

**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

**JOHN ROBERT MITCHELL, 1 Redhall Mill,
80 Katesmill Road, Edinburgh**

Respondent

1. A Complaint dated 19 March 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that John Robert Mitchell, 1 Redhall Mill, 80 Katesmill Road, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Mr A.
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 appointed the Complaint to be heard on 16 August 2019 and notice thereof was duly served on the Respondent.
5. At the hearing on 16 August 2019, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was present and represented by William Macreath, Solicitor, Glasgow.

6. Of consent, the Tribunal granted the Complainers' motion to amend the Complaint by deleting paragraphs 5.20(6), 6.7, 6.8 and 7.1(3). References to "May" in paragraphs 7.1(1) and (2) were deleted and "July" substituted. A Joint Minute of Admissions was lodged. Said Joint Minute agreed that the Respondent admitted the averments of fact, duty and misconduct contained within the Complaint as amended. It was noted that the Respondent was no longer practising as a solicitor and the address above was provided. The Tribunal heard submissions from both parties.

7. Having given careful consideration to the terms of the Complaint as amended, the Joint Minute of Admissions and the parties' submissions, The Tribunal found the following facts established:-

7.1 The Respondent was enrolled as a Solicitor on 6 June 1980. He was a Partner with McKay Norwell, WS until June 2012 and was an LLP Designated Member and Partner of Blackadders LLP from 18 June 2012 to 31 March 2019. He no longer practises as a solicitor.

7.2 In 1994, the Secondary Complainer and his then partner jointly bought a property. The couple separated and the Secondary Complainer moved out of the property in around 2008.

In March 2012, the Secondary Complainer instructed the firm of McKay Norwell, WS in relation to realising the capital value of his one-half share of the property.

7.3 On 18 June 2012, McKay Norwell ceased trading and merged with Blackadders LLP. On 18 July 2012 the Secondary Complainer was informed that the Respondent had taken over his case. The Respondent sent the Secondary Complainer an email on 24 July 2012 in which he raised the issue of an action of division and sale, if the Secondary Complainer's partner did not agree to a voluntary sale.

7.4 From the point in time the Respondent took over the case until 5 July 2013, matters were progressed by the Respondent. There were ongoing negotiations with

Secondary Complainer's former partner's Agents, regarding financial settlements and other sundry matters.

The Respondent emailed the Secondary Complainer on 5 July 2013 following on from a meeting they had had on 2 July 2013. The Respondent stated that once he knew the Secondary Complainer's position on certain items of moveable property, he intended to set up a meeting with the Secondary Complainer's former partner's Agents to see if a deal was possible and if it was not, then he would move for an action of division and sale. He stated that he awaited the Secondary Complainer's further contact and instructions.

- 7.5 The Secondary Complainer emailed the Respondent on 7 July 2013, with a list of his moveable property that was still in the property.
- 7.6 The Secondary Complainer again emailed the Respondent on 17 October 2013, this time asking if there were any updates as things did not seem to have progressed.

The Secondary Complainer's former partner's Agents wrote to the Respondent on 22 November 2013 asking if he was still instructed in the matter, as there had been no response to their previous letters.

The Secondary Complainer emailed the Respondent on 5 December 2013 listing the attempts he had made to contact the Respondent and expressing his worry at the lack of progress.

The Secondary Complainer's former partner's Agents called the Respondent on 26 February 2014 and again on 31 March 2014 regarding previous discussions with the Respondent and asking that he return their calls.

- 7.7 The Respondent returned the Secondary Complainer's former partner's Agents phone call on 31 March 2014 and discussed their positions in regard to the case. Both Agents agreed to obtain up to date instructions from their respective clients.

On the same day, the Respondent emailed the Secondary Complainer, advising he had now spoken to the former partner's Agents. He reported back on what was discussed and said he had left the matter with the other Agents, to obtain instructions and revert with any further offers. He stated he would review the position in 10 days' time.

- 7.8 On 2 May 2014, the Respondent emailed the Secondary Complainer, advising that his hourly rate had increased.

On 20 May 2014, the Secondary Complainer's former partner's Agents wrote to the Respondent pointing out they had received no response to several letters, offers and enquiries they had made. They further stated that the Secondary Complainer's former partner's position remained as was previously stated and if this was a problem, it would need to be made known.

