

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

**FINDINGS**

**in Complaint**

**by**

**THE COUNCIL OF THE LAW  
SOCIETY of SCOTLAND, 26  
Drumsheugh Gardens, Edinburgh**

**against**

**FRASER CURRIE, Solicitor,  
Alexander McAllister &  
McKechnie, 6 Moss Street, Paisley**

1. A Complaint dated 19 January 2012 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Fraser Currie, Solicitor, Alexander McAllister & McKechnie, 6 Moss Street, Paisley (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be set down for a procedural hearing on 16 April 2012 and notice thereof was duly served on the Respondent.
4. The procedural hearing took place on 16 April 2012. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented Craig Murray, Advocate. It was agreed that there would a period of adjustment and then a Record

would be prepared. The case was adjourned to a substantive hearing on 25 June 2012.

5. The case called for hearing on 25 June 2012. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented Craig Murray, Advocate.
6. The Tribunal heard evidence from three witnesses for the Complainers. The Respondent did not lead any evidence.
7. After having heard the evidence and Submissions from both parties, the Tribunal found the following facts established

7.1 The Respondent was enrolled as a solicitor on 23 July 1998. Between 1 December 2005 and 21 September 2011 both dates inclusive he was a director of Robertson & Ross Solicitors Limited, a company incorporated under the Companies Acts and having a place of business at 7 Causeyside Street, Paisley. Robertson & Ross is the trading name of Robertson & Ross Solicitors Limited. The Respondent currently works for Messrs Alexander McAllister & McKechnie, 6 Moss Street, Paisley.

**Mr A**

7.2 Mr A, is a prisoner currently detained in HM Prison Perth, 3 Edinburgh Road, Perth. At the High Court of Justiciary on 24 January 2007 Mr A was sentenced to life imprisonment having been convicted of murder and attempting to defeat the ends of justice. In January 2007 the statutory time limit for lodging a Notice of Intention to Appeal was 14 days.

**Transfer of Legal Aid to Mr Myles**

- 7.3 The Respondent was acting on behalf of Mr A in a potential appeal against conviction under legal aid reference 379163. On 25 August 2008 the Respondent attended at HM Prison Kilmarnock to consult with Mr A in relation to his appeal against conviction. Mr A refused to meet with the Respondent at that time. On 27 August 2008 the Respondent wrote to Mr A seeking clarification of his instructions. Where a client is represented by a solicitor nominated under the Criminal Legal Aid (Scotland) Regulations 1996, a change of agency must be approved by the Scottish Legal Aid Board.
- 7.4 On 1 September 2008 the Applications Division of the Scottish Legal Aid Board wrote to the Respondent to advise that Mr A had nominated another solicitor for his appeal and that the grant of legal aid had been transferred to Mr Myles of J Myles and Co with effect from 29 August 2008. This letter was received on 2 September 2008.

#### **The Mandate**

- 7.5 On 3 September 2008 Messrs J Myles and Company, Solicitors, Dundee, sent a letter to Robertson & Ross Solicitors Limited with the reference "Mr Currie". This letter was received on 4 September 2008. Said letter enclosed a mandate signed by Mr A and requested "his files and papers in implement thereof". Said letter confirmed that Legal Aid had been transferred to Messrs J Myles and Company on 29 August 2008. Messrs J Myles and Company received no response to this letter. Mail in the offices of Robertson & Ross was opened by administrative staff each day. All criminal correspondence was initially reviewed by Miss B, the Practice Manager. Miss B would arrange for matters to be diarised as appropriate. Iain Robertson allocated to himself inter alia criminal mail he deemed urgent. Other mail would

be put on top of the filing cabinet to allow the relevant file to be extracted from the filing system and matched with the mail later. Once mail had been matched with the relevant file it would be placed in a central filing location to allow solicitors to uplift mail together with the relevant file. Where mail was received in relation to a file which could not be located, this was placed in a correspondence basket. This would be checked regularly by the office assistant. If a solicitor did not pick up a file or if mail remained unclaimed in the correspondence basket for a period of approximately five days Mr Robertson would pick up the mail and arrange for a response to be sent.

7.6 The mandate attached to the letter of 3 September was dated 21 August 2008 and signed by Mr A. It authorised and instructed Messrs Robertson & Ross to pass all files, papers and documents held in Mr A's name to Joseph Myles of Messrs J Myles & Company, Solicitors.

