

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

**FINDINGS**

**in Complaint**

**by**

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

**Complainers**

**against**

**SIMON KENNEDY DUNCAN, Solicitor, Flat  
G/L, 603 Clarkston Road, Glasgow**

**Respondent**

1. A Complaint dated 17 November 2023 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 Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, William Cairns, 32 Glenbervie Drive, Kilwinning.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal set the matter down for a virtual hearing on 9 February 2024 and notice thereof was duly served upon the parties.
5. At the virtual hearing on 9 February 2024, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee. A Joint Minute between the parties making two amendments to the Complaint and agreeing all of the averments of fact and duty had

previously been lodged with the Tribunal. The Fiscal indicated he was not leading any evidence. The Tribunal proceeded to hear submissions from both parties.

6. Having regard to the foregoing, the Tribunal found the following facts established:-

6.1 The Respondent's date of birth is 17 December 1967. He was enrolled as a Solicitor on 18 December 1991. From 2 April 2001 to 2 May 2019 he was a principal in the firm of Buchanan Campbell, Solicitors, 11 Central Chambers, 11 Bothwell Street, Glasgow. On the latter date the Complainers suspended him from practice and his Client Account was vested in the Complainers.

6.2 The Respondent acted for Mr Cairns ("the Secondary Complainer") in a claim for damages for personal injury.

6.3 On 3 October 2018 the Respondent emailed the Secondary Complainer advising that:

- The defender's agents had proposed a final offer of settlement in the amount of £12,000 in relation to the claim for damages being pursued on his behalf.
- The Respondent advised the Secondary Complainer to accept this offer, saying that: *"All things considered, I would recommend acceptance...I should be obliged if you would confirm your instructions."*

6.4 A further email was sent by the Respondent to the Secondary Complainer on 4 October 2018 in which the Respondent advised of a time limit for acceptance of the offer expiring on 5 October 2018 and requested instructions *"as a matter of urgency"*.

6.5 The Secondary Complainer responded on the same date confirming his instructions to accept the offer.

6.6 On 2 November 2018, an email was sent by the Secondary Complainer to the Respondent seeking an update and timeframe for conclusion of the matter and receipt of funds.

- 6.7 The Respondent responded by email on the same date advising that “the cheque should be with us in the next couple of weeks.”
- 6.8 In the absence of progress the Secondary Complainer sent a further email to the Respondent on 29 November 2018 requesting an update.
- 6.9 The Respondent responded on same day, 29 November 2018 advising that he had chased up the defender’s agents on the previous day asking for an update and that they had apologised for the delay.
- 6.10 The Secondary Complainer emailed the Respondent again on 11 December 2018 looking for an update on the conclusion of the case and asking when he would be in receipt of the settlement cheque. He expressed his increasing concern at the length of time it was taking to conclude matters and stated: *“It’s been another 2 weeks and no indication as to when this case will be concluded. My family are concerned and guiding me to make contact with the legal ombudsman in relation with this case.... I appreciate that an amount of time is to be expected, but you have not given any indication as to a date to expect finalization. Please give a date to which I can expect compensation cheque to be in my possession. It has now been over 10 weeks since the offer was accepted, which was pressured to be accepted. Please look to act with an amount of urgency. Thank you in advance.” (sic)*
- 6.11 The Respondent responded by email on 18 December 2018 stating that he had spoken with the defender’s agents and was advised that the insurance company issuing funds had approved the payment by cheque. He advised the Respondent of the following: *“They were able to give me no timeframe for receipt. I will continue to monitor the position closely.”*
- 6.12 On 19 December 2018 the defender’s agents sent a letter enclosing the settlement cheque to the Respondent which stated the following:

*“Dear Sir,  
William Cairns v [.....]*

*Further to our telephone conversation and email on 19 December 2018, we are pleased to enclose a cheque in the sum of £12,000.00 in respect of your client's damages.*

*This cheque is to be held as strictly undelivered pending our receipt of the signed Joint Minute and Motion. Copies of the draft document are attached.*

*Yours faithfully*

*Clyde & Co (Scotland) LLP*

*Enc "*

6.13 An email dated 23 January 2019 was sent by the defender's agent to the Respondent requesting a response to his previous emails and resolution to the outstanding issues of the case. The email read as follows:-

6.14 *"Dear Simon,*

*I refer to my emails of 19 and 27 December 2018 and 9 January 2019 and note that I have yet to receive your response. My clients continue to be concerned about your lack of response recently. Can you please respond to the outstanding issues:*

1. *Confirm that you received the principal sum cheque;*
2. *Sign and return the joint minute and joint motion;*
3. *Provide vouching for your outlays;*
4. *Confirm your position on our proposed abatements;*
5. *Confirm your position on the proposed expenses figures of £5,868.18/£7,368.18*

