

**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, 26
Drumsheugh Gardens, Edinburgh**

Complainers

against

**STEPHEN GERARD FAGAN,
Fagans Solicitors, 115 Graham
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") requesting that, Stephen Gerard Fagan, formerly of Fagans Solicitors, 115 Graham Street, Airdrie, then of Scullion Law Limited, Airdrie and then of EF Kelly Limited, Solicitors, 11B Academy Street, Coatbridge and now of Fagans Solicitors, 115 Graham Street, Airdrie (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 2 May 2014 and notice thereof was duly served upon the Respondent.

4. The hearing took place on 2 May 2014. The Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was absent but represented by Hugh Neilson, Solicitor, Coatbridge.
5. The Fiscal for the Complainers moved to amend the Complaint. The solicitor for the Respondent concurred in that motion. The Tribunal granted the motion to amend the Complaint. Thereafter a Joint Minute of admissions between the parties was lodged admitting the averments of fact, duty and misconduct within the Complaint.
6. The Joint Minute additionally agreed that the documentary productions lodged on behalf of the Complainers were agreed to be true, correct and complete. A number of testimonials were lodged on behalf of the Respondent.
7. Having heard submissions from both parties in respect of the Complaint, the Tribunal found the following facts established:-
 - 7.1 The Respondent was enrolled in the Registers of Scotland on 17 November 1988. He practised as a partner between 27 October 1997 and 2 March 2004 in the firm of MFY Partnership and then as a sole practitioner under the business name of Fagans Solicitors, 17 Stirling Street, Airdrie, ML6 0AH between 1 March 2004 and 31 August 2012. As of 1 September 2012 he became an employee in the firm of Scullion Law Limited, Airdrie. On 5 August 2013 he became a consultant in the firm of EF Kelly Limited, 11B Academy Street, Coatbridge. On or around 21 November 2013 he set up as a sole practitioner again under the business name of Fagans Solicitors "Fagans", 115 Graham Street, Airdrie.

7.2 As the sole practitioner at Fagan's, he was the Cashroom and Client Relations Partner at all material times.

MS A

7.3 Mrs B was employed by the Respondent at Fagans as a solicitor between 9 November 2009 and 31 August 2012.

7.4 In 2009 Ms A instructed the Respondent's firm, Fagans, in relation to a personal injury claim.

7.5 On 5 November 2010, Ms A submitted a complaint to The Scottish Legal Complaints Commission (SLCC). The complaint was against the Respondent's firm, Fagans, and Mrs B.

7.6 By letter of 22 November 2010 the SLCC intimated the complaint to Mrs B. By further letter of 2 December 2010 to Mrs B, the SLCC requested *inter alia* a copy of the Terms of Business between the Respondent's firm and Ms A.

7.7 By letter of 15 December 2010 the Respondent acknowledged the SLCC's letter of 2 December 2010; apologised for the delay in responding and indicated that it was due to adverse weather. A copy of Ms A's complaint form was requested and it was indicated at that time that the Respondent would respond to the SLCC's letter in full.

7.8 By letter of 16 December 2010 to the Respondent, the SLCC provided a copy of the complaint form as requested. No response was received.

7.9 By letter of 26 January 2011 to Mrs B, the SLCC advised that Ms A's complaint was an eligible service complaint and

advised her that a copy of that letter had been provided to the Respondent.

- 7.10 By letter of 26 January 2011 the Respondent was also advised of the acceptance of the complaint by the SLCC for processing.
- 7.11 By letter of 28 January 2011 the SLCC offered the Respondent the opportunity to resolve the complaint by mediation. No response was received. In the meantime, on 31 January 2011, Ms A indicated that she was willing to enter into mediation to resolve the complaint.
- 7.12 By letter of 15 February 2011 the SLCC advised the Respondent that mediation would not take place as the Respondent had not responded to the offer of mediation by the required deadline. No response was received.
- 7.13 By letter of 16 March 2011 the SLCC requested a full and detailed response to the complaint and provision of the Respondent's file. No response was received.
- 7.14 By letter of 5 April 2011, the SLCC requested a response to the letter of 16 March 2011 within 7 days. No response was received.
- 7.15 By letter of 20 April 2011 in exercise of the powers under Section 17 of the Legal Profession & Legal Aid (Scotland) Act 2007 ("the Act") the SLCC required delivery of the Respondent's file by 11 May 2011. In addition, the SLCC required an explanation about the circumstances of the complaint within 21 days of 20 April 2011. Said letter outlined the SLCC's power to apply to the Court for an order for documentation and also pointed out Rule 11 of the SLCC's Rules 2009 relating to referral to The Law Society reporting the

delay and the relevant circumstances and indicated this could result in a conduct complaint against the Respondent.