7.7 On 5 September 2008, the Respondent wrote to his Edinburgh agents Messrs Gillespie MacAndrew, Solicitors, stating "We are no longer acting in this case. Please let us have any account to conclude." The outgoing correspondence from Messrs Robertson and Ross contained the reference of the solicitor who had dictated the correspondence and the secretary who had typed the correspondence. Said letter to Messrs Gillespie MacAndrew contained the initials "FC" and "AP". "FC" was Fraser Currie's initials. "AP" was Office Manager Miss B's initials. Iain Robertson's initials were "IR". Said letter also contained a standard instruction "if calling please contact" in this case "Mr Currie". The solicitor dealing with a matter at its conclusion was responsible for instructing preparation of a legal aid account. This was achieved by passing the file to

the firm's cashroom with a request that an account be prepared. The firm's cashroom would prepare an account and return said account to the instructing solicitor together with the principal file and a letter to the Scottish Legal Aid Board for signature and an account synopsis form. Outgoing correspondence to the Scottish Legal Aid Board contained the reference of the solicitor who had instructed the preparation of the legal aid account and the member of the cashroom who had prepared the correspondence and legal aid account.

7.8 By letter of 6 October 2008, the Respondent's file, together with account, was sent to the Scottish Legal Aid Board. The letter was written and sent by Mr C, a cash room assistant at Robertson & Ross. An Account Synopsis Form was completed in respect of Mr A's appeal and attached to the letter to the Scottish Legal Aid Board. Said Form certified that the matter had been transferred to another solicitor. Said Form contained the Respondent's name and Nominated Solicitor reference 379163. Said Form was drafted by cashroom assistant Mr D, dated October 2008 and certified by a person unknown. The Respondent instructed the preparation of a legal aid account in this matter. Said letter to the Scottish Legal Aid Board contained the Respondent's initials "FC".

7.9 On 15 October 2008, Messrs J Myles and Company wrote again to Robertson & Ross Solicitors Limited. The letter was marked for the urgent attention of the Respondent. The letter referred to Messrs J Myles and Company's previous letter to the Respondent of 3 September and requested that the Respondent "forward all files that you hold for Mr A to us without further delay." The letter also provided "If you do

have any difficulty or problem in implementing the mandate sent with our letter of 3rd September then perhaps your Mr Currie would telephone our Mr Joe Myles to discuss". Messrs J Myles and Company received no response to this letter.

7.10 On 10 November 2008, Mr T Williamson, another director of Robertson & Ross Solicitors Limited, wrote to Messrs J Myles and Company. That letter provided:-

"We refer to your recent call to our office. We cannot trace having received any mandate from you in respect of Mr A. We do however enclose his stopping out file. This is the only current file which we hold for Mr A."

Mr A's criminal appeal file was at that time with the Scottish Legal Aid Board.

7.11 On 13 November 2008, Messrs J Myles and Company wrote by post and fax to Robertson & Ross Solicitors Limited, under the reference "Mr Williamson". The letter explained that the Respondent had been acting on behalf of Mr A in connection with an appeal against conviction, and enclosed copies of the letters of 3 September 2008 and 15 October 2008 referred to above. The letter confirmed the previous transfer of legal aid from the Respondent to Mr Myles with effect from 29 August 2008. The letter concluded "Presumably therefore you have a file relating to this appeal and we shall be pleased to receive this from you at your earliest convenience." Messrs J Myles and Company received no response to this letter.

7.12 On 15 December 2008, the Respondent contacted the Clerk of Chris Shead, Advocate by telephone to advise that Robertson and Ross were no longer instructed in connection with Mr A's appeal and advised that other solicitors had been instructed. On 16 December the Respondent wrote to Mr Shead's Clerk, Mr E. That letter provided:-

"I refer to our telephone call and that Mr A has now instructed new agents and in the circumstances we no longer require to instruct Mr Shead." [sic]

Said letter contained the reference "FC/GE/A" and "Mr Currie".

7.13 By letter of 30 December 2008, the Scottish Legal Aid Board wrote to the Respondent returning the Respondent's file of papers in connection with Mr A's appeal against conviction.

