28 May 2015 and considered the complaint against Mr B. They determined that after careful consideration of all of the information before it they would take no action in respect of the Respondent's complaint. The Complainers submitted a complaint to the SLCC due to the Respondent's failure and delay in cooperating with the investigation of his complaint.

8.8 Criminal Legal Aid practitioners often require to be out of the office during normal business hours and such practices set up their office procedures accordingly.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that the Respondent had, having made a conduct complaint against a fellow solicitor, between 22 July 2014 and 28 May 2015 repeatedly failed or delayed to respond to the reasonable requests of the Complainers for information and documentation relating to his complaint thereby hindering and delaying determination of the complaint which was under investigation for a period of over one year.

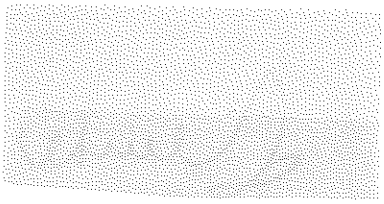
10. Having heard further submissions from the parties with regard to mitigation, expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 20 September 2016. The Tribunal having considered the Complaint dated 16 March 2016 at the instance of the Council of the Law Society of Scotland against Robert Jude Peter Kerr, Solicitor, The Robert Kerr Partnership Limited, 12A Moss Street, Paisley; Find the Respondent guilty of professional misconduct in respect that he, having made a conduct complaint against a fellow solicitor, between 22 July 2014 and 28 May 2015 repeatedly failed or delayed to respond to the reasonable requests of the Complainers for information and documentation relating to his complaint thereby hindering and delaying determination of the complaint which was under investigation for a period of over one year; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)
Nicholas Whyte
Chairman

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 28 OCTOBER 2016 .

IN THE NAME OF THE TRIBUNAL



Nicholas Whyte

Chairman

NOTE

When the case called before the Tribunal on 20 September 2016, the Tribunal had before it the Complaint, Productions for the Complainers, Joint Minute and Answers for the Respondent. The Joint Minute between the parties referred only to the Complaint and the Complainers' Productions. It made no reference to the Answers for the Respondent. Accordingly, the Chairman asked the parties to clarify the relevance of the Answers.

Mr Brown submitted to the Tribunal that the Respondent was not intending to lead evidence. Although the Answers were not referred to in the Joint Minute he suggested they were not entirely redundant. Mr Brown stated that there was no factual dispute and the Joint Minute was intended to reflect the absence of any dispute in fact of the conduct complained of which was a failure to respond. Nor was there any dispute that a measure of culpability attracts. The sole issue for the Tribunal was whether this conduct was of sufficient gravity, sufficiently serious and reprehensible, to amount to professional misconduct or whether it was more in the area of unsatisfactory professional conduct.

The Chairman explained that the difficulty the Tribunal faced was that there was a Complaint with a Joint Minute that agreed the averments of fact within it but there were averments in the Answers that were not consistent with some of the averments in the Complaint.

Mr Brown responded that there was no inconsistency between the Answers and the averments of misconduct in the Complaint. The Answers put the conduct into an explanatory context. He submitted that it was his intention to address the Tribunal on the admitted facts.

The Chairman, as an example of the difficulty, drew Mr Brown's attention to averment 6.1 in the Respondent's Answers where there was a suggestion that the Respondent had not himself completed or signed the original complaint. Mr Brown was asked if he was seeking to establish that as a fact and if so, how that was to be done.

Mr Brown responded that to the best of his knowledge it was not in every or even in the majority of cases that the Tribunal heard evidence. He was in a position to lead that evidence if the Tribunal could not deal with the case on the basis of submissions.

The Chairman explained that the example referred to Answer 6.1 was just one random example of the conflict. The Chairman asked Mr Brown if he was seeking to establish that fact and Mr Brown responded that he was.

The Chairman asked the Fiscal what her position was and Ms Motion confirmed that she could not accept that matter was either established or agreed. It was however part of her submission that even if that was the case there is a requirement on a solicitor to respond to correspondence from the Law Society. Even at its highest the defence position would amount to misconduct.

Mr Brown responded that it may not matter whether Mr Kerr physically signed the form or not as the form proceeds in his name and with regard to attribution of culpability that may not matter at all. It was not part of his submission that this was a *"get out of jail free card"*. The point he was making was simply that the organisation of this firm was such that administration duties were carried out by others within the firm. Thereafter it was for the Tribunal to assess if this was acceptable or not.

The Chairman raised with Mr Brown that the Tribunal would not reach the stage of assessing whether this arrangement was acceptable or not until it had decided upon what facts had been established. The facts could be established either by way of the Complaint and the Joint Minute agreeing them or if they were accepted by the Fiscal, or otherwise upon the basis of evidence led. The Tribunal required to identify what facts the Respondent wished the Tribunal to hold as established in addition to the facts agreed in the Joint Minute given that they appear not be accepted by the Fiscal. Once these facts or issues were identified the Fiscal could be asked if they were accepted, in which case they could be treated as established or the Respondent could lead evidence and the Tribunal could determine on what basis it was to make a decision.