- 7.16 By letter of 21 April 2011 the Respondent forwarded the relevant file and provided a response to the complaint. No apology was tendered in relation to the failures to respond to the SLCC's letters prior to then. That letter acknowledged the SLCC's "letters with regard to the matter".
- 7.17 By letter of 28 April 2011 the SLCC acknowledged the file and the information.
- 7.18 By letter of 8 August 2011 the SLCC informed the Respondent that an additional issue of complaint had been raised, namely a failure to provide Ms. A with a Terms of Business letter. The Respondent was advised that comments were sought in relation to this additional complaint within 14 days of 8 August 2011 and in doing so, the SLCC enclosed a copy of their letter to Mrs B. The present complainers were also advised of the position. No response was received by the Respondent.
- 7.19 The SLCC proceeded to complete its investigation and by letter of 1 September 2011 it advised the Respondent of its recommendation that the complaint should be partly upheld. In doing so, it provided its Investigation Report. It required return of the form entitled "Practitioners Form of Agreement to Proposed Settlement" by 22 September 2011.
- 7.20 Ms A accepted the recommendations set out in the Investigation Report. Acceptance was acknowledged by the SLCC by letter of 9 September 2011.
- 7.21 By letter of 20 September 2011 the SLCC advised the Respondent of Ms A's acceptance and requested the

Respondent's promised response by 22 September 2011. It indicated that if no response was received by that deadline, the complaint would be considered by a Determination Committee.

- 7.22 On 21 September 2011 the SLCC received return of said form from the Respondent dated 21 September 2011 advising that he did not accept the proposed settlement. Said form indicated that "I do not accept Issue 1 finding – detailed reasons to follow." No detailed reasons were provided by the Respondent.
- 7.23 By letter of 26 September 2011 the SLCC advised the Respondent that the matter would now be passed to the Determination Committee.
- 7.24 On 15 December 2011 the Determination Committee of the SLCC determined that Issues 1 and 3 of Ms A's complaint should be upheld and that *inter alia* Ms A should receive £1,500 in compensation. It also determined that as Issue 3 was a hybrid issue, it should be referred to the present complainer. In addition, in terms of Section 28 of the Act it determined that the complaints levy should be £800.
- 7.25 By letter of 18 January 2012, the Determination Committee issued a draft of its report to the Respondent for comment but none was received. By letter of 24 February 2012, the Respondent was advised of the final determination and at the same time was issued with a complaint levy invoice for £800 payable within 21 days indicating that interest may be charged on any late payment.
- 7.26 By letter of 3 April 2012 the Respondent was advised he had failed to pay the invoice rendered on 24 February 2012 and that an invoice with interest was enclosed. No response was received. On the same date, the SLCC tried to contact the

Respondent but he was not available. Mrs B took the call and advised she would pass the message on. Later that day, the SLCC's agent, Ms C of Anderson Strathern, spoke with the Respondent. She was advised by the Respondent that he had not decided what to do about the decision yet because he was not happy about it. The Respondent was advised that the timescale for complying with the decision was the same as the timescale for raising an appeal and that both had now passed. Ms C requested the Respondent progress this.

- 7.27 By letter of 4 April 2012 the Respondent requested that the SLCC return his file.
- 7.28 By letter of 16 April 2012 the SLCC returned the Respondent's file to him. In doing so it indicated that the present complainers had been advised of this.
- 7.29 In the letter of 16 April 2012, the Respondent was reminded of the SLCC's letter of 3 April 2012 seeking payment of the invoice. Said letter indicated that if payment was not received within 10 days of the date of the new invoice, formal recovery action may be initiated. No response was received.
- 7.30 The SLCC then provided the present complainers with a timeline for compliance with the SLCC's determination.
- 7.31 At that stage no payment had been made by the Respondent.
- 7.32 By letter of 11 July 2012 the SLCC issued a notice in terms of Section 12 of the Act requiring a response within 21 days, failing which it would instruct its solicitors to take enforcement action. No response was received.

- 7.33 Accordingly, the SLCC commenced a Small Claim Summons against the Respondent with a hearing date of 5 December 2012. It was served by Sheriff Officers on the Respondent on 12 October 2012.
- 7.34 The Respondent then lodged a Time To Pay Application with the Sheriff Court. He admitted liability. He offered to pay the full amount (excluding Sheriff Officer's fees) in one payment within 3 months from the date of the Court Order. The SLCC accordingly sought a Decree in terms of the Time To Pay Order. Decree was granted on 5 December 2012 in the sum of £800 with interest at 8 per cent per annum from 24 February 2012 until payment together with the expenses of £176.23. The decree also detailed that the amount was payable by lump sum within three months of intimation of the Extract Decree. The date of extract was 20 December 2012. The Extract Decree was intimated on the Respondent by Sheriff Officers on 4 January 2013. Accordingly payment was due by 4 April 2013. No payment was made. A Charge for Payment was served on the Respondent.
- 7.35 On 9 July 2013 the SLCC were advised by their agents that the Respondent had finally paid the outstanding levy plus expenses. The Respondent was in breach of s 28(4) of the Legal Profession and Legal Aid (Scotland) Act 2007 for his late payment of the complaints levy.