7.14 On 8 January 2009, Messrs J Myles and Company wrote by post and fax to Robertson & Ross Solicitors Limited. Said letter was marked for the attention of the Respondent and requested that he implement the mandate. The letter stated "We sent you a mandate for Mr A as long ago as 3rd September 2008. We have still not received his file and the delay is wholly unacceptable".

7.15 On 16 January 2009, Messrs J Myles and Company received the Respondent's file of papers. The file contained inter alia legal aid certificates, Advocate's fee notes, vouchers for outlays, the Complaint/Petition and indictment and precognitions. The respondent had sent a mandate to the firm of Sam Milligan seeking release of the original trial papers. On 19 May 2009, the High Court of Justiciary refused an

application for further time for Mr A to lodge a Note of Appeal against conviction.

8. Having heard submissions from both parties, the Tribunal made no Finding of Professional Misconduct and pronounced an Interlocutor in the following terms:-

Edinburgh 25 June 2012. The Tribunal having considered the Complaint dated 19 January 2012 at the instance of the Council of the Law Society of Scotland against Fraser Currie, Solicitor, Alexander McAllister & McKechnie, 6 Moss Street, Paisley; Find the Respondent not guilty of Professional Misconduct; Find the Complainers liable in the expenses of the Respondent 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)**

**Alistair Cockburn**

**Chairman**



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

**IN THE NAME OF THE TRIBUNAL**

**Chairman**

**NOTE**

It was clarified that evidence was to be led in connection with certain facts which were not admitted in the Record. Mr Marshall moved to amend the Record slightly to add the word “admitted” to averment 5.8. Mr Murray confirmed that this was agreed. Mr Marshall then led the evidence of three witnesses.

**EVIDENCE FOR THE COMPLAINERS**

Mr Marshall led evidence from Miss B, practice manager with Robertson & Ross Solicitors Limited. Miss B confirmed that she had been in charge of the administrative duties in the office for the past six years and was responsible for running the office. The Respondent was a Director of Robertson & Ross between September 2005 and December 2011. Miss B stated that she thought that the Respondent joined the firm in 1998. He did criminal work especially criminal appeals and indictment matters. The Respondent often saw clients in prison who would come to the Respondent and give him instructions in respect of appealing their sentences. The Respondent would then obtain the files from the previous agents. Miss B advised that when the mail came in it was divided up in to civil, criminal and conveyancing. The criminal mail was passed to Iain Robertson. Miss B advised that she would go through the mail first to see if anything required to go into the diary. Mr Robertson would then look at the mail and if there was anything urgent that could be dealt with without the file then he would deal with it. The remainder of the mail was put on top of the filing cabinet to be matched up with the files later. Miss B explained that there was an office assistant whose responsibility it was to match the mail with the files. The files with the mail were then left on a table in Miss B’s room. The Respondent would come through and take what he could deal with and the rest was left for Mr Robertson. The Respondent would take some criminal appeal cases.

Miss B explained that if correspondence was dictated by Mr Robertson the initials “IR” would be on the letter. If it was dictated by the Respondent, the initials “FC” would be on the letter.

Mr Marshall referred Miss B to Law Society Production 4 being a letter from the Respondent going to the Edinburgh agents Robertson & Ross. Ms Phillips stated that she typed the letter and it had her initials on it. Miss B explained that if a phone call was made or received a note would be kept on the file and the initials on the note would show whose attendance note it was. In respect of Production 7, Miss B confirmed that this related to a phone call with Chris Shead, the Advocate dealing with the appeal or perhaps the Advocate's Clerk. It explained that Robertson & Ross were no longer instructed as other solicitors had been instructed. Production 8 was the letter from the Respondent referring to the phone call.

In connection with legal aid accounts, the solicitor who had been dealing with the case would pass the file to the cash room for the legal aid account to be prepared. After it was prepared it would be sent to the Legal Aid Board with the file. Production 5 was the letter to the Legal Aid Board in respect of Mr A's case.

In cross-examination, Ms Phillips confirmed that she was the personal assistant to Iain Robertson and did most of his typing. She explained that if the file relating to the mail which had come in could not be found, the mail would be put into a pigeon hole and the office assistant would go through the mail every so often to check it was not lying for too long and if had been lying for a while it would be passed to Mr Robertson. Miss B explained that there were a number of office assistants at different times around the end of 2008.

