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

DAMIEN CHRISTOPHER TONNER, having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh

Respondent

1. A Complaint dated 1 February 2022 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 Damien Christopher Tonner, having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh (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 appointed the Complaint to be heard on 25 August 2022 and notice thereof was duly served on the Respondent. An amended Complaint dated 24 June 2022 was lodged with the Tribunal. A Joint Minute was lodged with the Tribunal.

5. At the virtual hearing on 25 August 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by William Macreath, Solicitor, Glasgow. On the Fiscal's motion, the Tribunal

made typographical amendments to paragraphs 3.31, 3.32 and 3.36 of the amended Complaint and these alterations are reflected in the findings in fact below.

6. Having given careful consideration to the terms of the amended Complaint, the Tribunal found the following facts established:-

6.1 The Respondent is Damien Christopher Tonner having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh. He was born on 12 December 1979. He was admitted as a solicitor on 6 September 2004. He was employed by Miller Samuel Solicitors, Glasgow between 17 November 2004 and 23 June 2009. He was then employed by Brodies LLP in their Glasgow office between 26 November 2010 and 27 August 2012. He moved to BTO as an associate between 19 September 2012 and November 2019. He then became an associate at Clyde & Co., Edinburgh on 16 December 2019. He remains employed there.

6.2 The Secondary Complainer consulted Brodies regarding a medical negligence claim. The Respondent, shortly after starting his employment with Brodies, was directed to represent the Secondary Complainer by Jonathan Cornwell, a partner of Brodies LLP. The file was delegated to the Respondent in December 2010. The triennium was imminent – 15 January 2011. The Respondent advised Mr Cornwell he had no experience of medical negligence work nor of handling a Court of Session case but had assisted in them.

6.3 The Respondent instructed Counsel and had a summons signeted. The summons was signeted on 11 January 2011. He instructed Messengers at Arms to serve the action. The action was served on 14 January 2011. The triennium was 15 January 2011.

6.4 The Central Legal Office ("CLO"), an NHS body which provides legal advice to all Trusts and which defends medical negligence cases on their behalf, wrote on 3 February 2011 asking the Respondent when he intended to lodge the summons for calling. A summons for Personal Injury (which included medical negligence cases at the time) should call no later than 3 months and a day after the case has been Signeted, failing which the cause will fall.

6.5 The last day for calling the summons raised on behalf of the Secondary Complainer for clinical negligence was 11 April 2011. By letter dated 14 March 2011, the Respondent advised the CLO that the summons would be lodged on 15 March 2011 for calling and that it would then be intended to sist the cause for further investigations. The summons was not lodged. The summons did not call on 15 March 2011. The Respondent did not lodge the summons for calling before 11 April 2011. As a result, the cause fell.

6.6 Between January and April 2011, the Secondary Complainer emailed the Respondent several times re the progress of her claim. The Respondent was dilatory in responding to those requests. There is little work on his file over those three months.

6.7 Any fresh action raised after the 12 April 2011 would be time barred without the Court exercising its discretion in favour of the Secondary Complainer.

6.8 On discovery of his failure to lodge the Summons timeously, the Respondent acknowledged his mistake and sought advice from senior colleagues – including Jonathan Cornwell. Ultimately, he spoke to David Armstrong, senior partner for the pursuer personal injury team. David Armstrong instructed the Respondent to instruct Counsel to obtain advice on the predicament.

6.9 Counsel was instructed on the 2 June 2011 some two months after the cause fell. The Respondent had not by this time and did not at this time advise the Secondary Complainer of the falling of the case.

6.10 Counsel provided a note dated 14 June 2011. Counsel advised the instance had fallen and there was authority that Court of Session Rule 2.1 (a general dispensing power) could not be used to cure the oversight. He advised there were 2 issues: whether the claim was time barred and whether it was equitable to allow the action to proceed, regardless of time bar. He advised that there would be no prejudice to the defender (NHS). He stated the court had allowed a separate action to proceed in a case where a second summons had been served 4 days after the expiry of the triennium due to an error in the defenders first name in the original summons, but

that the court had refused to allow another action to proceed in a case where service was ineffectual, and the pursuers had taken 6 months to re-serve the summons. He advised that his greatest concern was the issue of prejudice to the pursuer (the secondary complainer) and that the alternative remedy, namely an action against the firm, was a matter the court would be entitled to rely upon in refusing to allow the discretion afforded by s19A. He referred to another case, where the court had refused to exercise discretion in favour of a pursuer where a Writ was warranted 48 days after the triennium and Counsel stated it was his view that the complainer could seek to rely upon s19A but that it was more likely than not that the court would refuse to exercise their discretion in favour of the Secondary Complainer.

