

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

FINDINGS

in Complaint

by

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

Complainers

against

**DOUGLAS KILPATRICK, PRP Legal Ltd,
Kensington House, 227 Sauchiehall Street,
Glasgow**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Douglas Kilpatrick, PRP Legal Ltd, Kensington House, 227 Sauchiehall Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent at this time.
4. In terms of its Rules, the Tribunal set the matter down for a virtual procedural hearing for 22 April 2022 and notice thereof was duly served upon the Respondent.
5. On 11 April 2022, the Respondent lodged Answers to the Complaint.
6. At the virtual procedural hearing on 22 April 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Derek Murray, Solicitor, Glasgow. The Tribunal set a virtual hearing

for 4 May 2022, both parties having indicated that they were willing to waive the usual notice period provided for in the Tribunal's Rules.

7. At the virtual hearing on 4 May 2022 the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Derek Murray, Solicitor, Glasgow. Mr Murray having no objection, the Tribunal amended the Complaint in terms of the Minute of Amendment which had been lodged by the Complainers prior to the hearing. Mr Murray indicated that the factual averments in the Complaint as amended were admitted. The Answers were withdrawn. Parties made submissions.

8. Having given careful consideration to the submissions and documents before it, the Tribunal found the following facts established:-

8.1 The Respondent is Douglas Kilpatrick of PRP Legal Ltd, Kensington House, 227 Sauchiehall Street, Glasgow. His date of birth is 21 January 1956. He was admitted as a solicitor on the 2 September 1980. He was partner in Thom, Matthew & Co between 1 May 1983 and the 12 August 1998 when he was sequestered and his practising certificate was suspended. He was then employed by Semple Fraser WS between 27 September 1999 and 31 March 2000 at which point his practising certificate was suspended again (due to his ongoing sequestration). He was an employee at Peterkins between the 31 July 2000 and 30 April 2002. He was then employed by The Anderson Partnership (and on incorporation Anderson Solicitors LLP) between the 3 November 2003 and the 2 November 2009. He has been and remains a consultant with the PRP Legal Limited since 13 January 2010.

8.2 In early 2018 the Respondent accepted instructions in a domestic conveyancing transaction on behalf of Mrs R. Mrs R wished to purchase the property at the price of £495,000. The purchase price was to be funded by a loan from the Clydesdale Bank of £435,000. The balance was to be paid by Mrs R. The Respondent was advised the balance of £60,000 was to be funded by the payment of a dividend to Mrs R.

- 8.3 Missives were concluded on the 20 March 2018. The date of entry was the 13 April 2018. Peterkins sent a formal letter on behalf of the seller rescinding the missives on the 4 May 2018.
- 8.4 The Respondent received instructions from the Clydesdale Bank to act on their behalf to constitute a valid security in respect of their loan on the 11 May 2018. The instruction was issued on the basis of the CML Handbook.
- 8.5 The Respondent signed the certificate of title on the 25 May 2018 which contained the undertaking
- “If settlement does not take place within FIVE working days of us receiving the Home Loan Advance, unless you have agreed otherwise in writing, we will return it in full within FIVE working days by CHAPS transfer and will advise you that the CHAPS transfer is to be made.”*
- 8.6 The Respondent’s firm received the loan funds (less CHAPS cost) of £434,960 on the 25 May 2018.
- 8.7 There was no agreement in writing permitting the Respondent to retain the sums beyond the fifth day.
- 8.8 The Respondent pressed his client Mrs R for payment of the balance of the purchase price on several occasions. He was initially told it was to be forthcoming shortly. Then his client and/or her husband ceased taking his calls.
- 8.9 The Respondent retained the loan funds. The Respondent received a letter from the Clydesdale Bank dated 20 August 2018 noting that they had not received satisfactory confirmation that the charge over the property had been registered. The Respondent did not reply, nor did he return the funds. They wrote in similar terms again on 19 September 2018.
- 8.10 On 25 September 2018 David Morris a director in the firm emailed the Respondent noting the second letter had been received from the Clydesdale bank while he was on annual leave. The Bank had asked why the Security had not been registered and

the reason for that was that the transaction had not settled. The Respondent replied the following day noting that the balance from the Mrs R was coming but it had never appeared. The solicitor noted that the balance being in the account for so long was “an oversight on my part”.

8.11 The funds were returned to Clydesdale Bank on Friday 21 September 2018, four months after the funds had been received by the Respondent.