Production 5 was a letter written by Mr C. Miss B explained that a solicitor would occasionally dictate a letter relating to another solicitor's file but would put their own reference on it. Miss B confirmed that the Respondent was a specialist in criminal appeals which involved a lot of travelling and he was out of the office a lot. The Respondent was not involved with the management of the office or the office systems. This was done by Mr Robertson. In connection with Production 11, being the synopsis form, Miss B confirmed that she did not know whose signature it was on the form or whose handwriting it was but it was not the Respondent's handwriting. She confirmed that Robertson & Ross no longer did legal aid criminal work.

In response to a question from the Chairman, Miss B confirmed that if mail had been lying for more than five working days it would be brought to the attention of Mr Robertson. She further confirmed that on the principal letter it would be typed “if calling please ask for” then the relevant person’s name. In connection with Production 4 this was the Respondent and in connection with Production 5 it was Mr C. Miss B confirmed that Mr C was the cashier. Production 5 was a standard letter that goes out with the file.

The Tribunal then heard evidence from Mr C, who confirmed he had been the cashier with the firm of Robertson & Ross since 2009 and had worked for the firm since 2001. Mr C confirmed that he dealt with all payments and prepared accounts. He advised that he was a Scottish Law Accountant qualified since October 2011. Mr C advised that the Respondent mainly did prison work concentrating on criminal appeals, life Tribunals and parole hearings. Mr C explained that legal aid accounts were prepared once a case was completed and the file would be given to the cash room department with a note asking that an account be prepared. The account would be prepared either by Mr C or by Mr D. The account would be given to Mr C personally to check and it would then be passed to the solicitor to check and sign it off. Thereafter it would be forwarded to the Scottish Legal Aid Board for payment. Mr C confirmed that the solicitor who had been dealing with the matter would sign the synopsis form. Production 5 was the standard letter which was sent out with the legal aid accounts. Mr C confirmed that the cash room prepared the letter and the reference on the letter would be the reference of the solicitor who had instructed the account to be prepared followed by the initials of the person who had prepared the account. The initials “AD” were Mr D’s initials. Mr C explained that his name was always on the letter because he was the cashier. Mr C further explained that the synopsis forms were issued by the Scottish Legal Aid Board and the nominated solicitor would certify that the account was correct. Mr C stated that he thought it was Mr D’s handwriting on the synopsis form. He however could not say whose signature was on the form but Mr C advised that it would normally be the solicitor who instructed the account to be prepared. Once the account was sent to the Scottish Legal Aid Board, he would chase matters up after 30 days. Mr C confirmed that if the file was required he would phone the Legal Aid Board and ask for the file to be returned. He indicated that he did not remember doing that in respect of Mr A’s case.

In cross-examination, Mr C stated that Robertson & Ross were different from a lot of other firms because they had to send the files with the legal aid accounts to the Board so that they could check things. Mr C stated that he could not recall much about the specific case of Mr A. He indicated that there were two or three people in the cash room dealing with a quite a volume of work. He stated that he was unaware of what the signatures of the partners were like when they were signing on behalf of the firm but he knew their individual signatures. He indicated that the signature on Production 11 did not look like Mr Robertson's signature. He confirmed that Mr Robertson was the cash room partner in October 2008. He further confirmed that the ticks on the synopsis form meant that these documents were enclosed with the form. Mr C explained that legal aid accounts were usually signed off on a Friday and then sent off to the Legal Aid Board. If the Respondent was not present on a Friday it would wait until he was present. No one else would sign it off. Mr C stated that he was familiar with the firm's signature by the Respondent and that the signature was probably not that of the Respondent. The Respondent's signature started with a squiggle which looked a bit like an "F". Mr C confirmed that he did not witness the signing of the form.

The Complainers then called their witness Iain Robertson who confirmed that he was Senior Director of Robertson & Ross Solicitors Limited which was a limited company. He confirmed that it traded as a law firm and he was the senior partner. Mr Robertson confirmed he was responsible for the running and the finance and management of the practice and had been for a period of 30 years. The Respondent was a director laterally and had previously been a trainee/assistant. The Respondent undertook criminal and legal appeal and high court work. He would see clients and have consultations and prepare for courts and tribunals.