FAILURE TO RESPOND TO THE LAW SOCIETY

- 7.36 By letter of 17 July 2012 the SLCC referred the above matter to the Law Society and on 19 July 2012 it commenced its investigation into the Respondent.

- 7.37 On 9 August 2012 the conduct complaint was intimated to the Respondent along with a summary of the complaint and the correspondence sent to him by the SLCC dated 3 and 16 April 2012. By said letter, the Respondent was made aware of the importance of responding within the specified timescales and that Statutory Notices would be issued if a response was not received. The Respondent was also advised that he should contact the Complaints Investigator if he believed he would need a further period of time to prepare his response.
- 7.38 By letter of 4 September 2012 the Respondent wrote to the Law Society purportedly in response to the complaint. However, said letter referred to a separate matter entirely and was not relevant to the issues intimated.
- 7.39 By letter of 7 September 2012 the Law Society advised the Respondent of the correct position, and requested a formal response together with relevant files within 14 days of that date. To avoid any doubt, the earlier letter of 9 August 2012 was re-sent to the Respondent. No response was received within the specified time limit.
- 7.40 On 25 September 2012 Ms D, an employee of the Law Society contacted the Respondent given that his previous letter had not addressed the issue currently being investigated. The Respondent advised that he thought the SLCC was taking no further action in relation to the complaints and the complaints levy. He suggested to Ms D that all the communication with the SLCC was by Mrs B. He was requested to search for whatever e-mails or letters he held to enable the Law Society to have as much information as possible. He indicated that he would have a look but was not sure what he still had. He was advised at that stage that because he had not addressed the issues intimated to him earlier, the Law Society had given

consideration to raising an additional complaint. Ms. D then referred matters to the Complaints Investigator, Ms E. She made enquiries with the SLCC and was advised on 23 October 2012 that enforcement action had commenced at the Small Claims Court due to the Respondent's failure to pay the complaints levy.

- 7.41 By letter of 10 October 2012 the Respondent was requested to provide any paperwork from the SLCC referring to the status of the complaint. No response was received.
- 7.42 By letter of 19 November 2012 the Law Society advised the Respondent that the position with the complaints levy had been clarified with the SLCC and that the conduct complaint would proceed. The letter required a formal response to the complaint within 21 days failing which consideration would be given to the issuing of Statutory Notices for failure to respond and failure to deliver files. For the avoidance of doubt the previous letters of 9 August 2012 and 10 October 2012 were enclosed with said letters. No response was received.
- 7.43 The SLCC provided the Law Society with an update on 3 December 2012, in particular advising that the Small Claim Summons against the Respondent would call on 5 December 2012 and it was anticipated that a Minute for Decree would be taken on the basis that he had agreed to pay the outstanding complaints levy plus expenses within 3 months.
- 7.44 By letter of 6 December 2012 the Respondent was requested to confirm his understanding of the position regarding the complaints levy with a deadline for a response by 10 December 2012. The Respondent was advised that if no response was received, Statutory Notices would be served.

- 7.45 By fax received 16.13 on 10 December 2012 the Respondent advised the Law Society that “your understanding is correct”.
- 7.46 As no formal response to the complaint was received, a Notice under Section 15 of the Solicitors (Scotland) Act 1980 was sent to the Respondent on 11 December 2012. A 14 day response period was highlighted in said letter. Said letter was sent by recorded delivery. No response was received.
- 7.47 A recorded delivery reference for said letter could not be traced and accordingly it was re-issued on 28 January 2013. Said letter was delivered on 29 January 2013 and signed for at 10.45am.
- 7.48 On the same date, namely 28 January 2013, the Law Society advised the Respondent that they held two files being the SLCC’s file relating to Miss A’s complaint and the client file operated by the Respondent’s firm. It was accordingly confirmed that the Respondent no longer required to provide the file. The letter still however sought a response to the complaint. Said letter also indicated that “I trust you have kept copies of correspondence sent to and received from the SLCC”.
- 7.49 No response was received to said Notice and accordingly a further Notice in terms of Section 15(2)(i) was sent to the Respondent by recorded delivery on 13 February 2013. By further letter of the same date the Respondent was also advised that an additional complaint had been raised due to the Respondent’s failure to respond to the Law Society’s correspondence. A 21 day period was provided to enable the Respondent to reply to the additional complaint.
- 7.50 By e-mail of 18 February 2013, timed at 19.14, the Respondent demanded a retraction of the Notice failing which the matter

would be referred to the relevant head of department. He indicated that he had “paid the compensation I was asked to pay by the SLCC and I responded appropriately to them.” He indicated that he was “very disappointed in the way this matter is being handled”. The e-mail provided no detailed response to the issues of complaint intimated to him.

