

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

**FINDINGS**

**in Complaints**

**by**

**THE COUNCIL OF THE LAW SOCIETY of  
SCOTLAND, formerly at 26 Drumsheugh  
Gardens, Edinburgh and now at Atria One, 144  
Morrison Street, Edinburgh**

**Complainers**

**against**

**DAVID STUART McDONALD, Solicitor, Suite  
G1, 5 Golden Square, Aberdeen**

**Respondent**

1. On 11 May 2016 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 David Stuart McDonald, Solicitor, Suite G1, 5 Golden Square, Aberdeen (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer. The Secondary Complainer did not seek an order for compensation from the Tribunal.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 23 August 2016 as a procedural hearing and notice thereof was duly served on the Respondent.
5. At the procedural hearing on 23 August 2016, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was present and represented by Robin Macpherson, Solicitor Advocate, Edinburgh. The Tribunal fixed a hearing for 7 December 2016 at 10:30am.

6. At the hearing on 7 December 2016, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was present and represented by Robin Macpherson, Solicitor Advocate, Edinburgh. A Minute of Agreement which had been previously lodged was before the Tribunal. Mr Macpherson moved for the Respondent's inventory of productions to be received late. Of consent this motion was granted by the Tribunal. Submissions were made on behalf of both parties.
  
7. The Tribunal found the following facts established:-
  - 7.1 The Secondary Complainer was a director of Independent Financial Services (Scotland) Limited. On or around 12 October 2009 liquidators Begbie Traynor were appointed to Independent Financial Services (Scotland) Limited.
  - 7.2 In early 2010 and prior to April 2010 the Secondary Complainer instructed the Respondent to act on his behalf following the liquidation. In particular he instructed the Respondent to dispute the contention that he was due to repay a Director's loan. He claimed that he had repaid the loan. He claims that he provided the Respondent with all relevant copy financial paperwork to support his position and was advised the matter would be cleared up.
  - 7.3 Having heard nothing from the Respondent, the Secondary Complainer received a further letter from Begbie Traynor and on 29 October 2010 he e-mailed the Respondent. Thereafter he had a meeting with the Respondent who requested that the Secondary Complainer provide financial information. This information had already been provided by the Secondary Complainer, he claims, when he originally instructed the Respondent. The Secondary Complainer claims that the copy information was again provided. The Respondent assured the Secondary Complainer that he would deal with the matter and it would be cleared up.
  - 7.4 On 11 December 2010 the Secondary Complainer received a further letter from Begbie Traynor claiming that they had received no response from him on their demand for repayment of the Director's loan. The Secondary Complainer then wrote to the Respondent on 13 December and e-mailed him on 14 December 2010.

- 7.5 The Secondary Complainer was thereafter contacted by the Respondent who again requested the financial paperwork, already provided on 2 previous occasions, to allow him to deal with the matter. In early January 2011 the Secondary Complainer's fellow former Director Michael Murray delivered the original and only remaining set of documentation (including Bank Statements) to the Respondent's office.
- 7.6 There was no further contact from the Respondent until on or around March 2011 when an action was raised by the liquidators (hereinafter referred to as 'the Pursuers') at Arbroath Sheriff Court against the Secondary Complainer. The court action sought recovery of a sum allegedly owed by the Secondary Complainer to Independent Financial Services (Scotland) Limited in the form of a director's loan in the sum of £20,837.00.
- 7.7 By letter dated the 29 March 2011 the Sheriff Clerk at Arbroath Sheriff Court wrote to the Respondent intimating the last date for defences was 13 April 2011 and an Options Hearing had been assigned for 13 June 2011 at 10am. Parties had until 30 May 2011 to make adjustments to their pleadings and the Record was to be lodged by 10 June 2011.
- 7.8 The Respondent wrote to the Secondary Complainer by letter dated 4 April 2011 enclosing copy notice from the court and stating *inter alia* "I shall draft defences next week". The Respondent asked the Secondary Complainer to remit the sum of £80.00 to him to cover the cost of lodging a notice of intention to defend the court action.
- The Secondary Complainer emailed the Respondent on 5 April 2011 confirming a cheque for £80 had been sent to the Respondent.
- 7.9 The Respondent failed to lodge Defences timeously. On 20 April 2011 the Solicitor acting for the Pursuers called the Respondent to discuss the fact Defences had not been lodged. A motion seeking Decree had been lodged by the Pursuers which was opposed by the Respondent.

