

**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

**RICHARD HUTCHISON, of Malcolm &
Hutchison, 34-36 Alexander Street, Airdrie**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Richard Hutchison, of Malcolm & Hutchison, 34-36 Alexander Street, Airdrie (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Mr C.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 15 March 2019 and notice thereof was duly served upon the Respondent.
5. At the hearing on 15 March 2019, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor-Advocate, Edinburgh. The Respondent was present and was represented by his solicitor, Ronald Conway, Solicitor-Advocate, Glasgow. The Fiscal lodged an amended Complaint with the Tribunal and invited the Tribunal to allow this to be received. The Respondent confirmed he had no objection to that motion and the Tribunal allowed same. A Joint Minute between the parties agreeing all of the averments

of fact, duties and professional misconduct within the amended Complaint and agreeing the documentary productions for the Complainers was lodged. The Tribunal heard submissions from both parties. The Respondent lodged two testimonials and the Complainers lodged a copy of the up to date record card for the Respondent.

6. The Tribunal found the following facts established:-

- 6.1 The Respondent is a solicitor enrolled on 27 November 1990. He trained at Flowers & Co and was then employed by Nicolson O'Brien as a solicitor between 2 March 1992 and 7 July 1995. He has been a partner in Malcolm & Hutchison (the firm) since 10 July 1995. He has been the cash room partner since 1 June 2000, the AML partner since 1 March 2004 and the complaints partner since 17 October 2011.
- 6.2 Mr C had consulted with the Respondent over many years in respect of a family matter (namely, obtaining contact with his son). He had also consulted with the Respondent regarding a matter with the Child Support Agency ("CSA").
- 6.3 Mr C decided to move his business to another firm of solicitors and signed a mandate dated 31 August 2016 authorising the Respondent to "*release all records and information in relation to me to my solicitors [Firm B]...*"
- 6.4 By letter 5 September 2016, Mr A of Firm B wrote to the firm advising that he had been instructed on behalf of the complainer. The letter stated: "*We understand that he had a family and contact matter to which he previously instructed you in and we have now been requested to act on his behalf. We attach herewith mandate authorising release of his full file of papers and look forward to hearing from you in due course*".
- 6.5 By email 31 October 2016, Mr A emailed Mr C as follows: "*Unfortunately, to date, we have not received any papers from your former agents. We have now written to them twice and I have now asked my secretary to contact them directly to chase up the file of papers. Hopefully, I should be in receipt of them shortly. It may also assist if you contact your former agents directly to confirm the mandate being sent over which may quicken up the process...Please be assured that we are*

doing everything we can to obtain these file of papers and give you the advice to which you require.”

- 6.6 On 31 October 2016, Mr A’s secretary telephoned the firm. The attendance record stated:

“Telephone attendance with receipt at [the firm] adv me that it is [the Respondent] dealing with the case and he was not in the office. Will confirm to him where the papers are then give me a call back. Thanking her and passing to [Mr A].”

- 6.7 On 1 November 2016 (1.48pm), Mr C emailed the Respondent asking him to pass his file to Firm B as soon as possible.

- 6.8 Between 13 January 2017 and 13 February 2017, Mr A’s secretary telephoned the firm on four occasions. A note was taken on each occasion and state as follows:

(a) 13 January 2017:

“Telephone attendance with [the firm] re file of papers, recep adv that it is someone named Richard who is dealing with the case and will pass this on to him to give me a call back. Thanking her and pass to [Mr A].”

(b) 17 January 2017:

“Telephone attendance with Victoria at [the firm] adv that we have still not rcvd our file of papers since Sept. Adv that Richard is out at court and she will get him to give me a call asap.”

(c) 9 February 2017:

“Call to Margaret at [the firm] req file of papers adv that Richard is not in the office this morning. Adv that we have mandated them and still no file since sept. Margaret adv she will pass a message to Richard and get him to call me as soon as possible. Thanking her and passing to [Mr A].”

(d) 13 February 2017:

“Call to Kerry at [the firm] req update on file of papers, noting that I have called on numerous occasions with no update or call back. Adv that Richard is on holiday and he will not be back till next week, Thanking her and passing to [Mr A].”