On 24 June 2014, the Secondary Complainer emailed the Respondent informing him that he would be unavailable at his usual email address for a while and providing alternate contact details.

On 10 September 2014, the Secondary Complainer emailed the Respondent expressing dissatisfaction with the case having been stalled for so long and instructing the Respondent to raise an action of division and sale if a voluntary sale could not be agreed by 30 September 2014.

- 7.9 The Respondent emailed the Secondary Complainer on 14 September 2014, confirming that he had noted the position and would deal with the matter the following week.

The Respondent gave a full response on 1 October 2014. He informed the Secondary Complainer that he had overlooked a letter received in May 2014 from the Secondary Complainer's former partner's Agents with an offer and apologised for the oversight, stating that he could offer no explanation. He advised the Secondary Complainer about the matter and suggested setting up a meeting between them. This meeting took place on 13 October 2014.

7.10 Thereafter, the Respondent engaged in regular communication with both the Secondary Complainer and his former partner's Agents. On 22 July 2016, the Respondent replied to a letter and email from the Secondary Complainer, giving advice in relation to the property and also discussing the unbilled work he had completed on behalf of the Secondary Complainer. The Respondent suggested a funding package that he felt might be appropriate and asked the Secondary Complainer to have a think about it and revert with his instructions.

7.11 The Secondary Complainer did not respond until 18 October 2016, when the Secondary Complainer requested an update and mentioned that he had not heard from the Respondent since July.

The Respondent replied on 19 October 2016, explaining no progress had been made as the Secondary Complainer had failed to respond regarding funding options and he had been instructed by his managing partner to do not further work until funding was in place. He advised on funding options available to the Secondary Complainer. He informed the Secondary Complainer that if he was unable or unwilling to arrange funding, that he would be instructed to withdraw from acting and bill the Secondary Complainer.

7.12 By e-mail dated 24 October 2016, the Secondary Complainer advised the Respondent that he was terminating his instructions to the Respondent and the firm and asked for an itemised bill. On 7 November 2016, the Respondent sent the Secondary Complainer a bill for £11,702 inclusive of VAT.

7.13 The Secondary Complainer instructed another firm of solicitors, who wrote to the Respondent on 17 November 2016 enclosing a mandate signed by the Secondary Complainer and requested the Respondent send them the Secondary Complainer's title deeds to the property.

The Secondary Complainer emailed the Respondent on 20 November 2016, querying the bill he had been sent.

The Secondary Complainer's new Agents wrote again to the Respondent on 30 November 2016, referring to their previous letter.

The Secondary Complainer emailed the Respondent on 3 December 2016 seeking a reply to his previous e-mail and stating that he wanted the bill to be examined and taxed by the court auditor.

The Respondent replied to the Secondary Complainer on 7 December 2016, apologising for his lack of reply and citing the pressure of other work. He said he hoped to respond fully soon.

- 7.14 On 14 December 2016, the Respondent replied to the Secondary Complainer, explaining the bill and advising on taxation. He offered to reduce his bill by £300.60 in light of duplication issues. The Respondent advised the Secondary Complainer at this point that he was exercising a lien over the Secondary Complainer's client file and title deeds until his bill was settled.

The Respondent also wrote to the Secondary Complainer's new Agents on 14 December 2016, advising them that he was exercising a lien over the Secondary Complainer's client file and title deeds.

- 7.15 On 19 December 2016, the Secondary Complainer emailed the Respondent to inform him that he had submitted a complaint to the SLCC and, separately, that an action for division and sale had been raised by his new Agents. He renewed his requests for the Respondent to send his title deeds, as they were required for the action.

- 7.16 The Respondent replied on 21 December 2016, stating he would send the title deeds to the Secondary Complainer's new Agents but that the client file would be sent to his firm's Client Relations Manager, as it was now a complaint.

On 22 December 2016, the Respondent sent the title deeds to the Secondary Complainer's new Agents, who acknowledged receipt on 23 December 2016.

7.17 The Secondary Complainer lodged a Complaint Form with the SLCC on 27 January 2017. The SLCC determined the matter to be a conduct complaint and referred the matter to the Complainers.