7.51 By e-mail of 21 February 2013 the Respondent referred to his recent e-mail, set out in the preceding paragraph, indicating that “no response or even acknowledgement from you is unacceptable. I therefore expect to hear from either you or your head of department withdrawing the notice before close of business today.” No detailed response to the complaint intimated to him was provided.

7.52 By e-mail of 22 February 2013 the Quality Assurance Manager of the Law Society wrote to the Respondent indicating that the Statutory Notice would not be withdrawn. He was advised that the Notices had been issued due to his failure to respond to the Law Society. He was reminded that the correspondence in relation to the SLCC had been previously copied to him. He was given a further opportunity to provide information. The Respondent’s file was returned to him on the same date under cover of a separate letter. No response was received from the Respondent.

7.53 By letter of 4 April 2013 the Respondent was advised that an update would be sought from the SLCC and the Respondent was provided with a further opportunity to respond to the letter of 22 February 2013 by 12 April 2013. No response was received within said time limit.

- 7.54 By e-mail of 9 May 2013 the SLCC confirmed that it had not received payment of the complaints levy from the Respondent and legal agents had been instructed to pursue matters.
- 7.55 By e-mail of 10 May 2013 the SLCC confirmed the amounts outstanding comprising the original amount of £800 plus interest plus expenses with further expenses to accrue. Said email confirmed that if further court action was necessary an order for further expenses would be sought.
- 7.56 By letters of 1 and 14 both May 2013 the Respondent was asked to confirm payment had been made, was advised of the SLCC's response and that the matter would proceed to a report stage.
- 7.57 By e-mail of 13 June 2013 the Respondent was again given the opportunity to provide a response.
- 7.58 By letter of 21 June 2013 the Law Society's report was provided to the Respondent. That letter indicated that any written comments should be provided within 14 days from the date of the letter.
- 7.59 By e-mail of 28 June the Respondent indicated that he was consulting with Mr Neilson of Harper Macleod and requested an extension of the deadline by 4 weeks.
- 7.60 By e-mail of 1 July 2013 the period for responding was extended to 2 August 2013. The Respondent acknowledged receipt of that extended deadline on 1 July 2013.
- 7.61 On 2 July 2013 the Law Society were contacted by telephone by Mr Neilson of Harper Macleod. Said call requested

confirmation that the deadline would not pass while he was on holiday in France.

7.62 By e-mail of 2 July 2013 it was confirmed to Mr Neilson that the deadline was 2 August 2013 for submissions. Said deadline of 2 August 2013 passed without comments from either the Respondent or his representative, Mr Neilson and a chasing e-mail was sent on 5 August 2013 to Mr Neilson. An out of office reply was received.

7.63 By letter of 13 August 2013 the Respondent and his representative were given a further opportunity to provide comments by 12 noon on 26 August 2013. A chasing e-mail was sent on 19 August 2013. No response or submissions were received by the deadline and accordingly on 4 September 2013 the Respondent was advised that the matter would be considered by a Professional Conduct Sub-Committee (PCSC) on 12 September 2013.

7.64 By email on 12 September 2013 at 10.36am the Respondent's representative, Mr Neilson sought a continuation of the matter to enable him to respond. A further month was allowed by the PCSC and the Respondent and his representative were so advised. Said Submissions were not received until 26 September 2013 for the PCSC meeting on 10 October 2013.

7.65 Accordingly the Report and Supplementary Report prepared by the present complainers for the PCSC were prepared in the absence of information from the Respondent or his representative.

8. Having given careful consideration to the agreed averments of fact, the submissions from both parties and the testimonials produced, the

Tribunal found the Respondent guilty of Professional Misconduct in respect that:-

- 8.1 He delayed unreasonably to respond to the reasonable enquiries of the Law Society of Scotland;
- 8.2 Between 15 December 2010 and July 2013, he delayed unreasonably and / or failed to respond to requests, both written and verbal, from the SLCC or its agent, both as a solicitor and separately as the designated Client Relations Manager;
- 8.3 He failed and / or delayed in paying the complaints levy in breach of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 28(4).

9. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 2 May 2014. The Tribunal having considered the amended Complaint at the instance of the Council of the Law Society of Scotland against Stephen Gerard Fagan, Fagans Solicitors, 115 Graham Street, Airdrie; Find the Respondent guilty of Professional Misconduct in respect that he delayed unreasonably to respond to the reasonable enquiries of the Law Society of Scotland, that between 15 December 2010 and July 2013 he delayed unreasonably and/or failed to respond to requests written and verbal, from the SLCC or its agent, both as a solicitor and separately as the designated Client Relations Manager, and that he failed and/or delayed in paying the complaints levy in breach of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 28(4); Censure the Respondent; Fine him in the sum of £5000 said fine to be paid within six months of this date and 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 and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Alan McDonald

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

IN THE NAME OF THE TRIBUNAL

Alan McDonald
Vice Chairman

NOTE

At the hearing on 2 May 2014 the Fiscal for the Complainers made a motion to the Tribunal to amend the Complaint before it. The agent for the Respondent confirmed that the Respondent concurred in that motion. The parties lodged a Joint Minute of Admissions agreeing all of the statements of fact, duties and professional misconduct within the Complaint. Additionally the Joint Minute agreed the accuracy of the documentary productions which had been lodged on behalf of the Complainers. Given the extent of the agreement between the parties, no evidence required to be led. Submissions were made on behalf of both parties. The Respondent lodged a number of testimonials.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion indicated that in terms of the complaint relating to the SLCC there were around 15 letters or notices over a period of some two and a half years which had required a response from Mr Fagan. The time period given of 2 September 2010 to July 2013 was a conservative description of the time period involved.

The Fiscal drew the Tribunal's attention in particular to the failure of the Respondent to correspond in relation to a suggestion of mediation outlined in paragraphs 3.11 – 3.12 in the Complaint and detailed in Productions No 10 and 11. This had deprived the client of the option of mediation to which she had agreed. She further drew the Tribunal's attention to documentary Productions 18-22 where the SLCC had produced their report which included a recommendation that the client had accepted. The Respondent had rejected the proposal offered and suggested that detailed reasons would be given later, which never appeared.

The Respondent had sought and been granted a time to pay order by the court in relation to the complaints levy that had been imposed. The Fiscal suggested that this was a promise to the court that the Respondent would meet that payment. The Respondent had failed to pay and Sheriff Officers had required to be instructed.

Concurrently with the difficulties in correspondence with the SLCC, there was a failure to respond to the Law Society. There were some 13 letters/notices over a period of approximately 1 year.

In total between the two issues of failure to respond there were at least 28 letters or notices.

The Respondent's failure to respond had compromised the Law Society's regulatory process. The Fiscal submitted that this case was not less serious because this type of failure was a frequent matter before the Tribunal. It has been suggested previously in court proceedings, in the case of Cathcart, that failure to respond to the Law Society was similar to failing to stop and report in connection with a road traffic accident. It seriously hampered the Law Society in its investigations. The seriousness of this type of case should not be underestimated.

The Fiscal submitted that this case involved a blatant course of conduct with a deliberate choice by the Respondent not to respond.

The Fiscal drew the tribunal's attention to paragraph 3.4 of the Complaint where the Respondent had had a conversation with a member of the Law Society in which he had suggested that the SLCC Complaint was not proceeding when in fact that was clearly not the case.

She submitted that this was a serious course of conduct. The respondent was accepting that his behaviour amounted to professional misconduct. With regard to late payment of the levy, the fiscal referred to Section 28 of the Legal Profession and Legal Aid (Scotland) Act 2007 which indicated that this could amount to professional misconduct.

Ms Motion indicated that the facts as agreed did not put this case at the lower end of the scale. In considering the sanction to be imposed, she asked the Tribunal to take the following factors into account:-

1. There was no early plea – it was only received on Wednesday 30 April.
2. There had been no sign of remorse to date.

3. The Respondent had shown no sign of any insight into the matter. In fact the opposite was disclosed in paragraphs 3.50 and 3.51 of the Complaint where the Respondent had complained that the Law Society had not dealt with his correspondence quickly enough.
4. Co-operation had not been until late in the day – the Complainers had had to arrange for all of the witnesses to attend and they could not be stood down until 30 April 2014.
5. The Respondent's conduct presented a risk to the public – the Respondent appeared content to ignore the gate-keeper, the SLCC, and his regulator, the Law Society.
6. There was no sign of any corrective steps having been taken – the Respondent was still a sole practitioner, there would be no supervision or input from colleagues.
7. The testimonials produced for the Respondent suggested that the Respondent may be over worked. If that remained the position as a sole practitioner then this type of behaviour could be repeated.
8. There was a direct impact on a member of the public in having to be involved in the protracted complaints procedure.
9. There were consequences for the SLCC who had incurred costs of £500 in dealing with the matter and the Law Society had been put to cost and inconvenience.
10. This behaviour presented a clear course of deliberate conduct and disregard to his client, the SLCC and the Law Society.
11. Public confidence requires the seriousness of this misconduct to be marked.

