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

GORDON DANGERFIELD, Archer Coyle Solicitors, 513 Clarkston Road, Muirend, Glasgow

Respondent

1. A Complaint dated 22 November 2018 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Gordon Dangerfield, Archer Coyle Solicitors, 513 Clarkston Road, Muirend, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Susan Christie, South Lanarkshire Council Administration and Legal Services, 11th Floor Council Offices, Almada Street, Hamilton.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent.

4. In terms of its Rules, the Tribunal fixed a procedural hearing for 26 February 2019 and notice thereof was duly served upon the Respondent. Answers dated 25 February 2019 were lodged for the Respondent.

5. At the procedural hearing on 26 February 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Tribunal fixed a further procedural hearing on 11 March 2019 to determine whether to receive the Respondent's Answers late.

6. At the procedural hearing on 11 March 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Tribunal received the Respondent's Answers late. On joint motion, the Tribunal fixed a preliminary hearing for 1 August 2019 to deal with four questions the parties agreed required to be addressed.

7. An amended Complaint of 18 March 2019 was lodged with the Tribunal.

8. At the preliminary hearing on 1 August 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. Parties made submissions on the four questions they had agreed should be determined by the Tribunal. The preliminary hearing was continued to 12 September 2019.

9. At the continued preliminary hearing on 12 September 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Tribunal repelled the preliminary pleas of both parties and provided answers to the agreed questions it was asked to address. An Interlocutor and Note dated 12 September 2019 was produced and issued to the parties in accordance with Rule 42 of the Tribunal's Procedure Rules. The Tribunal fixed a procedural hearing for 16 December 2019.

10. At the procedural hearing on 16 December 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Elizabeth Coyle, Solicitor, Glasgow. The Tribunal received the affidavit of Sheriff Brown under reservation as to competency and relevancy. An Interlocutor and Note dated 16 December 2019 was produced and issued to the parties. The Tribunal continued the case to the hearing already fixed for 22 and 23 January 2020.

11. A Record was lodged with the Tribunal on 20 January 2020.

12. At the hearing on 22 and 23 January 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Andrew Smith, Q.C. A signed Joint Minute of Admissions was received. On the unopposed motion of the Fiscal, the Tribunal received the affidavits of Sheriff Brown and Sheriff Millar without reservation as to competency and relevancy. The Fiscal led two witnesses. The Respondent gave evidence. Parties made submissions. The

Tribunal began its deliberations. Due to lack of Tribunal time, the case was continued to 6 March 2020. Parties were instructed to attend at 12pm.

13. At the hearing on 6 March 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Andrew Smith, Q.C.

14. Having given careful consideration to the terms of the Complaint, Answers, Joint Minute, the productions lodged by both parties, the parole evidence of the witnesses, and the parties' submissions, the Tribunal found the following facts established:-

14.1 The Respondent first enrolled as a solicitor in Scotland on 30 October 1985. He was an employee, partner, then consultant with Ferguson & Company in Stranraer until September 1993.

14.2 On 31 October 2002, he requested that his name be removed from the Roll of Solicitors.

14.3 The basis for him wishing his name to be removed from the roll was to allow him to pursue an academic career inter alia in the United States of America.

14.4 His name was restored to the Roll on 12 February 2010 and he commenced employment as a solicitor with Archer Coyle, Solicitors as from 4 January 2012. On 1 November 2013, he became a consultant with that firm.

14.5 The Respondent qualified as a Solicitor Advocate on 26 October 2017.

14.6 Prior to the current complaint being made, no complaint had been made to the Law Society of Scotland regarding the Respondent's conduct.

14.7 The Secondary Complainer was at all material times employed by South Lanarkshire Council ("SLC").

14.8 In late 2015, the Respondent was instructed to represent the interests of a client, "JR".

14.9 In correspondence, JR was threatened with eviction along with her three children, on account of alleged arrears of rent. At the material time, JR was pregnant with a fourth child.

14.10 The Respondent contacted the Secondary Complainer by email dated 19 November 2015 at 10.19.

14.11 The Respondent was instructed to defend any proceedings raised by SLC against JR.

14.12 On or about July 2016 proceedings were raised against JR for payment of arrears and eviction.

14.13 The Respondent upon investigating the circumstances, considered that if JR was in arrears, that was partially or wholly due to an error in the assessment of the benefits to which she was entitled.

14.14 SLC are responsible for assessing entitlement to housing benefit. The assessment was based upon the information JR provided to SLC.

14.15 In the event that there is an error in assessment of housing benefit, the claimant for that benefit is entitled to seek to have the relevant local authority review the application. Such applications can, if successful, have retrospective effect. Prior to July 2016, JR had not provided SLC with full supporting documentation for a review to be carried out. The Respondent did not provide the SLC with the documentation either until the events narrated below.

14.16 Following the raising of the action against JR, it was anticipated by SLC and JR that a review application would be made to SLC.

14.17 Following the raising of the action in July 2016 against JR the Respondent indicated he would be making a Subject Access Request. This was intimated on 11 November 2016. The SAR was not accompanied by the statutory fee. The action called as pre proof hearing on the 5 December (a proof having been fixed for the 16 December) 2016. The proof was discharged on the Respondent's motion to allow him to

correct his oversight, pay the statutory fee and recover the documents under the SAR. A further proof and pre proof hearing were fixed for 16 February 2017 and Monday, 30 January 2017 respectively.

14.18 On the basis that a review application was expected to be lodged, which if wholly successful would have the effect of clearing arrears of rent, the further pre proof hearing was arranged to again allow the court to be addressed on whether an application for review had been made and its status.

14.19 By Thursday, 26 January 2017, the Respondent had not yet lodged a review application with SLC.

14.20 On Thursday 26 January 2017, at 22.49 or thereby, the Respondent emailed SLC's relevant department making a review application.

14.21 On Thursday 26 January 2017 at or around 23.50, the Respondent emailed the Secondary Complainer.

14.22 Unknown to the Respondent, on Thursday 26th January 2017 the Secondary Complainer left her office at or around 4pm.

14.23 Unknown to the Respondent, on Friday 27 January 2017 the Secondary complainer was on annual leave.

14.24 On Friday 27 January 2017, at around 08.30, SLC confirmed receipt of the benefits review application.

14.25 On Friday 27 January 2017, the Respondent delivered copies of the Review Application to the court with the intention that the Court would thus be aware that the application had been made.

14.26 On Monday, 30 January 2017, the Secondary Complainer attended court to represent the interests of SLC in its claim against JR. She did so without attending the offices of SLC. Unknown to the Respondent, SLC did not provide solicitors in

their employ with a phone or tablet which would allow the checking of emails outwith the office.

14.27 On that date, the Respondent was not able to be at court in person. He instructed a local agent AM to appear to represent the interests of JR.

14.28 Upon the case against JR calling, the Secondary Complainer advised the court *inter alia* that no Housing Benefit review application had been lodged on behalf of JR with South Lanarkshire Council.

14.29 The Sheriff indicated that papers in the process appeared to show that a Review Application had in fact been made.

14.30 The Secondary Complainer stated that she had not "had sight" of the Application.

14.31 AM indicated that the Application had been intimated to the Secondary Complainer.

14.32 The Sheriff allowed a short continuation in order that the Secondary Complainer could consider the matter.

14.33 Upon resuming the hearing later that day, the Secondary Complainer indicated that she required to consider matters further with SLC and moved and was granted a continuation until 13 February 2017.

14.34 When the case recalled, the Secondary Complainer did not specifically address the Sheriff on whether she had in fact received notice that the Review Application had in fact been intimated to her by the Respondent.

14.35 Following the Court hearing on 30 January 2017, the Respondent received a report from AM on the events of the day concerning JR's case. The Respondent did not discuss the calling of the case with AM.

14.36 At 15.44 on 30 January 2017, the Secondary Complainer emailed the Respondent regarding the case.

14.37 At 21.12 on 30 January 2017, the Respondent emailed the Secondary Complainer.

14.38 On 31 January 2017, at 10.15, the Secondary Complainer emailed the Respondent.

14.39 On 31 January 2017 at 18.00, the Respondent emailed the Secondary Complainer.

14.40 On 31 January 2017 at 18.10, the Respondent emailed the Secondary Complainer.

14.41 On 6 February 2017, at 15.21, the Respondent emailed the Secondary Complainer. The email had attached identical documents to those referred to in the immediately following paragraph.

14.42 On 7 February 2017, the Respondent wrote a letter to the Sheriff Clerk with enclosures. The Respondent expressed a wish that the letter be placed before the Sheriff at the calling on 13 February 2017. The letter submitted that the Secondary Complainer's submissions on 31 January 2017 were false, that she made a representation that was less than the whole truth and that she misled the court.