Mr Brown responded that it was his understanding that the Complainers did not actively dispute what was being said rather that the Society could not know or take a position either way on what was outwith the Respondent's knowledge. It is not uncommon in any mitigatory submission to proceed on the basis of *ex parte* submissions. He invited the Tribunal not to take a decision at this stage but allow him to develop an outline of his submission. The Tribunal could then take a view that it did not matter and that it may make no difference to the outcome. He was happy to leave the matter with the Tribunal unless it was uncomfortable.

The Chairman indicated the difficulty might be if the Fiscal took issue with the facts. The Chairman also clarified that at this stage the Tribunal was not dealing with only mitigation.

Mr Brown submitted that there was a sliding scale between mitigatory and contextual matters which assists the Tribunal in assessing relative gravity.

The Chairman indicated that matters could proceed in the manner described subject to Mr Brown having regard to whether what was included in the submissions was consistent with the facts as established by the Joint Minute. The Respondent would require to pay attention to what matters he would ask the Tribunal to hold as established fact which were not included in the Joint Minute and not admitted by the Fiscal.

Mr Brown confirmed he would make that clear in his submission. The Complaint and Joint Minute spoke for themselves and it might be appropriate for him to begin submissions first. The Fiscal indicated that in the circumstances of this case she was happy for Mr Brown to make his submission first.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown submitted that he wanted to make it clear from the outset that there was a formal and specific admission that, on any view, what was admitted here supported a finding of unsatisfactory professional conduct. He explained that the Respondent had always accepted that. He confirmed that he understood the Tribunal could not make such a finding but that if it was in agreement with him then the case required to be referred back to the Law Society. He wanted to make it plain from the outset that he had specific instructions to concede unsatisfactory professional conduct. This supported his submission that this was not a route to escape responsibility, simply a way to determine the appropriate finding.

Mr Brown accepted that it was a general proposition that a persistent failure to respond to correspondence from the Law Society acting in its regulatory function is treated as misconduct. He did not intend to challenge that proposition. He would however suggest that the policy rationale for the Society prosecuting such behaviour as misconduct and the Tribunal treating the behaviour as misconduct was on the basis that it was commonly as a result of a complaint made by a client. Clearly a lack of cooperation could result in a matter coming to a complete standstill.

He did not intend to suggest anything that would change this historical approach to such conduct. He did however intend to persuade the Tribunal that the case before it today did not reach the threshold of

seriousness for a finding of professional misconduct having regard to (1) the subject matter and context of the original complaint made by the Respondent and (2) the context provided by the administrative organisation of the Respondent's firm.

With regard to the first point, he would emphasise that this was not a complaint made by a client. This was a complaint made by the Respondent's firm of another solicitor engaging in sharp practice in the criminal legal aid market at Paisley Sheriff Court. This was not the normal situation of an aggrieved client seeking redress. This was one solicitor saying that another solicitor was breaking or bending the rules.

He submitted that, on one superficial view, one might see substantial justice having been done by the original complaint that was made being thrown out by the Law Society.

This case did not involve the usual issues of protection of the public interest. The same mischief was not present in this case. The bad conduct does not of itself require such clear marking or deterrence as if this had been a client complaint.

The second part of his argument related to the context of the conduct in relation to the particular system of administration of the Respondent's firm.

He submitted that the Tribunal is an expert Tribunal and is taken to have knowledge of the generalities of the practice of law. He asked the Tribunal to consider the general day to day practice of the criminal law. Many solicitors will spend their day seeing clients by appointment, working on the telephone and dealing with correspondence. Civil litigators will appear at court with more or less frequency dependent on the firm. He emphasised that the Respondent's firm was one practising criminal legal aid in Paisley. He invited the Tribunal to have regard to the generality of the practice of criminal legal aid in urban jurisdictions and submitted that it was much less structured. In this area solicitors are dealing with clients many of whom are troubled or non-compliant. Such clients do not necessarily open or respond to mail. They do not keep appointments or turn up without appointments. A summary criminal legal aided case attracts a fixed fee of £500 – this being expressed as *"swings and roundabouts"*. The practical consequences of this is that in particular in the afternoon the office requires to operate more as a drop-in clinic. Often what is involved will be in many ways routine such as taking instructions from an accused who has received a complaint often at the lower end of the scale of offending. It might include completing an application for legal aid. Thereafter a plea will be tendered possibly by letter. Witness statements will be disclosed by the Crown. In advance of an intermediate diet, the client

will be seen again if all goes to plan. Instructions will be taken in the light of the statements and commonly the case will resolve often by way of a plea of guilty in whole or in part. An office can only run on general structural lines. Criminal courts cannot fix court dates according to the diaries of practitioners. The only way to proceed is to ensure that files can be picked up by anyone. These will not be big files. These will be the day to day bread and butter of criminal legal aid. The majority will be cases involved in summary procedure in the large part involving recidivist offenders.

