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

F I N D I N G S

in Complaint

by

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

Complainers

against

STUART McDONALD BAIN, Andersonbain LLP, 6, 8 & 10 Thistle Street, Aberdeen

Respondent

1. A Complaint dated 12 April 2019 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 Stuart McDonald Bain, Andersonbain LLP, 6, 8 & 10 Thistle Street, Aberdeen (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Ms 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, Elaine Crawford, Solicitor, Edinburgh. 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 the words "honesty and" in paragraph 6.1(a) and also by correcting the name of the Respondent's client in paragraph 4.18. A Joint Minute was lodged whereby the Respondent admitted the averments of fact, duty and misconduct in the Complaint as amended. 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 is Stuart McDonald Bain. He was born on 2 February 1963. He was admitted as a solicitor on 13 November 1986. He was an associate with Smith & Sutherland, Aberdeen, from January 1989 to July 1990 and a partner there from August 1990 to December 1999. The Respondent has been a partner in the firm Andersonbain LLP, Aberdeen, since 2000. He holds a current practising certificate.

7.2 In July 2015 the Respondent was instructed by his client Mr B to prepare a Power of Attorney in favour of the Respondent to enable him to deal with the sale of Mr B's house ("the property") and to sign the disposition on behalf of Mr B as he would be working abroad.

7.3 On 18 November 2015 Alex Hutcheon & Company Solicitors sent an offer, on behalf of the Secondary Complainer, to Andersonbain LLP ("the firm") to purchase the property. The offer to purchase included the conditions contained in the Scottish Standard Clauses (Edition 1) specified in the Deed of Declaration by Ross Alexander MacKay dated 2 December 2014 and registered in the Books of Council and Session for preservation on 3 December 2014. The proposed date of entry was 15 January 2016.

7.4 The Scottish Standard Clauses (Edition 1) state:

Clause 6 Statutory Notices

6.1 "Any Local Authority (or other public body) notices or orders calling for repairs or other works to the Property dated prior to or on the date of conclusion

of the Missives (or any other work affecting the Property agreed to or authorised by the Seller outstanding at the Date of Entry) will be the responsibility of the Seller. Liability under this condition will subsist until met and will not be avoided by the issue of a replacement notice or order."

6.2 "The Seller warrants that he has not received written notification of, approved, entered into or authorised any scheme of common repairs or improvement affecting the Building. Where the Seller approves, enters into or authorises any such scheme or where any such scheme is instructed, the Seller shall remain liable for his share of the cost of such works. Details of any such scheme will be disclosed to the Purchaser prior to settlement. The Seller undertakes not to enter into, approve or otherwise authorise any such scheme prior to settlement without the consent of the Purchaser."

6.3 "When any work in terms of Clauses 6.1 or 6.2 above is incomplete or unpaid for at the Date of Settlement the Purchaser will be entitled to retain from the Price a sum equivalent to the estimated cost of the Seller's share of such works (which estimate shall be augmented by 25%). Such retention shall be held in an interest bearing account by the Purchaser's solicitor pending settlement of the Seller's liability. The retention shall not be released or intromitted with without the written authority of the solicitors for the Purchaser and the Seller. Any shortfall will remain the liability of the Seller."

6.6 "Without prejudice to the above, the Purchaser may retain from the Price such sum as is reasonably required to meet any costs for which he may be contingently liable under Section 10(2) of the Title Conditions (Scotland) Act 2003 or Section 12(2) of the Tenements (Scotland) Act 2004 as amended. Such retention shall be held in an interest bearing account by the Purchaser's solicitor pending settlement of that liability. The retention shall not be released or intromitted with without the written authority of the solicitors for both the Seller and the Purchaser. Any shortfall will remain the liability of the Seller."

Clause 7 Property Management and Factors

7.1 "Where the property is part of any larger subjects (the Building or otherwise) or development, it is a condition that:

7.1.1 common charges will be apportioned between the Seller and the Purchaser as at the Date of Entry on the basis that the Seller will be responsible for all common repairs and improvements carried out, instructed or authorised on or prior to the Date of Entry;

7.1.2 there are no major repairs or improvements proposed, instructed, authorised or completed but not yet paid for in respect of the Property or the larger subjects or the Building or development of which it forms part;

7.1.3 the Seller shall provide the Purchaser with full details of any factoring and block insurance arrangements affecting the Property; and

7.1.4 all other outgoings and charges payable in respect of the Property will be apportioned as at the Date of Entry."

