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

against

TORQUIL F MACLEOD, formerly of Torquil MacLeod & Co, 5 Longman Road, Inverness

1. A Complaint dated 6 June 2017 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Torquil F MacLeod, formerly of Torquil MacLeod & Co, 5 Longman Road, Inverness (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent but later withdrawn.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 13 September 2017 and notice thereof was duly served upon the Respondent.

5. The hearing took place on 13 September 2017. The Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by William Macreath, Solicitor, Glasgow.

6. A Joint Minute was lodged admitting the facts, averments of duty and averments of professional misconduct in the Complaint. The Joint Minute agreed that only four of seven fee notes referred to in the Complaint had been rendered to the executor. Submissions were made on behalf of both parties.

7. The Tribunal found the following facts established:-

7.1 The Respondent's date of birth is 14 August 1954. He was enrolled as a Solicitor on 19 February 1979. Between 19 February 1979 and about 1 February 1981 he was employed by Bonar Mackenzie, Solicitors, Edinburgh. Between 2 February 1981 and 31 October 2001 the Respondent was a partner in Innes & Mackay, Solicitors, Inverness. Between 1 November 2001 and 31 October 2013 the Respondent was a partner in Torquil MacLeod & Co, Solicitors, Inverness. Between 1 October 2013 and 26 February 2016 the Respondent was a partner in MacArthur & Co, Solicitors, Inverness. Since 29 February 2016 the Respondent has been a consultant to another firm.

7.2 Mr A died on 17 March 2007. At the time of his death he was the Factor of Estate 1. The Respondent had previously acted for the deceased during the latter's lifetime. In terms of the will left by the deceased an accountant in England and the brother of the deceased, Mr B, were appointed to act as executors. The will further provided that in the event that Mr B was unable or unwilling to act, his son Mr C would be appointed. By the time Mr A died the accountant had retired from practice. The brother of the deceased, Mr B, acted as sole executor until his death when his son Mr C assumed office as executor.

7.3 On 23 March 2007, the Respondent met Mr B, Mr C and Mr D. Mr C and Mr D were, along with their sister, residuary beneficiaries of the late Mr A. The Respondent's note of that meeting recorded that Mr B was provided with a copy of the Respondent's firm's general terms of engagement, which included an hourly rate of £140 plus VAT. The Respondent recorded that he told the others present that in view of his long acquaintance and business relationship with Mr A he would restrict his firm's fees from the usual 1% of the gross estate by one third. There was no further correspondence concerning the feeing arrangements for the administration of the estate.

7.4 The Respondent proceeded to ingather the substantial estate of the deceased. On 25 February 2008, the Respondent advised Mr B that he had made payments to account of their entitlement to the beneficiaries. He also as at that date took a fee and rendered a fee note to the executor Mr B in the amount of £5,875 including VAT.

7.5 On 29 January 2009, the Respondent sent a note to his partner Mr Howie and an assistant within the firm concerning his impending absence from business. He summarised the position in relation to the estate and set out proposals as to the approach which should be taken to the inheritance tax position of the estate. Thereafter there was little activity in relation to the administration of the estate. On 1 March 2010 the Respondent wrote to the executor advising that he had made further payments to account to the beneficiaries. In the letter he advised that there were a number of minor matters to tie up. He indicated that he would be in a position thereafter to produce a final statement in relation to his administration of the estate. On the same date the Respondent took a fee amounting to £6,462.50 for work carried out at that stage and rendered a fee note in that amount to the executor. On the same date a separate fee of £70.50 was taken and a fee note rendered. After that date (1 March 2010) only two further letters were written on the file, the first in relation to a bank account in Suffolk and the second to a firm of Solicitors in London who were acting in the transfer of English properties to the beneficiaries.

7.6 The Respondent ceased to be a partner in Torquil Macleod & Co as at 31 October 2013. Thereafter he became a partner in MacArthur & Co, while his former partner Mr Howie joined the new firm of Howie Nicholson & Co. The Mr A executry was retained by that firm. Guarantee Fund Inspectors employed by the Complainers carried out an inspection of the affairs of Howie Nicholson in December 2014. Inspection of the Respondent's files in relation to the Mr A executry revealed that between February 2008 and September 2012 seven fees were taken by the respondent in relation to the Mr A executry. The copy fee notes were addressed to "executors of the Late Mr A" at the deceased's address and did not contain any specific details of the work which was said to have been carried out. Of those seven fee notes, only four were rendered to the executors. The Complainers determined that the Respondent's files in relation to the executory should be assessed by the Auditor of Court. This was done. The Auditor's analysis was as follows:-

7.6.1 Between 25 February 2008 and 5 November 2009 fees totalling £16,800 were taken by the Respondent. The Auditor assessed the correct level of fee as £17,314.25.