6.9 On or around 28 February 2017 Mr C submitted a complaint form to the SLCC. Within the form, he stated that he had consulted the firm for approximately 15 years regarding a family matter. He stated that he subsequently sought advice from Mr A on 31 August 2016 and that both had tried to request files from the firm *“since this time...with no success.”*

6.10 On 24 March 2017, the Respondent telephoned the SLCC in response to a message which the SLCC had left the previous day. The attendance record stated:

“[The Respondent] ... said that he has had a look for the file but cannot find it and is sure it was sent to [Mr C’s] new solicitor. He said that he still has many old files to go through and has a law student coming in over the weekend and will ask them to help look for it. He said he will get back to me on Monday to let me know. In any event, he has copies of the file and can arrange to copy these and to be sent next week.”

6.11 On 28 March 2017, the Respondent telephoned the SLCC again. The attendance record stated:

“[The Respondent] ... has found a copy of [Mr C’s] file. He said that there was a copy of a letter stating the file had been sent to [Firm B] on 13 January 2017. He said that luckily he has a copy of the file and is going to hand deliver it to [Firm B] on Friday of this week (31 March 2017). He said he would phone me and let me know when this was done.”

The SLCC subsequently telephoned Mr C to advise of this.

- 6.12 On 7 April 2017 (5.12pm), Mr C emailed the SLCC stating that Mr A had not received any letters or files or any correspondence whatsoever from the firm. He stated: *“I am trying to move forward with a case and [the Respondent] is deliberately holding my files and this has been over 8 months now. This is constantly to my stress, etc and is and has been affecting my life and health in a big way.”*
- 6.13 On 9 May 2017 (2.16pm), Mr A emailed the SLCC confirming that they had yet to receive Mr C’s file of papers. He advised that the firm had been telephoned on four occasions and that, *“on each occasion, we have been informed that the file of papers are being located.”*
- 6.14 On 9 May 2017, the Respondent telephoned the SLCC. The attendance record stated:
- “... [the Respondent] stating that he has somehow ended up with the original file - slightly confused as he thought he had previously sent it - may have gone Royal Mail instead of LP and been returned to him - in any event he will ensure that it is now delivered to [Mr C’s] new agents asap and will enclose copy of that letter with his response to the SLCC.”*
- 6.15 The SLCC determined the matter as a conduct complaint and passed it to the present complainers.
- 6.16 On 5 July 2017 the conduct complaint was then intimated to the Respondent.
- 6.17 On 26 July 2017 the Respondent telephoned the present complainers, advising that the files had been hand-delivered by him to Firm B in June 2017.
- 6.18 On 1 August 2017 (9.36am), Mr A emailed the SLCC to confirm that he had now received the full file of papers from the firm. This information was passed to the present complainers.
- 6.19 On 23 September 2017 the Respondent provided his detailed explanation for the situation. The following is a summary of the information provided:

A-The Respondent admitted he had received Mr A's letter of 5 September 2016.

B-He also accepted he had received calls from Mr A's firm following this up.

C-The Respondent indicated that he had been the only solicitor who acted for Mr C.

D-He provided various explanations for the delay in complying with the mandate which included a cataloguing process for closed files; a winter flood a couple of years earlier; an inability to locate the files; the need to check and photocopy them when found ; a mistaken understanding that they were sent to the new agents in January 2017 following a further call with them at that time; after being contacted by the new firm after January 2017 he assumed the files had crossed with that but did not check;

E-He accepted that at no stage did he keep Mr C or Mr A updated of the position.