14.43 On 13 February 2017, the case called for the pre proof hearing. At that hearing, Ms Bonnar appeared for SLC and the Respondent for his client. The Respondent invited the Sheriff to consider his letter of 7 February 2017. As a result of the statements made to the court by Ms Bonnar on 13 February 2017, the Respondent reasonably concluded he was under threat of defamation proceedings.

14.44 On 13 February 2017, the diet of proof was discharged on the basis that a Benefits Review Application had been made.

14.45 On 13 February 2017 at 13.45, the Respondent emailed the Secondary Complainer. That email includes an assertion that the Secondary Complainer "made false representation to the court."

14.46 On 16 February 2017, the case again called before the Court at which the Secondary Complainer and the Respondent represented their respective clients. As a result of the statements made to the court by the Respondent on 16 February 2017, the

Secondary Complainer reasonably concluded that she would be the subject of a Minute of Contempt.

15. Having considered the foregoing circumstances, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal did not consider that the conduct established met the test for unsatisfactory professional conduct and therefore declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

16. Having heard further submissions from parties on expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 6 March 2020. The Tribunal, having considered the Complaint dated 22 November 2018 as amended by the Complaint of 18 March 2019 at the instance of the Council of the Law Society of Scotland against Gordon Dangerfield, Archer Coyle Solicitors, 513 Clarkston Road, Muirend, Glasgow as amended; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent restricted by 25%, 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; Certify the cause as appropriate for Junior Counsel; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and witnesses but need not identify any other person.

(signed)
Nicholas Whyte
Chair

17. 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 JUNE 2020 .

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chair

NOTE

At the Hearing on 22 and 23 January 2020 and 6 March 2020, the Tribunal had before it the Complaint as amended, Answers, a Joint Minute of Admissions, five Inventories of Productions for the Complainers, two Inventories of Productions for the Respondent, Lists of Witnesses for the Complainers and Respondent and Lists of Authorities for the Complainers and Respondent.

At the start of the hearing on 22 January 2020, the Fiscal noted that the List of Authorities lodged by the Respondent contained various European authorities. If the Respondent intended to made submissions on Article 10, he wished to have an opportunity to answer these, amend or seek written submissions. Mr Smith's view was that no amendment to the pleading was required. The Tribunal decided to hear the evidence. It indicated that the Fiscal could make submissions when the issue arose.

EVIDENCE OF SUSAN CHRISTIE

Ms Christie gave evidence on oath. She is 54. She is a solicitor employed by South Lanarkshire Council and is a member of the First Tier Tribunal, Housing and Property Chamber. She has been a solicitor since 1988 and has worked for the Council since 2005.

She became involved in the JR case in November 2015. Between November 2015 and July 2016 there was some correspondence between the parties and the case called in court during 2016. A pre-proof hearing was fixed for 30 January 2017. On 26 January 2017, the witness met with a housing officer. She told the housing officer to "keep an eye on" the housing benefit issue. She took all the files from the office on Thursday evening for court on Monday morning because she was due to be on annual leave on Friday 27 January 2017. She set up an out of office email which indicated that emails would not be read in her absence.

On Monday 30 January 2017, the witness went straight to court. A local agent appeared for the Respondent for the Defender. The local agent told the witness as the Sheriff was coming on the bench that the Defender was seeking an adjournment. She did not explain the reason for this. The witness was not aware that the Respondent had lodged a Housing Benefit Review. The appearance was brief. Solicitors are not expected to take up much time in a procedural heritable court. The witness told the court that no housing benefit review or application had been made. The local agent sought an adjournment. The Sheriff asked the witness if she had seen the Defender's inventory. She said that she had not. The Sheriff did not say what was in the inventory. The witness asked for the case to recall so

she could check the papers. The witness could not remember if the local agent told the court the Housing Benefit Review Application had been lodged. The Sheriff agreed to recall the case. The witness scanned the inventory. There was a letter to the Benefit and Revenue Section of the Council looking for a review. The witness took it that the application had therefore been made. She would defer to the knowledge of the review team as to the application, but it looked correct to her. She realised the case was not going to be dealt with that day. She needed to find out the result of the review and the timescales involved. When the case recalled she sought to preserve the status quo. She asked for a continued pre-proof hearing. She proposed that at the pre-proof hearing, the court could be advised of the more accurate position regarding whether or not the Council opposed the application to adjourn the proof. That motion was granted. The witness said the hearing was not unusual.

The witness was referred to the email from the Respondent to the witness dated 26 January 2017 at 2351 hours (Production 2 in the First Inventory of Productions for the Complainers). She confirmed that she saw this email on her return to the office after court on 30 January 2017 and responded at 1545 hours (Production 2 in the First Inventory of Productions for the Complainers). She then received the email of 30 January 2017 at 2112 hours from the Respondent (Production 3 of the Complainers' First Inventory of Productions). She did not know why the Respondent was so angry. The witness said that the information she gave to the court on 30 January 2017 was wrong. She said no review had been lodged. That was her knowledge. She was corrected by the Sheriff. He knew she had not seen it. In the course of the morning she had told him she had been on annual leave on Friday. She realised something might have happened. Therefore, she had the case continued for two weeks. She sent the Respondent a courtesy email to say she had not seen his email of 26 January 2017 until after court and she was waiting on further instructions regarding the review request.

The witness was referred to Production 4 in the Complainers' First Inventory of Productions which was an email from her to the Respondent on 31 January 2017 at 1015 hours. She agreed she had sent this email and received the Respondent's response of 31 January 2017 at 1801 hours (Production 5 in the Complainers' First Inventory of Productions). The witness realised the Respondent thought he had been slighted but "didn't understand what he was slighted about" as she had tried to explain on two occasions that nothing untoward had happened. She said she received the email from the Respondent of 6 February 2017 at 1521 hours (Production 6 in the Complainers' First Inventory of Productions) and the copy of the letter he had sent to the sheriff clerk (Production 7 in the Complainers' First Inventory of Productions). That letter contained allegations that she had misled the court. She was "outraged". She spoke to her line manager and the legal department manager. She briefed her colleague Josephine Bonnar who was to appear on 13 February 2017. The case called on 13 February 2017. The case was

continued to 16 February 2017. Josephine Bonnar told her she would have an opportunity to speak to the court then.

The witness received an email from the Respondent on 13 February 2017 at 1345 (Production 8 in the Complainers' First Inventory of Productions). She did not offer any further explanation to the Respondent. She had already explained the situation twice. She did not think she had done anything wrong. Given the Respondent's proactive role in pursuing matters she thought the least said the better. She was concerned and worried. She was unhappy that her reputation was being questioned in her own court. She was worried and anxious. She was reflecting on whether she had done anything wrong. She had to put all the paperwork together.

On 16 February 2017, she went to court. She sat in the public area. A solicitor asked her what this issue was all about. During the hearing, the Respondent said both she and the Council were at fault. The Respondent said the witness was in contempt. The witness was referred to the note she produced following the hearing on 16 February 2017 (Production 2 in the Complainers' Second Inventory of Productions) and said it was accurate. It was dictated back at the office and was not a script. The witness said that the Sheriff on 16 February 2017 was a bit bemused. He was trying to sort out the situation. She was happy with that approach because she thought everything had been blown out of all proportion. The Sheriff said the allegation of contempt was not for that day, in that process or procedure. He said the Respondent should put in a Minute, Answers would be allowed and the case could progress to proof. The Respondent was quite definite in his view that he intended to do that.

During cross examination, the witness was referred to the emails of 26 January 2017 at 2351 hours, 30 January 2017 at 1545 hours and 30 January 2017 at 2012 hours. Mr Smith said it was clear the Respondent was concerned that he had told the court by letter that the review application had been lodged and then the witness told the court the opposite. The witness said she had not analysed the correspondence to that extent. She had not seen the local agent's court report. Only part of it was quoted to her by the Respondent. Mr Smith suggested that the Respondent's complaint was clear. The witness said she told the Respondent she had not seen the review so matters were self-evident.

Mr Smith suggested that the witness could have used different language in court. The witness accepted she could have done so. However, it was a busy court. Long-winded explanations are not encouraged. The witness accepted that on the matter recalling, she did not unreservedly accept the Respondent's position. However, the Sheriff knew that the witness had been on annual leave on Friday and had come

straight to court on Monday. She moved to maintain the status quo. There was no prejudice to either party. Everything was self-evident. The Sheriff was not troubled at all.

Mr Smith explained that when the matter was reported to the Respondent, he believed his integrity had been called in question. The witness said that these things happen all the time. For example, someone will say there is no legal aid but the solicitor might say he applied for it the day before after seeing the client at the office. The Respondent wholly overreacted. His tone and challenge overstepped the mark. It was inflammatory. She felt badgered and intimidated. She did not say he had not lodged the document or the letter was fabricated. She accepted he must have done something and wanted to look into it.

