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

F I N D I N G S

in Complaint

by

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

Complainers

against

MATTHEW DAVID COHEN, residing at Dalgety Farmhouse, Dalgety, Brechin

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Matthew David Cohen, residing at Dalgety Farmhouse, Dalgety, Brechin (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. A revised Complaint dated 24 March 2022 was lodged with the Tribunal. Answers to the revised Complaint were lodged for the Respondent.

4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 14 June 2022 and notice thereof was duly served on the Respondent.

5. At the virtual hearing on 14 June 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow.

6. Having given careful consideration to the terms of the Complaint, Answers and submissions, The Tribunal found the following facts established:-

6.1 The Respondent is Matthew David Cohen. He resides at Dalgety Farmhouse, Dalgety, Brechin. He was born on 14 February 1975. He was admitted as a solicitor on 10 January 2007. He was employed by Todds Murray LLP between 12 March 2007 and 10 August 2007. He was then employed by Cohen & Co from 13 August 2007 until 1 January 2008 then again by Cohen & Co between 4 September 2008 and 30 October 2008. He was employed by Hutcheon Rattray & Co between 1 November 2008 and 30 January 2009. He then became a director at Matthew Cohen & Associates Ltd where he practised until 7 December 2017. On 7 December 2017 he was suspended from practice by the Law Society of Scotland. He remains suspended. He was sequestrated on the 30 October 2019.

6.2 The Respondent latterly practised as Matthew Cohen & Associates Ltd, where he was the cashroom manager. The firm was inspected by the Society over the period 14 – 16 August 2017. It had previously been inspected in 2015. The Respondent was the cashroom manager during the period between the two inspections.

6.3 Following the 2017 inspection, the Society produced an inspection report and asked the Respondent for comment upon each area of concern. In respect of the Respondent's inspection there were 12 areas of concern which appeared as 12 schedules in the report. Not all schedules formed actionable areas of concern. The Respondent did not provide any replies or confirmation that the observations had been resolved.

6.4 It was noted in the 2017 Report that in 2015 it was observed that there was a delay in returning client balances in breach of Rule 6.11 (Client balances held after the conclusion of a matter) and a delay in registering deeds. The same breaches and delay were evident in the inspection in 2017. The Respondent had failed to alter his practices to lodge deeds timeously. Other breaches not remedied following the inspection in 2017 were extant since the previous inspection in 2015 (these included delay in registering deeds and breaches of Rules B6.5.1, B6.5.1(d), B6.7.1(a), B6.7.3, B6.3, B6.11 and B6.23).

6.5 Rule B 6.3 The Respondent's client bank account required to be properly reconciled and be in credit in order that he could pay all client money out if called upon. Of concern were two payments £294.30 dated 3 May 2017 and £500.31 dated 23 May 2017 received by the Respondent's client bank account. They were held as unreconciled. It could not be established for which client these monies should be held. Investigations should have been made promptly. No such investigations were observed between receipt in May and inspection in August. The Respondent had not properly reconciled these funds.

6.6 The unknown sums should have been identified as such and held on a miscellaneous client ledger thereafter dealt with promptly and if no client identified returned to the bank. The Society sought explanation as to what investigation was carried out and why the sums had not been returned to the bank. No explanation was given by the Respondent.

6.7 Further, the Respondent's client bank account was in deficit, in that he did not hold sufficient funds to settle with all clients, if called upon, in the period 23 May to 30 June 2017 (38 days). No explanation was provided to the Society by the Respondent.

6.8 Rule B6.5.1 permits only fair and reasonable fees (as defined by Rule B1.11) to be drawn from a client account. In five cases the Respondent did not charge reasonable fees on the basis that the fees charged exceeded the fee quote provided. The Respondent did not provide any explanation for fees which were charged in excess of the fee quoted (Rule B1.9.2).

6.9 Rule 6.5.1(d) provides that a solicitor is required to render a fee note timeously and before taking funds from the client account to meet the same. In seven cases fee notes were debited without being rendered.

6.10 Rule B6.7.1(a) requires a practice unit and in this case the Respondent as the Cashroom manager to keep proper written accounting record showing client's money and the use thereof.