6.11 Counsel advised the Respondent should have a fresh summons signeted and served. That the summons should mirror the summons which had fallen. The NHS were on notice, and that a forceful argument could be made that there was no prejudice to the NHS.

6.12 Counsel advised there existed a stateable argument in favour of the court exercising its discretion to allow the action to proceed, however, the prospects of that argument being successful was poor, in others word it was likely the court would hold the action was time barred.

6.13 Counsel expressed their view that the firm required to consider whether they ought to continue acting for the Secondary Complainer. Counsel was not of the opinion that the firm had no option but to withdraw. He raised the question of a conflict of interest.

6.14 Counsel concluded by observing that the Secondary Complainer ought to be made aware of the oversight and the potential consequences and a check with the Law Society to ensure there was no difficulty in continuing to act for the Secondary Complainer was prudent.

6.15 The Respondent did not check with Law Society of Scotland as recommend by Counsel.

6.16 The Respondent did not act on the advice to advise the Secondary Complainer about the predicament of her case.

6.17 The Respondent did not receive specific instruction from David Armstrong as to what steps to take following receipt of Counsel's note.

6.18 The Respondent raised a second summons which had no new averments. The action was served on the 11 July 2011, six months after the triennium and three months after the earlier case had fallen.

6.19 The CLO on behalf of the defender intimated defences by letter of the 18 July 2011. The defences contained an averment the cause was time barred. The Respondent did not send the defences to the Secondary Complainer.

6.20 There was a telephone discussion between the Respondent and the Secondary Complainer in late July 2011. There are two contemporaneous notes. One by the Respondent and one by the Secondary Complainer. The notes differ.

6.21 The Secondary Complainer's note is dated 26 July and is silent upon a failure to lodge papers and a triennium issue.

6.22 The Respondent's note is dated 29 July 2011 and includes the following:

"*I also advised her that it would be worth having a meeting with her at our offices to go over the case in detail. I also advised her that due to an admin error we had failed to return papers to court on time and needed to re-raise the court action. This could potentially cause difficulties in terms of the triennium and explained the concept of this. I said I wished to have a meeting about this and she said that would be fine. I said I would contact her in the week beginning 8 August 2011 to confirm the position in terms of medical evidence and a meeting. She said she was happy with this.*"

The Respondent's note also refers to difficulties in getting an appropriate expert witness. Those details are in the Secondary Complainer's note.

6.23 Following the telephone conversation, the Respondent wrote to the Secondary Complainer regarding the expert witness following the conversation. He did not set out the failure to lodge the summons for calling, the consequence that the summons was no longer live, that there was delay of two and a half months in instructing Counsel to advise what to do and nor that a second action was raised 4 months after the triennium. He did not explain that there was not now a live action which had been raised timeously. He did not explain her case was time barred. He did not advise he and his firm had been negligent. He did not explain that she a claim against the firm. He did not explain that there was a potential conflict of interest. He did not advise her of Counsel's view on the prospects.

6.24 The Respondent's file has a note of a telephone discussion with the Secondary Complainer's husband dated 11 August 2011. This note narrates the Respondent mentioned again the failure to lodge the summons and that if the defenders took a triennium point, he would talk in more detail in a meeting.

6.25 The Secondary Complainer has note of call with her and her husband on the 8 August 2011. The Secondary Complainer had numbered questions to ask, and she did so. The Secondary Complainer's position is that the Respondent did not mention any timebar problem.

6.26 An expert report was instructed on the 8 August 2011. The Respondent wrote to the Secondary Complainer on the 2 September setting out the letter of instruction and advising what documents were provided to the expert.

6.27 The expert report was received in early 2012. The report was not supportive of clinical negligence. The Respondent pressed the expert on two occasions, the second being 15 February by telephone to ensure that the expert had covered all relevant matters. The expert remained unmoved.