F-He further sought to explain his failure to comply as follows: *"Following contact from the SLCC I became aware that the files had not been received by [Firm B]. I contacted the SLCC and advised that although I had thought that the files had been sent, I did have a copy of them (or most of them) and that I could send those to [Firm B]...Discussions with the staff in the office seemed to reveal that the files had been sent and had subsequently been returned in the post. Thereafter the files seem to have been returned to the dead files for recording as before. I could not identify who had returned the files for recording as dead...However, I was thereafter able to locate the original files and I contacted the SLCC to advise that I had them in my possession and would deliver same to [Firm B]. I advised the SLCC that I did not have an explanation for how this happened but could only guess that the files had been addressed as Legal Post but put in the Royal Mail bag by mistake, as someone faintly recalled there had been a chat about the address. Thereafter I can only assume and it is no more than that, that the files were returned to us by Royal Mail as being incorrectly addressed. Had it been the other way around I suspect that Legal Post would have delivered it. The initial letter from [Firm B] had a location with a Legal Post*

address but the mandate enclosed asked for the files to be sent to a different location with a Royal Mail address. I cannot offer this as an excuse or explanation as to what happened. I do not know what happened. I am only speculating to try to make some sense of how this situation arose.”

In providing this explanation he failed to disclose that he had advised the SLCC he would deliver them on Friday 31 March 2017 nor that he had not called the SLCC as requested by them.

- 6.20 His response continued: *“Having now located the files again, before delivering them, a rereading of the actual mandate signed by [the complainer] showed that it referred to "all records and information in relation to me" and not just to the family and contact matter referred to in [Firm B]’s request ... At this point, to be frank, I panicked somewhat realising that not only had the family files not actually been delivered but that the mandate request may go beyond that requested by [Firm B] and should extend to "all records and information in relation to me" as recorded in the mandate itself. I decided that the request should therefore include all of his files and accordingly located the files relating to the other matter we had dealt with, at various times, over a number of years. This involved a debt matter relating to monies due by [Mr C] to the Child Support Agency.*

My thinking at this point was, after consideration, perhaps not as logical as it would usually be. My thoughts were that all of the files should be sent to his new agents at the same time. Again, on reflection, I should have simply contacted [Firm B] to advise them and would imagine that this would have been met with their understanding..... I, perhaps wrongly, considered that as there was no prejudice to [Mr C] contact matter in these circumstances, (or indeed the CSA matter) it would be better to wait until all the other files had been located before sending them off. On reflection, my "everything together" approach was wrong and I should have sent the family files when I became aware of the problem in March of this year. Had I done so perhaps [Mr C] would have been satisfied at that point.”

The Respondent did not know the purpose of the transfer and therefore could not know if any prejudice was being caused. In any event lack of prejudice is not a sound basis for failing/delaying to comply with a mandate.

- 6.21 With reference to the further files relating to the CSA matter, the Respondent set out that it again took time to locate these; that they included emails from Mr C; they had changed their email system over the years and considered it was important to check old emails where still available and placed on the file and this took longer than anticipated.
- 6.22 The Respondent accepted that, following the further call with the SLCC on 9 May 2017, he did not deliver the files until 22 June 2017. In his response he provided no explanation for this further six week delay.
- 6.23 The Respondent also acknowledged that *“[o]n this occasion, I did play a part in getting it wrong. Notwithstanding the combination of factors coming together here, (including some e.g. the post, that I am unable to confirm or fully explain), I should have been more aware of the ongoing problem regarding the location and delivery of these files. I should also have been more aware of the importance of the simple task of contacting [Firm B] to keep them apprised of the situation...Whilst I am happy to say that we do not receive many mandates into our office, any that have been received over the years are usually simply located by a member of staff, checked over and sent on. This seems like a simple task. This did not happen on this occasion and I apologise to [Mr C] and to his Solicitors that this did not happen as quickly as it should have.”*
- 6.24 The Respondent concluded by stating: *“Please be assured that I do not offer these comments as any excuse or reason for not having implemented the mandate sooner, but rather simply seek the succour of the knowledge that [Mr C] should not have suffered any prejudice as a result of his solicitors not having the files earlier. Together with my apologies to [Mr C] and his solicitors for the events as they occurred I can only advise the [present complainers] that our system of recording dead files is running as envisaged and this, together with a more involved approach by myself regarding the location of archived files, for whatever*

reason, as not simply being an administrative exercise, should ensure that a situation like this does not occur again.”