*In that regard, I attach the email which I received directly from your client this morning regarding the principal sum cheque. I can confirm that the cheque of £12,000.00 was posted to your with our letter dated 19 December 2018. A copy is attached. My cashroom colleagues have confirmed to me that it was cashed last week...*

*I look forward to receiving your urgent response on all of these issues so that we can bring this claim to a conclusion."*

- 6.15 The Secondary Complainer sent a further email to the Respondent dated 27 January 2019 confirming that he had been advised by the defender's agent of the settlement cheque having been sent to the firm and requested a timeframe for receipt of funds.
- 6.16 On 14 February 2019 the Secondary Complainer sent another follow up email requesting an update as to when he would be in receipt of the settlement funds and again expressed his concerns at the lack of response on the part of the Respondent. He stated: "*...I am concerned that you have not responded to my previous emails, please inform me in a timely manner as to the position on principal cheque that you received from Mr Harry Boyle of Clyde & Co sent to you on 19th December 2018 and cashed on or around 15th January 2019. Thank you in advance.*" (sic)
- 6.17 On 18 March 2019, the defender's agent emailed the Respondent requesting an update on matters.
- 6.18 The Respondent sent an email in response dated 19 March 2019 to the defender's agent in the following terms: "*Harry, I apologise for any confusion caused. For the avoidance of doubt Harper MacLeod have not taken over my business. I am in the process of closing Buchanan Campbell and have intimated my intention to the Law Society. This is one of the last cases and unfortunately it was archived in error. I have sent Mr Cairns his cheque.*"
- 6.19 A letter dated 21 March 2019 was sent to the Secondary Complainer by first class post from the Respondent's firm enclosing a cheque for the sum of £10,542.85 (Global £12,000 minus success fee) and advising that the case was now concluded.

7. Having given careful consideration to the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that he:-

- (a) Unduly delayed to provide the Secondary Complainer the sum of £12000 which he had accepted in settlement of his claim, the Respondent having received the cheque in settlement on or around 19 December 2018, cashed the cheque on or around 15 January 2019 and forwarded payment to the Secondary Complainer on 21 March 2019, contrary to Rules B1.2 and B1.14.1 of the Law Society of Scotland Practice Rules 2011; and

(b) Failed to act in an appropriate manner in that he failed to return the signed Joint Minute and Motion to the solicitors acting for the defenders, and thereafter cashed a settlement cheque on or around 15 January 2019, despite the solicitors informing the Respondent in correspondence dated approximately 19 December 2018 that the cheque was to be held as strictly undelivered pending those solicitors receiving the signed Joint Minute and Motion, contrary to Rules B1.2 and B1.14.1 of the Law Society of Scotland Practice Rules 2011.

8. The Tribunal found the Respondent not guilty in relation to the averment of misconduct at paragraph 7.3 of the Complaint.
9. Having heard further submissions in relation sanction, publicity and expenses, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 9 February 2024, The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow; Find the Respondent guilty of professional misconduct in respect of his contraventions of Rules B1.2 and B1.4.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Make no award of expenses; Direct that publicity will be given to this decision; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a claim for compensation if so advised.

**(signed)**

**Kenneth Paterson**

**Vice Chair**

10. 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 *29 FEBRUARY 2024*

**IN THE NAME OF THE TRIBUNAL**



**Kenneth Paterson**

**Vice Chair**

## **NOTE**

At the hearing on 9 February 2024, the Tribunal had before it the Complaint, Joint Minute, written plea-in-mitigation and Productions lodged on behalf of the Respondent.

The Tribunal drew to the Fiscal's attention a potential typographical error at paragraph 5.15 of the Complaint and the Fiscal moved to amend to correct that. There being no objection by the Respondent, the Tribunal allowed this amendment to be made.

The Fiscal sought leave to lodge with the Tribunal, later that day, confirmation in writing that he had duly intimated the Complaint and hearing to the Secondary Complainer. There being no objection to that motion, the Tribunal granted same.

The Fiscal confirmed that due to the extensive nature of the Joint Minute, no evidence required to be led. He confirmed he would proceed by way of submissions only.

## **SUBMISSIONS FOR THE COMPLAINERS**

Mr Lynch stated that the question before the Tribunal was whether what was averred within the Complaint and now agreed amounted to professional misconduct. The Complaint centred around the Respondent making misleading statements, for whatever reasons, in respect of a cheque and the Respondent cashing a cheque without first signing and returning a Joint Minute to the defender's solicitors. He submitted whatever difficulties the Respondent was labouring under, however many and various they were, this did not amount to a defence to professional misconduct. He explained that the Tribunal was aware that this Complaint was part of a much bigger picture for the Respondent. He submitted that what was averred within the Complaint and now admitted was sufficient to amount to professional misconduct.