8.12 In the period the funds were held by the firm, the firm’s cashier spoke to the Respondent to highlight the credit balance on several occasions. The Respondent would have received printouts showing all outstanding credit balances of over two months. He would have received such a printout before the Clydesdale Bank’s first letter. The provision of the printout was an aide memoire. It should have prompted him to consider the retention of other sums, including the £434,960 of Clydesdale Bank Money.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect that he:-

- (a) Failed to return the loan on the expiry of the period of five days (without written agreement) as per the undertaking in the certificate of title, thus failing to act with the utmost propriety to protect the lender’s interests, such action being likely to bring the profession into disrepute;
- (b) Failed to communicate with the lender when Mrs R had not provided the deposit, putting her interests ahead of the lender’s interests in that he retained the sums on her order and placed himself in a conflict of interest;
- (c) Failed to return the lender’s money in terms of their instruction and in so doing did not act in the lender client’s best interests in breach of Rule B1.4.1;
- (d) Failed to return the loan funds for four months in contradiction to his instructions to return the funds in five days (without written agreement), in breach of Rule B1.5.1 in that the Respondent did not follow instructions;
- (e) Failed to return the funds on the sixth day after receipt, causing or permitting funds to be retained by the practice unit when there was no reason to retain them in breach of Rules B6.2.3(b) and B6.11.1.

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

By Video Conference, 4 May 2022. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Douglas Kilpatrick, PRP Legal Ltd, Kensington House, 227 Sauchiehall Street, Glasgow; Find the Respondent guilty of professional misconduct *in cumulo* in respect that he failed to return loan funds to a lender within the timescale specified in the undertaking in the certificate of title, failed to communicate with the lender, and breached Rules B1.4.1, B1.5.1, B6.2.3(b) and B6.11.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Fine him in the sum of £4,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Catherine Hart

Vice Chair

11. 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

19 MAY 2022.

IN THE NAME OF THE TRIBUNAL



Catherine Hart

Vice Chair

NOTE

At the virtual hearing on 4 May 2022, the Tribunal had before it: the Complaint as amended, a Joint Minute which agreed the Complainers' productions, an Inventory of Productions for the Complainers and a List of Authorities for the Complainers. The Respondent admitted the factual averments in the Complaint as amended. Parties made submissions on misconduct.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal outlined the factual situation as outlined in the Complaint as amended. With reference to paragraph 7.04 of Smith and Barton's "*Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal*" and paragraph 7.16.01 of Paterson and Ritchie's "*Law, Practice and Conduct for Solicitors*", the Fiscal noted that it is essential that there is absolute trust between solicitor and client. The solicitor has a duty to advise the client if a transaction is taking an unusual turn, detrimental to the interests of the client. Professional misconduct has been established in the past when the solicitor failed to inform a Building Society for whom the solicitor was acting, of a material change in circumstances in a loan transaction, as for instance where, after encashing the loan cheque, a problem occurs which prevents the immediate recording of the standard security in favour of the Building Society. The Fiscal referred to the historical pragmatic reasons which allow a solicitor to act for both the borrower and the lender in house purchase transactions. However, this means that the solicitor must act with absolute propriety and protect the interests of the lender with the same degree of care and responsibility as is given to the purchase transaction. The solicitor must remember that the lender is also a client, to whom the normal duties are owed.

The Fiscal submitted that in failing to return the loan funds, the Respondent had not acted properly regarding the lender's interest. He had failed to communicate with the lender. He had put the purchaser's interests over that of the lender. He had not acted in the best interests of the lender client. He did not act in accordance with his instructions. He caused or permitted the funds to be retained by the firm without reason. In the Fiscal's submission, this conduct was a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore met the Sharp test.

In answer to a question from the Tribunal, the Fiscal indicated that a substantial amount was paid to the lender as a penalty and interest. Mr Murray clarified that the firm paid that sum.

SUBMISSIONS FOR THE RESPONDENT

Mr Murray confirmed that the “charges” in the Complaint were admitted by the Respondent. He wanted to “colour in” the background as opposed to making a defence of the Respondent’s conduct. The Respondent accepted he was guilty of professional misconduct but there were also factors which were outwith the control of the Respondent.

According to Mr Murray, the transaction was “fraught”. The delays were down to the client failing to produce the deposit. The Respondent repeatedly chased the client to establish when the funds were going to arrive, and latterly, whether the transaction was going to complete. The Respondent did retain funds for more than five days. The Respondent missed the timeline due to a combination of him chasing the client and latterly, due to illness. The Respondent was absent from the practice unit for a significant period.

The Respondent accepted that his behaviour fell short of what was expected of practising solicitors in Scotland and was aware of the implications of that. However, he also wanted to highlight some additional factors. The client did not help the situation. This was compounded by the Respondent’s illness and absence from the office. The Respondent expected the cashier and the cashroom manager to pick up this matter. Printouts of the outstanding balances were produced but the Respondent was at home and had no access to his work computer system. He accepted there were one or two conversations between him and the cashier. He expected steps would be taken to return the funds but this did not happen until much later. In his submission, there were systemic failures in the cashroom. The cashroom manager could have returned the money at any time. There was no need to get instructions or authority from the Respondent. The cashier and cashroom manager were very experienced. It is peculiar that they did not deal with matters in the Respondent’s absence. The funds were never at risk. They were in plain sight on the monthly reports.

