

**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

**JOHN FLEMING HAMILTON, 7 Forfar Road,
Kirriemuir**

Respondent

1. A Complaint dated 18 June 2018 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that John Fleming Hamilton, 7 Forfar Road, Kirriemuir (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There were seven Secondary Complainers, Ms A, Ms B, Mr C, Mr E, Ms F, Ms G and Mr H. Only Ms A, Ms B, Ms G and Mr H were said to be seeking compensation.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. The Respondent applied for an extension of time to lodge Answers which was granted. No Answers were lodged.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard at a procedural hearing on 10 September 2018 and notice thereof was duly served on the Respondent.
5. On 5 September 2018, on joint motion, the Chair, exercising the functions of the Tribunal under Rule 56 of its Rules, adjourned the procedural hearing fixed for 10 September 2018.

6. In terms of its Rules, the Tribunal fixed a procedural hearing for 7 November 2018 and notice thereof was duly served upon the Respondent.
7. On 25 October 2015, on joint motion, the Chair, exercising the functions of the Tribunal under Rule 56 of its Rules, adjourned the procedural hearing fixed for 7 November 2018.
8. In terms of its Rules, the Tribunal fixed a procedural hearing for 24 January 2019 and notice thereof was duly served upon the Respondent.
9. On 21 January 2019, on joint motion, the Chair, exercising the functions of the Tribunal under Rule 56 of its Rules, adjourned the procedural hearing fixed for 24 January 2019. On 22 January 2019, an amended Complaint dated 21 January 2019 was lodged with the Tribunal Office.
10. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent.
11. In terms of its Rules, the Tribunal fixed a hearing for 27 March 2019 and notice thereof was duly served upon the Respondent.
12. The hearing took place on 27 March 2019. The Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by David Logan, Advocate, instructed by John Clancy, Solicitor, Dundee. The Tribunal received a signed Joint Minute relative to the Complaint dated 21 January 2019. The Tribunal heard submissions from both parties.
13. The Tribunal found the following facts established:-
 - 13.1 The Respondent is John Fleming Hamilton or Ian Hamilton. His date of birth is 4 March 1957. He was enrolled as a solicitor on 16 November 1982. At the time of the events narrated in the Complaint, he was the sole partner in the former firm of Messrs Maclean & Lowson, 94 East High Street, Forfar.
 - 13.2 The Complaint consisted of five individual and separate complaints made against the Respondent as follows: -
 - i. complaint made by Ms A and Ms B;

- ii. complaint made by Mr C;
- iii. complaint made by Mr E and Ms F;
- iv. complaint made by the Law Society of Scotland following a Financial Compliance inspection; and
- v. complaint made by Ms G and Mr H.

The Respondent admitted the facts and duties averred in the Complaint in respect of each of the five individual and separate complaints.

Complaint 1 made by Ms A and Ms B

- 13.3 On 17 January 2011 the Respondent was instructed in relation to the executy of the late Ms I (“the deceased”). The two executors of the deceased’s estate were Ms A and Ms B (referred to under this heading as “the Secondary Complainers”).
- 13.4 The Respondent’s fee for the administration of the executy was agreed at 3.75% of the value of the deceased’s estate (“the percentage fee”).
- 13.5 On 24 May 2011 the Respondent advised the Secondary Complainers by email that the application for confirmation had been lodged with Forfar Sheriff Court. On 6 June 2011 the Respondent e-mailed the Secondary Complainers to confirm that Confirmation had been obtained.
- 13.6 The Respondent’s firm was also instructed in connection with the sale of the deceased’s home. The Respondent’s firm’s fee for estate agency and marketing was agreed at 1% of the sale price together with VAT and outlays. The Respondent advised that the conveyancing fee was likely to be around £700 together with VAT and outlays.
- 13.7 The Respondent issued ten receipted interim fee notes under cover of letters addressed to both Secondary Complainers at the home address of Ms B on 20 June 2011, 30 June 2011, 26 July 2011, 29 September 2011, 3 November 2011, 20 December 2011, 19 March 2012, 25 June 2012, 30 October 2012 and 15 May 2013. The Respondent’s letter dated 20 June 2011 and enclosed receipted interim fee note was produced as an example for illustrative