6.28 The Respondent prepared a memo for David Armstrong, his managing partner. It was dated 19 March 2012. He set out that the expert report was against the Secondary Complainer and that her case would not be successful. He had drafted a letter to the Secondary Complainer with the medical report and advice. David Armstrong added further comment to the letter.

6.29 In the letter of the 19 March 2012, the Respondent committed to writing for the first time the failure to have the first case called. He noted the NHS's position was that the court action "should not be allowed to proceed" because of this failure. The Respondent added that the case was not strong as they could not establish negligence. The letter noted the Respondent could seek alternative legal advice. The Secondary Complainer was invited to a meeting to discuss these points.

6.30 The Secondary Complainer disagreed with the expert's report. She believed he had not taken everything into consideration. In a file note dated 18 April 2012, the Respondent noted a full detailed account would be forthcoming from the Secondary Complainer.

6.31 In due course a meeting was fixed for 11 May 2012. The Secondary Complainer sought a copy of the instruction sent to Dr Armstrong from the Respondent on 8 May 2012. The meeting on 11 May 2012 did not take place as the Respondent was absent from work.

6.32 The Secondary Complainer by email of 16 May 2012 requested:

1. A copy of the Writ lodged in the Court of Session to check what had been served on the NHS;
2. Information on who drafted the pleadings and what had been said;
3. Information on the Defenders pleadings; and
4. A copy of a transcript provided by the Secondary Complainer to the Respondent relating to medical treatment.

6.33 On the 23 May 2012, the Respondent emailed the Secondary Complainer advising he would collate the documents requested and pressed her for her written comments which she referred to in the telephone conversation in April.

6.34 On 31 May 2012 the Respondent emailed the Secondary Complainer a copy of the summons and advised he would forward a copy of the defences on his return to the office the following week. He also asked for her letter to the expert. The

copy summons provided was not complete. It was an office copy. It did not contain the conclusions, the process number, nor the date the Signet was granted.

6.35 The Secondary Complainer for the first time comprehended the time bar point and wrote on the 31 May 2012 that she "*was greatly alarmed by the statement regarding the failure to comply with the court timetable and requested that the solicitor expand on the problem and what was happening*".

6.36 A meeting took place between the Secondary Complainer her friend (another solicitor) and David Armstrong on the 4 July 2012. All matters were canvassed. The Respondent had provided David Armstrong with two memos in advance of the meeting setting out the history of the case.

7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect that he breached Rules 3 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and Rules B1.4 and B1.9 of the Law Society of Scotland Practice Rules 2011 in that he:

7.1 Failed to act in the Secondary Complainer's best interests by failing to provide her with the summons and the defences lodged in the action meaning that she was not aware of her case, the defence case or the potential prospect of failure of her case due to the Respondent's omission to lodge the first summons for calling, and failed to advise her of a potential conflict of interest;

7.2 Did not communicate effectively with the Secondary Complainer from the point at which the case fell until March 2012 in that he failed to inform her in writing: that the first cause had fallen; the consequences with regard to timebar, the Court's discretion to excuse the failure and her right of action against the Respondent and his firm; the content of Counsel's note: that a potential conflict of interest had arisen; and that she may wish to take alternative legal advice. He also failed to provide the Secondary Complainer with a copy of the defences when lodged.

8. Having heard the Solicitor for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 25 August 2022. The Tribunal having considered the Complaint dated 1 February 2022 at the instance of the Council of the Law Society of Scotland against Damien Christopher Tonner, having place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh; Find the Respondent guilty of professional misconduct in respect of his breach of Rules 3 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and Rules B1.4 and B1.9 of the Law Society of Scotland Practice Rules 2011; 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 the Secondary Complainer or any other person: and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge an amended claim for compensation if so advised.

(signed)

Beverley Atkinson

Vice Chair

9. 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 27 SEPTEMBER 2022 .

IN THE NAME OF THE TRIBUNAL

[redacted]

Beverley Atkinson

Vice Chair

NOTE

At the Hearing on 25 August 2022, the Tribunal had before it the Complaint as amended, a Joint Minute of Admissions, two inventories of productions for the Complainers, and a list of authorities for the Complainers.