- 7.10 By email dated 27 April 2011 the Solicitor for the Pursuers wrote to the Respondent stating *inter alia*:

“I have received intimation from the Sheriff Clerk at Arbroath that subsequent to the lodging of your Opposition to Motion they have assigned 9<sup>th</sup> May at 10am as a Hearing on the Opposed Motion. In that regard while I note you have tendered Defences both to myself and the Court there has been no Intimation of a Motion for these to be received late [...] Obviously if you undertake that step at this stage the Motion will be granted as unopposed prior to the Hearing of 9<sup>th</sup> May.

Contingent upon you taking that step I would be content to let the Motion for Decree drop as now being superseded.”

The Respondent did not advise the Secondary Complainer Defences had not been lodged timeously or that a motion for decree had been lodged by the Pursuers. He did not advise the Secondary Complainer that he had agreed the Secondary Complainer would be liable for the expenses of the motions.

- 7.11 The Respondent wrote to the Sheriff Clerk on 28 April 2011 enclosing an endorsed motion to receive Defences late stating “The pursuers’ motion can now be dropped.”

On 4 May 2011 the Solicitor for the Pursuers emailed the Respondent with a copy of an Interlocutor from Arbroath Sheriff Court. In said email the Solicitor for the Pursuers expressed concern that the Sheriff allowed the Pursuers’ motion to be dropped stating “The dropping of the Motion and discharge of the Hearing may not have been appropriate if agreement with regard to expenses had not been reached.”

- 7.12 By email dated 17 May 2011 the Respondent emailed the Secondary Complainer asking for further information on the transfer of bank debts. The Secondary Complainer responded the same day stating *inter alia*:

“If you remember the bank statements showing the transfer of overdraft and bank loan were put through your door by Mike in January...As we are no longer

directors of IFS Scotland we cannot officially obtain further copies of the statements etc although in all likelihood the bank would probably supply them if asked and paid. Personally I don't see why we should have to pay to get copies of info. Beyond that I am not really sure of what else you are still waiting for.”

7.13 In September 2011 the Secondary Complainer made various attempts to contact the Respondent by email and by leaving messages on the Respondent's answer machine in an attempt to discover the current position. He did not receive any response.

7.14 A diet of Debate was fixed to proceed on 25 November 2011. By email dated 21 November 2011 the Respondent wrote to the Solicitor for the Pursuers asking for a copy of the Record as he required to do a Minute of Amendment.

On 22<sup>nd</sup> November 2011 the Solicitor for the Pursuers spoke with the Respondent by telephone. During this call the Respondent advised his intention was to produce a Minute of Amendment and intended to seek a discharge of the diet of Debate on 25 November 2011. The Respondent agreed that the Defender would be liable to the Pursuers for the expenses of the preparation for and discharge of the Debate.

7.15 The Solicitor for the Pursuers sent the Respondent an Account of Expenses in respect of the discharged Diet and in the absence of any payment “chased” the Respondent for payment.

By email dated 29 February 2012 the Solicitor for the Pursuers noted that the Respondent's Minute of Amendment had never been lodged in Process although it had been intimated to him and further noted that the expenses remained outstanding in respect of the discharged Diet of Debate. The email provided the Respondent with an Amended Account of Expenses as lodged with the Auditor.

The Solicitor for the Pursuers met the Respondent at Court on 21 March. The expenses remained outstanding and the Respondent indicated a willingness to make immediate payment.

7.16 The Respondent agreed that the Defender was liable for the expenses of the Amendment Procedure. The Solicitor for the Pursuers submitted an Account to the Respondent and despite the Solicitor emailing the Respondent re payment, the Respondent had not made payment by 25 June 2012.

7.17 On 5 September 2012 the Respondent emailed the Solicitor for the Pursuers attaching a letter he had sent to Arbroath Sheriff Court intimating that he was withdrawing from acting for the Defender.

On or about 12 September 2012 the Respondent phoned the Secondary Complainer to confirm his new address. The Respondent then suggested that they should meet and that he would phone the following week with a date and time.

On 14 September 2012 the Secondary Complainer received a recorded delivery letter from the Solicitor for the Pursuers intimating that the Secondary Complainer's Solicitor had withdrawn and that a Peremptory Diet had been fixed for 8 October 2012 at Arbroath Sheriff Court. The Secondary Complainer did not receive any intimation from the Respondent himself that the Respondent was withdrawing from acting for him.

The Secondary Complainer attended personally and the Court assigned a Debate for 14 December 2012.