The Chairman asked the Fiscal if she could confirm if the £1500 awarded to the client had been paid. Ms Motion confirmed that the compensation had in fact been paid, if not timeously.

SUBMISSIONS FOR THE RESPONDENT

Mr Neilson, the solicitor for the Respondent, submitted that the Respondent deeply regretted finding himself in this position. He regretted the catalogue of failure to respond that was set out within the Complaint.

He submitted that the Respondent had not deliberately been neglectful of his duties. Rather, he had known that he ought to respond but he had placed other clients interests before his own. The hurly burly of private practice had resulted in him not responding and not giving the matter the priority it deserved. He accepted that not responding made the system look less than perfect. It was his submission that the person most prejudiced by this however was the Respondent himself. If the Respondent had had anything to say in his defence he had failed to say it, leaving the Law Society and the SLCC to reach their conclusions with no input from him.

The Respondent knew he had an obligation to respond to both the SLCC and the Law Society and he accepted that he had failed in that obligation.

Mr Neilson stated that support for the proposition that the Respondent was the one most prejudiced could be seen from the fact that the Complaint by Ms A had not resulted in the Practice Complaint being upheld. It was the service element of the Complaint that had been upheld without Mr Fagan doing anything to give his position. This had resulted in an award of £1500 in compensation. The net result of him failing to respond to the SLCC was that they reached a decision without the knowledge of his position. Ultimately however that was fair enough, if the Respondent didn't tell them the information then he would pay the price. The respondent had obtempered this decision by paying the compensation awarded.

The Respondent had never met the client who had made the original Complaint. She had been dealt with solely by his assistant although Mr Fagan had supervised her.

The only dispute that Mr Neilson wanted to take in relation to the Fiscal's narrative was in relation to the failure to pay the complaints levy. At the time the Respondent had made his time to pay application he was in a similar position to many working in his area of the profession, struggling financially. He found himself unable to pay the £800 whilst still meeting other obligations including obligations to his staff and keeping the show on the road. The Respondent had made the time to pay application in good faith. Mr Neilson submitted that a time to pay application did not involve a promise to the court. In fact, in his submission, this was a request to the court for

time to pay, with a sanction that decree could be extracted and enforced if payment was not forthcoming. The Respondent had genuinely hoped and expected to be able to pay in full. He had been wrong. Thereafter, when charged to pay the sum the Respondent had paid it. It had been financial stringency that had prevented him from paying previously.

The Respondent had no excuse to offer for failing to respond to correspondence. He ought to have dealt with matters more robustly. As time went on the SLCC Complaint had become untouchable and difficult for him to tackle. This was a lesson hard learned for the Respondent. It was through his own neglect that something that had started out that was not hugely serious had ended up bringing him before the Tribunal.

Mr Neilson confirmed that the Respondent is 48 years old, married with three children aged 12, 18 and 20. The Respondent has recently celebrated 25 years as a solicitor with no disciplinary record at all. The Respondent had in fact been a reporter of the Law Society. As a result of this Complaint being raised the Respondent had taken the decision to step down from this role.

The Respondent was well enough regarded by the Law Society to have been appointed to assist in the winding up of the firm of McConville & Company following its collapse. This had involved the Respondent in completing unfinished business of that firm and also sorting out a large number of credit balances within the firms books. The Respondent had incurred outlays to Law Accountants that he felt obliged to pay as well as other outlays in relation to obligations of that firm. His working relationship to McConville & Company had continued after the Respondent had given up practising on his own account. The Respondent gave up practice on his own account at the end of August/beginning of September 2012 when he was then employed by Scullions. That employment had lasted for just under one year. His payment of outlays on behalf of McConvilles had continued whilst he was a paid employee. The extent of the process had resulted in April of 2013 in a payment to the Queens and Lord Treasurers Remembrancer of just short of £63,000.

Despite his good intentions, the Respondent had found himself in straightened circumstances, where other debts were given greater priority to the sum due to the SLCC. The Respondent accepted that he did not get his priorities right.

Mr Neilson submitted that the Tribunal was dealing with a man who had not previously defaulted, was of good standing with his peers and with the court. Mr Neilson indicated that he wished to highlight some of the references that had been lodged with the Tribunal. Two of the references were from the local bench. Each testified to the Respondent being hard working. Sheriff Galbraith testified to the Respondent taking on cases that other solicitors might deem troublesome and to taking on difficult cases. Mr Neilson submitted that taking on such cases if anything, enhanced the reputation of the profession with the public. Often people with significant personal difficulties, or personality difficulties, or mental health problems could find it difficult securing representation. Often clients who have grievances with other members of the profession find it difficult to secure representation. This does not do the profession much credit with members of the public. The Respondent is not of that cut. He will take on challenging cases where clients have high expectations. That is to the Respondent's credit and brings credit to his profession. Both Sheriffs testify to the Respondent being hard working, honest and decent in pursuit of his client's interests. Both indicate the Respondent has a heavy workload.