The Tribunal clarified with the parties at the outset of the hearing that the misconduct alleged and admitted in this case related to failing to act in the Secondary Complainer's best interests and failing to communicate with her. There was no allegation before the Tribunal relating to the failure to lodge the summons for calling or acting in a conflict of interest situation.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal narrated the circumstances of the alleged misconduct with reference to the Complaint. He noted that all averments of fact were admitted by the Respondent.

The Fiscal noted that there was no allegation of misconduct relating to the failure to lodge the summons. Different periods apply to these cases than other actions. The Respondent had very little experience of these types of cases. Failure to lodge the summons could not be misconduct in these circumstances. There was also evidence in the file that the Respondent had sent the instruction to the court runner and it was not clear whether the error had actually occurred due to a systemic failure within Brodies. The gravamen of the case was failure to advise of the consequences of the failure, not the failure itself. The Fiscal submitted that the Respondent's inexperience did not excuse his obligation to communicate effectively or to act in the client's best interests.

When the Respondent became aware of the error, he acknowledged the problem and sought advice from senior colleagues. David Armstrong told him to get Counsel's opinion. Counsel's opinion was instructed on behalf of the client, not in relation to Brodies' own position. Counsel advised that the Secondary Complainer should be informed. Counsel also suggested that advice should be sought from the Law Society of Scotland on the firm continuing to act for the Secondary Complainer. This was not done.

The Fiscal noted that the notes of the telephone call in July 2011 between the Secondary Complainer and the Respondent differed. The averment about the notes (which was admitted) had been included to give context to the issues which were live before the Tribunal, namely failure to act in the client's best

interests and failure to communicate. However, the Complainers' averment of misconduct about communication referred to the Respondent's failure to communicate certain advice in writing. It was not the Complainers' position that there was no communication at all.

The Fiscal drew the Tribunal's attention to the requirement to confirm information in writing where necessary and appropriate. The Fiscal noted that the Respondent failed to provide the Secondary Complainer with details of the summons and defences. It was in her best interests that she understood her case and that of the defence. Had the defences been intimated on receipt, she would have understood the timebar issue. It was in her best interests to know the case she faced and the possible failure of the whole case and to be fully advised of the potential conflict of interest. It was in her best interests to read Counsel's note. It was in her best interests to consider whether she needed new agents. The Respondent's failures prejudiced the Secondary Complainer.

The Fiscal referred to the test for misconduct in Sharp v Council of the Law Society of Scotland 1984 SLT 313. He said that when something goes wrong, competent and reputable solicitors own up. Even if there are discussions about the issue with the client that must be followed up in writing. It was not until May 2012 that she fully understood the position.

SUBMISSIONS FOR THE RESPONDENT

Mr Macreath noted that this complaint was first intimated by the Scottish Legal Complaints Commission in 2014 and for a variety of reasons the matter drifted. It took Mr Macreath some time to recover all relevant papers from Brodies. Once these were available, the Complaint was revised. Mr Macreath described the matters which were admitted in the Complaint.

According to Mr Macreath, the live issues were the interests of the client and communication. The degree of culpability was also relevant. The Respondent was not experienced in medical negligence and had little or no experience of Court of Session practice. There is evidence on the file that he sent the note to the court runner. He expected that the case would call. He found out that there was a problem in late May. He reported the matter to his immediate superiors and the partner in charge. He prepared memos for them about the case. Responsibility for mistakes such as this is generally taken by the supervising partner. That person will give directions about how the issue is to be handled. In this case, the supervising partner told the Respondent to obtain Counsel's opinion and following that, to re-raise the case. However, the Respondent was also duty-bound to write a letter early in 2011 admitting that a mistake had been made, that the firm could continue to argue the case but might lose, and that the client

might wish to take independent advice having been fully informed of the potential conflict of interest. The Respondent maintains that the situation was explained to the Secondary Complainer in a telephone call. However, the matter was not put in writing until 19 March 2012. This letter was revised by the partner. The letter contained both their references.

DECISION

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 failed to provide the Secondary Complainer with the summons and defences lodged in her personal injury action. She was therefore unaware of the defence and the likelihood that her case would fail. The Respondent failed to tell the Secondary Complainer about the potential conflict of interest or her right of action against the firm. She was not told that she may wish to take independent advice.

