

**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

**THERESA MARY McWILLIAMS, Trainor
Alston Limited, 18 Academy Street, Coatbridge,
North Lanarkshire**

Respondent

1. A Complaint dated 29 July 2020 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 Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a 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.
4. In terms of its Rules, the Tribunal set a procedural hearing to take place by video conference on 24 September 2020 and notice thereof was duly served upon the Respondent.
5. At the virtual procedural hearing on 24 September 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was absent but was represented by Nicola Irvine, Solicitor, Glasgow. Parties informed the Tribunal they had agreed a Joint Minute. On joint motion, the Tribunal fixed a hearing to take place by

video conference on 23 October 2020. Notice thereof was duly served upon the Respondent.

6. At the virtual hearing on 23 October 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was not present but was represented by Nicola Irvine, Solicitor, Glasgow. A Joint Minute of Admissions was before the Tribunal. No evidence was led. Parties made submissions.

7. The Tribunal found the following facts established:-

7.1 The Respondent is Theresa Mary McWilliams who was born on 28 June 1957. She was enrolled as a solicitor on 22 October 1981. The Respondent became a partner in the firm Trainor Alston Limited, Coatbridge in 1986 and is now a Director of said firm. She holds a current practising certificate.

7.2 In 2014 the Secondary Complainer instructed the Respondent to represent him in relation to a number of matters including an action against KM. The Respondent ceased to act on behalf of the Secondary Complainer in October 2014.

7.3 In 2018 the Secondary Complainer instructed Brodies LLP to investigate and provide advice in connection with the previous service he had received from the Respondent and her firm. On 9 May 2018 the Secondary Complainer signed a mandate addressed to the Respondent's firm authorising and requesting that they deliver to Brodies LLP Edinburgh "*all files and any other documents (together with digital copies of files held by you in digital format)*" which they held on his behalf in relation to two matters, one of which was the dispute with KM.

7.4 Brodies sent the mandate to the Respondent's firm under cover of a letter dated 10 May 2018 stating that "*We should be grateful if you would arrange for any papers, along with any electronically stored data including emails, to be provided to us.....as soon as possible*".

7.5 On the same date Brodies sent another letter to the Respondent's firm enclosing a mandate seeking files and papers in relation to a third matter on behalf of another client.

7.6 On 7 June 2018 Brodies sent a further letter to the Respondent's firm and, with reference to the aforesaid letter dated 10 May 2018, enclosed a further copy of the mandate noting that they had not received any papers from the firm and asking for the papers and any electronically stored data to be provided as soon as possible, as required by the Law Society Rules.

Brodies further asked the Respondent's firm to confirm to them in writing as soon as possible if the firm did not hold any papers covered by the mandate.

7.7 On 15 June 2018, following a telephone conversation between a solicitor at Brodies and the Respondent's secretary, Brodies sent further copies of the mandate and letters dated 10 May and 7 June 2018 to the Respondent's secretary by email.

7.8 On 18 June 2018 the Respondent sent an email to Brodies acknowledging the email and enclosures of 15 June 2018. In respect of the matter involving the third party she stated that she had no files relating to that matter. In respect of the mandate signed by the Secondary Complainer she stated that she had no knowledge of one of the matters and consequently no file. In respect of the second matter against KM she stated:

"We do have a file relating to [KM]. This has been sisted for about 4 years. We have never rendered a fee note and will now prepare same and on payment will forward all of the relevant papers to you."

7.9 On 6 July 2018 Brodies sent an email to the Respondent asking if she had issued her fee note to the Secondary Complainer so that once it was paid the Respondent could provide the file.

7.10 The Respondent replied to Brodies on 12 July 2018 advising that she was having the file feed and would advise the Secondary Complainer, via Brodies, of the fee. The Respondent advised that once the fee was paid she would forward the file to Brodies.

7.11 Brodies noted the position and advised that they would forward the fee note to the Secondary Complainer once received.

7.12 Having heard nothing further from the Respondent, Brodies sent an email to her on 28 August 2018 noting that they had not received her fee note in connection with the KM case. They asked for this to be sent to them as a matter of urgency so that they could forward it to the Secondary Complainer for payment and have the file released.