The witness said the Respondent should not have been troubled by the local agent's report. She did not tell the court she had made an error but that was the implication and it was blindingly obvious. Nothing bad happened to the case. She did not do anything non-genuine. She thought she was being conciliatory. She could not account for the Respondent not understanding that. In her view it was a "non-event".

The witness was referred to the email of 31 January 2017 at 1801 hours. She agreed that the Respondent asked to see her out of office email. It was not possible for her to do this but she asked someone else to print off a copy he had received.

Mr Smith referred the witness to the email of 6 February 2017 at 1521 hours and the letter of 7 February 2017. The witness agreed that she made a statement to the court which was factually inaccurate. Mr Smith suggested that the Respondent does not say anything which is wrong in the letter of 7 February 2017 and it is clear what he was complaining about. The witness referred Mr Smith to the local agent's report and said there was no suggestion the Respondent had anything to be concerned about. There was no debate or discussion with the Sheriff about what was in the inventory. The Respondent was not present. He did not know the words that went back and forward. In the witness's view, the local agent's report supports the witness's position.

The witness was referred to two file notes of 16 February 2017. One was produced by her, and the other by Ms Bonnar. The witness said she thought the reference to the Respondent acting in a defamatory way came from Ms Bonnar on 13 February 2017. The witness thought the Respondent was "detracting from her character." The Council had to be concerned about defamation. She felt the Respondent was attacking her in a personal capacity. However, she was not involved in anything regarding an action for defamation. Mr Smith suggested the witness must have made mention of defamation. The witness said she asked Ms Bonnar about it, but she was quite clear that was not what she said.

The witness said the Respondent was very clear he intended to lodge a Minute of Contempt. The only time she had an inkling it was not coming was when the client relations partner at his firm said the Respondent's time and talents were better expended elsewhere than dealing with the witness. She agreed that things can change, for example on refusal of legal aid or on mature reflection.

The witness was re-examined regarding the review application and her words to the Sheriff on 26 January 2017. She said she did not tell the Sheriff she needed to take instruction. She just asked to see the papers and for the case to recall.

In answer to a question from a Tribunal member, the witness said she did not telephone the Respondent. She felt bullied and that he was trying to intimidate her. She had explained the position to him. She could not do anything about him. She wanted to give him time for reflection.

The witness was asked who had decided to introduce the question of defamation. She said that no one did this. Someone said the language was "potentially defamatory" but this was different to raising proceedings for defamation.

EVIDENCE OF JOSEPHINE BONNAR

Ms Bonnar gave evidence on oath. She is 51. She is a solicitor employed by South Lanarkshire Council and a member of the First Tier Tribunal, Housing and Property Chamber. She qualified in 1993 and has worked for South Lanarkshire Council since July 2003.

She was aware of the correspondence from the Respondent. Her instructions at the hearing on 13 February 2017 were to deal with that issue, as well as the merits of the action. She discussed the case with Susan Christie, their line manager and the manager of the litigation team.

On 13 February 2017 she informed the Sheriff of the issue in the case. She said a false allegation had been made and it was potentially defamatory. The Respondent said his intention was for the court to find Susan Christie's misrepresentations amounted to contempt of court. He said she had misled the court and did not deny it. The witness said she never threatened to raise defamation proceedings. She had no instructions to raise proceedings.

The witness was referred to the Respondent's email of 13 February 2017 at 1345 hours contained at Production 8 in the Complainers' First Inventory of Productions. The letter refers to the witness advising the court that the Council was taking advice on defamation proceedings against the Respondent. The witness denied saying this. She may have said that the Council was taking the matter seriously and regarding the matter with concern. She denied there was any threat of defamation made.

The witness attended court on 16 February 2017 as an observer. She took notes. Susan Christie told the court she wanted to discuss the Respondent's invitation to the court to find her in contempt of court. The Respondent categorically stated that Susan Christie and South Lanarkshire Council were in contempt of court regarding the misrepresentations made by her. The Sheriff indicated that a Minute of Contempt would be required. The Respondent said that would be presumptuous. He was just drawing the court's attention to the matter. The Sheriff indicated the case would recall. When the matter recalled, Susan Christie addressed the court. The Respondent interrupted. The Sheriff reiterated this was not the time nor the place. The Respondent said Susan Christie had misled the court and did not deny it. Susan Christie said she did deny it. The Respondent said he intended to lodge a Minute of Contempt.

The witness agreed that she produced the notes at Productions 1 and 2 in the Complainers' Fifth Inventory of Productions. They are accurate. The court was busy on 16 February 2017. Other solicitors and members of the public were present. The Respondent was very definite and emphatic about his position. He sighed loudly and gestured. He was not reluctant to make submissions. Susan Christie was agitated and taken aback by what he said.

The witness was cross examined. She agreed there was nothing wrong with a lawyer being emphatic. She said the reference to a "defamatory allegation" arose out of her discussion with Susan Christie. She could not say who came up with the term. There were no discussions about defamation with their managers. Mr Smith said that an informed observer would see this as a threat to take legal action. The witness disagreed.

The witness was referred to the email of 13 February 2017 from the Respondent to Susan Christie. The witness agreed that the Respondent said it had been indicated in court that the Council were considering suing him. Susan Christie asked Josephine Bonnar about this. The witness told her this was not what had been said. Susan Christie clarified this in court on 16 February 2017. It did not occur to her to call the Respondent or write to him.

The witness was in court on 16 February 2017. It did not occur to her to tell the Respondent that defamation proceedings were not being considered. The witness said she read from her notes and there was no possibility she had overstated beyond the note.

The witness said she did not know what she meant when she said the Council was concerned and was considering its position.

In re-examination, the witness said Susan Christie's managers knew she was very distressed by the whole situation and were keeping a watchful eye on her welfare. The witness was referred to the last paragraph of the letter of 7 February 2017 (Production 7 in the Complainers' First Inventory of Productions). The Respondent asked Susan Christie to share the letter with her manager. He hoped and expected that Susan Christie and a senior representative of the Council would take the matter seriously and appear at court on Monday to explain themselves. There was a discussion about whether Susan Christie should continue to deal with the case.

The Fiscal asked about the potential allegations of defamation. The witness said she was very careful about what she said given allegations had been made by the Respondent of misrepresentation. She used the word defamatory because it was a serious allegation potentially damaging to Susan Christie's reputation.

The Fiscal closed the Complainers' case, drawing the Tribunal's attention to the Joint Minute and the affidavits lodged.

AFFIDAVIT EVIDENCE OF SHERIFF MILLAR

Sheriff Millar presided over the calling of the case of South Lanarkshire Council v JR on 30 January 2017. It was a busy heritable court with 65 cases calling that morning. The case required to recall and the Sheriff recalled that the Secondary Complainer required to take instructions in respect of an Inventory which had been lodged. On her motion he continued the pre-Proof calling to 13 February 2017. He had no recollection of passing any inventory to the Secondary Complainer or being asked to pass any inventory to the Secondary Complainer. He did not recall reading any correspondence from the Respondent. There was no opposition to the request for a continued hearing. He was not able to recall or offer any evidence in respect of the submissions made by the Secondary Complainer at the first calling or the recall or whose request it was for the matter to be recalled. He did not consider he was misled by any party or that there was any attempt to mislead or challenge the authority of the court

Generally, he had no concerns about the submissions of the Secondary Complainer. Generally, she is fully prepared, succinct and he has encountered no difficulty with her attitude or submissions in the past.

AFFIDAVIT EVIDENCE OF SHERIFF BROWN

Sheriff Brown presided over the calling of the case of South Lanarkshire Council v JR on 16 February 2017 at Hamilton Sheriff Court. A number of cases called for procedural hearings at 10am. The Respondent informed him that he was applying to the court to have the Secondary Complainer found in contempt of court. The Sheriff agreed to have the case recalled later that morning for discussion between the representatives. He noted that the suggestion by a solicitor in open court that another solicitor was in contempt of court was highly unusual and had never previously happened in his experience as a sheriff. The allegation was plainly serious and the potential consequences for the Secondary Complainer were similarly serious. It might reasonably be expected that such a serious allegation would only be made if there were clear and compelling grounds to substantiate it. Sheriff Brown noted that the Secondary Complainer had previously appeared before him on numerous occasions. She is very experienced and competent and had never given him any cause to question her integrity or respect for the authority of the court. The case was recalled. The Sheriff noted no further discussion regarding alleged contempt but he indicated then or at the earlier calling that the appropriate procedure for dealing with the matter was for a minute to lodged with the court setting out the alleged contempt with a view to answers being lodged.

EVIDENCE OF GORDON DANGERFIELD

The Respondent affirmed. He is 57. He was aware of the content of the Joint Minute which was accurate. The Answers were true and accurate. The Respondent gave details of his career history.