The Tribunal noted that the admitted breach of the rule relating to communication was only in relation to the requirement to confirm certain matters in writing. The Tribunal did not therefore have to resolve the differences in the notes prepared by the Respondent and the Secondary Complainer following their telephone meeting in July 2011.

Although the Respondent admitted professional misconduct, it was for the Tribunal to consider whether the admitted conduct met the test as set out within 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."

Solicitors must act in the best interests of their clients. They must be fearless in defending their client's interests, regardless of the consequences to themselves (Rule 3 of the Solicitors (Scotland) (Standards of Conduct) Rules 2008 and Rule B1.4 of the Law Society of Scotland Practice Rules 2011). Solicitors must communicate effectively with their clients and others. They must provide any relevant information which is necessary to allow the clients to make informed decision. Information must be clear and

comprehensive and where necessary or appropriate, confirmed in writing. Solicitors must advise their clients of any significant development in relation to their case and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them (Rule 9 of the Solicitors (Scotland) (Standards of Conduct) Rules 2008 and Rule B1.9 of the Law Society of Scotland Practice Rules 2011).

The Tribunal had regard to the cases included in Smith and Barton's *"Procedures and Decisions of the Scottish Solicitors Discipline Tribunal"* at paragraph 6.06 which refer to the liability of qualified assistants and newly qualified solicitors (Law Society-v-Alexander Gunn 747/88, Law Society-v-David Tod 809/90 and Law Society-v-Iain Wallace 857/93) as well as more recent cases (Law Society-v-Isabel Macleod and Law Society-v-Paul Gallagher). In those cases, the Tribunal emphasised the responsibility of all solicitors to comply with their ethical obligations, even if they have relatively junior status within their firms.

Having regard to all the circumstances, which included the Respondent's inexperience in this area of law, and the involvement of his supervising partner once the error was discovered, the Tribunal was satisfied that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. While not every communication has to take place in writing, the Respondent ought to have communicated these issues in writing to the Secondary Complainer at a much earlier stage. Counsel's note highlighted that the Secondary Complainer should be informed of the situation. There was a continuing failure for a lengthy period to communicate with the client properly and to act in her best interests. Even when the matter was committed to writing in March 2012, the issue about timebar was not communicated well. The Secondary Complainer was not kept informed of major developments which affected her.

The Fiscal noted that the Respondent did not have any findings on his record in relation to conduct matters. A reference from the Respondent's current supervising partner was provided to the Tribunal.

SUBMISSIONS IN MITIGATION

Mr Macreath described the Respondent's personal circumstances and career history. He drew the Tribunal's attention to the reference provided by Duncan Batchelor, the Respondent's current supervising partner. Mr Macreath noted that the complaint had been hanging over the Respondent since 2014. The lengthy delay had affected him. The decision to refer the matter to a Fiscal took place on 12 November 2020. The Complaint was revised in June 2022 and allegations of breach of Rule B1.2 were

deleted at that stage. Mr Macreath suggested it would be appropriate to award expenses against the Respondent but only from the date of the revised Complaint. He had no submission on publicity.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal had regard to the very long delay in bringing this case to a conclusion and the consequent impact on the Respondent's personal life. It noted that the Respondent has apparently practised since this incident without further conduct issues arising. He had informed his superiors that he was inexperienced in this area. He did the correct thing by reporting the mistake within the firm. He sought help and advice. He followed the instructions of his supervising partner. However, he had neglected his personal duty to communicate with the Secondary Complainer and act in her best interests. Overall, the Tribunal was satisfied that the misconduct in this case was at the lower end of the scale. It was content that censure was the appropriate sanction in all the circumstances. A fine was not necessary. The Respondent did not need to be supervised by way of a restriction.

The Tribunal was of the view that there was no reason to depart from its usual position on expenses, namely that expenses follow success. It was not persuaded that it should only award expenses from the date of the revised Complaint. Neither party had the information which led to the amendment at an earlier stage in proceedings. The two averments of misconduct in this case were also in the original Complaint. They would always have to come before the Tribunal. Pleadings are frequently amended prior to the hearing.

The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and the partners of his firm in accordance with paragraph 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there was no requirement to identify the Secondary Complainer or 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 update her claim for compensation if so advised.

[redacted]

Beverley Atkinson

Vice Chair