Brodies also sought copies of any invoices already sent to the Secondary Complainer for services rendered.

7.13 The Respondent did not reply to Brodies email of 28 August 2018 and accordingly Brodies sent a letter to the Respondent's firm on 6 September 2018 to make a formal complaint on behalf of the Secondary Complainer about the service received from the firm and the conduct of the Respondent. Brodies stated, amongst other things, that in relation to the mandate which they had sent to the firm, the Respondent had still not issued a fee note to the Secondary Complainer despite several requests to do so and accordingly the Secondary Complainer was unable to make payment and recover the file which had been requested.

Brodies sought the fee note by return and a response to the complaint within 28 days.

7.14 Brodies did not receive the fee note or a reply to the letter of complaint and on 5 October 2018 a member of staff at Brodies telephoned the Respondent's firm to speak about this.

7.15 The Respondent sent an email to Brodies on 5 October 2018 advising that she had gone on holiday shortly after receiving their letter and had only returned on 3 October 2018. She stated that she was still waiting for her file to be feed and would forward this shortly.

7.16 On 31 October 2018 Brodies submitted a complaint to the Scottish Legal Complaints Commission on behalf of the Secondary Complainer in relation to the

Respondent and, amongst other things, stated that she had failed to provide a fee note despite repeated requests and accordingly had failed to timeously respond to the mandate.

- 7.17 On 27 February 2019 Brodies sent a letter to the Respondent by recorded delivery and email referring to their previous correspondence to the Respondent. They noted that they had still not received the fee note despite the Respondent having advised them 7 months previously that she was having the file feed.

Brodies asked the Respondent to provide the file within 7 days otherwise a further complaint would be made to the SLCC in respect of her failure to act in accordance with the mandate.

- 7.18 On 22 March 2019 the Respondent sent an email to Brodies apologising for the delay in responding. She advised that she had been trying to locate the main file in order that it could be feed but had been unable to locate it and could only forward the file as saved electronically which did not include handwritten notes of attendances and telephone calls. She had also been unable to locate the diary and telephone records from 2014. The Respondent advised that she therefore intended to fee the file on the Sheriff Court scale. She stated that she presumed the file had been forwarded to the solicitor who thereafter represented the Secondary Complainer but she did not have any documentation confirming this.

The Respondent attached her electronic file to the email without seeking or receiving payment of any fee from the Secondary Complainer.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in that she:-
- a) failed or unduly delayed, for a period of 10 months, to implement the mandate sent to her on 10 May 2018 in respect of the matter against KM;
 - b) failed to communicate effectively with Brodies Solicitors during the period of 10 months as to the position in relation to her implementation of the mandate.

9. Having heard submissions in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 23 October 2020. The Tribunal having considered the Complaint dated 29 July 2020 at the instance of the Council of the Law Society of Scotland against Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire; Find the Respondent guilty of professional misconduct in respect that she (a) failed or unduly delayed, for a period of 10 months, to implement a mandate and (b) failed to communicate effectively with Brodies Solicitors; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; 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; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.

(signed)

Beverley Atkinson

Vice Chair

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 NOVEMBER 2020** .

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson

Vice Chair

NOTE

At the Hearing on 23 October 2020, the Tribunal had before it the Complaint, a signed Joint Minute of Admissions, a List of Authorities for the Complainers and the Fiscal's written submissions. By way of the Joint Minute, the Respondent admitted the statements of fact, and the averments of duty and misconduct contained in the Complaint.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal referred to her written submissions which were as follows:-

There is a joint minute in this case and the Respondent has accepted the facts, duties and averments of professional misconduct in the complaint although it is accepted by the parties that it is for the Tribunal to decide whether or not it finds that the conduct meets the test for professional misconduct. In relation to the facts of the complaint - in 2014 the secondary complainer instructed the Respondent to represent him in relation to several matters including an action against an individual KM. The Respondent ceased to act on behalf of the secondary complainer in October 2014 when he instructed other solicitors. The secondary complainer was unhappy with the way in which the Respondent had dealt with matters on his behalf and in 2018 he instructed the firm Brodies to investigate and advise him about the representation he had received from the Respondent and her firm.