The Chairman indicated to Mr Neilson that the Tribunal had in fact received all of the testimonials, had had an opportunity to consider their content and he confirmed the Tribunal accepted the terms of the references.

Mr Neilson drew the Tribunal's attention to the reference from the secretary of the Airdrie Society of Solicitors. He indicated that the significance of this reference was that it was made on behalf of the Bar of Airdrie and not just a single solicitor.

He drew the Tribunal's attention to the testimony of Ian Smart the former President of the Law Society and a former representative of the Council of the Law Society of Scotland. The current Law Society Council member Colin Dunipace had also given a reference albeit unsigned. A number of these references were from fellow practitioners. These fellow practitioners refer to them passing work to the

Respondent and him carrying out the work with great acceptance. This was eloquent of the sort of man the Tribunal was dealing with.

Mr Neilson submitted that the Respondent had been struggling financially and he had taken steps to resolve that. The Respondent had had an assistant and when she left it did not take long before his firm was taken over by Scullions. That firm had bought the Respondent's business and had then taken the Respondent on as an assistant in September 2012. This brought him extra resources in handling his own resources. He assisted Scullions with their civil work in his Hamilton office. Having decided that the arrangement was not for him, he left Scullions and became a consultant with his long term friend Mr F of EF Kelly & Company. This had lasted only a few months. The Respondent had had a personal disagreement which resulted in him re-establishing himself in his old office in Airdrie. The Respondent had set back up in sole practice in November 2013.

The Respondent was currently drawing in the region of £2000 per month although he saw that that was likely to increase in the not too distant future. The Respondent has a reasonable but manageable workload. It had taken the Respondent longer than expected to re-register for Legal Aid and that had impacted on his ability to fee up work. The Respondent now has the benefit of having Mr Neilson himself working as a part-time consultant. Mr Neilson's presence within the firm contributes to the financial well-being of Mr Fagan's firm.

Mr Neilson submitted that the Respondent was an unimpeachable character who had not been guilty of this type of conduct before and who regretted this conduct. He had paid Ms A and was now attempting to build up a fresh practice. The Respondent had just come to an agreement with Scullions – subject to not over stretching himself – that he would be referred civil work.

The Tribunal were dealing with a man who had placed his own interests below those of his clients. The Respondent now regretted not looking after his own interests and had learned a sore lesson. Mr Neilson submitted that if the testimonies lodged on behalf of the Respondent could be believed then the Respondent could be trusted to resume a previously faultless practice.

The Chairman asked Mr Neilson where Mr Fagan was today.

Mr Neilson indicated that his absence was not a reflection of the Respondent not taking this seriously. The Respondent did not require to be present in terms of the Rules. The Respondent had been supporting his best friend from school through a serious illness and that friend had died just over 24 hours ago. The friend's widow was bereft and Mr Fagan was assisting her with arrangements she required to make. Additionally there was a court matter for an excessively anxious client who would not agree to his case being dealt with by another solicitor.

A member of the Tribunal asked Mr Neilson to confirm that the Respondent had sold his practice at the same time as he had made the time to pay application at the Sheriff Court.

Mr Neilson confirmed that the business was sold to Scullions and that payment was to be made by instalments over the following year. The Respondent had other accumulated debts he had required to pay. He confirmed that the Respondent had received the first instalment approximately one month after he commenced working with Scullions.

The Tribunal sought clarification from Mr Neilson with regard to the late plea tendered in the case.

Mr Neilson responded that although the plea had been tendered at a late stage, no Answers had been lodged. Mr Neilson stated that an indication had been given both to the Clerk and to the Fiscal some time ago that a plea would be tendered here. He indicated that he himself had been ill over the period of the last 7 or 8 weeks.

The Tribunal sought clarification of what steps had been taken by the Respondent to fill the deficit in service.

Mr Neilson indicated that the Respondent had been asked similar questions by the Legal Aid Board when he applied to be re-registered. The Respondent is a sole

practitioner with a simple system for answering mail. He opens all of the mail himself in the morning and extracts the items which need dealt with that day. He attempts to answer these pieces of correspondence before leaving the office to go to court. Later in the day on his return to the office he will try to complete the remaining pieces of correspondence. The Respondent has a number of baskets within his office that he uses to prioritise remaining mail.

Mr Neilson explained that in relation to these matters the sum and substance was that the Respondent had had a blind spot and that these pieces of correspondence never came to the top of the pile.

The Tribunal sought clarification from Mr Neilson of any steps taken by the Respondent to ensure that this would not happen again.