Mr Brown submitted that he was describing this by way of context and that the Tribunal being an expert Tribunal should not require evidence. He submitted that the Tribunal would be accepted to have knowledge of the standard criminal legal aid practice in urban jurisdictions.

Many conventional firms have sole practitioners. In relation to this practice of a drop-in clinic in the afternoon it will be whoever gets back from court first who sees the client. Clients in custody will also require to be visited. There may also be clients of greater or lesser importance.

This firm was nothing out of the ordinary. The Respondent was the leading light of the firm. The firm is in his name. He was the one with the market presence or as it is sometimes said the *"rainmaker"*. He was the trial lawyer of repute in that jurisdiction and firm. The others in the firm processed the business obtained by him.

Mr Brown submitted that the Tribunal could accept this without evidence.

The particular feature of the firm at that time was that it was organised in such a way that the Respondent would work from court. He was at court every day. Clients would turn up looking for a lawyer. Paisley Sheriff Court is the largest court in Scotland with a large jurisdiction which includes what could be called the southern fringes of Glasgow. It has eight separate courtrooms and six or so full-time sheriffs. This was a very busy criminal court serving a population of a quarter of a million people or so including areas of social deprivation. The busy firms have to get through the business as efficiently as they can. In this firm this was organised by the Respondent generating the business, doing the advocacy and incidental client contact work. The Respondent used the meeting rooms at the court. When he was not on his feet or with a client he would be dictating, on an old fashioned dictaphone, attendance notes and the like. An office junior would shuttle to and from the office which was almost immediately adjacent to the Sheriff Court building. The junior would take the dictation tapes back to the office and bring the next set of files.

The other members of the firm would run the drop-in clinic and the back office. Although this might not be an arrangement to everyone's taste, it could not be said that in and of itself this was an accident waiting to happen. The others referred to were experienced lawyers and partners who were well able to deal with the work.

This whole situation began with a spat or disagreement over what might be called touting for business. A client of the Respondent was being tapped up. Correspondence was sent to the Law Society and the Law Society responded by saying the complaint needed to go first to the SLCC. As far as Mr Brown was instructed the correspondence was drafted by the solicitor Karen Railton although it runs in the Respondent's name. Mr Brown was instructed that the form of complaint to the SLCC was completed and signed by Ms Railton. Although the form runs in the name of the Respondent the reality always was that the complaint was that of the firm. The complaint was *"our clients are being approached by our competitor"*. The underlying dispute was a storm in a teacup.

The Respondent knew that the initial steps towards a complaint being made had been taken and he knew this because there had been discussions and agreement reached on what they would be. He did not however monitor the correspondence. This was being dealt with by the general structure of the firm. The Respondent now knew that there was a considerable degree of pressure within the office. Ms Railton was just back from maternity leave having started back working two days a week. Another one of the partners was moving in a different direction. The others in the firm prioritised client business with immediate court deadlines. Law Society correspondence was put in a pile for tomorrow and tomorrow and tomorrow.

Mr Brown emphasised that it was not part of his submissions that Ms Railton was anything other than a competent lawyer. She had thought that she would be able to come back to work under the same pressure as before but now with a baby. This was a high pressure, high octane business. Conscientious practitioners sacrificed themselves. Ms Railton found this difficult and ultimately concluded that she could not continue.

This context was relevant for the application of the Sharp test. The Tribunal required to look at the gravity and the assessment of the individual culpability of the Respondent. Firms do not get found liable, solicitors do.

The Sharp case had involved the Accounts Rules and partners working in branch offices too remote to the main office. Unless such partners were put on notice, they were entitled to assume that the office structures were performing in the way they were supposed to.

Mr Brown acknowledged that the Respondent could be found guilty of misconduct by culpable lack of supervision. Nothing he said intended to challenge the proposition that a solicitor could be guilty for the sins of others if the environment created had no proper control. In this case there was nothing until after the event that put the Respondent on notice that a problem existed. This was not a case where there was a one man band leaving an unqualified secretary to do a solicitor's job or leaving a trainee to do the best that he or she could.

Mr Brown acknowledged that whilst there was a school of thought that in the generality this might be acceptable, nonetheless you have to put your nose around the door on a regular basis. Hindsight in this case indicates that this would have been better. The Respondent's firm is now organised so that the Respondent is in the office.

The Respondent has always worked on the basis that he knew what was on his plate. Others in the firm found it intrusive if he was looking over their shoulder in the office. However that it is just the way it is now with the changes made.