7. Having given careful consideration the foregoing circumstances and the submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct:
- (a) Singly in that he failed to implement a mandate for a period of nine months; and *in cumulo* in that he:
 - (b) failed to communicate effectively with Mr A throughout the nine-month period as to the position in relation to complying with the mandate;
 - (c) misled the SLCC by indicating that he would deliver the files to Mr A on Friday 31 March 2017 and failed to correct the position when he did not do so;
 - (d) failed to communicate effectively with the SLCC as he did not call them as requested at the end of March 2017/beginning of April 2017 to confirm he had delivered the files; and
 - (e) failed to communicate effectively with the Complainers in relation to his failure to deliver the files and therefore implement the mandate.
8. Having heard the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 15 March 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Richard Hutchison, of Malcolm & Hutchison, 34-36 Alexander Street, Airdrie; Find the Respondent guilty of professional misconduct singly in respect of his failure to implement a mandate for a period of nine months and *in cumulo* in respect that he (a) failed to communicate effectively with Mr A throughout the nine month period as to the position in relation to complying with the mandate, (b) misled the SLCC by indicating that he would deliver the files to Mr A on Friday 31 March 2017 and failed to correct the position when he did not do so, (c) failed to communicate effectively with the SLCC as he did not call them as requested at the end of March 2017/beginning of April 2017 to confirm that he had delivered the files, and (d) failed to communicate effectively with the Complainers in relation to his failure to deliver the files and implement the mandate; 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; 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)

Alan McDonald

Vice 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
8 APRIL 2019 .

IN THE NAME OF THE TRIBUNAL



Alan McDonald
Vice Chairman

NOTE

At the hearing on 15 March 2019, the Tribunal had before it an amended Complaint, Answers, a Joint Minute between the parties admitting all of the averments of fact, duty and professional misconduct within the amended Complaint and agreeing the documentary productions previously lodged by the Complainers. The Respondent confirmed that compensation had already been paid to the Secondary Complainer and that there was now no longer any claim for compensation within the current proceedings.

There being no reference to the Answers within the Joint Minute, it was clarified by the Respondent that they might be referred to in passing in mitigation or as explanation only and the Fiscal confirmed she had no objection to this.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal explained that in the initial stages of these events there were five telephone calls and emails to the Respondent seeking delivery of the client's file. The Respondent gave no response at all. The Fiscal submitted that all that would have been required was a telephone call in explanation. Consequently, a complaint was made to the SLCC which led to the Respondent on two separate occasions making promises to deliver the file. These promises led to the client's expectations being raised and then dashed when they were not complied with.

Although the Respondent had provided an explanation for the delay in May, the file was still not delivered until 22 June. No adequate explanation for this was given.

The Respondent gave an explanation in hindsight in September in which he omitted to refer to the previous promises he had made to the SLCC to deliver the file. Within that explanation, the Respondent indicated that there was no prejudice to his client by this delay. The Fiscal submitted that this was not a matter for the Respondent to assess. She emphasised that the Respondent was economic with the reality in that letter of explanation when he stated that "he did play a part in the issue" although she accepted that this might have simply been poor wording chosen by the Respondent.

The Fiscal emphasised that the Respondent had delayed for nine months. She submitted that the Respondent's duties were clear and invited the Tribunal to hold that misconduct was established. She

emphasised that this was not just a one-off failure but that there had been a number of occasions where the Respondent had failed to address a simple issue.

SUBMISSIONS FOR THE RESPONDENT

Mr Conway confirmed that the Respondent had acted for his client in six matters dating from 2003. These had included family matters regarding a child access dispute and also a dispute with the Child Support Agency.

Mr Conway explained that when the Respondent had received the mandate he was unable to find the file. A previously well organised archive of files had been put in disarray as a result of two office floods. The Respondent accepted that he did not give the matter the priority it required. The Respondent accepted he had not provided any explanation or communication at all.

The Respondent found the file relating to the family matter and assumed that the papers had been passed to Firm B. It was the Respondent's impression that his office had forwarded the file in January 2017. By this time, the child concerned would have been 16 years old and any court proceedings would have required to have been in the child's own name.