The Respondent explained that shortly before the court hearing on 30 January 2017, he filed a housing benefit review application. He could not attend court himself and instructed a local agent. It appeared from the court report that Susan Christie said something untrue to the court. This would not have been a problem if it had been corrected properly. However, she did not correct herself. His very clear understanding was that the Sheriff would be left under the impression that he had not intimated the report to Susan Christie as he told the Sheriff Clerk in his letter. His integrity was under threat. As a litigator, one's reputation with the court if everything. The court should be able to trust one's word. If a solicitor should do anything to tarnish his reputation, he needs to do something about that forthwith. If word gets around that your word cannot be trusted it is bad for the solicitor and clients.

Mr Smith noted Susan Christie's impression that the Sheriff was not that bothered and understood a mistake had been made. The Respondent said he did not know that and certainly not at the time. The Sheriff had been told he had not intimated an important document. That error by Susan Christie was left hanging without qualification or correction. He would be "properly astonished" if a Sheriff was not perturbed by that. He wanted the record set straight at the next hearing. In his email to Susan Christie, he quoted accurately from the court report. Susan Christie said nothing untoward happened and there was no need to set things straight. The Respondent said he did not recall getting an out of office message from Susan Christie. He checked his inbox and spam messages. However, he said an email could go out and not be received and that nothing turned on this.

The witness was referred to his letter of 7 February 2017. He said he wanted Susan Christie to have notice of the things he was going to say. There was nothing in the letter that was incorrect or factually misplaced.

The witness expected Susan Christie to come to court and set the record straight. He was exceedingly taken aback by Josephine Bonnar's remarks that he was being "put on notice". This was a major escalation of the dispute. It was a clear attempt to bully and intimidate him. It should have been recognised that Susan Christie went astray. Instead, the Council doubled down as if nothing untoward had happened. He clearly remembered Josephine Bonnar saying defamation proceedings against him were being considered.

The Respondent was asked if he ever accused anyone of contempt of court. He said he made it clear he was making a distinction between facts put before the court and then making submissions on the basis of these facts. The issue of contempt arose because it became clear to him that the Sheriffs on 13 and 16 February 2017 were not interested in dealing with the issue other than by way of contempt of court. However, contempt is entirely a matter for the court. Ultimately the court also determines defamation. No Minute of Contempt was ever raised because it was obvious that the Sheriffs were not interested in dealing with it in any form. There was very little prospect of advancing matters. There were also questions of expense and legal aid. On the instructions of his client he did not proceed. Every solicitor will have experienced a situation where he or she intends to do something he or she does not then do.

The Respondent was surprised when Susan Christie made a complaint. She had ample opportunity to ventilate her views in court.

During cross examination, the Respondent said he thought local authorities were "inherently untrustworthy". He was asked if he thought they were dishonest but said that he was not sure an institution could be dishonest.

The Respondent said he accepted Susan Christie was not at work on the Friday and had always accepted her explanation for why she did not see his email.

The Respondent clarified that he did not seek any information after receiving the court report before writing to Susan Christie. The Respondent agreed the Sheriff knew he had intimated the review. It was "ludicrous" for Susan Christie to say it had not been received. He understood her position to be that although the court had the review, the Council did not. The email from the Council was lodged to show intimation.

With reference to his email of 30 January 2017 at 2112, the Respondent explained that if one makes an unequivocal statement to the court and that turns out to be wrong and you don't check, there is fault.

The Respondent said he was never told by Susan Christie that she had advised the court she would take the correspondence at face value. The first time he saw this was in the Complainers' Complaint. However, the Law Society must have an evidential basis for pleading that.

The Respondent said he did not consider phoning Susan Christie. He did not accept that a telephone call would have elicited more information that an exchange of emails.

The Respondent said the question was more nuanced than whether Susan Christie was telling lies. There is a distinction between something that is untrue or factually incorrect and something which is not the whole truth. When Susan Christie said she had not had sight of his email that was true as far as it went, but the reason she had not had sight was she had not checked her emails. That was the whole truth. She misled the court. The Respondent accepted the Sheriff says he was not misled in his affidavit. However, the Respondent was not there and did not know what the Sheriff thought. He was not trying to take advantage of Susan Christie's error. He wanted it corrected at the first opportunity. He accepted it was a mistake. The problem was that the mistake was not corrected or acknowledged. It affected his professional reputation. An apology would have brought the matter to an end. He sought a setting straight of the record. The idea of contempt of court came forward as a means of redress when he realised this was the only way to get it. Throughout the procedure he was strictly observant of the facts he put before the court and his submissions in law. At all times he sought the court's view. The court notes

were not verbatim or complete. The Respondent said his views on contempt were irrelevant. Solicitors make unsuccessful submissions all the time based on facts and legal conclusions.

The Respondent acknowledged he made no file notes of the court appearances. However, his emails were more comprehensive than any file note.

The Respondent said he was perhaps more sensitive to these slights than others because of his history with local authorities. Other solicitors might not have considered this as much of a threat to their integrity as he did.

During re-examination, the Respondent said that Susan Christie never acknowledged her error to him. She continued to say nothing untoward happened and the Respondent was raising a fuss about nothing.

A panel member asked why the Respondent did not bring the matter up in court and invite Susan Christie to set the matter straight. The Respondent said he thought he would be called on to speak to his submissions but simply never got a chance. Whenever he tried to speak, he was shut down with immediate comments regarding the Minute of Contempt or the Pursuer's agent insisting on speaking first. He subsequently learned that the Sheriffs on 13 and 16 February 2017 had not read the correspondence. They were therefore completely in the dark. He confirmed he had instructions from the client to raise the issue.

The Respondent clarified that at the hearing on 30 January 2017, there was no evidence of receipt of the housing benefit review application by the Council in the papers. An email acknowledging the housing benefit review was received by the Respondent, but the documents had already been lodged with the court. He did not think anything would turn on an acknowledgment.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal submitted that the Respondent's conduct amounted to professional misconduct, within the definition in Sharp v Law Society of Scotland 1984 SLT 313. The test was met by the Respondent's use of language in his correspondence and his assertion of contempt in open court on 13 February 2017. The Fiscal clarified that he did not intend to make any submissions regarding the Respondent going back on his word by failing to lodge a Minute of Contempt.

The Fiscal noted that lots of the Complainers' pleadings were admitted and some facts agreed by Joint Minute. He invited the Tribunal to make particular findings in fact. He indicated that he did not rely on

the admission in the Joint Minute that Susan Christie accepted the correspondence "at face value". The words "She advised the court she would take the Respondent's correspondence at face value" were therefore deleted from paragraph 34 of the Joint Minute.

The Fiscal submitted that Susan Christie received the inventory, considered it and changed her motion on the basis that she did not continue to maintain that no housing benefit review application had been lodged. Her evidence was that the court accepted it had been lodged. There was no reason for the Sheriff to bring the productions to her attention other than to contradict her submission. The reason for the Sheriff asking if she had seen the inventory was to show she was wrong and ask for submissions on that basis. Errors are frequently made in court and addressed at the time.

The Fiscal asked the Tribunal to prefer the evidence of Susan Christie and Josephine Bonnar and Josephine Bonnar's file notes to the evidence of the Respondent and his emails. The Fiscal said he relied on the evidence of Susan Christie and Josephine Bonnar that the Respondent made allegations of contempt of court. By raising the issue of contempt and inviting or suggesting to the court it should find contempt, the Respondent impugned the character of Susan Christie. The Fiscal asked the Tribunal to rely upon the affidavits of the Sheriffs which supported the evidence of Susan Christie and Josephine Bonnar.

The Fiscal referred to Alan Cowan, Petitioner [2014] CSIH 11. Alan Cowan said he did not give an undertaking. He had given it. This error was noted but the judge took no further action. This was a much more serious error than Susan Christie's mistake, but it was not even unsatisfactory professional conduct, never mind contempt.

In the Fiscal's submission it was important to consider the timing of the housing benefit review application. It had been expected for months but was submitted the day before the pre-proof hearing. It was not unreasonable of Susan Christie to think it was not going to be lodged.

The Fiscal submitted that the Respondent's response went beyond the attitude of mutual trust and confidence between solicitors. He harassed the Secondary Complainer. The error was corrected on 30 January 2017. Susan Christie stepped away from her position by requesting a pre-proof hearing. It was tacitly accepted that the review was lodged even though it was not stated in open court. The Respondent's correspondence was not conciliatory or investigatory. It was accusatory. The emails were antagonistic and combative.

The Fiscal submitted that the behaviour started with the emails, but he did not say they were themselves professional misconduct. The aim of the letter to the Sheriff Clerk is not to bring the matter between JR and South Lanarkshire Council to a conclusion. It is purely about the dispute between the Respondent and Susan Christie.

The Fiscal submitted that misleading requires a deliberate action. It is a positive statement. There is no evidence Susan Christie made a statement to the court knowing it to be false.

The Fiscal asked the Tribunal to reject the Respondent's evidence that the suggestion of contempt of court was to get an apology and set the record straight. A finding of contempt would not have had this result. The Respondent had already set the matter straight. He had an email acknowledgement from the Council.