Addressing the question of whether the Tribunal can consider this, he submitted the Respondent could indeed take the oath and answer any questions that anyone may have of him. However he submitted the question for the Tribunal really was *"Does it really matter"*. It is not his submission that because he did not sign the letters he escapes. It is his submission that one has to look at the relative gravity in context. If the Respondent is to give evidence and be cross-examined then so be it. However this was not a case where the Tribunal was in the position that if it found X then Y must follow. All of this is double-edged for the Respondent. It raises different questions of duty and different questions of whether appropriate steps were taken to monitor the firm.

Mr Brown submitted that there was a scale of gravity and that somewhere on that scale there was a line. The Tribunal's job is to say where on that scale this case falls. Does it pass the threshold? Is this a case that is susceptible to fine examination or a case that requires to be looked at in the round.

He submitted that he was in the Tribunal's hands but that any evidence that could be led would be restricted to the administrative side of it.

At this juncture the Chairman indicated to Mr Brown that the difficulty for him was that the Tribunal required to assess the facts against which the test had to be measured to decide on which side the case fell. The Tribunal requires to know what the facts are to which it requires to apply the test. The difficulty was that the Respondent had put forward an alternative to the Complaint. The submissions for the Respondent appeared to accept that the suggestion that he did not sign letters did not affect his culpability however, the Chairman asked Mr Brown if he accepted that the suggested fact that he did not sign the letters and was not involved has to be assessed by the Tribunal against the test. The Tribunal requires to know what it is they are testing. It may be that the Fiscal accepts the submissions but the Tribunal needs to be clear what it is testing.

Mr Brown indicated that what he had had in mind was that ultimately the Tribunal decision would not be affected by the Respondent's version of events.

The Chairman indicated that whilst that may be the end result, the Tribunal required to hold certain facts as established. The Chairman asked the Fiscal for her position, confirming that having heard the Respondent's submissions it was clear what position the Respondent was putting forward with regard to the facts.

The Fiscal indicated that she did not consider that the Respondent giving evidence would help in either way. It was her submission that whatever position was put forward the case still amounts to professional misconduct.

The Chairman continued to express concern. He suggested that the Fiscal could choose one of two paths, either say that she did not accept the position put forward by the Respondent, in which case evidence could be led, or accept what was said but submit that nonetheless the conduct amounted to professional misconduct.

The Fiscal indicated that whilst she did not accept what was being said, she did not dispute it. She indicated that she required to take the more neutral position. It will be her submission that, whichever factual scenario applies, the conduct amounts to misconduct.

The Chairman questioned whether this had an effect on the Joint Minute.

Mr Brown indicated that he concurred with the Fiscal's approach. She was not in a position to question the Respondent's submission. He submitted that the Fiscal was perfectly entitled to say that she does not know the position but that did not mean that the opposite applied. The Tribunal is entitled to proceed on the basis of *ex parte* representations whilst acknowledging that is what they are placing such weight on them as it considers appropriate.

The Chairman again emphasised that before looking at whether or not the conduct amounted to misconduct, the Tribunal required to find facts established. The Chairman asked if both parties were satisfied that the Tribunal proceed by assessing the *ex parte* statements which have not been admitted but are not being disputed and that the Tribunal would have to consider whether or not it is satisfied that these matters have been established and then the Tribunal would assess on which side of the line the conduct falls.

The Fiscal indicated that she agreed with Mr Brown that it was for the Tribunal to assess what weight it should give to the *ex parte* statements.

The Chairman clarified that if the parties were both happy to proceed on the basis of the ex parte statements they had to be aware that the Tribunal will be making a decision in respect of these ex parte statements. Both parties confirmed they were content with that.

The Chairman asked Mr Brown if he had any comments to make with regard to the rule 48 notice. Mr Brown submitted that was another part of the story of correspondence that was not dealt with. It was the type of correspondence that obviously screams for a response but it was in the general position that this was not brought to the Respondent's attention. He did not seek to argue that this was anything other than unsatisfactory conduct. It was not part of his submission that was something that did not require to be complied with.

In response to a question from the Tribunal, Mr Brown accepted that whilst he had submitted that the mischief present in this case was not the same as the mischief present in a case where the complaint was made by a client he nonetheless accepted that there was a mischief albeit of a different character. He also acknowledged that a one line letter from the Respondent withdrawing his complaint would have solved the problem. He accepted that there was a mischief of time and trouble and the possible wider interest in a complaint being fully investigated by the Law Society.

After an adjournment for lunch, on reconvening the hearing, the Chairman again asked the parties for clarification with regard to the *ex parte* submissions made on behalf of the Respondent. He asked both parties if they were accepting that it was for the Tribunal to determine between the position put forward in the *ex parte* submissions and the version as set out and admitted in the Complaint, where there is a divergence between them, or were parties stating that as the submissions are not disputed they are to be taken as admitted.