On 7 December 2012 the Court discharged the Diet of Debate, allowed the Defences to be withdrawn and granted Decree in favour of the Pursuers in the sum of £20,837 with interest and expenses.

7.18 Following his attendance at the Peremptory Diet on 8 October 2012 the Secondary Complainer arranged to meet the Solicitor for the Pursuers. Only at that meeting did the Secondary Complainer discover the procedural history of the Court Action, that there had been awards of expenses made against him and that no evidence had been passed by the Respondent to the Solicitor for the Pursuer in respect of the Loan Account having been repaid.

7.19 By letter dated 19 November 2012 the Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC). The complaint was considered a hybrid complaint of service and conduct. The Complainers agreed that the SLCC should investigate the service complaint first.

7.20 The SLCC intimated the Complaint to the Respondent in a letter dated 19 December 2012.

From intimation of the Complaint until December 2013 the SLCC were unable to obtain any meaningful response from the Respondent despite numerous letters to him.

As a consequence, on 5 December 2013 the SLCC wrote to the Respondent by First Class Recorded Delivery and fax and issued a Statutory Notice under the Legal Profession and Legal Aid (Scotland) Act 2007 Section 17(1) *inter alia* requiring the Respondent to provide his business files and requiring him to provide an explanation of his position.

7.21 On 3 February 2014 the SLCC wrote to the Respondent referring to his failure to respond or to provide any files in respect of the Statutory notice issued on 5 December 2013.

The SLCC advised that it was considering the addition of a new issue of complaint in respect of the Respondent's failure to respond to the SLCC.

7.22 On 18 June 2014 the SLCC wrote to the Respondent referring to his failure to provide information and documentation and to the Complainers' contact with the Respondent. The letter referred to the Respondent's confirmation in a telephone call with the SLCC on 6 May 2014 to the effect that he would provide a response and files by 16 May 2014. Despite a letter from the SLCC to the Respondent on 19 May 2014, nothing had been received.

On that basis the letter advised the Respondent that if the relevant response and documentation was not provided by 21 July 2014 the matter would be passed to

the SLCC's in-house Lawyer to consider taking steps to exercise the SLCC's powers under the 2007 Act Section 17 for recovery of the files.

By letter dated 7 July 2014 the SLCC wrote to the Respondent intimating a further issue in respect of his failure to provide a response to the SLCC.

7.23 On 25 February 2015 the SLCC referred the issues to the Complainers as a "conduct" matter. The summary of the complaint was:

"I wish to complain about the action/inaction of Mr. David Stuart McDonald of David S. McDonald and Co., whom I instructed in early 2010 to represent me following the liquidation of my company in 2009, in relation to a dispute with the liquidator concerning a disputed director's loan of £20,700, as evidenced by:

1. Despite meeting with Mr McDonald in early 2010 and on numerous occasions since then, and providing him with evidence at said meetings that there was no outstanding directors loan, Mr McDonald:
  - (a) failed to act in, or represent, my best interests in that he did not diligently pursue the matter with the liquidator, act or make use of the evidence I gave him, or keep me informed with developments;
  - (b) failed to communicate with me effectively, in that he failed to keep me informed of correspondence received from the liquidators, developments in the matter including failure to advise me of Court Proceedings raised against me, the details of the Court dates and judgements made against me;
  - (c) deferred Court dates and accepted responsibility for expenses on my behalf, despite it being Mr McDonald's fault as he failed to provide sufficient notice to Court for not appearing;
  - (d) Unduly delayed in responding to my telephone messages and e-mails around September 2011 regarding the progress of the matter.



2. Mr McDonald withdrew from acting on my behalf, on or around September 2012, without giving any reason and failed to inform me that he had withdrawn from acting.
3. I wish to complain about the action/inaction of Mr. David Stuart McDonald in respect of the complaint I made to the Scottish Legal Complaints Commission in that:

Mr. McDonald has failed to/delayed providing a response to the complaint, including any explanation for the failure/delay in doing so, and has failed to delay responding to letters requesting his formal response and files, including Notice issued on 5 December 2013 under section 17 of the Legal Profession and Legal Aid (Scotland) Act 2007.”

- 7.24 The Complainers intimated the complaint to the Respondent on 27 February 2015. Thereafter, they emailed the Respondent on 2 March 2015 with a copy of the formal intimation of the complaint.