The Fiscal asked the Tribunal to prefer Josephine Bonnar's evidence and find that the Respondent did ask the Court to consider Susan Christie's misrepresentations as contempt of court. The Respondent characterised the conduct as contempt.

The Fiscal referred to the Complainers' List of Authorities, particularly paragraph 13.02 of Paterson and Ritchie's "Law Practice and Conduct for Solicitors", the Anwar Remit [2008] HCJAC 36, Law Society of Scotland v McGeechan, and the findings of the Bar Standards Board against Apsion and Dunn.

He submitted that there was no factual or legal basis for the Respondent to make the allegation of contempt. It was reprehensible to do it in open court. It lacked integrity and was likely to bring the profession into disrepute. The Respondent did not act in a trustworthy way with another solicitor.

The Fiscal confirmed he was not relying on paragraph 5.2(iii) of the Complaint. He indicated he wished to address the Tribunal on the Article 10 jurisprudence after Mr Smith's submissions.**SUBMISSIONS FOR THE RESPONDENT**

Mr Smith made some opening remarks before taking the Tribunal through his written submissions. He noted Mr Stewart's concession that the Complainers were not insisting on the undertaking to proceed with the Minute of Contempt.

Mr Smith said that the allegations against the Respondent were "extraordinary". A finding against the Respondent will undoubtedly have a huge effect on solicitors and advocates and will prevent a solicitor

in good faith and with justification protecting clients' interests and his own. It will prevent practitioners asking for an explanation or making submissions without making themselves subject to disciplinary proceedings.

Mr Smith noted the case was not about Susan Christie's conduct. It was not about whether she could have been in contempt. It was not about the Respondent being dilatory in attending to his client's interests. It was not about whether the Respondent could have resolved the issue by a telephone call to the local agent.

On the facts, the Respondent was right about Susan Christie's conduct and he was entitled to ask for an explanation, which he did. What she or Mr Stewart thinks the Sheriff thought is irrelevant. What the Sheriff thought is irrelevant. What matters is what the Respondent thought was happening and the effect on his reputation. He told the court via the clerk "I did X" and the Secondary Complainer told the court "X has not been done." The Respondent was entitled to have that corrected. Any advocate must be trusted by the bench and colleagues. Reputation comes on foot and leaves by horseback. Everyone is entitled to protect their reputation. Some practitioners might not have bothered but you cannot criticise the Respondent for wanting an explanation.

Mr Smith said there was very little in dispute in fact. It will come down to a "gut reaction" for the Tribunal. He asked the Tribunal to hold that there was a threat of proceedings. Context is everything. The Respondent turned up to court and expected an explanation or apology and instead got a threat to sue. The Sheriff asked what about the issue and the Respondent said it could be anything and it could be contempt.

Mr Smith took the Tribunal through his written submissions which were as follows:

" INTRODUCTION

1.1 The Tribunal is invited to hold that the charges brought against the Respondent are unfounded; and to dismiss the complaint with expenses in favour of the Respondent together with certification for the employment of Senior Counsel. It is understood that the usual rule is that expenses are assessed on the agent and client, client paying basis.

1.2 The format of these submissions will be to focus first on what it sought in terms of the findings in fact [most of these are based upon the terms of the Joint Minute and the pleadings, and from what should be seen as uncontroversial facts from those primary facts]. Submissions in law will be made, and an argument presented that nothing said by the Respondent was without a factual basis; and his views were merely expression of opinion which he was entitled – and arguably obliged – to express. Reference will be made to his rights under the European Convention, and in particular the rights that a solicitor has to make statements to the court, or in public or to opponents.

1.3 The Tribunal is reminded of the terms of the "Sharp" test, the Respondent in this matter facing a professional misconduct charge:

> "There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors **as serious and reprehensible** may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider **the whole circumstances and the degree of culpability** which ought properly to be attached to the individual against whom the complaint is made." Sharp v Council of the Law Society 1984 S.C. 129. [Emphasis added].

1.4 It should be observed that the conduct has to be both serious *and* reprehensible. Both the entire circumstances should be taken into account, and the degree of culpability of the individual. It will be submitted in due course that the Respondent was plainly seeking to have what he considered to be an error (and indeed in this submission it will be submitted that there *was* an error committed by the SC) corrected as he considered it left a stain on his integrity. It will be submitted that he was seeking answers and a correction, and indeed an apology. The context was that the issue of "contempt" was plainly left by him to the court to decide upon the evidence and he did nothing other than he was entitled.

1.5 Before turning to the facts, the Tribunal is also reminded that to establish culpability on the part of the Respondent, it must be to the standard of beyond reasonable doubt: in other words, to decide that the Respondent acted culpably – reprehensibly in other words – the Tribunal must be satisfied to the standard of beyond reasonable doubt that he did so. Not reckless; not

negligent; not even ill advised. But "culpably". For authority for the proposition, see Paterson and Ritchie, 2nd Edition:

> .....What does "culpability" mean in this context? Although it has been established[93] that for the purposes of the European Convention on Human Rights, professional disciplinary proceedings in the United Kingdom are civil in nature,[94] in the minds of many solicitors professional misconduct is a quasi-criminal jurisdiction, perhaps because of the severity of the sanctions which can flow from conviction. Certainly, misconduct must be proved beyond reasonable doubt.[1] [See page 17 of text, page 122 of the Bundle of Authorities for the Respondent.

1.6 Against that background and introduction, we turn now to the facts.

THE FACTS

2.1 The following findings in fact are invited in addition to those contained in the Joint Minute:

(i) On 30th January 2017, what is narrated in paragraph 28 of the Joint Minute by the Secondary Complainer was factually incorrect.

This additional finding is taken, inter alia, from the evidence of Mrs Christie. She accepted an error; but as is invited, the Respondent was not told at any time (until this hearing) that she acknowledged that there was such an error.

(ii) In respect of the terms of paragraph 34 of the Joint Minute regarding the Secondary Complainer taking the Respondent's correspondence "at face value", there is a practical difficulty with that agreement. The difficulty is that although it is agreed, the witness declined to accept that it was said. As was alluded to in the evidence of the Respondent, the very fact that it was agreed – as with all joint minutes – does not mean that the party agreeing is agreeing that it was accurate: he is agreeing that he is prepared to accept that it was accurate for the purposes of the hearing. We invite the Tribunal to take the view that it is irrelevant as to whether or not it was said: what is important is that it has never been suggested that the Respondent *knew* that the matter was accepted "at face

[1] The reference provided by the authors is as follows: "See S v B Unreported February 25, 1981, Court of Session in Smith and Barton, Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal (1995), p.15."

value" (whatever that actually means). Either it was not said (and thus there is nothing to know) or it was said, but was not communicated to him (and did not know).

(iii) That at no time was the error identified in (i) above corrected by the Secondary Complainer in representations to the court.

(iv) That at no time did the secondary complainer explain to the court that she had not checked her emails between her departure on 26th January 2017 and her appearance at court on 30th January 2017.

(v) That at the hearing on 13th February 2017, Mrs Bonnar stated in the clearest of terms that the council was actively considering taking defamation proceedings against the Respondent.

[This finding is proper, having regard to the very fact that the word "defamation" was used (and recorded in the note); that the use of the words "the council is considering its position" is clearly indicative of such a threat; the contemporaneous note by the Respondent after the hearing; and the lack of explanation for the "considering its position" being entirely unsatisfactory on the part of Mrs Bonnar. It is submitted that she was a wholly unsatisfactory witness and was not being truthful about this matter.

2.2 It is submitted that each of those findings follows from the evidence before the tribunal. At no time was it suggested that clarification was provided by the Secondary Complainer to the effect that she accepted that the application had been lodged; that she would advise the court to that effect; and that if appropriate she would apologise for the error being made. If that is the position, then the Tribunal will be drawn to the conclusion that the problem which arose here was that the Respondent was justifiably under the impression that his honesty and integrity was being impugned. The matter could (and we submit should) have been nipped by a simple process of Mrs Christie saying that she accepted that there was an error; and that the position would be corrected at the next calling. Quite why she did not do this was not satisfactorily answered. The clear impression is that Mrs Christie, and indeed Mrs Bonnar, were digging themselves into a deep and entrenched position that "nothing untoward happened". The simple truth is that something untoward did happen: that she made an error which directly brought into issue the professionalism of Mr Dangerfield.

2.3 It is emphasised by the Respondent that he does not seek to portray the error by the Secondary Complainer as anything other than an initial misunderstanding by her. But, her apparent refusal

to correct it led to an immediate implication that his representation to the Sheriff – via the correspondence – that he was seeking to mislead the court.