Both parties intimated to the Tribunal that it was their positon that it was the former position that they were accepting.

As an example of the divergence of the two positions, the Chairman drew the parties' attention to averment 4.4 of the Complaint. In that averment reference was made to a discussion with a member of staff which appeared to be at variance with the submission made on behalf of the Respondent.

Mr Brown indicated that the Respondent was not able to say that he had never had such a discussion. It was his position however that he was absolutely certain that he had no knowledge of or notice of correspondence piling up and not being responded to.

The Chairman asked the parties to consider the significance of the last statement made by Mr Brown. This appeared to fall directly into the category of a matter that was not admitted but not disputed but that the Tribunal required to assess before considering the question of misconduct. This was not just the question of what weight to be placed on the matter. The Tribunal required to decide what facts had been established before going on to consider the Sharp test.

Mr Brown indicated that he was not in a position to contradict that such a discussion in fact took place. However, he sought to draw a distinction between the knowledge that the correspondence was in fact underway and a strongly held belief that the matter was in hand.

The Chairman asked if Mr Brown's submission was that he wanted the Tribunal to proceed on the basis of a lack of detailed knowledge of the correspondence. Mr Brown accepted that was the position.

The Chairman asked both parties what the status was of an *ex parte* submission that was not admitted but not disputed.

The Fiscal indicated that it was her view that it had the status of a hearsay statement and the weight the Tribunal chose to give it was a matter for the Tribunal.

The Chairman asked both parties to confirm that if what they were saying was that if there was a conflict between the position of the Complaint, Joint Minute and correspondence and the *ex parte* submissions it was for the Tribunal to choose between them. Both parties agreed that was their positon.

Mr Brown submitted that in addition however the Tribunal could take into account its knowledge as a specialist Tribunal of this type of legal practice.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal lodged a copy of an email dated 3 October which she asked to be added to her bundle of productions. She indicated that this had been previously intimated to the Respondent. The Respondent confirmed he had no objection to this.

The Fiscal drew the Tribunal's attention to the terms of the Joint Minute and emphasised that the documents lodged on behalf of the Complainers were agreed to be complete and accurate and that they could be relied upon for their terms. She submitted that there were a couple of documents that were important in relation to the issue of knowledge on the part of the Respondent.

This was the first case of its type to be taken to the Tribunal where the allegation was that the solicitor may be guilty of professional misconduct for making a complaint against another solicitor and thereafter failing to respond to Law Society correspondence.

She intended to open her submissions by discussing whether it was open to the Tribunal to find that such circumstances might amount to professional misconduct. The question she asked of the Tribunal was *"Can it be professional misconduct and then is it professional misconduct"*.

At this juncture Mr Brown intimated to the Tribunal that he did not dispute that such conduct could be professional misconduct.

The Chairman clarified that despite an admission of this on the part of the Respondent, the Tribunal had to be satisfied of this itself.

The Fiscal lodged a List of Authorities. She referred the Tribunal to Sections 47, 48, and 51 of the Legal Profession and Legal Aid (Scotland) Act 2007. Sections 48(1)(b) and 48(4)(b) provided for the complainer being required to provide information. She submitted that the terms of Section 51 reinforced this although no Section 51 notice was served in this case.

It was her position that there was no distinction and that the obligations were the same for a complaining solicitor as they were for a complainant solicitor. If the obligations were the same then the failure to comply requires the same scrutiny when considering whether the conduct amounted to professional misconduct. The principle that a failure to respond can be considered as professional misconduct is very well known. She referred the Tribunal to Smith & Barton and Paterson & Ritchie. These make clear the principles on which the Society has founded when bringing a Complaint before the Tribunal and upon which the Tribunal has held misconduct.

She referred the Tribunal to the case of the Law Society of Scotland-v-Murray. She submitted that this was a case involving a single failure to respond to the Law Society where issues of ill-health and administrative issues in relation to the closing of the firm did not prevent misconduct being held. Whilst she accepted that each case had to be decided on its own facts, the Murray case had involved two letters over a period of three months.

The Fiscal then referred to the case of the Law Society of Scotland-v-Stephen Angus Anderson. This again involved one Complaint of failure to respond and this was over a period of three months.

The third case she referred to was that of the Law Society of Scotland-v-Taco Frank Nolf. She referred the Tribunal to pages 7 and 8 of the findings disclosing that there had been four letters with no response.

The Fiscal submitted that these three cases set the scene for the general principles to be applied. She submitted that it was open to the Tribunal to hold that a complaining solicitor who then failed to answer correspondence could be guilty of professional misconduct.

The Fiscal went on to suggest that in some ways the issues were clearer where the complainer was a solicitor. She submitted that a solicitor should be more aware of the potential serious consequences of making such a complaint to the Law Society. One would expect a solicitor to be aware of the time and cost involved on the part of the SLCC and the Law Society. A solicitor should be aware of the stress involved to the complainant and the time involved for that solicitor in answering the complaint raised.