Given the lack of any response, on 25 March 2015 the Complainers issued to the Respondent by Recorded Delivery and email, Notices under the Solicitors (Scotland) Act 1980 Section 15(1) and the Legal Profession and Legal Aid (Scotland) Act 2007 Section 48.

The Respondent emailed the Complainers on 25 March 2015 having received the email with the Section 15(1) Notice and advising that he would “call later”. The Complainers emailed the Respondent by return.

There was no contact from the Respondent and the Complainers, on 15 April 2015 by recorded delivery, issued a 1980 Act Section 15(2) Notice to the Respondent. On 16 April 2015 the Respondent undertook to respond to the Complainers and “probably” no later than 24 April 2015.

- 7.25 There was no response from the Respondent. Accordingly, by letter dated 5 June 2015 the Complainers intimated a further conduct complaint to the Respondent in

respect of his failure and/or material delay in responding to the Complainers' correspondence.

Thereafter, the Complainers wrote to the Respondent on 8 June 2015, 3 July 2015, 5 August 2015, 12 August 2015, 17 August 2015, 20 August 2015 and 25 August 2015, all without response.

8. Having given consideration to the accepted facts and the parties submissions in relation to the question of professional misconduct, the Tribunal found the Respondent guilty of Professional Misconduct individually and *in cumulo* in respect of:
- (a) His failure to communicate with the Secondary Complainer, his failure to respond and provide documentation to the SLCC and his failure to respond to the Complainers.
  - (b) His failure to act in and/or represent the best interests of his client, the Secondary Complainer in that he did not diligently pursue his client's interests with the Liquidators or their Solicitors.
  - (c) His failure to advise the Secondary Complainer of any relevant Court dates and his acceptance of liability on behalf of the Secondary Complainer for Court expenses in respect of sections of the Court procedure without the consent of the Secondary Complainer.
  - (d) His withdrawing from acting on the Secondary Complainer's behalf without advising his client that he was withdrawing and accordingly without providing any reason for the withdrawal.
9. The Tribunal heard further submissions from both parties in relation to disposal. Having given careful consideration to these submissions, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 7 December 2016. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against David Stuart McDonald, Solicitor, Suite G1, 5 Golden Square, Aberdeen; Find the Respondent guilty of

professional misconduct singly and *in cumulo* in respect of his failure to communicate with the Secondary Complainer, failure to respond and provide documentation to the SLCC and failure to respond to the Complainers; his failure to act in and/or represent the best interests of his client, the Secondary Complainer in that he did not diligently pursue his client's interests with the Liquidators or their Solicitors; his failure to advise the Secondary Complainer of any relevant Court dates and his acceptance of liability on behalf of the Secondary Complainer for Court expenses in respect of sections of the Court Procedure; and his withdrawing from acting on the Secondary Complainer's behalf without advising his client that he was withdrawing and accordingly without providing any reason for the withdrawal; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that any practising certificate held or issued to the Respondent, shall be subject to such condition as will limit him to acting as a qualified assistant or as a consultant whether on an employed or self employed basis to or with such solicitor, firm or employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland and that for an aggregate period of three years; 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 should not include the name of the Secondary Complainer.

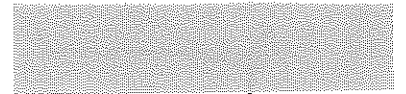
**(signed)**

**Nicholas Whyte**

**Chairman**

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on  
26 JANUARY 2017.

**IN THE NAME OF THE TRIBUNAL**



**Nicholas Whyte**  
**Chairman**

**NOTE**

At the hearing on 7 December 2016 the Tribunal had before it an amended Complaint and signed Minute of Agreement. In the circumstances evidence did not require to be led and the Tribunal proceeded to hear submissions.

**SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal indicated that the Respondent had been fully cooperative during the investigation and had signified at an early stage his intention to plead guilty to the averments of misconduct made against him. The Fiscal gave a narrative of the circumstances with reference to the averments of fact, duty and misconduct contained within the Complaint as amended by the Minute of Agreement.

In the Fiscal's submission, the conduct described by him and admitted by the Respondent was sufficient to meet the Sharp test. He indicated that the Tribunal had held on many occasions that a failure to communicate of itself can amount to professional misconduct. In this case, the Respondent had failed to communicate effectively with the Secondary Complainer, the Law Society of Scotland and the Scottish Legal Complaints Commission. The Fiscal submitted that the Respondent had also failed to act in the best interests of his client by failing to inform him of court dates, accepting liability for expenses on his behalf and withdrawing from acting without advising the Secondary Complainer. He suggested that individually and *in cumulo* these breaches amounted to professional misconduct.