2.4 The correct response by the Secondary Complainer, it is submitted, would have been to indicate at the outset on 30th January 2017 that "I am not aware of any application being lodged". And then, upon being educated on the correct facts, to state that she accepted immediately that it had been lodged but she had not been aware of that fact. Every experienced practitioner in the Courts has on occasions (and for good reason) been in a position where the information provided was incorrect. But correction and acceptance of a mistake is the professional way of dealing with the matter. It is also submitted that it matters not one whit what the Sheriff thought. Apart from the fact that we don't actually know what the Sheriff thought, what matters is what Mr Dangerfield thought. And he was protecting his rights and integrity; and also protecting his client's interests.

2.5 Unfortunately, both the Secondary Complainer and the Respondent entered into what might be described as a "standoff". Each was convinced as to their being correct, and matters escalated. However, it is plain that the Respondent was in fact right.

2.6 The question, though, before looking to culpability is to try to understand what the charges against the Respondent actually amount to.

THE COMPLAINT

3.1 [4.2 of the Complaint]

This complaint focuses on the obligation of a solicitor to act in a manner which is "trustworthy... honestly...so that personal integrity is beyond question. [he must not act in a way] .... Which is fraudulent or deceitful.."

3.2 It would appear that the details of the charge are contained in paragraph 3.8 of the complaint, and concerned the hearing on 13th February 2017. It alleges that the statement that the Secondary Complainer "misled" the court on the hearing on 30th January 2017; and invited the Court to consider

whether she was in contempt of court. The charge accuses the Respondent of repeating the allegations in open court, showing a lack of integrity, trustworthiness and acting in a deceitful way.

3.3 The first point to be made about this charge is that there is a complete lack of specification as to how it is alleged that the Respondent acted in a manner which implies falsity. The letter and the note in court speak for themselves, but from them it cannot be said that there is anything which can be described as dishonest. It is well established that with fraud – and it is submitted any allegation of dishonesty – there have to be clear pleadings to allow the accused in a civil context to know what he is actually accused of doing: see Lord Carloway in Marine & Offshore (Scotland) Ltd v Hill [2018] SLT 239

> "However, it has been said that, where fraud is alleged, fair notice requires relevancy of the same standard as in such an [ordinary] action.... It follows that there must be clear and specific averments of the representation founded upon and how the loss was sustained. **General allegations will not suffice** (Shedden v Patrick , Lord Fullerton at (1852) 14 D., p.727; Royal Bank of Scotland v Holmes , Lord Macfadyen at 1999 S.L.T., p.569, following RH Thomson & Co v Pattison, Elder & Co)." [Emphasis added and see page 99 of the bundle].

3.4 It is verging on impossible to understand what the complaint of dishonesty is for this charge. What actually happened, and is clear from the correspondence, is that the Respondent complained that the court had in fact been misled. That, it is submitted, is in fact a truism: the review application had in fact been lodged. What he went on to say, which was repeated in context, was that that could amount (or maybe even did amount) to a contempt of court.

3.5 There is little to be gained in this submission by alleging that this error did or did not amount to a contempt of court. Frankly, on behalf of the Respondent, it is accepted that it is difficult to see how it could be a contempt of court if there was an honest mistake. It was not contemptuous to make a mistake: but the question is not whether it *was* a contempt. It is whether there was a justified belief that there was on the known facts.

What the Respondent did was draw on a number of occasions the facts to the attention of the court, when he felt he had no other route to go down. Whether he stated that it was contempt, or whether he said it might be contempt is – as he said – the way that our adversarial system operates. Any and every Advocate must have occasion to say to a judge, or a jury, or even in correspondence: here are

the facts. Mr X lied/committed murder/raped/committed fraud.... That accusation is not stating it as a truism. It is a matter of submission and happens every single day of life in courts. Indeed, even Mr Stewart brings those charges against Mr Dangerfield and says "here are the facts, I say it is professional misconduct". No one would dream of saying he is not entitled to say that.

Misleading the court is not about making the accusation. Misleading is making something up. And it should be recalled that an advocate has an obligation to his client too, which is made clear in Ritchie and Paterson, at page 109 in the bundle. Sometimes it is unpalatable to make accusations, but it is often necessary to fulfil that duty.

3.6 There is of course a difference of recollection on the facts. The Respondent says that what was asked was what it *could* be and he responded that it could amount to contempt. But whether he is accepted on that submission or not, merely to make an accusation for which there was a subjective justification cannot be considered to be dishonest or fraudulent or deceitful or untrustworthy. It was an expression of opinion, not a statement of fact. On any view, contempt is a matter for the court. Not for a complainer. And in that context, it has to be said that the allegation (if this is what it is) that the Respondent falsely, or dishonestly or deceitfully made that submission and allegation is wholly without merit.

3.7 There is something of an irony here of course. The clear implication from the statement in court by the Secondary Complainer is that the Respondent was being dishonest with the court. And it is clear that she was entitled to make that complaint without consequence. Equally, the Respondent is accused (in these proceedings) of having acted in a fraudulent manner or dishonest or otherwise reprehensibly. It will be noted in Ritchie and Paterson, at page 122 of the bundle, that a reckless statement as to truth is professional misconduct. And it can be said, quite properly, that Mrs Christie was arguably in breach of the Rules by making a statement without knowing its truth.

3.8 Can it truly be said that no lawyer is allowed, in his professional capacity, to accuse another person or another lawyer of not acting appropriately??? And if he cannot, what would that prohibit? Would it result in a complaint to suggest that an action had been incompetently pled by an opponent? Or that a question asked of a witness was inappropriate absent proper pleadings? Or that bringing a case of fraud without proper grounds is a breach of the code of ethics?? If that is the law, then the system of justice will grind to a halt overnight.

3.9 But it is not the system we have. The Tribunal will be addressed on a number of European authorities regarding the rights of lawyers to considerable latitude in their professional capacities. This right is enshrined in the ECHR and the following basic principles can be derived from the cases.

(i) Although there are constraints upon the latitude that lawyers are allowed consistent with their right to freedom of speech, a sharp distinction is drawn between statements of **fact and statements of opinion.**

(ii) This Tribunal is bound to respect and apply those rights, and read the prohibitions enshrined in practice rules and guidance in the light of those rights.

(iii) It is only in extreme circumstances that the margin of appreciation afforded to regulators can impinge upon those rights. And thus, it is submitted in this case that unless there is identified a dishonest statement of fact, or an ill motivated and malicious statement of opinion, that a charge can be held established. The Tribunal is again reminded of the high standard by which such matters are judged.

3.10 In summary therefore, in respect of the charge referred to above the Respondent was merely stating a fact which was correct (the error by the SC); and to the extent that he was equating that with contempt, it was clearly an expression of opinion as to its possible characterisation. He was entitled to so express that in that way and accordingly the charge cannot be held established.

FALSE OR MISLEADING INFORMATION TO THE COURT

4.1 In paragraph 4.3 of the complaint, the Respondent is alleged to have breached the rules concerning "knowingly giving false or misleading information to the court.... [and failing] to maintain due respect and courtesy to the court...."

4.2 Once again, there is little by way of specification as to how this has been breached. It is assumed that this is largely a follow on from the other averments of fact: and is suggesting that the submission

to the court about the SC misleading the court was "knowingly" providing false or misleading information to the court.

4.3 As is submitted above, the information to the court by the Secondary Complainer *was* in fact incorrect. It is thus not false or misleading. Indeed, even if it were overcooking the goose slightly, which it was not, all the information was placed before the court by the Respondent. It is not suggested that he presented false or fabricated information, or that it was even misleadingly incomplete. It appears to be that the characterisation of the conduct of the Secondary Complainer is taken issue with. And the points made above are made equally in respect of this charge. The Fiscal is challenged to explain what was said by the Respondent as fact that was incorrect. Nothing was put to him that is so.

4.4 Once again, can it seriously be said that if an advocate states to the court that it appears that a party is dishonest, that the advocate is misleading the court? As long as he has a basis – and all information is before the court – it is in the very nature of our adversarial system that allegations have to be made.

4.5 Again, though, even if the above submission is wrong, where is the evidence that the Respondent "knowingly" provided false information to the Court? He was unaware of the "face value" statement of the SC until these proceedings were raised. So to the extent that that takes the "sting" out of the conduct of the SC, which is hardly at all, one wonders where the knowing misleading of the court and lack of respect arises.

4.6 Paragraph 4.5 and 4.6 must be read together. It appears to focus on "going back on one's word". Much of the charge is repetitive regarding the facts, but it once again has to be said that at no time in the correspondence did the Secondary Complainer indicate that she accepted that she had made a mistake in her submissions. In fact, somewhat strangely, she does not mention in her correspondence that she had indicated that she would take the correspondence "at face value." It might be said that that is not exactly an unqualified acceptance that the application for review was lodged and thus her assertion to the contrary was wrong. But, whatever else was being requested by the Respondent, it was a simple acceptance of error or her part. The question is thus not whether she accepted that she had not had sight of the documents prior to be in court – which everyone is agreed about – but whether she told the sheriff that the review application had not been lodged. She did –

as is agreed – and it had been. There can be no dishonesty when the facts are correct. Although it appears that the court was not troubled by the matter, the Respondent was entitled to protect his reputation and his client's interests by seeking to have the error corrected.