7.18 The matter was investigated by the Complainers, who compiled a Report, a copy of which was provided to the Respondent's Representative by letter dated 27 April 2018. Inter alia, the letter advised that the complaint would be considered by the Complainers' Professional Conduct Sub Committee.

7.19 The Report and all other relevant documentation was considered by the Complainers' Professional Conduct Sub Committee on 28 June 2018.

The Sub Committee determined that the Respondent's conduct appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that it appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

Further, the Sub Committee determined that a Fiscal should be appointed in terms of Section 51 of the Solicitors (Scotland) Act 1980.

8. Having given careful consideration to the established facts and the submissions made by parties, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal did not consider that the conduct established met the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.
9. Having heard further submissions from parties on expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 16 August 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against John Robert Mitchell, 1 Redhall Mill, 80 Katesmill Road, Edinburgh; Find the Respondent not guilty of professional misconduct; Make no finding of expenses due to or by either party; and

Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Beverley Atkinson

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 10 SEPTEMBER 2019 .

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson
Vice Chair

NOTE

At the hearing on 16 August 2019, the Tribunal had before it the Complaint, a Joint Minute of Admissions and various testimonials lodged on behalf of the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that by way of the Joint Minute, the Respondent had admitted the averments of professional misconduct contained at paragraphs 7.1 and 7.2 of the Complaint. Despite this, it was for the Tribunal to determine whether the conduct amounted to misconduct. It was the Fiscal's submission that the Sharp test was met in this case by the Respondent's failure to update the Secondary Complainer on the progress of his family law matter between July 2013 and September 2014 despite numerous telephone calls and emails requesting that he do so; and also by the Respondent's undue delay in progressing that family law matter between July 2013 and October 2014. He said that the Tribunal had frequently held that a 14- or 15-month delay in progression and lack of communication was sufficient to satisfy the test for misconduct. The Fiscal highlighted the paragraphs of the Complaint which narrated the detailed history of the matter. Despite various attempts by the Secondary Complainer to communicate with the Respondent and get things moving, there was no reciprocal communication or progress. The Fiscal noted that the Respondent's agent was involved at early stage and the Complainers had been saved significant preparation.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath confirmed that the Respondent pleaded guilty to the Complaint as amended and that the period of inactivity was from 7 July 2013 to 1 October 2014. Mr Macreath explained the complicated background to the family law case. The Respondent had given the Secondary Complainer advice on irregular marriage and an action for division and sale and the likelihood of success in the circumstances. At one point, the police were called to the former family home. A "bare knuckle dispute" followed which involved very protracted correspondence between the Respondent and the agent on the other side. Up until June 2013, the Respondent attempted to settle the case. In July 2013 he met the Secondary Complainer and corresponded with him by email. However, from that point on, nothing proceeded apart from the suggestion that the agents meet. From 7 July 2013 to 30 September 2014, despite the Secondary Complainer and the other side making contact, nothing happened. However, in October 2014 the Respondent apologised and matters progressed from there. The Respondent carried out a significant

amount of work from October 2014 to November 2016 on behalf of the Secondary Complainer. The reason for the withdrawal of agency in November 2016 was a dispute over fees. In the end, a fee of £11,000 was waived by Blackadders LLP. Mr Macreath noted there was no risk of repetition as the Respondent had retired.

DECISION

The Tribunal proceeded on the basis of the facts admitted in the Joint Minute. The Respondent initially gave the Secondary Complainer advice regarding a family law matter. He communicated with him and work progressed satisfactorily until July 2013. Thereafter, the Complainers alleged that “effectively nothing happened” for 15-months, despite the efforts of the Secondary Complainer and his former partner’s agents to engage with him. The Tribunal noted that the Secondary Complainer during that period emailed the Respondent on 7 July 2013, 17 October 2013 and 5 December 2013, although only the latter two emails expressed concern. The Secondary Complainer’s former partner’s agents wrote to the Respondent on 22 November 2013 and they called the Respondent on 26 February 2014 and 31 March 2014. However, no averments of misconduct relating to a failure to communicate with the agents was made in the Complaint, which related only to the Respondent’s conduct towards the Secondary Complainer.