**SUBMISSIONS FOR THE RESPONDENT**

Mr Macpherson emphasised the Respondent's bitter regret and his apologies to all concerned. Mr Macpherson highlighted the Respondent's cooperation with the investigation and prosecution, his early plea and the fact that he had already paid the Secondary Complainer £2,000 by way of compensation.

Mr Macpherson referred to his written plea in mitigation, copies of which had been provided to the Tribunal. He explained the circumstances under which the Respondent who was an experienced practitioner with a good record came to conduct himself in the manner admitted, in particular with reference to the Respondent's ill health and family bereavements. With regard to the Tribunal's indicative sanctions guidance, Mr Macpherson submitted that the failures were not at the most serious end of the scale of professional misconduct. There was no dishonesty or financial irregularity. The

conduct arose from a one-off isolated matter. The circumstances arose as a result of the Respondent's failing health and other personal circumstances. He had taken steps to deal with these. His conduct was not deliberate or premeditated.

Mr Macpherson drew the Tribunal's attention to the reference provided by the principal of the firm where the Respondent is currently working. This reference demonstrated the conditions under which the Respondent currently works and would continue to work if he retained his practising certificate. In Mr Macpherson's submission, the public could be protected and recurrence of professional misconduct prevented by this working arrangement.

Mr Macpherson submitted that the Respondent wished to make it clear that he no longer sought the responsibility of partnership and did not seek to be a sole practitioner again. Mr Macpherson indicated that there was no risk that these issues would arise again. The Respondent is closely supervised in his current working arrangement. However, Mr Macpherson submitted that he could not be a consultant if he had a restricted practising certificate and so urged the Tribunal not to follow this course of action.

## **DECISION**

The Tribunal had regard to the test for professional misconduct contained within Sharp v Council of the Law Society of Scotland 1984 SLT 313, namely that:

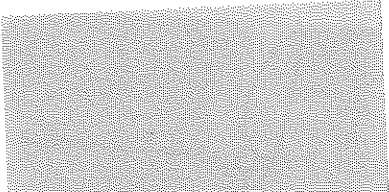
*"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct 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."*

The Tribunal was satisfied that the Respondent's behaviour was serious and reprehensible and met the test for professional misconduct. The Respondent had failed to act in the best interests of his client by failing to diligently pursue his client's interests with the liquidators or their solicitors, failing to inform him of court dates, accepting liability for expenses on his behalf, and withdrawing from acting without advising him. He had failed to communicate effectively with the Secondary Complainer, the Law Society of Scotland and the Scottish Legal Complaints Commission. The course of conduct had

covered a period between 2010 and 2014. The Respondent had failed his client and had also failed the profession. Failure to cooperate with the SLCC and the Law Society hampers these bodies in the performance of their statutory duties and brings the profession into disrepute.

Having regard to the various mitigatory circumstances put forward by Mr Macpherson, the Tribunal were of the view that the appropriate disposal in this case would be to Censure the Respondent and place a condition upon his practising certificate. The Tribunal did not consider that a fine was appropriate and any sanction stronger than a condition restricting his practising certificate would not be proportionate to the seriousness of the professional misconduct. The Tribunal were of the view that the Respondent's current working arrangement was a positive development and should be allowed to continue. However, if his practising certificate was not subject to any restriction, the Respondent would be free to operate as a partner or sole practitioner again. The Tribunal did not consider that this would provide adequate protection to the public or to the Respondent in the event of a recurrence of ill health. The Tribunal therefore was of the view that the Respondent should be allowed to work as a consultant but that any practising certificate held or issued to him should be subject to such condition as would limit him to working with a solicitor, firm or employer approved by the Law Society of Scotland whether that was on an employed or self-employed basis. The Tribunal considered it appropriate that the restriction be in place for an aggregate period of three years. Said period does not include any time when the Respondent is not working as a solicitor in terms of his practising certificate. The Tribunal was of the view that this would provide the necessary reassurance that the Respondent was not working on his own during this period while he recovered. The restriction would protect the Respondent and in so doing, would protect the public.

Following submissions regarding publicity and expenses, the Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal. Publicity will be given to the decision. However, the Tribunal thought it was not appropriate to identify the Secondary Complainer whose interests might be damaged if he was identified in these findings given the personal and financial information disclosed during the hearing and contained in these Findings.



**Nicholas Whyte**  
**Chairman**