Thereafter it became apparent that the mandate had not been implemented. The Respondent believes, following discussions with his staff, that the file had been sent to the new firm by Royal Mail in an envelope bearing a Legal Post address. Royal Mail had returned the item to the sender and as the file had been marked dormant, the office staff simply re-filed it.

At the stage where the Respondent appreciated that the mandate had not been implemented, the Respondent had then considered that the mandate covered all of the files held by his firm and not just the one initially sent. He had then taken time to find all of the client's files. The Fiscal had described this as the Respondent placing his head in the sand and Mr Conway could not disagree with that. In hindsight, it was barely credible that a solicitor of the Respondent's reputation could have failed to obtemper a mandate appropriately. The Respondent wished to apologise to his client and had previously done so in a letter sent to the client together with a payment in compensation. He also wished to apologise to Mr A and the investigation officer of the SLCC.

The Respondent accepted that whether or not there was actual prejudice to the client was not the appropriate test to be applied although Mr Conway wanted to emphasise that it was unlikely that any

actual prejudice had been caused given the age of the child concerned. The Respondent accepted that this did not excuse the inconvenience suffered by his client.

The Respondent has been practising for 30 years with an unblemished record. He is a high street practitioner who has served the public, the courts and his profession with an unblemished character.

Mr Conway lodged two testimonials with the Tribunal, one from a fellow practitioner that indicated that the Respondent was held in high regard and one from a large commercial client that confirmed the Respondent's general competence and integrity.

Mr Conway emphasised that the Respondent was embarrassed, chastened and contrite. This conduct was unlikely to be repeated by the Respondent.

Whilst Mr Conway accepted that the question of misconduct was one for the Tribunal, he invited the Tribunal to hold that the conduct here was at the lower end of the scale of misconduct.

The Fiscal lodged a copy of the Respondent's record card confirming no previous issues. She indicated that she accepted that the misconduct here was not at the serious end but invited the Tribunal to consider the inconvenience caused to all concerned by the Respondent's failure to communicate.

DECISION

Whilst a Joint Minute had been entered into between the parties agreeing the averments of misconduct, the question of whether the conduct met the appropriate test remained one for the Tribunal.

The primary averment of misconduct was a failure to obtemper a mandate for a period of nine months. This Tribunal has made it clear on a number of occasions that it is imperative that solicitors fulfil their professional obligations and respond properly to mandates. In these circumstances, the Tribunal was satisfied that this conduct itself met the test for misconduct as referred to within the case of Sharp v The Law Society of Scotland 1984 SLT 313 and accordingly found the Respondent guilty of professional misconduct.

With regard to the other averments of misconduct, whilst in some circumstances, they too could singly be held to amount to misconduct, in the circumstances of this particular case the Tribunal concluded that the conduct was part and parcel of failing to obtemper the mandate and the appropriate finding


was one of professional misconduct *in cumulo* with each other and with failing to obtemper the mandate.

The Tribunal accepted that in the circumstances of this case, the conduct was at the lower end of the scale. It did not appear to be deliberate or premeditated. The Respondent appeared remorseful and to have insight into the seriousness of his conduct. He had cooperated fully with the proceedings before the Tribunal. Answers had been lodged at an early stage containing an admission of misconduct and thereafter a Joint Minute had been lodged. The Respondent had been in practice for 30 years without any further incident. The Tribunal took the view that there was no ongoing risk to the public and no requirement for any supervision. Testimonials had been produced on behalf of the Respondent confirming his good record.

In all of these circumstances, the Tribunal concluded that the appropriate disposal was one of Censure.

The Fiscal invited the Tribunal to award expenses to the Complainers and to order publicity including only the name of the Respondent. Mr Conway confirmed he had no comment in relation to either motion. Accordingly, the Tribunal awarded expenses to the Complainers and, on the basis that no purpose would be served by naming anyone other than the Respondent, directed that publicity should be given to this decision including in the name of the Respondent but not any other party.

The Secondary Complainer having confirmed to Mr Conway receipt of payment of the compensation in settlement of his claim. The Tribunal treated the claim for compensation in the present proceedings as having been withdrawn.



Alan McDonald
Vice Chairman