In connection with the mail, it would be opened and divided up in to conveyancing, civil and criminal matters. If it required immediate attention Mr Robertson would deal with it personally or it would be given to the filing team to match up with the files. It was usually better to have the file when dealing with correspondence. Once the file was matched with the mail it would come to Mr Robertson. He would deal with everything he could or he would take it to the person dealing with the matter. All the

files remained in his room but sometimes his assistants would come and take them away. Mr Robertson explained that the criminal appeal files were green and would be stacked together. Mr Robertson dealt with most of them but the Respondent would deal with some of them. Mr Robertson confirmed that the Respondent saw clients in custody.

If a file could not be found, the correspondence would lie in the mail basket until it was matched with the file. This would be checked from time to time by solicitors and Mr Robertson checked this every three to four days. Mr Robertson stated that it did not matter if the mail was marked for a particular solicitor but that he would speak to that person if they were named on the correspondence. If a file could not be located, the software system would be checked to see who last had the file. Mr Robertson stated that he could not remember Mr A's file or seeing any mail in connection with it. He did not recall seeing a letter or the mandate being Productions 2 and 3. He had no recollection of dictating Production 4 which had the Respondent's reference on it. He did not recall seeing Production 6 or Production 10. Mr Robertson stated that he could not recall whether he had discussed the mandate with the Respondent. This could be because it was not sitting in the in tray unclaimed.

In cross-examination, Mr Robertson confirmed that the Respondent had worked for him since approximately July 1997. He further confirmed that the Respondent focused on criminal appeals and specialised in this area and had developed a reputation for dealing with this kind of matter. The Respondent travelled a lot and Mr Robertson explained that there were a lot of cases and up to 300 tariff cases. Mr Robertson also confirmed that the Respondent was not involved in the management of the office or with the office systems. Mr Robertson confirmed he was the cash room partner. Mr Robertson indicated that he could not recall whether a finding of Inadequate Professional Service had been made against Robertson & Ross Solicitors Limited in connection with failure to implement the mandate. In connection with Production 11, Mr Robertson stated that the signature could be his or it could be that of the Respondent. He stated that the solicitor dealing with the matter would pass the file to the cash room.

In response to a question from the Chairman, Mr Robertson stated that they had a policy that if there was a high court trial and dates had been fixed a mandate would be dealt with as a matter of urgency. In connection with criminal appeal files, they were more historic and papers were inherited from previous solicitors but mandates would be dealt with as soon as possible. Mr Robertson stated that if he had seen Productions 2 and 3 he would not have thought that they required to be dealt with immediately and dealing with them within two to three days would have been sufficient. He confirmed that if he had seen the mail in the basket he would have done something with it. Mr Robertson also confirmed that if he dealt with a matter on behalf of another partner he would put his own reference on the letter. He however indicated that it was possible for the typist to put the wrong reference on the letter.

Mr Marshall indicated that he did not intend to lead any further witnesses.

Mr Murray on behalf of the Respondent stated that he did not intend to lead any evidence.

#### **SUBMISSIONS FOR THE COMPLAINERS**

Mr Marshall stated that he was asking the Tribunal to make a finding of professional misconduct in respect of failure to respond to a mandate and failure to respond to another firm of solicitors. He pointed out that there had been a number of facts agreed in the Record. It was agreed that the Respondent had been instructed in respect of a criminal appeal which was legally aided for Mr A. Mr A decided to instruct new solicitors and refused to see the Respondent on 25 August 2008. On 1 September 2008 the Legal Aid Board wrote to the Respondent to advise that Mr A had instructed a new solicitor. Accordingly as at 1 September 2008 the Respondent knew that he was no longer instructed by Mr A. Mr Marshall submitted that the Respondent's position was that after the 1 September 2008 correspondence he was unaware of further correspondence in connection with the matter. However on 3 September 2008 the new solicitors wrote a letter to the Respondent enclosing a mandate being Productions 2 and 3 of the Complainers' Productions. They were marked for the attention of the Respondent. The Respondent claims that he did not see these and that all the mail was opened and responded to by Mr Robertson. Mr Marshall however submitted that the

evidence given was to the effect that Mr Robertson would only reply to a matter if it was urgent. Mail would be paired up with the file and put on the table or left in an in tray if the file was missing and was checked by Mr Robertson after five days. Mr Robertson had no recollection of replying to the letters or having seen the letters in an unclaimed tray. Mr Marshall submitted that the file would be necessary to enable the mandate to be responded to.