The complaint had a potential impact on a solicitor's day to day business; the time required by that solicitor to respond to the complaint; the possible impact on that solicitor's application for professional indemnity insurance; the effect on any official tender for business or applications for official positions. Any fellow solicitor should or would be aware of these matters.

The lack of response to the correspondence has an impact on the reputation of the profession. Ultimately a complaint has to be dealt with on the basis of the information available. It is even more incumbent upon a solicitor making a complaint to follow up timeously to allow the Law Society to deal with the complaint expeditiously. Although it may have a different flavour and angle to the usual situation where a complaint is made by a client it is nonetheless just as serious.

She invited the Tribunal to prefer the Complaint as it was admitted and supported by the documents produced.

She submitted that it was known that (1) the complaint was lodged on 6 May 2014, (2) the complaint ran in the Respondent's personal name and (3) that the name printed at the bottom of the form was that of the Respondent. She referred the Tribunal to document 1/17 of her Productions. This was a complaint made by the Respondent to the SLCC based on a letter sent on 26 March which was documentary Production 1/21. The Respondent was clearly aware of that complaint and that letter. He knew about it and that it was done with his authority and knowledge.

The Fiscal drew the Tribunal's attention to the last sentence of the letter dated 26 March 2014 that was Production 1/21. It took just short of one year for any information to be provided by the Respondent.

She drew the Tribunal's attention to Production 1/24 which was a letter of 26 March 2014 which was a precursor to the actual complaint itself and was a letter bearing the Respondent's name at the bottom. This letter refers to a complaint being made to the Law Society and to the Sheriff Principal at Paisley Sheriff Court. It expresses some considerable upset at the complained of conduct by the other solicitor.

With regard to the *ex parte* submission for the Respondent regarding him basing his practice at the Sheriff Court, it was stated that he carried out dictation. It should be asked why he did not carry out dictation in relation to these letters if files and correspondence were being brought to him at the courthouse. It was hard to describe a complaint to the Law Society as routine administrative business. It was the Respondent's responsibility for his own practice including correspondence sent to him personally. Correspondence was sent to him not the firm.

There was no suggestion here that letters were hidden or that there was inappropriate hiding of the documentation. If the Respondent had chosen to set up his administration in such a way that matters were not dealt with, this she suggested was the opposite to mitigation. If the Tribunal also considered that he was aware that there were problems within the partnership involving one partner not coping and another heading in a different direction, then alarm bells should have been set off for him. The abrogation of responsibility in relation to such correspondence undermines the importance of it. To accept such an argument would remove a significant plank of the regulator.

The Answers for the Respondent do not disclose when he became aware of the correspondence. The Answers suggest that the Respondent was not aware of the correspondence. If the Tribunal prefer that position then this is an absolute abrogation of his responsibilities. There is however a conflict between the Complaint and the Answers. The Fiscal invited the Tribunal to prefer the Complaint and in particular to look at averment 4.4 and Production 6. She also referred to the copy emails that she had lodged previously in the hearing.

The Respondent at least had knowledge of the complaint and was pinned with knowledge of the correspondence by this stage. The letter referred to in the telephone conversation is the letter reproduced as Production 4. The Fiscal submitted therefore that the Respondent was pinned with knowledge as at September 2014.

The Answers for the Respondent indicated that two of his partners were responsible for *"some"* of the correspondence. She indicated that the use of the word *"some"* was significant. In fact only two responses were made – the first being a fax dated 26 September 2014 bearing reference JAA/JG asking for further time and the second being Production 12 being a letter from the Respondent dated 12 March 2015 bearing the name of the Respondent himself.

She suggested that the Respondent was very much aware of what was going on. He certainly was aware of the situation before the statutory notice was served. He failed to respond to any correspondence. That failure included a failure to respond to a threat of a statutory notice sent on 16 January 2015.

This lack of response continued for nearly 12 months. 11 letters were sent including emails. 10 deadlines were imposed. There was one threat of a statutory notice then the actual notice itself. Apart

from the last piece of correspondence there was no material substantive response ever received from the Respondent.

The Fiscal asked the Tribunal members to put themselves in the position of the solicitor receiving such correspondence. She asked whether it would be seen as acceptable to deal with it in this manner or whether one would consider that the correspondence had better be dealt with. All the Respondent had required to do was write to say that having considered matters he had calmed down. In that situation, although the matter would go to a Committee, the Society would in all likelihood not take it forward.

She submitted that whichever angle was established – whether the Respondent was aware of matters in September or whether it was failure in systems within his office, the test for professional misconduct was met. She submitted that the Respondent could not abrogate responsibility for such correspondence. At no time did the Respondent contact the Law Society to suggest he had not seen any of these letters.