7.6.2 Fees totalling £6,533 were taken on 1 March 2010. The Auditor's assessment of the fee due between 2010 and 2011 was £616.87.

7.6.3 On 10 September 2012 the Respondent took a fee of £3,000. On 13 September 2012 the Respondent took a further fee of £7,200 making the total for that month £10,200. The Auditor's assessment in respect of the period under consideration was £18.00.

7.7 On 31 October 2013 the firm of Torquil MacLeod & Co ceased to exist. The executry file was taken over by Howie Nicholson, Solicitors, the firm established by the Respondent's former partner Mr Howie. It was during an inspection which took place in 2014 of that firm's books and records that the overcharge became apparent. Subsequently, the administration of the estate was taken over by Fergusson Law to completion. In April 2015 the Complainers contacted a solicitor of that firm. She confirmed that she had been unable to find any fee notes in the files and could not find any letter of engagement, but only a copy of the firm's terms and conditions which referred to time-based fees.

7.8 The fees taken by the Respondent amounted in total to £33,533. The assessment by the Auditor indicated that the fee due was £17,949.12. The amount of the overcharge was £15,583.88.

7.9 At the beginning of August 2015 the Respondent made a payment of £15,583.88 which was credited to the executry ledger.

7.10 There was no agreement to charge a percentage fee, but in any event such a fee would require to apply to all of the work done to administer the estate. A significant amount of this work, including the transfer of the English properties which were tenanted to the beneficiaries, was not carried out by the Respondent.

8. Having heard submissions from both parties and having considered the matter carefully, the Tribunal found the Respondent guilty of professional misconduct in respect that he:

8.1 Charged grossly excessive fees to an executry; and

8.2 Failed to render fee notes in respect of the fees taken.

9. Having considered the mitigation advanced on behalf of the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 13 September 2017. The Tribunal having considered the Complaint dated 6 June 2017 at the instance of the Council of the Law Society of Scotland against Torquil F MacLeod, formerly of Torquil MacLeod & Co, 5 Longman Road, Inverness; Find the Respondent guilty of professional misconduct in respect that he charged grossly excessive fees to an executry and failed to render fee notes in respect of the fees taken; Censure the Respondent; Fine the Respondent the sum of £3,000 to be forfeit to Her Majesty; 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 declaring that such publicity should include the name of the Respondent but need not name any other person or otherwise identify them as publication is likely to damage their interests.

(signed)
Kenneth Paterson
Vice Chairman

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 12 OCTOBER 2017.

IN THE NAME OF THE TRIBUNAL

[redacted]

Kenneth Paterson

Vice Chairman

NOTE

A Joint Minute was lodged admitting the averments of fact, duty and professional misconduct in the Complaint and agreeing that of the seven fee notes narrated in the Complaint, only four were rendered to the executor.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal outlined the factual basis of the Complaint. Mr A was the Factor of Estate 1. He died in March 2007. His will provided that his executors should be his brother Mr B, whom failing, Mr B's son, Mr C. In March 2007, the Respondent met Mr B and Mr C. In his file, the Respondent recorded that he gave Mr B his terms of engagement letter. This letter provided for an hourly rate of £140 exclusive of VAT. According to the Respondent's notes of the meeting, he indicated he would restrict his firm's fees from the usual 1% of the gross estate by one third. However, there was no further correspondence regarding the feeing arrangements and any discussion regarding fees was not reduced to writing. The Respondent was not responsible for all the work on the executry, some of the which was undertaken by English solicitors.

The administration of the estate proceeded as usual. In February 2008, the Respondent told Mr B that he had made payments to the beneficiaries. He took a fee at that stage. In January 2009, the Respondent knew he was going to be absent from work. He left a note summarising progress and dealing with the inheritance tax position. After that there was very little activity on the file. In 2010 more fees were taken. During 2010-2012, no work of any consequence was done on the file. However, fees continued to be taken. Fee notes were not rendered to the executor. The files were taxed by the Auditor of Court who determined that overcharge amounted to £15,583.88. The Fiscal submitted that the combination of overcharging and failing to render the fees was sufficient for the Tribunal to make a finding of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath indicated that Answers to the Complaint had been lodged but were now withdrawn. He explained that the deceased's will had been prepared in England. However, his solicitors said that because his sudden death occurred in Scotland, his affairs should be wound up there. The Respondent had been the local solicitor for Estate 1 from 1991. His business relationship with the deceased grew into a friendship. Mr B wished to instruct the Respondent given the relationship between the deceased and the

Respondent. The Respondent therefore met the deceased's brother and his sons at offices in Inverness. He provided a letter of engagement and charges were discussed. A verbal estimate was provided based on the gross estate. In view of his association with the deceased he told them that he would not charge the full amount although this would be normal practice for other solicitors who might also impose an uplift dependent on the complexity or difficulty involved.