purposes as document number 1.1 in the List of Documents for the Complainers. The Respondent's total fees amounted to £11,100 plus VAT. On each occasion on which the Respondent issued receipted interim invoices to the Secondary Complainers, the Respondent drew down on funds held in his client account in settlement of his interim fee notes without having obtained the written approval of the Secondary Complainers in advance.

- 13.8 On 26 May 2011, 5 August 2011 and 8 August 2011, Ms B sought updates from the Respondent on his costs and the funds held by the estate. This correspondence was produced as document number 1.2 in the List of Documents for the Complainers.
- 13.9 On 8 August 2011 the Respondent replied with a general update on progress. He failed to provide the details of the estate account and funds held requested by Ms B. On 9 August 2011, the Respondent sent a reply to Ms B disputing the need to provide this information. He noted that everything would be taken into account in the Account of Charge and Discharge at the conclusion of the executy and that the provision of this information at that stage would only increase costs to the executy estate. This correspondence is produced as document number 1.3 in the List of Documents for the Complainers.
- 13.10 In October 2011 the Secondary Complainers sought an update on the Respondent's costs and confirmation on whether or not there would be additional costs for any additional work being carried out. On 26 October 2011 the Respondent advised that there would be no additional costs. The Secondary Complainers thanked the Respondent for providing that clarification and asked him to advise them if any work was not covered by the percentage fee. This correspondence is produced as document number 1.4 in the List of Documents for the Complainers.
- 13.11 On 14 November 2011 Ms A e-mailed the Respondent requesting a copy of the Respondent's receipted interim fee note dated 3 November 2011 which had been sent under cover of a letter addressed to both Secondary Complainers at Ms B's address. This was the Respondent's fifth receipted interim fee note but Ms A misapprehended it as his second. She referred to it as his "second account" in her email. The Respondent did not reply to Ms A's

email. Ms A sent reminder emails to the Respondent on 2 December 2011 and on 14 December 2011. By a second email on 14 December 2011 Ms A requested a summary of the Respondent's costs from the beginning of the executry to date, as well as a note of the funds held by the estate. On 15 December 2011 the Respondent e-mailed Ms A enclosing a copy of his fifth receipted interim fee note dated 3 November 2011. He did not correct Ms A's misunderstanding that this was his fifth (not second) receipted interim invoice. The Respondent stated, under reference to Law Society of Scotland Practice Guidelines, that he was bound to send his invoices to Ms B as the first-named executrix. He stated that sending copies of his invoices in duplicate to Ms A in addition to Ms B would increase his costs to the executry estate. This correspondence is produced as document number 1.5 in the List of Documents for the Complainers.

13.12 By email to the Respondent dated 11 June 2012 Ms A requested from the Respondent an update on the funds held in the executry account, together with details of ongoing payments towards council tax etc. Ms A noted that in the absence of this information being provided by the Respondent the Secondary Complainers were not in a position as executors to provide an update to the beneficiaries. On 26 June 2012 the Respondent sent an e-mail to both Secondary Complainers which stated that the estate funds held at that date were £22,872.34. He did not provide the further information requested by Ms A in her email of 11 June 2012. This correspondence is produced as document 1.6 in the List of Documents for the Complainers.