The impact on a solicitor complained about cannot be underestimated. The Respondent's conduct hindered the investigation and caused the Society to carry out investigations at increased cost and expense. The investigation period was extended by his lack of cooperation. This had actual cost consequences for the Complainers. Additionally the complaint had to be determined on limited information. This was a lengthy period of non-cooperation or disengagement by the Respondent. This clearly had the capacity to bring the profession into disrepute. This caused the Complainers to lodge their own complaint with the SLCC.

The Fiscal referred the Tribunal to the case the Law Society of Scotland-v-Alan McWilliam, at page 11 and submitted that this set out the well-established position of the Tribunal. She went on to refer to the Law Society of Scotland-v-Stephen Gerard Fagan, although conceded that this was of a more serious nature.

She referred to the case of the Law Society of Scotland-v-Stephen Michael Skimming, although conceded that this case also involved failing to respond to client correspondence.

The Fiscal went on to emphasise that the Respondent had wasted the Law Society's time, had caused members of staff of the Law Society to incur expense by investigating this complaint and had subjected another solicitor to the possibility of a disciplinary sanction. This in itself had the capacity to bring the profession into disrepute.

The Chairman asked the Fiscal what her position was with regard to the nature of the letters sent. It appeared that there were two categories, those that required a response and those that invited a response if the Respondent wished to make one.

The Fiscal responded that both categories of letter had to be considered and that they should be taken together. There was a general obligation on the profession to communicate effectively with the regulator and others. She submitted that, undoubtedly, the failure to respond to the statutory letters themselves was more serious, however together they all pointed to a picture of a course of conduct. She submitted that the failure to respond to the statutory letters themselves would be enough to justify a finding of professional misconduct.

RESPONSE BY THE RESPONDENT

Mr Brown indicated that he wanted to make three points.

(1) The Complaint before the Tribunal is not that the original complaint made was malicious or itself misconduct.

(2) He wanted to observe that there was a measure of corroboration in the documents for the position he had urged upon the Tribunal. He referred to Production 6 as it referred to the Respondent being seldom in the office. He referred to Production 5 which he referred to as the holding letter which bore the reference of another partner. The final letter at Production 12 he accepted was a letter from the Respondent. He conceded that this was not a complete response although it was indicative of the matter being promptly addressed once brought to the attention of the Respondent.

He asked the Tribunal to consider the terms of the original complaint itself. Someone else in the office had conduct of this complaint and that person was dealing with it as a partner of the firm.

(3) He asked that the Tribunal to consider the terms of the correspondence in that many of the pieces of correspondence did not demand a response but rather invited one if *"you have anything to add"*. He accepted the general principle that a solicitor must respond to correspondence but the Tribunal had to have in mind the effect on the reader of the terms of the correspondence. In the grand scheme of things, where matters require to be prioritised, there are things that require to be done and those that might not need to be. Matters had to be looked at in the round.

He submitted that there ought to be some material gravity before the Tribunal made a finding of professional misconduct. He suggested that this case was at the margin. He accepted the generality that solicitors not responding to the Law Society could be misconduct. He suggested that here the context should be taken into account where the complaint was that of the firm. The question of professional misconduct concerned the Respondent's failure and not the collective failure of the firm. He submitted that it was not culpable to leave partners to deal with the day to day business of the firm including complaints raised by the firm. The collective failures of the firm should not fall upon the Respondent alone. Mr Brown conceded that the Respondent required to take a rateable share of the blame and conceded that the Respondent's final answer to the correspondence was not sufficient to answer the queries that had been raised or to satisfy the previous lack of correspondence. He submitted that the final analysis should be a broad consideration of the circumstances made by an expert Tribunal.

In response to a question from the Tribunal, Mr Brown confirmed that the Respondent's office is some 300 yards from Paisley Sheriff Court.

The Chairman addressed both parties and indicated that it was his intention to set out what the Tribunal required to consider in order to give the parties an opportunity to make any further representations. It appeared that there had been submissions on whether or not such conduct can amount to professional misconduct. It appeared that the Respondent had put forward two matters which might place the conduct in this particular case outwith the category of professional misconduct; (a) the subject matter of the original complaint itself and (b) the context of the organisation of the firm. This was the area where the Tribunal would require to determine between the Complaint and the Joint Minute on one hand and, where it varied, the *ex parte* submissions of the Respondent which were not admitted but not disputed. The Chairman asked the parties to make it absolutely clear that they were expecting the Tribunal, where there was a divergence between the Complaint and Joint Minute on the one hand and the *ex parte* submissions on the other, that the Tribunal were to make a determination between the two, whilst also taking into account the content of the documents. Both the Fiscal and Mr Brown confirmed this was what they were asking the Tribunal to do.