6.11 The inspectors arrived on the 14 August 2017 at which time the Respondent advised that the books for July 2017 had not been closed due to the Respondent's financial year ending in July. He required to send further postings to his outsourced cashroom provider. The inspectors sought by email of the 23 August the July daybooks. The Respondent advised the July books remained unclosed. The longer daybooks remain unclosed the greater the risk of manipulation. It is reasonably expected the daybooks should close immediately at month end.

6.12 On inspection of available records, the inspector found

a) client ledger for MCLEJ00-01 contained an entry whereby the fee debited to client ledger dated 9 December 2015 under invoice 1263 was recorded as £3,600.00, whereas the fee rendered per the client ledger was £4,390.00.

b) client ledger for WONGX01-07 contained an entry whereby the fee debited to the client ledger dated 25 April 2016 under invoice 1559 was recorded as £1,200.00, whereas the fee rendered per the client ledger was £40,183.83.

6.13 Rule B6.7.3 requires a practice to keep written record of the true financial position of the practice unit both on monthly and year end basis. The inspector found the following:

6.14 At the time of inspection, it was noted that staff salaries were in arrears, and the Respondent utilised loan funds drawn for the payment of tax to meet salary arrears. The true extent of the arrears of salary was not able to be identified from the records nor did the Respondent provide a definite figure.

6.15 The Respondent was in arrears in his settlement of VAT with HMRC. The Respondent had been meeting an agreed payment plan for VAT arrears with HMRC since February 2017. It was noted a VAT return dated 30/04/17 (£8500) had not been paid and the VAT return for period ending 31/07/17 had not been submitted. It was estimated that the total sum due to HMRC could be in the region of £35,000.00. The records did not show the true debt due re VAT. The Respondent did not provide a definite figure.

6.16 As the Respondent was not able to provide accurate figures for salary arrears and VAT obligation the true financial position of the firm could not be ascertained.

6.17 Rule B6.11.1 requires a practice unit to return client monies promptly when there is no reason for retaining the sums. Generally, a period of two months is a reasonable time for actioning the return of client balance. Monthly reviews are recommended to identify the necessity for retaining sums and distribution of the same.

6.18 On inspection of a sample of client balances, 25 ledgers showed retention of funds beyond the two months period.

6.19 Specific examples observed in August 2017:

a. MCLEJ00-01 £24,590.00 last moved December 2016
b. REIDG01-01 £24,770.83 last moved June 2017
c. SHEKN00-02 £25 last moved May 2017
d. SINGG00-01 £3.60 last moved April 2017
e. YESUH00-01 £63.60 last moved June 2017
f. BOURN00-10 £25 last moved June 2017
g. COHEM001-01 £188.90 last moved June 2017
h. ILSKR00-01 £180 last moved June 2017
i. KERRN00-01 £60 last moved April 2017
j. COHEM00-09 £11,250.85 last moved February 2016

6.20 Rule 6.23 & Money Laundering Regulation 2007. All solicitors are required to comply with the Money Laundering Regulations in terms of Rule B6.23. This requires *inter alia* preparing policies, keeping records of compliance (including training), carrying out customer due diligence and carrying out and monitoring risk assessment of each piece of client work.

6.21 The Respondent did not carry out a risk assessment and therefore did not carry out ongoing monitoring on the following files

i. MERZE00-02

ii. COOPC00-01

iii. ADAMK00-01

iv. MACDC00-01

v. GAULP00-03;

6.22 The Respondent did not keep record of the training (if any) he provided to his staff.

6.23 If a manager (partner) of the firm introduces capital to the firm he requires to evidence the source of funds. An example would be bank account details.

6.24 Mr Sharma, a partner of the firm, paid the sum of £7,000.00 to the practice unit by credit card dated 25/01/17. The sum was then repaid to Mr Sharma the same day. This was queried during the inspection, and it was advised that this was the only way Mr Sharma could obtain the funds he required.

6.25 A further £7,000.00 was paid into the firm bank on 08/02/17 by Mr Sharma - pay in reference 000026.

6.26 The Respondent did not keep details required to vouch the source of the capital injections. He was asked to provide the same but did not do so.