4.7 As far as the not misleading is concerned, or going back on one's word, it is hard to imagine what the charge actually is. Is it truly that by saying "I will take proceedings for contempt" – if that happened – then by not doing so it is matter of complaint? [It could be pointed out that if it is held that there was a threat to take defamation proceedings, that is equally such a breach]. But that is just wrong.

4.8 A statement of intent can be changed. I intend to go to Arran on holiday in the summer. But that does not mean that I will do so. Things can change. But, if I undertaken that I will be joining you for dinner tomorrow, one can expect reliance on that matter. And that is wholly different state of affairs. Thus, in a legal context, I can say that I intend to lodge my submissions on Wednesday evening. But there is no obligation. But if I undertake that I will do so, to fail to do so is a different kind of undertaking.

4.8 It is submitted that the charge to this effect is without merit and should be dismissed.

4.9 Each of the allegations in paragraph 4.5 will be referred to in detail in oral submissions; but it will be submitted that they have no merit in fact or in law.

CONCLUSIONS

In the whole circumstances, this Tribunal is moved to dismiss the complaint and to hold that it has not be established in fact or in law.

REFERENCES TO THREE ECHR CASES

The principles to be extracted are:

(i) There is a narrow margin of appreciation in respect of Article 10 [freedom of speech] rights. In other words, in rare circumstances can the state interfere with the right to speak out.

(ii) It is important to distinguish statements of fact from statements of opinion. A reckless statement of fact is subject to greater scrutiny as facts are either right or wrong. Opinions are not capable of that scrutiny [see Morice, paragraph 126]

(iii) The restriction on the right of a lawyer to speak out when he is representing his client can have a "chilling effect" (i.e. can restrict the proper ability of lawyers to represent clients) and should be avoided. [Morice, 127, 132]

(iv) Even a modest sanction is unacceptable as it may cause that chilling effect: Steur, para 29]

(v) The Tribunal has to address the facts and decide what has been established: Steur, paragraph 42]

(vi) The good or bad faith of the maker of a statement should be determined and may be determinative: Steur, 42]"

Mr Smith invited the Tribunal to look carefully at the correspondence in question. He said the Respondent was clearly asking for clarification. Nothing in his tone was unprofessional. As time progressed, he clearly became irritated, but the correspondence was still professional. He clearly believed he was being threatened with a defamation action.

Mr Smith referred to Nikula v Finland, Morice v France and Steur v Netherlands and highlighted various passages in them to draw out the matters he had highlighted in his written submissions.

He asked the Tribunal three questions:

1. Are there any facts the Respondent got wrong?
2. Did he do it dishonestly, was his conduct culpable or reprehensible?
3. Did he overstate his position? Was this in relation to opinion or fact?

ADDITIONAL SUBMISSIONS FOR THE COMPLAINERS

The Fiscal said that just because something is described as "potentially defamatory" that does not mean an action is being considered. Josephine Bonnar's evidence should be preferred because of her careful consideration beforehand and her contemporaneous note.

The European cases accept it is for Bars to restrict the rights and privileges of solicitors. The Tribunal is entitled to restrict the Respondent's freedom of expression. Allegations of bad faith, fraud, immoral conduct etc. should not be pleaded unless instructed and there is a clear case for it in the papers. There are limits and the Respondent went beyond these.

DECISION

The Tribunal had careful regard to the oral evidence of the witnesses. It found them all to be credible and reliable. It considered the correspondence and the file notes and emails produced after the court appearances. It noted the agreed facts in the Joint Minute and the admitted facts in the Answers. It had regard to the affidavits of Sheriff Brown and Sheriff Millar. The Tribunal considered whether the averments of misconduct had been proved, decided if the conduct passed the test in Sharp v Council of the Law Society of Scotland 1984 SLT 313, and considered the impact of its decision on the Respondent's rights under Article 10 of the European Convention on Human Rights.

According to the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313,
"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

The first averment of misconduct related to an email of 30 January 2017 sent at 2121 hours (Production 3 in the Complainers' First Inventory of Productions), an email of 31 January 2017 sent at 1801 hours (Production 5 in the Complainers' First Inventory of Productions), a letter of 7 February 2017 addressed to the Sheriff Clerk at Hamilton (Production 7 in the Complainers' First Inventory of Productions) and an email of 13 February 2017 at 1345 hours (Production 8 in the Complainers' First Inventory of Productions). The Fiscal invited the Tribunal to disregard the reference to an email of 7 February 2017 at 1021 hours. The Complaint alleged that these four items of correspondence contained very grave allegations against another solicitor. According to the Complaint, the allegations amounted to an *"insulting, intemperate and disparaging attack on the Secondary Complainer as they were untrue"*.

The Tribunal found the tone of the correspondence to be aggressive and rude. The Respondent's wording and attitude were unwise, provocative and unnecessary. The Tribunal criticised and did not condone his approach. He was himself partly responsible for the disproportionate escalation of the dispute and its eventual leading to disciplinary proceedings. The matter could undoubtedly have been handled better. However, the Tribunal did not consider that the content of the correspondence was sufficient to meet the test for professional misconduct or that the language used was intemperate, insulting and disparaging.

The dictionary definition of the word "false" is simply the opposite of "true". According to that definition and its use in common parlance, the term is not pejorative. The Tribunal did not consider that a submission that something is false implied knowledge that it was inaccurate. The suggestion that the Secondary Complainer's representation was less than the whole truth was correct and clarifies the Respondent's use of the word "false". The Respondent's assertions were factually correct. The Secondary Complainer made an error at court on 30 January 2017. She did misrepresent the position to the Sheriff, albeit inadvertently. This was a simple mistake. Errors occur in court all the time and the Sheriff was not misled. The Respondent's response was out of all proportion to what happened in court on 30 January 2017. However, it could not be said that what he alleged was "untrue".

The Respondent qualified his opinions by saying "in my view", "I understand" and "as far as I can gather". He noted that he saw the matter differently to the Secondary Complainer and said, "I seek the view of the court on the whole matter." His letter of 7 February 2017 was advance notice of the submissions he intended to make at court on 13 February 2017.

The Respondent sought a resolution but there was a breakdown in communication between the Respondent and the Secondary Complainer about what was required to settle the matter. The Secondary Complainer attempted to placate and reassure the Respondent. She did not appreciate that he wished her to clarify the matter in court before the Sheriff. The Respondent was overly and unnecessarily sensitive to a perceived slight. He allowed his distrust of Local Authorities to cloud his judgement in this matter. He believed the argument he was putting forward was correct. Matters reached an impasse. The Respondent did not clarify the matter himself before the court as would have been sensible. However, taking into account the averments of duty, the Tribunal did not consider that the Respondent's conduct in this correspondence represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

The second averment of misconduct related to the Respondent's conduct in court on 13 and 16 February 2017. It was alleged that he made unfounded allegations which were unjustified in fact and law against

the Secondary Complainer's character in writing, and in court on 13 and 16 February 2017 when *"he asserted the [Secondary Complainer] was in contempt of court"*.

The Tribunal considered that the allegations made by the Respondent had some basis and were therefore not completely unfounded although they were extreme and the conduct was never likely to reach the threshold for contempt of court. Most solicitors would not have progressed in this way. However, the Tribunal did not consider that the Respondent's submissions were "unjustified in fact and law". After careful consideration of the evidence, the Tribunal could not find that the Respondent "asserted" the Secondary Complainer was in contempt of court. He invited the court to consider the issue but was careful to note that it was the court's decision. It was surprising and unorthodox even to make the invitation. That is a step that no solicitor should take lightly against another solicitor. However, the Tribunal had regard to the context. The first suggestion that the court ought to consider contempt was made after the Respondent reasonably considered that he might be the subject of an action of defamation. The Respondent's email of 13 February 2017 notes his understanding that defamation proceedings might be brought against him. On reflection, the Respondent did not submit a Minute of Contempt. By the time of the hearing, the Complainers made no criticism of his failure to do so, although that was part of the original Complaint. The Tribunal did not consider that the Respondent's conduct in court on 13 and 16 February 2017 represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Tribunal considered the case of Law Society of Scotland v John Bunny McGeechan, referred to it by the Complainers. In that case, the Tribunal found a solicitor guilty of professional misconduct. He made baseless allegations of dishonesty about a fellow professional in correspondence to other professionals and in court pleadings. This case was similar to Bar Standards Board v Dunn in the Complainers list of authorities. The Tribunal was also referred to Grant Estates Plc v Royal Bank of Scotland [2012] CSOH 133. This case contained averments of fraudulent misrepresentation which ought not to have been lightly inferred or averred. It was noted in that case that allegations of dishonesty can have very serious consequences for people, particularly those engaged in regulated professions. The Bar Standards Board v Apsion concerned a letter which was improper as well as other conduct which was discreditable and likely to bring the legal profession into disrepute. The Tribunal considered the present case to be quite different to these authorities. The Respondent's correspondence was limited to the Secondary Complainer and the Court. His submissions were factual. He was careful not to make an allegation of contempt but made a submission, inviting the court to consider the issue. There was some basis justifying his complaint, although it was badly handled.