The Fiscal directed the Tribunal to Production 1/24 to emphasise to the Tribunal that the letter was written in the first person and referred to the language used in the second paragraph. Mr Brown accepted that the letter was written in the first person but drew the Tribunal's attention to the reference on the letter which he said was the reference for Ms Railton. He stated that it was not disputed that the

Respondent was aware of and agreed to this complaint being made. It was his submission however that once the machine began to grind forward it was not being dealt with by him.

DECISION

The first step the Tribunal required to take was to decide what facts had been established before it. In considering this the Tribunal had regard to the fact that the onus of proof lay with the Complainers throughout and that the standard of proof was one of *'beyond reasonable doubt'*.

The Tribunal required to determine factually what the conduct was before it could go on and take the next step of assessing whether that conduct amounted to professional misconduct.

On the one hand the Tribunal had the Complaint, Joint Minute, and documentary productions. On the other it had the *ex parte* statement of Mr Brown. Both parties had invited the Tribunal, where there was a conflict, to choose between them. Having carefully considered the agreed facts, content of the documentary productions and both parties' submissions, the Tribunal was satisfied that the above Findings in Fact had been proved beyond reasonable doubt. To the extent that there was any conflict between the ex parte statement and the facts as agreed in terms of the Joint Minute, it preferred the latter.

The next step for the Tribunal was to assess the conduct proved against the test for professional misconduct as described in the Sharp case. The Tribunal considered it important to emphasise that what was being criticised was not the original complaint itself but the Respondent's failure to respond to correspondence from his regulatory body.

This Tribunal has on many occasions stated the importance of a solicitor cooperating with the Law Society as a regulatory body. The Society exercises this function to protect the public and preserve the reputation of the profession. It cannot do so effectively without the cooperation of solicitors. There seemed no basis to the Tribunal upon which it should distinguish between solicitors as complainers or solicitors as complainants. A solicitor hindering his regulatory body has the potential for bringing the profession into disrepute. Therefore a solicitor who makes a complaint to the Law Society who then fails to respond to Law Society correspondence may be guilty of professional misconduct.

This Complaint involved a number of pieces of correspondence over a period of nearly one year. While each individual piece of correspondence did not insist on a response, the course of

correspondence and course of conduct required to be looked at as a whole. The failure to respond to a statutory notice was of particular gravity.

Mr Brown invited the Tribunal to distinguish this case on the basis of the subject matter of the original complaint made by the Respondent. The Tribunal concluded that that was irrelevant to the issue before it - the basic fundamental principle that a solicitor has to respond to correspondence with his or her regulatory body.

Mr Brown had also asked the Tribunal to distinguish this case on the basis of the administrative set up of this firm. The Tribunal has already indicated that, to the extent of any conflict between the account submitted by the Respondent and the position as agreed between the parties in terms of the Joint Minute, it preferred the latter. Even however accepting everything that the Respondent had submitted by way of further explanation, the Tribunal concluded that this explanation would not have amounted to a basis for holding that the conduct did not meet the Sharp test. This case involved a significant number of pieces of correspondence addressed personally to the Respondent by his regulatory body. He could not abrogate his responsibility to reply to such correspondence.

The Tribunal concluded that the conduct in this case fell below the standard to be expected of a solicitor to such a degree as would be considered serious and reprehensible by any competent and reputable solicitor. Accordingly the Tribunal unanimously found the Respondent guilty of professional misconduct.

MITIGATION

Ms Motion submitted that whilst this case could be said to be at the lower end of the scale she had a concern regarding the possibility of repetition. The Respondent had no history of disciplinary matters on his record which she placed before the Tribunal.

She moved for expenses and indicated she had no submissions re publicity.

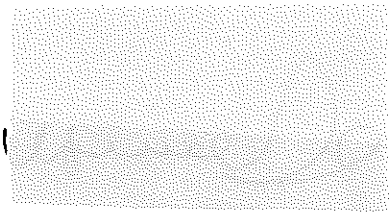
Mr Brown indicated he could not resist the motion for expenses and had no submissions re publicity. He emphasised the changes in office management made by the Respondent and submitted that there was no risk of a repeat of this conduct.

He submitted that the Tribunal could treat this as a one off. The Respondent had always accepted that this case amounted to at least unsatisfactory professional conduct. There were no concerns about this man being in practice as a principal. This conduct was at the margins of professional misconduct. The sanction selected by the Tribunal should reflect its position on the scale of misconduct.

PENALTY

The Respondent has been in practice for some 35 years with no previous difficulty. He had cooperated with proceedings to the extent that he had entered into a Joint Minute agreeing the averments of fact and duty. He had demonstrated insight into his conduct by changing his working practices. There appeared to be no risk presented to the public. In all these circumstances the Tribunal unanimously concluded that the matter would be best dealt with by a Censure.

The usual orders were made with regard to publicity and expenses.



Nicholas Whyte

Chairman