7.5 The Respondent took instructions from Mr B in relation to said offer by telephone on 18 November 2015. The Respondent's handwritten file note dated 18 November 2015 noted that Mr B had advised that there were no repairs or statutory notices.

7.6 On 18 November 2015 the Respondent sent a letter to Alex Hutcheon & Co, on behalf of Mr B, with a qualified acceptance of the Secondary Complainer's offer. The Respondent sent a copy of the offer and the qualified acceptance, together with the firm's terms of business, to Mr B by email on 18 November 2015.

7.7 On 20 November and 3 December 2015 the Respondent spoke to Mr B on the telephone and Mr B advised that he wanted the contract tied up immediately.

7.8 On 4 December 2015 Alex Hutcheon & Co sent a letter to the Respondent with further qualifications and the Respondent replied the same day concluding missives.

7.9 Unbeknown to the Respondent, JV Carroll, Chartered Architectural Technologist Building Design Consultants, had been appointed by Mr B, in February 2015, as

his agents in handling works to the *"Roof, Fabric & Pointing Repairs..."* in respect of the property. Said works being in respect of several properties forming the tenement. Mr B signed a consent form in those terms on 11 February 2015.

7.10 On 7 December 2015 the Respondent spoke to a colleague in another firm, seeking his advice regarding a letter from JV Carroll, dated 17 November 2015 addressed to Mr B, which had been brought to the attention of the Respondent by the viewing agent for the property.

Said letter dated 17 November 2015 referred to a previous letter to Mr B dated 20 October 2015 and also stated that Mr B's continued failure to respond to correspondence was preventing progress with the works and JV Carroll were being pursued by the remaining proprietors in the building to proceed with the works as soon as possible.

JV Carroll advised that Mr B's grant award from Aberdeen City Heritage Trust had been provisionally approved. They sought the return of the declaration part of the application form, confirmation from Mr B that he would meet his financial share for the works and the placing of those funds in their client account 14 days prior to commencement of the works.

Said letter had also been copied to Andersonbain.

The Respondent's file note dated 7 December 2015 regarding his conversation with his colleague, stated:

"Spoke to PY re JV Carroll letter.
What's position re missives? Have repairs been instructed?
Can't disclose w/o instns – email to [Mr B]. Law Society position? Do we have to make available.
PY says don't introduce but must disclose if asked.
Send to client asap."

7.11 On 8 December 2015 the Respondent's secretary sent an email to Mr B attaching a copy of the letter dated 17 November 2015 from JV Carroll and asking whether or not he was aware of it.

7.12 On 8 December 2015 the Respondent spoke to Mr B on the telephone. Mr B stated that he was very unhappy with JV Carroll who had not obtained enough quotes and that the works were unnecessary.

The Respondent advised Mr B that a majority of the proprietors could instruct the works under the Tenements (Scotland) Act 2004. Mr B stated that he did not know if a majority had agreed but that he had not agreed or authorised the works. He said that he had very little knowledge of the matter and had been consistently opposed and had not applied for a grant.

Mr B instructed the Respondent not to respond to JV Carroll and not to disclose the matter to Alex Hutcheon & Co.

7.13 Mr B also responded to the email of 8 December 2015 and stated:

"I'm not aware of this most recent letter no. I am aware that JV Carroll were asked to quote for some work which they have done. I informed Mr Carroll long before the flat went on the market that I was not interested in going ahead with the work as it had dragged on for over a year & we had not seen any other quotes from other companies. To my knowledge this has not changed. If my neighbours wish to go ahead then that's ok for them but at no point have I agreed to pay any costs and to the best of my knowledge this work is not compulsory and if I don't wish to go ahead then I don't have to nor do the new owners."

7.14 The Respondent did not respond to the letter from JV Carroll and did not advise Alex Hutcheon & Company of the position regarding the outstanding works.