The Tribunal's decision on misconduct was supported by the European authorities referred to it by the Respondent. Fair notice of the Article 10 argument was made to the Complainers and the Tribunal. The Tribunal did not consider there was any requirement to have specific pleadings in relation to this issue.

In Nikula v Finland (Application No 31611/96) [2002] ECHR 324, the applicant alleged her freedom of expression had been infringed on account of her having been convicted of defamation for having criticised, in her capacity as defence counsel, the public prosecutor's decisions to press charges against a certain person (thereby preventing the applicant's client from examining him as a witness) and not to charge another person (who had therefore been able to testify against the applicant's client). The European Court of Human Rights held that the conviction breached Article 10. Ordering the applicant to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

Morice v France (Application No 29369/10) [2013] ECHR 673 concerned an alleged violation of Article 10 following a criminal conviction for defamation for criticising judges. Where a statement amounts to a value judgement, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement. If there is not sufficient factual basis, that value judgement may prove excessive. It is necessary to take account of the circumstances and the general tone of the remarks. The nature and severity of sanctions are also factors with regard to proportionality. Lawyers cannot make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis. The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack. In this case, the defendant was not afforded a realistic chance to prove there was a sufficient factual basis for his allegations. While the remarks could admittedly be regarded as harsh, they nevertheless constituted value judgements with a sufficient factual basis. Conviction was a disproportionate interference with the right to freedom of expression and was not therefore necessary in a democratic society.

In Steur v Netherlands (Application No 39657/98) [2003] ECHR 559, in civil proceedings, a lawyer stated in writing that the statement of his client could not have been obtained in any other way than by the application of pressure in an unacceptable manner in order to procure incriminating statements, the significance of which was not or not sufficiently understood by the client given the absence of an interpreter. The allegation had basis in fact. The criticism was strictly limited to the officer's actions in his role, as distinct from criticism of general professional or other qualities. It was confined to the court room and did not amount to a personal insult. It was noted that in such cases, the Tribunal should attempt to establish the truth or falsehood of the impugned statement and whether it was made in good faith.

There will be occasions where agents must be free to make submissions on unpalatable matters such as contempt of court against other practitioners. If an agent is incorrect in his/her assessment of the situation, he ought not to be subject to disciplinary proceedings. This might have a chilling effect on the ability of court practitioners to do their best for the clients and seek justice for them. In the present case, the Respondent was most likely wrong in law regarding contempt. However, this does not make the matter of disciplinary concern. The Tribunal accepted that there are limits to freedom of speech which must be balanced against the requirement for court practitioners to act appropriately and in a manner of mutual trust and confidence with other solicitors. There will be circumstances where the conduct is such that disciplinary action is required. However, the latitude must be protected, and the Tribunal would have been concerned that a finding of professional misconduct in the circumstances of this case might limit the freedom of court practitioners.

Having decided that the Respondent was not guilty of professional misconduct, the Tribunal was obliged to consider if he might be guilty of unsatisfactory professional conduct. Elements of the Respondent's conduct were ill-advised and provocative. However, the Tribunal did not consider that it met the test for unsatisfactory professional conduct which is defined as professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. Again, the conduct had to be seen in the context of the Respondent's belief that he thought his reputation was being impugned, and later, that he might be the subject of a defamation action. His conduct was not exemplary but it was not disreputable. There was no criticism of the Respondent's competence. When considering unsatisfactory professional conduct, the Tribunal also had regard to the ECHR case law outlined above and the need to preserve the latitude afforded to court practitioners. A finding of unsatisfactory professional conduct might similarly have limited the freedom of speech afforded to solicitors. Therefore, the Tribunal declined to remit the complaint to the Council of the Law Society of Scotland under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal found it disappointing to have to deal with a case of this nature. As Sheriff Brown noted at the time, this matter could surely have been sorted out in a common sense manner. It ought to have been resolved long before contempt of court or defamation were mentioned and certainly well in advance of a complaint to the Scottish Legal Complaints Commission. This was a "stand off" between two lawyers about a trivial incident which ought to have been swiftly sorted out between the parties themselves, without recourse to this Tribunal.

The Tribunal invited submissions on publicity and expenses. The Respondent moved for expenses and sanction for the employment of senior counsel. He wished the matter to be given publicity but was

content that the name of the Secondary Complainer be anonymised. The Fiscal was content that the name of the Secondary Complainer be anonymised. The Fiscal submitted that he had a difficulty addressing the Tribunal on expenses because he did not know the reasons for the Tribunal's decision, and particularly the part played by the European case law relied upon by the Respondent but which did not feature in his pleadings. He wished the Tribunal to note his difficulty. Nevertheless, he submitted that the expenses for preparation for and attendance at the procedural hearing on 26 February 2019 should be awarded to the Complainers. The hearing was only required due to the late lodging of the Respondent's Answers. He also submitted that the expenses for preparation for and attendance at the preliminary hearing on 12 September 2019 should be awarded to the Complainers as they were mostly successful at that preliminary hearing. The Complainers were not successful in relation to the last question answered by the Tribunal but noted that the Tribunal had prevented him from questioning on the basis of that material at the hearing. If the Tribunal was not with him, he suggested that there should be no expenses due to or by in relation to the preliminary hearing on 12 September 2019. The Fiscal moved for expenses in relation to preparation for and attendance at the procedural hearing on 16 December 2019, failing which he submitted there should be no expenses due to or by.

Parties addressed the Tribunal on the notice given to the Complainers of the Respondent's argument under Article 10 of the European Convention on Human Rights. The Fiscal noted that there was no notice given in the Answers of this defence. He said he had to guess the Respondent's position. He suggested that the Tribunal could express its dissatisfaction of the Respondent bringing a defence not foreshadowed in the Answers in its award of expenses. He therefore submitted that if the Tribunal's decision was based on the Article 10 point, the Respondent should not be allowed to recover any expenses, failing which, the Tribunal should express its dissatisfaction by restricting the award to a party and party basis.

The Fiscal asked the Tribunal to consider that the Complainers had brought the Complaint in the public interest and in support of the reputation of the profession. He referred to Baxendale-Walker v Law Society [2007] EWCA Civ 233 and the chilling effect which might be brought to bear on regulators inhibited from pursuing prosecutions if they might be found liable in expenses. The Fiscal submitted that this was not a case where there had been improper investigations or could be described as a shambles from start to finish.

Mr Smith said he had sight of the interlocutors and notes produced earlier in the case and the issues had been fairly complex. There was late disclosure of the affidavits by the Complainers. He suggested that the earlier hearings should be considered in the cause. Mr Smith reiterated the notice of the Article 10

point was not necessary in the pleadings. He said he had given the Fiscal notice of the argument in correspondence. He submitted that the Baxendale-Walker case did not represent the default position. He assumed the human rights aspect had something to do with the Tribunal's decision. He therefore suggested that the Tribunal could approach matters by making no award of expenses then awarding expenses to the Respondent from a certain point in the procedure. However, his primary position was that the whole expenses were due to the Respondent. The Fiscal indicated that he fully accepted the position regarding Mr Smith's correspondence.

Following submissions on expenses and publicity, the Tribunal decided that the appropriate award of expenses was one in favour of the Respondent, restricted by 25%. It considered the Baxendale-Walker case, but noted that it is not always followed in Scotland. The Tribunal prefers to look at the whole circumstances of the case when considering expenses. An award of expenses is at the Tribunal's discretion. The Respondent was wholly successful on the ultimate issue and there was no reason to depart from the Tribunal's usual practice that expenses should follow success. However, these expenses should be restricted to reflect the Respondent's lack of success at earlier stages in the procedure and to signal the Tribunal's view that the Respondent had to some extent, brought this prosecution on himself. There had been fair notice of the Article 10 argument and it was not necessary to include this in the Respondent's Answers. It considered that sanction for junior counsel only was appropriate.

The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and the witnesses who had given evidence in the case. The Secondary Complainer was the instigator of this Complaint and the witnesses gave evidence before the Tribunal. In terms of the open justice principle, and for transparency of its decisions to the profession, the Tribunal thought it appropriate that all witnesses and those who gave evidence by affidavit ought to be named in this decision. Publication of their names would not be likely to damage their interests. No criticism was made of their conduct. However, there was no requirement to identify any other person (for example, "JR") as publication of their personal data may damage or be likely to damage their interests.

Nicholas Whyte

Chair