Mr Marshall referred to the Complainers' Production 4 being a letter of 5 September 2008 sent one day after the mandate was received, to the Respondent's Edinburgh agents stating that he was no longer acting. Mr Marshall accepted in response to a question from the Chairman, that this would also be four days after the letter at Production 1 had been sent to the Respondent. Mr Marshall pointed out that "FC" was the Respondent's reference and that the letter of 5 September 2008 was dictated by the Respondent. Miss B's evidence was clear with regard to this matter.

In connection with legal aid accounts, the letters were drafted by the cash room on the instruction of the solicitor dealing with the file. In this case it was clear from Mr C's evidence that the reference on the file was the Respondent's reference. If Mr Robertson had instructed preparation of the legal aid account his reference would have been on the letter.

Mr Marshall referred to the synopsis form indicating that it was not clear who signed this but it was clear that the Respondent had instructed the preparation of the legal aid account. Mr Marshall submitted that all the evidence suggested that the Respondent had received the mandate or at least was aware of the existence of it but he failed to respond to it. Mr Marshall pointed out that a further letter was sent from J Myles & Co being Production 6 on the 15 October 2008. The Respondent accepted that it was sent to him. There was no evidence suggesting that the Respondent responded to the letter. Production 10 was another letter from J Myles & Co. dated 8 January 2009 requesting the file and the implementation of the mandate. The Respondent admitted that the letter was sent and there was no evidence of a reply. Productions 7 and 8 were communications by the Respondent to the Advocate's Clerk. It was agreed that the Advocate had been instructed and that on 15 December 2008 the Respondent phoned



to explain that Mr A had instructed new agents. This was followed up by a letter confirming the phone call.

Mr Marshall stated that the file was returned from the Legal Aid Board on 30 December 2008 and sent by the Respondent to J Myles & Co on 16 January 2009. Mr Marshall submitted that there was sufficient evidence to find that the Respondent was aware of the mandate and the reminders sent. Mr Marshall submitted that there was evidence that the Respondent knew that he was no longer instructed but there was no evidence that he had responded. Mr Marshall referred to his list of authorities. He specifically quoted from The Parliament House Book F1295 in respect of what is expected of a solicitor on receipt of a mandate. This stated that when a solicitor received a mandate, he must respond to it "timeously" either by sending the items requested to the new solicitor or stating that the solicitor was exercising a lien pending settlement of fees and outlays. A delay in doing so would normally be misconduct. A solicitor could not retain papers even if he had a right of lien if to do so would prejudice the client but the solicitor could deliver the papers reserving the right of lien and requesting that the papers be returned when the case is completed. Prejudice is more than inconvenience and would depend on the particular circumstances of the matter. Mr Marshall submitted there was no lien in this case because it was legal aid funded. The Respondent should have accordingly responded to the mandate immediately and he had failed to do this and had failed to find out if anyone else had responded to the mandate.

In response to a question from the Chairman, Mr Marshall accepted that the letter from the Scottish Legal Aid Board could have triggered the letters sent by the Respondent to the Edinburgh agents and to the Advocate's Clerk. Mr Marshall however stated that it was the Respondent who instructed preparation of the legal aid account. Mr Marshall asked the Tribunal to accept the evidence of Mr Robertson to the effect that if the matter had remained unclaimed he would have dealt with it. Mr Marshall referred the Tribunal to the previous Tribunal case in respect of Brian Travers dated 23 September 2010. Mr Travers was found guilty of professional misconduct in respect of his delay and his failure to implement a mandate. The Chairman drew Mr Marshall's attention to the letter sent by Mr Williamson of Robertson & Ross on 10 November 2008 indicating that they had no knowledge of

the mandate. The Chairman enquired as to whether if the Respondent had written to give any information in connection with the file it would still have been a breach of the Rules. Mr Marshall suggested that the Chairman should not look behind the guidance on mandates as to do so would result in an undesirable position. The Chairman indicated that the Tribunal had no intention in looking behind the guidance on mandates. Mr Marshall submitted that the Respondent had shown a disregard for a mandate and a disregard for his client and the other solicitors concerned. Mr Marshall asked the Tribunal to make a finding of professional misconduct because to do otherwise would dilute the protection given by the guidance on mandates but suggested that the Tribunal may wish to take a particular approach with regard to sentence. Mr Marshall asked the Tribunal to make a finding of professional misconduct in respect of the Respondent's failure to respond to a fellow solicitor.