In answer to questions from the Tribunal, Mr Murray confirmed that the Respondent has been practising since 1981 and is experienced in dealing with the requests of lenders. The Tribunal asked Mr Murray to clarify when the Respondent was actually absent from the office. Mr Murray said the ill-health started in mid-June. He was absent “on and off” and then there was a longer period of absence from 30 July to mid-September. The Respondent had returned to work before the funds were returned to the lender. He had anticipated that his colleague in the commercial department would take over his work. He visited the office occasionally and remembers a number of conversations with the cashroom. For reasons unknown, the funds were not returned.

DECISION ON PROFESSIONAL MISCONDUCT

The Tribunal was satisfied beyond reasonable doubt on the basis of the admitted facts that the Respondent had acted in the manner set out in its findings in fact. The Respondent was instructed by a purchaser and lender in a conveyancing transaction. He signed a certificate of title which contained an undertaking to return the loan funds to the lender within five working days of receipt if settlement did not take place. The Respondent's firm received £434,960 on 25 May 2018 from the lender. This money was not returned to the lender until 21 September 2018. In the interim, the Respondent received monthly cashroom printouts which contained this balance and two reminder letters from the lender. He also had several conversations with the cashier about it.

Solicitors must protect the interests of the lender with the same degree of care and responsibility as they give to the purchaser. They must not prefer the interests of one client over another. They must act in the best interests of their clients (Rule B1.4.1). They must have the authority of their clients for their actions (Rule B1.5.1). They must return money promptly as soon as there is no longer any reason to retain it (Rule B1.6.11.1). They must not cause or knowingly permit their firms to fail to comply with the rules (Rule B6.2.3). The Respondent did not comply with these obligations. When the transaction did not settle, the funds should have been returned. If a further settlement was anticipated, the funds could have been ordered again.

The Tribunal considered the admitted conduct and established breaches of rules in the context of the test for professional misconduct contained in Sharp-v-Council of the Law Society of Scotland 1984 SLT 313. According to that case,

“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 Tribunal was satisfied that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and was therefore professional

misconduct. The Respondent had undertaken to return loan funds and failed to do so. This kind of conduct is likely to bring the profession into disrepute. Solicitors are trusted with lenders' money and must act with the utmost propriety towards them. Lenders must be able to trust the profession. The Tribunal noted the long period for which the funds were retained and the repeated opportunities the Respondent had to rectify the situation. It was an unusual situation and the Respondent ought to have acted promptly. It was said that the Respondent was absent from work for periods but no independent vouching of this was provided to the Tribunal. The Respondent was also said to be in and out of the office. He was not absent for the full period it took for the funds to be returned. The Respondent was responsible for the file. He was aware of the undertaking he had given. He has over 40 years of conveyancing experience and is aware of the lenders' requirements. As well as the reminders which came by way of printouts and letters from the lenders, the cashier had drawn this matter to his attention on more than one occasion. He did not ask her or anyone else to arrange for the funds to be returned.

SUBMISSIONS IN MITIGATION

Mr Murray said that the mitigating factors in this case were the significant absence from the office and the Respondent's expectation that his colleagues would attend to the matter. The firm was going through a significant dispute in 2018. Matters reached the Court of Session. There was a takeover attempt. This could explain why no steps were taken to deal with the matter.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal noted that the Respondent had been absent from work for periods. However, without more evidence about this, it was difficult to attach much weight to it when he had ample chances to return the funds before his periods of absence, he was in and out of the office during his leave, and had several conversations with the cashier during which he had the opportunity to instruct her to return the funds. The Tribunal was also of the view that the firm's difficulties at this time were irrelevant to the Respondent's responsibilities in this matter. Overall, the Respondent's conduct was at the lower end of the scale of misconduct.

Mitigating factors included the fact that this was a one-off incident and did not form part of a course of conduct. There were no previous findings of misconduct against the Respondent. He had cooperated with the Fiscal and the Tribunal and the case had been concluded swiftly.


Aggravating factors included the length of time it took for the funds to be returned. The Respondent is a very experienced conveyancer. He ought never to have found himself in this situation. The lack of remorse and insight displayed by the Respondent was significant. There was a distinct lack of personal responsibility in the submissions made on his behalf. He blamed the cashier, the cashroom partner and the firm, rather than himself. There was no acknowledgement that he let the lenders and his firm down. His conduct was likely to damage the reputation of the profession.

Taking all these factors into account, the appropriate sanction was censure and a fine of £4,000.

The Fiscal moved for expenses and made no comment on publicity. Mr Murray accepted that expenses would be awarded against his client. He was aware that the Tribunal published its decisions on its website and did not oppose that.

The Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal. It directed that publicity would be given to the decision, and that publicity would include the name of the Respondent but need not identify anyone else.




Catherine Hart
Vice Chair