On 9 May 2018 the secondary complainer signed a mandate addressed to the Respondent's firm and Brodies sent this to the Respondent's firm on 10 May 2018. The mandate sought all papers and any electronically stored data in relation to the dispute with KM and another matter. A separate letter and mandate was also sent in respect of a third matter. Having heard nothing Brodies sent a further letter dated 7 June 2018 with a copy of the mandate.

There was communication with the Respondent's secretary on 15 June 2018 and Brodies sent further copies of the mandate and letters to the firm. On 18 June 2018 the Respondent sent an email to Brodies acknowledging receipt of the items. In respect of the matter involving KM the Respondent advised Brodies that she did have a file, that the matter had been sisted for 4 years and that she had never rendered a fee note. She advised that she would prepare a fee note and once paid she would forward the papers.

Brodies sought an update on 6 July and on 12 July the Respondent advised that she was having the file feed and that she would send them the fee note.

Brodies again sought an update from the Respondent by email on 28 August 2018. They received no reply and therefore sent a formal letter of complaint to the Respondent's firm on 6 September 2018. They sought a response and the fee note within 28 days. Having received neither Brodies telephoned the Respondent's firm on 5 October 2018 which then prompted an email the same day from the Respondent who said that she had been on holiday and that she was still waiting for her file to be feed and she would forward the fee note to them shortly.

On 31 October 2018 Brodies submitted a complaint to the SLCC on behalf of the secondary complainer. 4 months later, and 7 months after the Respondent had advised that the file was being feed, the Respondent had still not provided the fee note or the papers. Therefore Brodies sent a letter to the Respondent on 27 February 2019 seeking the papers within 7 days.

The Respondent replied by email on 22 March 2019 advising that she had been trying to locate the file but could not do so and could only forward what had been saved electronically which did not include handwritten attendance notes and telephone calls. Accordingly she intended to fee the file on the Sheriff Court scale.

The Respondent attached to the email her electronic file without issuing a fee note or seeking or receiving payment of any fee.

In summary it was 10 months after the Respondent received the mandate and 8 months after she advised Brodies that the file was being feed that the Respondent informed Brodies that she could not find the file and sent what electronic papers she had in implementation of the mandate. This was only achieved after repeated requests and complaints from Brodies several of which went unanswered by the Respondent.

The duties and the Law Society Guidance in respect of mandates are set out in averments 4.1 to 4.4 of the complaint.

Whilst the Respondent initially indicated that she was exercising a lien over the file it is submitted that this cannot excuse the delay of 10 months as the Respondent was repeatedly asked for the fee note so that it could be paid and the file released and ultimately the Respondent released the papers without any fee note being rendered. The Respondent also failed to respond to at least four pieces of correspondence from Brodies and did not explain to them that she could not locate the file for a period of 10 months.

The Law Society guidance on mandates states that a solicitor must respond timeously upon receipt of a mandate and that a delay in doing so will normally be misconduct. It is submitted on behalf of the Complainer that the Respondent's conduct in the present case was serious and reprehensible and thus meets the test for Professional Misconduct as set out in Sharp.

I would refer to number 1 on the Complainer's List of Authorities which is the case of Sharp v Council of the Law Society of Scotland 1984 S.C 129 where on page 6, paragraph 2, Lord President Emslie states 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."

There have been a number of decisions of the Tribunal where delays in implementing mandates varying between 4 months and 14 months have been held to amount to professional misconduct.

Number 2 on the Complainer's List of Authorities is the case of the Law Society v Raymond Mallon (5 November 2013). In this case Mr Mallon failed or delayed to implement a mandate and to correspond with the firm which sent the mandate for a period of almost 4 months and the Tribunal found that his conduct amounted to professional misconduct.

Number 3 on the Complainer's List of Authorities is the Law Society v Gordon McNab (4 September 2018). Mr McNab failed to implement a mandate over a period of 14 months and failed to respond to

some correspondence from the secondary complainer in respect of the mandate. Again the Tribunal found that his conduct amounted to professional misconduct.