#### **SUBMISSIONS FOR THE RESPONDENT**

Mr Murray asked the Tribunal to find the Respondent not guilty of professional misconduct. He stated that the evidence did not support the contention that the Respondent was personally culpable of failure to implement the mandate. Mr Murray referred to the letter dated 1 September 2008 and submitted that it was this letter that prompted the letter of 5 September 2008 sent by the Respondent to his Edinburgh Agents. In respect of the letter sending the accounts to the Legal Aid Board, the inference was that the Respondent had instructed the account but there was no evidence as to when this was. He could have done it when he was waiting for the account from Gillespie MacAndrew.

Mr Murray submitted that there was no evidence that on 6 October 2008 the Respondent was aware that the file was still in the office. There was no evidence with regard to whose signature it was on the synopsis form. The evidence showed that the handwriting was that of Mr C. Mr Murray submitted that it could not be said what knowledge the Respondent had that the file was still in the office at that time. Normally the file would be returned from the Legal Aid Board within 30 days. The Chairman pointed out that the file in this case was with the Legal Aid Board from 7 October 2008 to 5 January 2009. Mr Murray clarified that it was accepted that the letter dated 15 October 2008 was addressed to the Respondent and should have

reached him. It was regrettable that the letter did not reach him personally. When this letter came in there was no file in the office which it could be matched with. It would have accordingly been pigeon holed and due to a lack of office systems it never reached the Respondent. This was Inadequate Professional Service on behalf of the firm but was not professional misconduct by the Respondent. In respect of Productions 7 and 8, these could have been generated by the Advocate Clerk contacting the Respondent. The letter only shows that the Respondent was no longer acting but shows nothing more than this.

Mr Murray referred to the authorities which he had lodged and in particular to J H Webster on Professional Ethics and Practice for Scottish Solicitors at page 83. Webster suggests that if a solicitor is going to exercise a lien, they must fully respond in writing to the new solicitor explaining what they are doing. Webster states that the situation is more difficult where the work has been done but the fee note has not yet been issued. Sometimes a delivery of a mandate is met by the original solicitors saying it is with the law accountant being feed up and it will be sent on in due course. Webster suggests that if only minor delay is anticipated this may be acceptable but if the process could take a long time to complete the practical course would be to take the file back from the accountant and send it to the new solicitor subject to an undertaking that the account will be paid out of the proceeds of the matter in hand. Mr Murray submitted that this suggested that a minor delay may be acceptable while it was being feed.

Mr Murray further referred to the test of professional misconduct in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC129 at page 134 which stated that a breach of a relevant rule may be professional misconduct but whether such a failure should be treated as professional misconduct must depend on the gravity of the failure and the consideration of the whole circumstances in which the failure occurred including the part played by the individual solicitor. The Chairman pointed out to Mr Murray that it would only be if knowledge of the mandate at the time of receipt was proved beyond reasonable doubt that it would be necessary to go on and look further at whether this would amount to professional misconduct. Mr Murray claimed that even if the Respondent knew of the mandate he put in place systems to bring about closure of the file and this was the end of his personal

culpability. Mr Murray pointed out that the Respondent had asked his Edinburgh agents for an account. He further pointed out that the reminder letters with regard to the mandate which came in to the office did not reach the Respondent due to the office systems being inadequate.

Mr Murray referred the Tribunal to three cases where the Tribunal had found a breach of a mandate may be professional misconduct but not necessarily on its own. Mr Murray pointed out that Mr A had at no time actually lodged a note of appeal and that the file concerned was a correspondence file. The Chairman pointed out that there was more in the file than correspondence as was indicated by the synopsis form suggesting that various other documents were included such as the indictment and precognitions. Mr Murray clarified that he was not claiming that the papers which the Respondent had belonged to him. He however indicated that he was asking the Tribunal to look at whether or not there had been any prejudice to the client as all the main documents had already been copied to Mr A personally and accordingly there was no prejudice caused only inconvenience. The Chairman pointed out that no evidence had been led with regard to this and as these facts were not admitted enquired of Mr Murray as to how the Tribunal could be expected to accept them as proved. Mr Murray indicated that it was accepted there that there had been no evidence of these averments which were made in the Answers. The Chairman pointed out to Mr Murray that the question of prejudice would only arise where the solicitor was claiming his right of lien. Mr Murray however claimed that in any question of professional misconduct it was necessary to look at the issue of any prejudice to the client. The Chairman pointed out that there was no provision which stated that the solicitor was entitled to delay implementation of the mandate if there was no prejudice to the client.