The Tribunal noted that on 31 March 2014, the Respondent returned the agent’s phone call and they discussed the case. Both agents agreed to obtain up to date instructions from their clients. On the same day, the Respondent emailed the Secondary Complainer updating him and noting that he had left the matter with the other agents, to obtain instructions and revert with further offers. He said he would review the matter in 10 days.

The Secondary Complainer’s former partner’s agents wrote to the Respondent on 20 May 2014 expressing their dissatisfaction. The Secondary Complainer emailed on 24 June 2014 but did not complain again until 10 September 2014. The Respondent emailed the Secondary Complainer on 14 September 2014 and provided a full response on 1 October 2014. He met with the Secondary Complainer on 13 October 2014. Matters appeared to have progressed satisfactorily until the dispute over fees in 2016.

The Respondent was instructed by the Secondary Complainer for four years from July 2012 to October 2016. According to the agreed position of the parties, the Respondent failed to communicate with the

Secondary Complainer for 14 months during that period. However, as narrated in the Complaint, the Respondent did communicate with the Secondary Complainer on 31 March 2014. The period of the failure to communicate therefore is broken into two sections of 8 months and 6 months. The Secondary Complainer contacted the Respondent three times by email during the first period and twice during the second period. Only three of these emails queried progress (17 October 2013, 5 December 2013 and 10 September 2014).

The Complainers averred and the Respondent accepted that he failed to act in the Secondary Complainer's best interests (Rule B1.4) and failed to carry out instructions adequately and completely within a reasonable time (Rule B1.10).

The Tribunal considered the test for professional misconduct contained within Sharp v The Law Society of Scotland 1984 SLT 313, namely that:

“There are certain standards of conduct to be expected of competent and reputable solicitors and 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...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.”

The Tribunal considered that the Respondent, by his admitted conduct, had breached the Practice Rules. However, it also had regard to the context where the failures took place over an 8- and 6-month period during a four-year relationship which appears only to have broken down two years later over a fee dispute. The issue regarding mandates was no longer before the Tribunal. The Respondent did not deceive or mislead the client. It was an isolated case. No adverse consequences flowed from the delay. The relationship with the client did not break down as a result of the delay or deficiencies in communication. The Tribunal therefore was of the view that in this context, the Respondent's behaviour could not be described as a serious and reprehensible departure from the standards of competent and reputable solicitors. The conduct was not likely to harm the reputation of the profession. The public did not require protection.

The Tribunal had regard to Section 53ZA of the Solicitors (Scotland) Act 1980 which provides that:

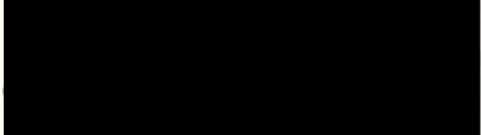
“Where the Tribunal is not satisfied that a solicitor is guilty of professional misconduct but considers that he may be guilty of unsatisfactory professional conduct, it must remit the complaint to the Council.”

According to Hood-v-The Law Society of Scotland [2017] CSIH 21:

“Unsatisfactory professional conduct is measured against the standard of the competent and reputable solicitor ...unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional service at the lesser end and determining where the conduct complained of lies on that spectrum is a question for evaluation by the relevant disciplinary tribunal.”

The Tribunal considered that the conduct in the amended Complaint was insufficient even to meet the test for unsatisfactory professional conduct and therefore it did not remit the Complaint to the Council of the Law Society of Scotland for its consideration. The Tribunal was of the view that the delay and communication matters were service issues.

The Tribunal sought submissions on expenses and publicity. Initially, Mr Macreath sought the expenses of the case on the basis that the Respondent had been successful. However, after the Fiscal moved for no award of expenses due to or by either party, Mr Macreath indicated that he was content with that outcome and the Complainers’ motion regarding expenses could be regarded as being of consent. Therefore, the Tribunal made no award of expenses due to or by either party. It directed that publicity should be given to the decision and that publicity should include the name of the Respondent in terms of Paragraphs 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there was no requirement to identify any other persons as publication of their personal data may damage or be likely to damage their interests.



Beverley Atkinson
Vice Chair