Mr Macreath explained that the case came to the attention of the Law Society during a routine inspection of Howie Nicholson and as a consequence the Respondent was referred to the Guarantee Fund Sub Committee. The interview panel of that Committee recognised that the value of the estate exceeded £4.4 million. The Respondent's intention to claim a percentage fee was therefore very significant. The Committee determined that the case should be sent for taxation.

The taxation took place in 2015. By this time, most of the administration of the estate was complete and payments to account made. The fees up to November 2009 were accepted by the Auditor. However, the later fees caused concern. In March 2010 a fee of £6,533 was taken and the Auditor assessed the work as being worth £616.87. In September 2012 a fee of £10,200 was taken and the Auditor assessed the work as being worth £18.00. The Respondent had no time recording system in place. The taxation assessment related solely to what was in the file. Some of the papers had been stored in Outlook files on the Respondent's former office computer which had been wiped. The Respondent was "totally at sea" when trying to explain the work he had done. However, the Auditor had to base the fee on the hourly rate provided in the terms of business letter as that was the contract between the Respondent and the executors and there was no consensus regarding a fee based on a percentage of the value of the estate. On receiving the Auditor's decision, the Respondent immediately repaid £15,000 overcharge from his own funds.

In mitigation, Mr Macreath highlighted that the misconduct occurred at a time when the Respondent was having trouble in his partnership with Mr Howie. The relationship became so strained that the Respondent left their partnership. When Howie Nicholson was wound up, the Respondent lost his capital which was in that firm. The Respondent accepts that he had a "mental block" when it came to this case due to his professional and personal problems.

Mr Macreath drew the Tribunal's attention to the references which had been provided on the Respondent's behalf. These were from the managing partner of a "blue chip" firm and the local Sheriff. The referees had full knowledge of the details of the Complaint. Mr Macreath asked the Tribunal to take into account that the Respondent had taken a fee to which he considered he was entitled. However, following taxation he immediately repaid the excess and has accepted that he is guilty of professional misconduct. Mr

Macreath noted previous decisions of the Tribunal involving overcharging had resulted in severe penalties. However, he sought to distinguish the present case based on its mitigating factors.

DECISION

The Tribunal considered carefully the admitted averments of fact in the Complaint. The Tribunal had regard to the test for professional misconduct as defined in Sharp v Council of the Law Society of Scotland 1984 SLT 313. In *Sharp* it was emphasised that a serious and reprehensible departure from the standards of conduct to be expected of competent and reputable solicitors may be properly categorised as professional misconduct. However, in every case it is essential to consider the whole circumstances and the degree of culpability of the individual against whom the complaint it made. The Tribunal considered all the circumstances and found that the Respondent's conduct was sufficiently serious and reprehensible to amount to professional misconduct. He had charged fees grossly in excess of what the Auditor considered to be fair and reasonable. He had done this based on an agreement to charge a percentage fee which was not included in the terms of business letter or ever reduced to writing. In addition, he failed to properly render those fee notes to the executors so that they were aware of the fees and the basis for them.

Ordinarily, the Tribunal views overcharging very seriously. The Respondent made a significant error of judgement. However, this was an isolated incident rather than a repeated course of conduct. He had a previously unblemished record. He admitted professional misconduct. The Tribunal accepted that the misconduct occurred at a difficult time in the Respondent's professional and personal life. He had paid the monies back immediately after the taxation. The Tribunal considered that the misconduct was unlikely to be repeated. In the circumstances of this case, the Tribunal did not consider that the public would be at risk if the Respondent continued to practise unsupervised. However, the Tribunal thought it appropriate to mark the seriousness of the conduct with a substantial fine. Therefore, a fine of £3,000 was imposed.

The Tribunal found the Respondent liable in the expenses of the Complainers and the Tribunal. The Tribunal ordered that publicity should be given to the decision but only the Respondent required to be named because publication of personal data is likely to damage individuals' interests. As the professional misconduct occurred before the Respondent was engaged by his present firm, there was no reason to identify it.

Kenneth Paterson

Vice Chairman