The final case on the Complainer's List of Authorities is Law Society v Richard Hutchison (15 March 2019). Mr Hutchison failed to implement a mandate for a period of 9 months and failed to communicate effectively with various parties. The Tribunal found that Mr Hutchison's conduct amounted to professional misconduct singly in respect of the failure to implement the mandate and in cumulo in respect of his failures to communicate effectively.

It is accordingly submitted that the Respondent's conduct is sufficient to amount to professional misconduct and I would invite the Tribunal to so find.

The Fiscal noted the Respondent's full cooperation in this matter.

SUBMISSIONS FOR THE RESPONDENT

Ms Irvine indicated that the Respondent had intended to be present at the hearing but was unwell and unable to attend. However, she was content that the matter proceeded in her absence.

Ms Irvine explained that when the mandate was received, a member of the Respondent's clerical staff carried out a computer search which indicated that there was a file in the Respondent's office and that no fee had been rendered. Staff were told to locate the file but the Respondent did not follow this up. When the new solicitors contacted her again she realised she could not find the paper file. She asked the support staff to collate the electronic records. The Respondent did not follow this up. She delivered the electronic records on 22 March 2019. She passed the papers on without charging a fee. The Respondent accepts there were shortfalls in her handling of the mandate. She ought to have prioritised and supervised the search. She should have kept the new solicitors informed. However, Ms Irvine noted that this was an old file which was not recently active and accessible.

DECISION ON PROFESSIONAL MISCONDUCT

On the basis of the Joint Minute, the Tribunal was satisfied beyond reasonable doubt that the Respondent had conducted herself in the manner set out in the Complaint. She failed for ten months to implement a mandate and she failed to communicate with the new firm of solicitors during that period.

The Tribunal considered the conduct and the test for 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.”

The Tribunal had regard to other cases where it had held that failure to implement a mandate could constitute professional misconduct. Failure to implement a mandate breaches the Law Society’s guidance. It also breaches Rule B1.9.1 and Rule B1.14.1. Solicitors must communicate effectively and act with other solicitors in a manner of mutual trust and confidence. Failure to implement a mandate is a breach of a solicitor’s obligations. It hampers the new solicitor instructed in the matter. It inconveniences the client. It is prejudicial to the legal profession and its reputation and can cause harm to the public. The Tribunal was satisfied that the Respondent was guilty of professional misconduct.

SUBMISSIONS IN MITIGATION AND ON PUBLICITY AND EXPENSES

The Fiscal indicated that the Respondent had a finding on her record card for unsatisfactory professional conduct. It was not analogous with the circumstances of the present case.


Ms Irvine indicated the Respondent was 63 and admitted to the Roll of Solicitors in 1981. She trained at Trainor Alston and is now a director of that company. She does conveyancing and executry work as well as civil litigation. The Respondent accepts there were shortfalls in the way she handled the mandate. She is embarrassed that after decades her professional standards slipped. She did not give the matter the importance it required. She had previously relied heavily upon her support staff but in the years leading up to this conduct, two experienced members of support staff had left the firm. The Respondent has taken steps to remediate the situation. Her firm now has a protocol whereby any mandates will be handled by a director unconnected with the file. Ms Irvine said the Tribunal should take into account the fact this was an isolated incident involving one client. There had been no repetition of the behaviour in the two years since the Complaint. The likelihood of reoccurrence was low. The Respondent cooperated with the Fiscal and the Tribunal. There was an early plea. This was not a deliberate or premeditated action. It had always been the Respondent’s intention to comply with the mandate. There was no risk to the public or requirement for supervision. The conduct was at the lower end of the scale of professional misconduct.

The Fiscal moved for expenses and the usual order regarding publicity. Ms Irvine indicated she could not resist the motion for expenses. She had no submission to make regarding publicity other than to suggest that only the Respondent required to be named.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal considered the misconduct was at the lower end of the scale. The unsatisfactory professional conduct finding was non-analogous. The Respondent had shown remorse and changed her practice. There had been no repetition of the conduct and there was no risk to the public. A censure in these circumstances was therefore sufficient.

The Tribunal awarded expenses to the Complainers and directed that publicity be given to the decision. That publicity should include the name of the Respondent but there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests. The Secondary Complainer will have 28 days from intimation of these findings to lodge or update his claim for compensation.



Beverley Atkinson
Vice Chair