6.27 Rule 6.4 provides that breaches should be remedied. A number of breaches were not remedied following the inspection and which were extant since the previous inspection in 2015 (including delay in registering deeds and breaches of Rules B6.5.1, B6.5.1(d), B6.7.1(a), B6.7.3, B6.3, B6.11and B6.23).

6.28 Rule B6.13 provides that the Cashroom manager is responsible for the systems in place and training of staff to implement and comply with provision of Rule B6-Account Rules.

6.29 The various distinct breaches of Rule 6 narrated in the complaint illustrate that in August 2017 the Respondent had failed to discharge his responsibilities as the firm's Designated Cashroom Manager. He failed to establish systems and training

and has not used acquired the appropriate skills and knowledge necessary to discharge the duties of a cashroom manager.

7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct singly in respect that he:

7.1 Breached Rule B6.11.1 by failing to return client monies promptly when there was no reason to retain the sums; and

7.2 Breached Rule B6.23 in that he:

a) Failed to carry out or retain or exhibit evidence of having undertaken risk assessments;

b) Failed to carry out due diligence in respect of the source of funds received from his partner;

c) Breached the 2007 Money Laundering Regulations in that he did not provide staff training records (up to 26 June 2017);

And *in cumulo* in respect that he:

7.3 Delayed in registering deeds;

7.4 Failed to properly reconcile his client account and had a deficit on the client account for 38 days in breach of Rule B6.3;

7.5 Failed to correct breaches of Rule B6.4.1 which were observed in 2015 and in the intervening years including delay in registering deeds, and breaches of Rules B6.5.1, B6.5.1(d), B6.7.1(a), B6.7.3, B6.3, B6.11and B6.23, and failed to remedy the breaches first observed inspection on the 14 – 17 August to the Society's satisfaction;

7.6 Breached Rule B6.5.1 by taking fees from the client account which were in excess of the fee quote, and which were not fair and reasonable and which no explanation was given for the reason for exceeding the quoted fees in breach of B1.9.2;

7.7 Breached Rule B6.5.1(d) by taking fees from the client account when he had no authority to do so (the fees not having been rendered).

7.8 Breached Rule B6.7.1(a) by failing to keep properly written up accounting records to show his dealings with client's money, failed to close the practice unit's accounting records relative to July 2017, and failed to resolve unreconciled anomalies in two client ledgers;

7.9 Breached Rule B6.7.1(d) by failing to keep properly written records to show the true financial position of the firm and advise the true extent of staff salary arrears and VAT liability;

7.10 Breached Rule B6.13 by failing to use reasonable endeavours to acquire and maintain the skills necessary to discharge his responsibilities as the practice unit's Cashroom Manager.

8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 14 June 2022. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Matthew David Cohen, residing at Dalgety Farmhouse, Dalgety, Brechin; Find the Respondent guilty of professional misconduct singly in respect of his breaches of Rules B6.11.1 and B6.23 and *in cumulo* in respect of his delay in registering deeds, and his breaches of Rules B6.3, B6.4.1, B6.5.1, B6.7.1 and B6.13 all of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of five years any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer or successive employers as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland; 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 and his partner but need not identify any other person.

(signed)

Catherine Hart

Vice Chair

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 25 July 2022.

IN THE NAME OF THE TRIBUNAL

[redacted]

Catherine Hart

Vice Chair

NOTE

At the Hearing on 14 June 2022, the Tribunal had before it the revised Complaint, Answers, two Inventories of Productions for the Complainers, a list of authorities for the Complainers, references for the Respondent, and a GP's letter and a medical report both lodged on behalf of the Respondent. The 2017 Financial Compliance Inspection Report contained in the Complainers' First Inventory of Productions was incorporated in the Complaint *brevitatis causa*. Mr Ferguson indicated that the information in the table of client account deficits between 23 May 2017 and 30 June 2017 was admitted. This table was the only production in the Complainers' Second Inventory of Productions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal outlined the conduct which was the subject of the Complaint. He noted that breaches had been observed during the inspection in 2015 and these had continued and had been noted again during the inspection in 2017. He invited the Tribunal to find that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore constituted professional misconduct. He referred the Tribunal to three analogous cases, Law Society-v-Harold Joseph (2019), Law Society-v-Christopher Forrest (2019) and Law Society-v-Caroline MacCallum (2017).