In answer to a question from the Tribunal, Mr Lynch confirmed that he was not suggesting any dishonesty on the part of the Respondent. It was his case that the failure to ensure that the statement was accurate and the cashing of the cheque without first signing the Joint Minute both demonstrated a lack of integrity.

## **SUBMISSIONS FOR THE RESPONDENT**



Mr Clark stated that the averments of fact and duty were admitted. He emphasised that there was no suggestion of any dishonesty on the part of the Respondent or any financial loss by the Secondary Complainer.

Mr Clark clarified that he had been instructed not to make any submissions on whether the issues before the Tribunal amounted to unsatisfactory professional conduct. He was instructed to invite the Tribunal, especially in relation to the averment of misconduct at 7.3, to consider whether in regard to one complaint the three discreet issues raised in paragraph 7 met the test for professional misconduct set out in the case of Sharp.

The Tribunal drew the Respondent's attention to averment 7.3 and queried whether the Respondent knew when he wrote the email to the other agents that he had in fact not sent the cheque to the Secondary Complainer. Mr Clark explained that there was a brief delay between the email to the agents and the letter to the Secondary Complainer caused by the Respondent having no office premises and doing his own typing. He explained that this was an issue of "catch-up" and that there was no intention on the part of the Respondent to mislead the Secondary Complainer.

The Tribunal adjourned in order to consider these brief submissions. The Tribunal recalled the Complaint and invited the Fiscal to clarify, in respect of each of the three averments of misconduct, on what basis he was inviting the Tribunal to find misconduct.

The Fiscal responded that each of the three averments of misconduct amounted to breaches of Rule B1.4.1 of the Conduct Rules. He stated that it was essential that trust be maintained in the profession and that the statement in respect of averment 7.3, whilst not dishonest, was reckless and demonstrated a lack of integrity.

The Chair drew the Fiscal's attention to the wording of the averment at paragraph 7.1 and queried whether the averment that "this statement was untrue" was suggestive of dishonesty.

Mr Lynch responded that he had no difficulty in the Tribunal having regard to the content of the Respondent's written plea-in-mitigation and submitted that it was clear that the Respondent had been labouring under significant difficulties which was confirmed by the medical report lodged on behalf of the Respondent. He invited the Tribunal to allow him to amend the averment at paragraph 7.1 to read "the Respondent knew or ought to have known that this statement was untrue." Mr Clark confirmed that he had no objection to that motion.

The Tribunal drew Mr Lynch's attention to the averments of duty at paragraph 6 and noted that reference was made to Rules B1.2, B1.4, B1.9 and B1.14 and asked what regard the Tribunal was to have to these. Mr Lynch clarified that it was his position that the averments of misconduct demonstrated a manifest lack of integrity and a clear breach of Rule B1.4.1 which was a refinement of Rule B1.2. He only relied on Rule B1.4 in "the most general sense". He submitted that Rule B1.9 was contravened in relation to what the Respondent said to the Secondary Complainer.

The Tribunal drew the Fiscal's attention to averment 7.3 where it was stated that the Respondent knew that the information he had provided to the agents acting for the defenders not to be true. Mr Lynch asked the Tribunal to be allowed to amend that paragraph to insert the words "or ought to have known".

## **DECISION ON PROFESSIONAL MISCONDUCT**

The Joint Minute between the parties agreed all of the averments of fact. Accordingly, the Tribunal held all of the averments of fact, as amended, to be established.

The issue for the Tribunal was to assess whether the averments of misconduct were established. The test for professional misconduct is contained in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313 where it is said,

*"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."*

There were three averments of misconduct before the Tribunal which could be summarised as follows:

- 7.1 That the Respondent failed or unduly delayed to provide the secondary Complainer with the accepted settlement sum of his claim.

- 7.2 That the Respondent acted in an inappropriate manner by cashing the settlement cheque where he had been asked to hold it as undelivered pending signing of a Joint Minute and Motion.
- 7.3 That the Respondent told the agents acting for the defender on 19 March 2019 that he had sent the Secondary Complainer the settlement cheque when he had not done so.

There was no averment within paragraph 7 inviting the Tribunal to make a finding of misconduct on an *in cumulo* basis. The Tribunal looked at each averment individually.

With regard to averment 7.1, it was clear that the Respondent had provided the Secondary Complainer with the settlement sum, albeit not until March 2019. He had not failed to provide the Secondary Complainer with the settlement sum. Given the agreed facts before it, the Tribunal was satisfied that the Respondent had unduly delayed to provide the Secondary Complainer with the settlement sum. The cheque was encashed on 15 January 2019 and the sum was not forwarded to the Secondary Complainer until 19 March 2019. This delay required to be set in context of the correspondence that took place between the Respondent, the Secondary Complainer and the agents for the defender. The Tribunal had regard to the comments relating to integrity in the case of Wingate and Evans v SRA [2018] EWCA Civ 366. In all of these circumstances, the Tribunal was satisfied that the conduct called into question the integrity of the Respondent both in relation to Rules B1.2 and B1.14.1 of the 2011 Rules and met the Sharp test. The Tribunal was satisfied that this in itself amounted to professional misconduct.