7.15 On 17 December 2015 Aberdeen City Heritage Trust sent a letter to Mr B advising that the Trust had approved an application for grant assistance lodged in relation to the property. The Trust enclosed an agreement for Mr B to sign should he wish to accept the offer of assistance.

7.16 JV Carroll sent an email to the Respondent on 22 December 2015 in the following terms:

"Dear Mr Bain

We have been appointed by the majority of owners at the building [...] including your own client, [Mr B]. Our remit was regarding the refurbishment of the external roof, pointing etc. We have since carried out our survey work, prepared contract documents, obtained competitive tenders and reported the same to our clients. Furthermore, we have also secured grant assistance from Aberdeen City Heritage Trust who are interested in the building as it is within a Conservation Area, as well as being a Listed building.

Your client, [Mr B], was previously keen to have his windows replaced due their poor condition. We added his replacement windows to the contract and advised that it was likely that ACHT would provide grant assistance towards such a replacement, provided they were traditional sash & case. Since we met [Mr B] at his flat, he has marketed the flat for sale, and he has failed to respond following our most recent correspondence, copies of which were copied to your practice. Can you advise what the current situation is regarding this flat and whether it has been sold? If so, can you advise details of the new owner, as well as confirming their knowledge of these pending works.

The grant award is in the process of being issued and the majority of owners are in agreement to proceed. Your assistance in this matter would be most welcome."

The Respondent did not speak to Mr B about the email from JV Carroll and the Respondent did not reply to said email.

7.17 The sale transaction settled on 15 January 2016.

7.18 On 21 January 2016 Alex Hutcheon & Co sent a letter to the Respondent advising that, on taking entry to the property, the Secondary Complainer found various items of correspondence addressed to Mr B in respect of common repairs to the roof and

repairs to the windows of the property. They noted that it appeared that Mr B had applied for a grant to cover part of the costs.

Alex Hutcheon & Co referred to the terms of Standard Clause 6 of the missives and stated that the common repairs should have been intimated to the Secondary Complainer and that Mr B remained liable to pay for them.

7.19 On 21 January 2016 Alex Hutcheon & Co sent a further letter to the Respondent enclosing copies of said correspondence. They included a letter dated 20 October from JV Carroll to Mr B. The letter referred to a previous letter to Mr B dated 29 June 2015 and noted that they had not yet received Mr B's acceptance of the reported costs for the roof, fabric and pointing repairs and confirmation that he wished to proceed and would forward his share of the cost to their client account. They enclosed a further copy of their standard letter of consent for signature and return.

JV Carroll confirmed that the majority of the co-proprietors had already confirmed their wish to proceed and were pursuing them to move the project forward.

Alex Hutcheon & Co suggested that the Respondent could sign any necessary consent forms on behalf of Mr B under the Power of Attorney and advised that they were waiting for the Secondary Complainer to confirm with the architect how much Mr B was due to pay to JV Carroll. They sought confirmation from the Respondent that this would be dealt with prior to the free proceeds of sale being dispersed.

The letter dated 20 October 2015 from JV Carroll to Mr B had also been copied to the firm Andersonbain.

7.20 Alex Hutcheon & Co also sent an email to the Respondent on 21 January 2016 attaching correspondence confirming that the balance due by Mr B in respect of the works was £7871.47. They asked the Respondent to confirm that this sum would be retained from the free proceeds of sale and used for Mr B's share of the works.

7.21 The Respondent replied the same day advising that funds had been released to Mr B the previous day but that he would copy their email to Mr B for his comments.

7.22 A letter had been sent by JV Carroll to Andersonbain on 22 September 2015 enclosing a copy letter addressed to Mr B dated 29 June 2015 in respect of the works. The correspondence was received by another partner in the firm and forwarded to Mr B on 23 September 2015.

The letter dated 29 June 2015 provided Mr B with details of the three tenders which JV Carroll had received for the works and provided a breakdown of the costs apportioned to the property based on the lowest tender. They advised him that they would be submitting, on his behalf, an application for grant assistance and would advise him of the outcome.

JV Carroll enclosed a letter of consent for Mr B to sign confirming that he would place the sums in their client account 14 days prior to the commencement of the works.

7.23 On 22 January 2016 the Respondent's secretary sent an email to Mr B attaching the correspondence which had been forwarded by Alex Hutcheon & Co stating:

"Presumably you don't wish us to do anything in this regard?"