## **DECISION**

The Tribunal considered the admitted facts as set out in the Record together with the evidence led from the three witnesses. The Tribunal had to consider whether or not it was satisfied beyond reasonable doubt on the basis of all the evidence before it that the Respondent was aware of the existence of the mandate from J Myles & Co requiring the file to be sent to them. It was clear from the admissions made and the evidence that the Respondent received the letter from the Scottish Legal Aid Board

being Production 1 of the Complainers' Productions advising that his client had now instructed other solicitors. The Respondent's position however is that he did not receive the letter and mandate being Complainers' Production 2 and 3. The evidence from the three witnesses shows that the mail system at Robertson & Ross at this time was that all the mail was opened by Miss B who diarised matters and then gave all the mail to Mr Robertson. He then dealt with anything urgent and the remainder of the mail was put in a basket to be tied up with the files by an office assistant. If a file could not be found the letter would be put in a pigeon hole until later but Mr Robertson would check matters after about five days to make sure that nothing was outstanding for too long. Given these office systems, the Tribunal cannot be satisfied beyond reasonable doubt that the letter enclosing the mandate was received by the Respondent personally. The Respondent's actions in writing to his Edinburgh agents (Complainers' Production 4) and in advising the Advocate's Clerk that he was no longer acting for Mr A (Complainers' Productions 7 & 8) could just as easily have been triggered by the letter from the Scottish Legal Aid Board as by the receipt of the mandate.

The evidence suggests that it would have been the Respondent who sent the file to be feed up in the cash department but there is no evidence as to when this happened. The witnesses indicate that because the Respondent's initials were on the letter sending the file to the Legal Aid Board it was presumed that it would have been the Respondent. However even if it was the Respondent who sent the file to the cashier to be feed up, it does not mean that the Respondent was aware of the mandate.

None of the witnesses who gave evidence were able to state whose signature was on the accounts synopsis form. The evidence from the witnesses is also to the effect that it was not the Respondent who filled out the synopsis form but an Mr D. The Tribunal could make no finding that the Respondent was responsible for signing the synopsis form and sending the file off to the Scottish Legal Aid Board.

It is also clear from the evidence that when the reminder letter from J Myles & Co came in on 15 October 2008 the file had already been sent to the Legal Aid Board and accordingly this letter would have remained in the basket rather than being put with

the file. The Tribunal cannot be satisfied beyond reasonable doubt that this letter was seen personally by the Respondent. It is accepted by the Complainers that on 10 November 2008 Mr Williamson of Robertson & Ross wrote to J Myles & Co stating that they had no trace of a mandate. This is consistent with the Respondent's claim that he was unaware of the mandate. Mr Robertson's evidence is to the effect that he was also unaware of having seen the correspondence in relation to the mandate. It is not disputed that the letter was sent by J Myles & Co and received by Robertson & Ross but the Tribunal cannot find beyond reasonable doubt that the letter enclosing the mandate and the letter of 15 October 2008 were seen personally by the Respondent or that the Respondent was aware of them.

A third reminder was sent by J Myles & Co dated 8 January 2009 and resulted in the mandate being implemented on 16 January 2009. If the Respondent had seen this letter there was no unacceptable delay in acting upon it.

As the Tribunal cannot be satisfied beyond reasonable doubt that the Respondent received the first two letters from J Myles & Co the Tribunal cannot find that the Respondent failed to respond to these letters. There could be no finding of professional misconduct absent a finding that the Respondent had knowledge of an unimplemented mandate

In the whole circumstances the Tribunal found the Respondent not guilty of professional misconduct.

Mr Murray invited the Tribunal not to give publicity to the Decision because a finding of not guilty had been made. The Chairman however pointed out that the legislation did not give the Tribunal much discretion in respect of publicity. Mr Murray noted the position. Mr Murray asked for an award of expenses. Mr Marshall stated that he was neutral with regard to publicity but could not argue against an expenses award. Mr Murray made no request for certification of the cause as appropriate for the employment of Counsel. The Tribunal accordingly found the Law Society liable in the expenses of the Respondent and the Tribunal at the usual rates.

**Chairman**