13.13 On 6 November 2012 Ms B acknowledged receipt of the Respondent's receipted interim invoice dated 30 October 2012. She pointed out that, as with the Respondent's previous receipted interim invoices, the invoice simply stated that it was "for services". The Respondent was asked to clarify the nature of the services for which the invoice had been rendered and paid from the executry. He was also asked to provide a full accounting of his interim invoices from the beginning of the executry to date. The Respondent failed to reply. Ms B sent a reminder email on 19 November 2012. The Respondent replied to Ms B on 20 November 2012. He failed to provide the full list of invoices and payments requested, nor did he clarify Ms B's query regarding the nature of the services for which his receipted interim invoice dated 30

October 2012 had been rendered and paid from the executry account. This correspondence is produced as document number 1.7 in the List of Documents for the Complainers.

- 13.14 On 13 August 2013 Ms A requested an update on the estimated net value of the executry estate for division amongst the beneficiaries. The email from Ms A is produced as document number 1.8 in the List of Documents for the Complainers. The Respondent did not reply to Ms A's email.
- 13.15 On 18 September 2013 the Respondent's firm sent an Account of Charge and Discharge for the period from the deceased's death to 18 September 2013 to the Secondary Complainers for review and approval. Amongst other things, this narrated the value of the estate at £229,945.99 and the ten interim invoices issued and paid to the Respondent's firm totalling £11,100 plus VAT. The Account of Charge and Discharge separately noted the fees taken in connection with the sale of the deceased's home. On the same date the Respondent received emails from the Secondary Complainers querying the Account of Charge and Discharge. In particular, the Secondary Complainers requested confirmation of the final sum paid to the Respondent's firm and an explanation of how that figure related to the percentage fee. By separate email on the same date, Ms A pointed out that the fees paid to the Respondent's firm exceeded the percentage fee and requested confirmation that the surplus of £2,972.44 would be repaid to the estate residue for division amongst the beneficiaries. This correspondence is produced as document number 1.9 in the List of Documents for the Complainers. The Respondent did not reply to the Secondary Complainers' queries.
- 13.16 On 26 September 2013 Ms A e-mailed the Respondent to confirm that she had approved the Account of Charge and Discharge and this would be posted to him. She noted that the Secondary Complainers were still awaiting a reply to their query regarding fees. On 3 October 2013 Ms A e-mailed the Respondent to confirm that both Secondary Complainers had now signed and returned their copies of the Account of Charge and Discharge in order that the residue of the estate could be distributed amongst the beneficiaries. This correspondence is produced as document number 1.10 in the List of Documents for the Complainers.

- 13.17 On 10 October 2013 the Respondent was suspended from acting as a solicitor by the Law Society of Scotland in accordance with section 40 of the Solicitors (Scotland) Act 1980. The Respondent was a sole practitioner. As a result of the terms of section 45(4) of the Solicitors (Scotland) Act 1980 the right to operate his firm's client account was vested in the Law Society of Scotland.
- 13.18 Notwithstanding his suspension and the vesting of his client account in the Law Society, the Respondent subsequently continued to correspond with the Secondary Complainers.
- 13.19 On 24 October 2013 the Respondent sent an e-mail to the Secondary Complainers advising that his firm was being audited and he required the Secondary Complainers to confirm approval of the Account of Charge and Discharge, including the additional fee for the additional work undertaken.
- 13.20 On 24 October 2013 the Respondent sent a subsequent e-mail to Ms B explaining that the Secondary Complainers had both signed the Account of Charge and Discharge and had therefore approved the Account, including the charge for the additional work carried out. The Respondent sought to argue that the percentage fee did not apply because the executory was not straightforward and considerable extra work was undertaken.
- 13.21 On the same date Ms B replied by e-mail pointing out that the Secondary Complainers had asked for updates on the Respondent's costs and for confirmation of his charges for additional work. Ms B pointed out that the Respondent had taken payment towards his interim fee notes, including the element of fees which exceeded the percentage fee, without the Secondary Complainers' approval. She stated that the Secondary Complainers remained dissatisfied but that the Secondary Complainers felt they had little choice other than to accept the additional charges to avoid further delays in the distribution of the estate amongst the beneficiaries. In his reply on the same date, the Respondent sought to dismiss the Secondary Complainers' concerns on the basis that they had signed the Account of Charge and Discharge, which included all fees rendered in the executry. The email correspondence between

the Secondary Complainers and the Respondent on 24 October is produced as document number 1.11 in the List of Documents for the Complainers.