A Tribunal member asked whether in the cases where fees had been taken in excess of the quote, whether work had been done to justify the fee taken. The Fiscal indicated that the fees had not been taxed and the Society was not in a position to say that additional work had not been done. The basis for alleging that the fees were not fair and reasonable was that there was no notification to the client that the quote was going to be exceeded.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson noted that all averments of fact, duty and law were admitted. All breaches of the rules were admitted. The Respondent had not wasted time. At one stage he had tried to get the files and have the fees assessed but unfortunately he was not allowed to access them and in any case, paying for this would have been difficult. Professional misconduct was not challenged.

DECISION

The Tribunal was satisfied beyond reasonable doubt on the basis of the admitted facts that the Respondent had acted in the manner set out in its findings in fact. The Respondent was cashroom manager in his firm. Various deficiencies had been noted during a financial compliance inspection in 2015. Similar breaches were also noted during the 2017 inspection. The Respondent failed to return client balances promptly and breached the anti-money laundering provisions. He delayed in registering deeds. He breached various Accounts Rules. He failed to properly reconcile his client account and the client account was in deficit for 38 days. He had failed to correct breaches. He had taken fees in excess of that which had been quoted. He had taken fees without them having been rendered. He failed to keep properly written up accounting records for clients and the firm. He had not discharged his responsibilities as cashroom manager effectively.

Although the Respondent admitted professional misconduct, it was for the Tribunal to consider whether the admitted conduct met the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313. According to that case,

"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 to be made."

Solicitors must register deeds without delay. They must communicate effectively (Rule B1.9). A solicitor must retain responsibility for the records of his/her firm. It is essential that books and records are properly kept and that the Law Society of Scotland can ascertain the true financial position of the firm at any time. The public must have confidence that the profession will comply with the Accounts Rules and can be trusted with their money. There must not be a deficit on the client account (Rule 6.3). Solicitors must rectify breaches promptly (Rule B6.4). They must render fees (Rule B6.5.1). Failure to do so demeans the trust the public places in the profession. Fees must be fair and reasonable (Rule B6.5.1 and Rule B1.11). They must keep proper accounting records (Rule B6.7). They must return client balances once the matter is concluded (Rule B6.11). They must comply with the anti-money laundering provisions (Rule B6.23). They must apply customer due diligence measures. They must establish and maintain appropriate and risk sensitive policies and procedures. They must regularly train staff.

Cashroom managers and money laundering and risk management partners must retain responsibility for the books and records and compliance with anti-money laundering procedures including documenting compliance. It is essential that the public can have confidence that the profession can be trusted to comply with the Rules. The Money Laundering Regulations exist to protect society against criminal acts. Documentation of anti-money laundering procedures allows the solicitor to demonstrate compliance with the Rules.

The Tribunal noted that the admitted breach in relation to fair and reasonable fees was only to the extent that the Respondent had failed to notify his client that the final fee would far exceed the quote. Although failing to register deeds could have very serious consequences, insufficient detail was presented to the Tribunal to allow it to assess the gravity of this failure and make an individual finding of misconduct in this regard. Nevertheless, the Tribunal was satisfied that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. He had fallen far short of what was required of him in the management of his practice. Of most concern to the Tribunal were the Respondent's failures to return client balances promptly and his breaches of the anti-money laundering provisions. Misconduct was established singly in relation to these breaches. The other failings were found to constitute misconduct *in cumulo*.

The Fiscal noted that the Respondent did not have any findings on his record in relation to professional misconduct or unsatisfactory professional conduct.

SUBMISSIONS IN MITIGATION

Mr Ferguson highlighted the Respondent's cooperation with the Fiscal. He noted that the Respondent regretted his conduct. According to Mr Ferguson, things started to go wrong for the Respondent in 2016-2017. He was under enormous pressure at work. He failed to record things in writing. He was exhausted and very stressed. He was almost relieved when the Law Society intervened in his firm. He accepts there were lots of things wrong with his management style but says he did not act in a way which was morally wrong, crooked or deceptive. No client complained. He was humiliated by the suspension of his practising certificate and his loss of status.