With regard to averment 7.2, the agents for the defender had forwarded to the Respondent a settlement cheque on the basis that the Respondent hold it as undelivered pending return to them of a signed Joint Minute and Motion. The Respondent cashed the cheque on 15 January 2019 and did not in fact return a signed Joint Minute and Motion to the defender's agent until March 2019. It is essential that not only the public have trust in the profession but that individual members of the profession can trust one another. The Tribunal was satisfied in the circumstances that the Respondent's conduct called into question his integrity and amounted to breaches of both Rules B1.2 and B1.14.1 of the 2011 Rules. The Tribunal was satisfied that this conduct met the Sharp test and amounted to professional misconduct.

With regard to averment 7.3, the Respondent sent an email to the agents for the defender on 19 March 2019 stating that he had sent the settlement cheque to the Secondary Complainer. In fact, the cheque was not sent to the Secondary Complainer until 21 March 2019. The Fiscal was clear in his submissions that there was no issue of dishonesty being alleged. Mr Clark stated that the Respondent had no intention to mislead the agent for the defenders. Reference was made to the content of the written plea-in-mitigation

that had been lodged on behalf of the Respondent, a medical report lodged on behalf of the Respondent and the chaotic conditions within which the Respondent was then working. The Tribunal had been invited to hold that the statement made by the Respondent in the email to the agents for the defender was reckless. The test for professional misconduct is a high bar. It requires that the conduct be both serious and reprehensible. The Tribunal considered that it did not have sufficient information before it to properly assess the degree of recklessness or otherwise of the misstatement made by the Respondent. In these circumstances, the Tribunal was not satisfied that this averment of misconduct was established.

Reference was made in the Complaint to Rules B1.4 and B1.9 of the 2011 Rules. It was not clear from the submissions of the Fiscal whether he was in fact relying on breaches of these rules and given the wording of the averments of misconduct themselves the Tribunal was not satisfied that breaches of these rules had been established.

#### **SUBMISSIONS IN RELATION TO SANCTION, EXPENSES AND PUBLICITY**

The Fiscal referred the Tribunal to a finding of misconduct made by the Tribunal in relation a Complaint against the Respondent dated 15 October 2021. He emphasised that that Complaint had a significant procedural history largely because there had been additional complaints that the parties had hoped would all catch up. Unfortunately, it was not possible to process this Secondary Complainer's complaint in time for it to be dealt with along with the others. Mr Lynch explained that he would not normally make submissions with regard to penalty but considered it only fair in the circumstances of this case to submit to the Tribunal that nothing beyond a censure be imposed. This would not prevent the Secondary Complainer proceeding with a claim for compensation if he so wished.

Mr Lynch confirmed that both parties had agreed that no award of expenses to either party was appropriate. He had no motion in relation to publicity.

Mr Clark referred the Tribunal to his written plea-in-mitigation and confirmed his agreement with Mr Lynch's submissions.

#### **DECISION ON SANCTION, PUBLICITY AND EXPENSES**

The Tribunal gave careful consideration to the parties' submissions and had regard to the Tribunal's decision of 2 June 2023 relating to the previous Complaint against the Respondent which had resulted in his Practising Certificate being restricted for 10 years. The dates of the conduct in the Complaint

before the Tribunal were of the same or similar time frame to the conduct before the Tribunal on 2 June 2023. There was now no suggestion of any dishonesty on the part of the Respondent or financial loss to the Secondary Complainer. The Tribunal considered that it was unlikely that the decision of 2 June 2023 would have been any different if these matters had been included in that Complaint.

In all of these circumstances, the Tribunal was content that the appropriate disposal was one of censure. The Tribunal considered it important to emphasise that this should not be seen as any reflection of the seriousness with which it regarded the conduct before it. Rather, this was the disposal the Tribunal considered fair and appropriate having regard to the exceptional circumstances surrounding the present Complaint and the previous findings.

The Tribunal agreed that no award of expenses should be made.

There was no information before the Tribunal to suggest that it should depart in any way from the usual order for publicity.

The Tribunal was advised that the Secondary Complainer had not sustained any loss and this was reflected in the Joint Minute with the amendment of paragraph 8 of the Complaint. Reference to loss was deleted and distress and/or inconvenience were substituted therefore. The Tribunal allowed the Secondary Complainer 28 days from the date of intimation of these findings to lodge a claim for compensation with the Tribunal Office should he be so advised.



**Kenneth Paterson**

**Vice Chair**