7.24 On 23 January 2016 the Respondent spoke to Mr B on the telephone. Mr B stated that he never agreed to any costs and never agreed to the appointment of an agent. He further stated that the agent (JV Carroll) had been extremely aggressive, that insufficient quotes had been received and that many of the items were unnecessary and went beyond simple repair.

Mr B further stated that he had not applied for a grant and had never said that he would. He advised that he was unaware that a majority of the proprietors had instructed the works but that he vehemently opposed paying for the works and had no proposals to make to the Secondary Complainer. He stated that he would not get the benefit of the works and couldn't be liable.

The Respondent was instructed to convey this to Alex Hutcheon & Co.

7.25 On 25 January 2016 the Respondent replied to the letters from Alex Hutcheon & Co. He stated that his client had advised that he did not agree to and was not party to any instruction to carry out any work nor did he apply for any grant. The Respondent advised that his client had no proposals to make and had instructed the Respondent not to correspond further.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that:-

8.1 He failed to disclose to the Secondary Complainer's solicitor that there were outstanding works in relation to the roof, fabric and pointing of the property, knowing that the information which his client had given him and which was contained in the missives was false, calling into question the Respondent's integrity.

8.2 He failed to disclose to the Secondary Complainer's solicitor that there were outstanding works in relation to the roof, fabric and pointing of property, knowing that the information which his client had given him and which was contained in the missives was false, thus breaching Rule B1.14.1 of the Law Society of Scotland Practice Rules 2011.

8.3 He failed to withdraw from acting on behalf of his client when he became aware that his client had given him false information and provided instructions not to disclose the correct position to the Secondary Complainer's solicitor.

9. Having heard the Solicitor for the Respondent in mitigation, 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 Stuart McDonald Bain, Anderson Bain LLP, 6, 8 & 10 Thistle Street, Aberdeen; Find the Respondent guilty of professional misconduct in respect of his failure to disclose to the Secondary Complainer's solicitor that there were outstanding works in relation to the roof, fabric and pointing of the property, knowing that the information which his client had given him and which was contained in the missives was false, calling into question the Respondent's

integrity and breaching Rule B1.14.1 of the Law Society of Scotland Practice Rules 2011, and failing to withdraw from acting on behalf of his client when he became aware that his client had given him false information and provided instructions not to disclose the correct position to the Secondary Complainer's solicitor; Censure the Respondent; 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; 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; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation.

(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

[redacted]

Beverley Atkinson

Vice Chair

NOTE

At the hearing on 16 August 2019, the Tribunal had before it the Complaint as amended, the Joint Minute of Admissions, an Inventory of Productions for the Complainers, and a number of testimonials contained within an Inventory of Productions for the Respondent. Submissions were made on behalf of both parties.

SUBMISSIONS FOR THE COMPLAINERS

The Complainers accepted that missives were concluded in good faith and the Respondent became aware of the repairs and the involvement of JV Carroll on about 7 December 2015. The Fiscal submitted that this was a serious matter which raised the issue of the Respondent's integrity but not dishonesty. Misleading information was conveyed to other professionals and once he discovered it was false, he did not take action. It was not sufficient that he sought advice from another solicitor. He should have contacted the Professional Practice Team at the Law Society. The Respondent allowed his client's interests to override everything else. The fact that the Respondent had power of attorney made the situation worse.

The Fiscal made reference to Frank Houlgate Investment Company Limited-v-Biggart Baillie LLP [2014] CSIH 79 at paragraph 39 where it is noted that if a solicitor becomes aware of dishonesty on the part of his client that amounts to a fraud on the other party to the transaction, he has a duty to ensure he does not further the fraud in any way. He should refuse to act and might have to disclose the fraud to the other party. The Fiscal noted that the information in the present case was available prior to settlement but the Respondent did not make the other party aware of it. This had an impact on the Secondary Complainer who could otherwise have withheld sums to cover costs.