The Respondent has conflicting views on remaining in the profession. He believes he could work as a solicitor again. However, he has no desire to become involved in the cashroom or administration of a firm again. He would like to be able to help clients in child contact cases. His physical health is better, as are his relationships with others. He has returned to his faith. He believes he can be an asset to the

profession and he cares about this. He is experiencing some financial hardship at present. It might be better for his family if he were to return to the profession. He believes he could do that if his employer was aware of his circumstances. Mr Ferguson drew the Tribunal's attention to the letter from the Respondent's GP and the terms of the medical report. Mr Ferguson also referred the Tribunal to the references which had been submitted on the Respondent's behalf.

Mr Ferguson submitted that due to personal and professional issues the Respondent had suffered a "classic burnout". This happens to many solicitors. Sole practitioners are particularly vulnerable. However, people do recover and return to the profession. The Respondent has cooperated with the Law Society. He has tried to do the right thing although he has been hampered by the fact of his sequestration and the Judicial Factory which meant he was unable to access the files to explain the situation.

In answer to questions from the Tribunal, the Respondent indicated he was undertaking some part time work and had a limited income.

The Fiscal moved for expenses and made no comment on publicity. Mr Ferguson said he had no counter suggestions.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal considered that this case fell mid-range on the scale of misconduct. Dishonesty or lack of integrity was not alleged. The Complaint contained an allegation of a failure to charge fair and reasonable fees. Ordinarily, this kind of conduct would fall at the more serious end of the scale of misconduct. However, parties indicated that the plea agreed related to a failure to inform clients that the fee quote would be substantially exceeded. The Complainers were not in a position to say that fees had not otherwise been justified.

Aggravating factors included the course of conduct and the failure to remedy issues which were first identified in the 2015 inspection. The Tribunal considered that the conduct could damage the reputation of the profession and was likely to be a danger to the public. Mitigating factors included the personal and professional circumstances of the Respondent at the time of the misconduct. The Respondent had cooperated with the Complainers and had entered into a joint minute. He had expressed remorse. He had insight into the circumstances which had led to the difficulties. Due to the appointment of a Judicial Factor, the Respondent's ability to take action to try and sort matters out was limited. The Tribunal had regard to the references provided by the Respondent.

The Tribunal considered its indicative outcomes guidance. Censure alone was not sufficient to mark the seriousness of the conduct. The Respondent's financial circumstances meant that payment of a fine would be very difficult. Censure and fine alone would be insufficient to deal with the issues which might arise if the Respondent returned to practice immediately, particularly as a principal. The Tribunal noted the Respondent's mixed feelings about returning to the profession. It was to his credit that he had reflected so carefully on this matter. He did not rule out returning to work as a solicitor. His financial circumstances might encourage him to do that at some point.

The Tribunal considered that there would be a risk of repetition of these events if the Respondent was to work as a sole practitioner immediately, particularly if his health problems were to recur. It therefore imposed a condition on any practising certificate issued to the Respondent that for an aggregate period of five years he should be limited to acting as a qualified assistant to and to being supervised by such employer or successive employers as may be approved by the Law Society of Scotland. The restriction will last for an aggregate period of five years. This means that the Respondent must work for a total period of five years with a restricted practising certificate before being allowed to apply for a full certificate. Periods when he is not in work as a solicitor will not count towards the total. A restriction will give the Respondent time to reflect on the finding of misconduct and for him to acquire the skills required to function as a manager of a practice unit again while being supervised. There were elements of his practice which would benefit from review and training. Solicitors work in a highly regulated and pressured profession. It is hoped that with support and assistance, the Respondent can make a full recovery and return to the profession if he wishes to do that. The Tribunal considered that a fine in addition to a restriction would be disproportionate and unnecessary. Suspension or strike off would be excessive in the particular circumstances of this case.

The Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and his partner in accordance with paragraph 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.

Catherine Hart

Vice Chair