Mr Neilson indicated that the Tribunal could take reassurance from the nature of the man. He asked the Tribunal to place particular emphasis on the letters of reference. This had been a sore lesson for the Respondent to learn. The Respondent could be trusted. He had never been in this position before. The Respondent had taken Mr Neilson on as a consultant in part as a result of this experience and the Respondent could turn to Mr Neilson for guidance and difficult issues.

In addressing the Respondent's attitude to the seriousness of these matters, Mr Neilson said the Respondent had found himself in the horns of a dilemma in deciding whether he was able to appear at the hearing. The Respondent realised that this was a serious matter but felt that he was giving his attention to these matters through Mr Neilson as he was entitled to do. The Respondent had been confronted by two issues that required his attention, causing a serious dilemma. The court case referred to was an anxious family matter. He was anxious that by failing to attend to the matter in court then he would be risking another complaint.

The Tribunal asked Mr Neilson if he could indicate where the Tribunal could draw confidence that the Respondent saw the need to answer correspondence with his regulatory body.

In response, Mr Neilson indicated that the Respondent was a man who was generally well regarded in the discharge of his duties. The Respondent had not found this a comfortable process and he recognised that if there were to be a repetition then his practising certificate would be in serious jeopardy.

DECISION

Albeit the Respondent had admitted that he was guilty of professional misconduct, it was for the Tribunal to consider whether the conduct admitted by the Respondent met the test of professional misconduct as set out in the case of Sharpe.

In relation to the failure or delay in responding to the SLCC, the conduct had persisted for in excess of two and a half years, commencing 2 December 2010 and involving approximately 15 pieces of correspondence requiring a response.

It had taken the Respondent from 24 February 2012 until on or around 9 July 2013 to settle the complaint levy, and that was not done until after a charge for payment had been served.

The conduct in relation to the Law Society had persisted separately from 9 August 2012 and involved approximately 13 pieces of correspondence requiring a response.

The Tribunal considered that each of these matters amounted to professional misconduct, clearly falling well below the standard to be expected of a competent and reputable solicitor, that could only be described as serious and reprehensible. Accordingly, the Tribunal had little hesitation in finding the Respondent guilty of professional misconduct.

In considering the sanction to be imposed the Tribunal was satisfied that this case fell towards the higher end of the scale of such misconduct given the following factors:-

1. This was a protracted and deliberate course of conduct
2. To ignore correspondence with the SLCC and the Respondent's professional body was extremely damaging to public confidence in the profession.

3. The conduct was detrimental to a client, the SLCC and the Law Society.

The Tribunal gave careful consideration to the submissions made, and the testimonials lodged in identifying mitigating factors for the Respondent.

There appeared to be little practical evidence of any remorse for or insight into the misconduct. The content of the exchanges with Ms D described at paragraph 7.40 above and his emailed correspondence outlined in paragraphs 7.50 and 7.51 above were particularly unfortunate for him in this regard. There had been little sign of cooperation on his part, with even intimation of his plea coming late in the day.

It was apparent that the Respondent had completely failed to recognise the importance of cooperating with his regulatory body. The public must have confidence in the regulatory system of the profession if they are to have confidence in the profession itself. The Respondent's conduct here disclosed a complete lack of respect for his client, the SLCC and the Law Society.

It appeared that the Respondent had taken deliberate decisions to prioritise his other personal and professional obligations above his obligations to the SLCC and his regulatory body, the Law Society.

There was little or no sign that the Respondent had taken any corrective steps to prevent any reoccurrence.

However, the Tribunal recognised that this was a solicitor with an otherwise unblemished record of 25 years. The testimonials produced disclosed a hard working and well respected practitioner.

Given the above noted circumstances, the Tribunal held that a Censure in itself would not be sufficient to mark the seriousness of this case.

The Tribunal were concerned that as a sole practitioner, there was little control over the Respondent's workload and that created a risk of repetition. However, the Tribunal identified that this Complaint did not relate to the substance of the

Respondent's representation of his clients and therefore felt that it could not be said that the public were directly at risk. To impose any element of supervision upon the Respondent could imperil his newly setup practice. It was, however, necessary in this case to emphasise and reinforce the importance of the regulation of the profession. Given the Respondent's previous good record, it was hoped that a substantial fine in addition to a Censure would mark the significance of the Respondent's misconduct both to him and to the profession. Accordingly the Tribunal imposed a fine of £5000. Given the financial circumstances of the Respondent, he was allowed 6 months to pay the fine in full from 2 May 2014.

As the Complaint indicated that the potential Secondary Complainer did not seek compensation, the Tribunal did not require to consider the question of compensation.

The Fiscal for the Law Society moved for expenses. The Respondent did not oppose that motion. Accordingly, expenses were awarded against the Respondent.

No submissions were made regarding publicity and so the usual order was made.

Alan McDonald
Vice Chairman