The Chair asked the Fiscal to explain the reference to "conflict of interest" at paragraph 6.1(c) of the Complaint. The Fiscal submitted that the conflict was between the Respondent and his client. He knew the information from the client was false. Therefore, the relationship should not have continued. Mr Macreath agreed that the conflict between the solicitor and his own client was untenable. The power of attorney complicated matters. He said that the conflict was a "by-product" of the situation.

The Fiscal invited the Tribunal to find that professional misconduct was established as the Respondent's behaviour was a serious and reprehensible departure from the standards of competent and reputable solicitors.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath noted that although missives were concluded, as soon as the Respondent received information about the works in December 2015, he had responsibilities to the Secondary Complainer and her agent. Given the availability of the architectural consultant's correspondence, there was an obligation on him to check the position. If he had done so, he would have been aware of the position. He would then have had to make disclosure to the other agent or withdraw from acting. Mr Macreath said the present case was not as stark as that in Frank Houlgate Investment Company Limited-v-Biggart Baillie LLP [2014] CSIH 79. Mr Macreath clarified that the letter sent by the architectural consultant to the Respondent's firm in September 2015 was not seen by the Respondent. It was sent on to the client by another partner.

Although the Respondent sought advice from another solicitor, he should have contacted the Professional Practice Team at the Law Society, spoken to the architectural consultant himself and then spoken to the client, explaining that the true situation would have to be disclosed to the other side. If the client refused to make disclosure, the Respondent should have withdrawn from acting. The Respondent held a power of attorney. This placed him in the position of the client with the obligation to disclose. However, the Respondent made an error of judgment in deciding that confidentiality to the client superseded disclosure. The Respondent was in a difficult position. No doubt his client would have raised issues if he had disclosed or withdrawn. Mr Macreath said that whether that error of judgment was serious and reprehensible was a matter for the Tribunal.

Mr Macreath submitted that the Respondent had insight into his conduct. He settled with the Secondary Complainer. He paid her £10,000 and was not reimbursed by the client.

DECISION

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

The Respondent concluded missives on behalf of a client and then discovered that property repairs were required and had been instructed by the other proprietors of neighbouring properties. He therefore knew that the information from his client was false. He should have ascertained the true position with the architectural consultant, discussed the problem with the client and made it clear that he would have to disclose the issue to the Secondary Complainer's agents or withdraw from acting. Instead, he continued to deal with the case, prioritising the duty of confidentiality to the client over his obligations as a solicitor and attorney. This was a serious misjudgement which called his integrity into question and breached his duties to other regulated persons. His actions constituted a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore he was guilty of professional misconduct. However, the Tribunal was not satisfied that the breach of duties was a "conflict of interest" in the usual definition of that term and so deleted references to this in the findings.

Mr Macreath made submissions in mitigation. He highlighted the references in the Inventory of Productions for the Respondent and said that they spoke for themselves. The Respondent is held in high esteem by his colleagues. The Respondent's senior partner came to the Tribunal hearing to support him. The Respondent made good the loss to the Secondary Complainer. Mr Macreath asked the Tribunal to bear in mind the impact of the stress of this case and the reputational damage to the Respondent, and the fact that it is likely he will have to bear the expenses of the case. He invited the Tribunal to impose a Censure on the basis that the Respondent was contrite and had insight. He understood the mistake he made and so there was no risk of repetition.

The Respondent made an error of judgement after being placed in a difficult position. He had given some thought to the problem and taken advice from a colleague. However, the case is a reminder to solicitors to seek assistance from the professional practice team at the Law Society if in doubt or difficulty. The Tribunal was pleased to note that the Respondent had come to a settlement with the Secondary Complainer regarding her financial loss. The problem appeared to be an isolated incident. The testimonials produced on behalf of the Respondent were impressive and highlighted the Respondent's good character. He showed remorse and insight and the Tribunal did not think the conduct was likely to be repeated. The conduct was less serious than that in Frank Houlgate Investment Company Limited-v-Biggart Baillie LLP [2014] CSIH 79. There was no requirement for supervision.

In all the circumstances, and with regard to the indicative sanctions guidance, the Tribunal was content that a Censure was appropriate. Following submissions on expenses and publicity, the Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent.

However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests. The Secondary Complainer will have 28 days from the date of intimation of these findings to lodge a written claim for compensation.

[redacted]

Beverley Atkinson

Vice Chair