- 13.22 By email dated 28 October 2013 the Respondent advised the Secondary Complainers that he would arrange an independent fee assessment and that this would cause a delay in finalising the executry administration.
- 13.23 By emails on the same date the Secondary Complainers disputed that independent fee assessment was necessary and requested the Respondent to proceed with distributing the net executry estate amongst the beneficiaries without further delay.
- 13.24 On 29 October 2013 the Respondent sent an e-mail to Ms B stating that her e-mails made it abundantly clear that she did not accept his firm's accounts and insisting that the files be independently assessed by independent fee assessors. On the same date Ms B responded by e-mail requesting that the Respondent not submit the files for independent fee assessment.
- 13.25 By further email later that day, Ms B sent an e-mail to the Respondent in which she stated that she had spoken with the Law Society of Scotland and had been advised of the Respondent's suspension from practice on 10 October 2013. She suggested that the Respondent's insistence on referring the files for independent fee assessment was a tactic to delay distribution of the executry estate. The email correspondence between the Secondary Complainers and the Respondent on 28 and 29 October 2013 is produced as document 1.12 in the List of Documents for the Complainers.
- 13.26 At no point in the course of his correspondence with the Secondary Complainers did the Respondent make it clear that he was suspended from acting as a solicitor and that his client account was now vested in the Law Society.

Complaint 2 made by Mr C

- 13.27 Mr C separated from his wife Mrs D. The Respondent's firm advised Mrs D in connection with the separation.

- 13.28 Mr C and Mrs D entered into a Minute of Agreement (“the Agreement”). The Agreement was signed by Mrs D on 12 April 2011 and by the Secondary Complainer on 18 April 2011. The Agreement provided that the matrimonial home would be sold and that the Respondent’s firm would carry out the conveyancing of the property.
- 13.29 The Agreement provided a scheme of division in respect of the proceeds of sale of the matrimonial home. It was provided that from the sale proceeds there would be deducted (a) the sum required to redeem the mortgage; (b) all fees incurred in respect of the sale of the property; and (c) all other matrimonial debts and a payment of £10,000 from Mrs D to Mr C. Thereafter, the remaining proceeds of sale were to be divided equally between the Secondary Complainer and Mrs D. Each party was to meet their own legal costs in respect of the preparation of the Agreement, together with half the cost of registering the Agreement.
- 13.30 On 18 June 2012 an offer was accepted for the sale of the matrimonial home. The sale completed on 23 August 2012 and the Respondent’s firm received the sale proceeds. The funds were placed on joint account in the name of Mr C and Mrs D. On 3 September 2012 the Respondent issued a copy receipted fee note in the sum of £750 plus VAT and outlays to Mrs D in respect of the conveyancing of the property.
- 13.31 On 20 September 2012 the Respondent debited the sum of £956.34 from the joint account to a client account in the sole name of Mrs D (“the matrimonial fee”). The narrative relating to that debit stated “*Settlement of matrimonial fee note*”. The joint account debit entry is produced as document 2.1 in the List of Documents for the Complainers.
- 13.32 The matrimonial fee was deducted from the sale proceeds prior to the proceeds being divided between Mr C and Mrs D in breach of the scheme of division provided for in the Agreement. The Respondent did not produce a fee note to Mrs D in connection with the sum of £956.34 before debiting that sum from the joint account. The Respondent did not seek the written authority from Mr C or Mrs D before debiting that sum from the joint account. As a

result following 20 September 2012 the joint account did not hold the total sum of monies to be divided between Mr C and Mrs D.

Complaint 3 made by Mr E and Mrs F

- 13.33 In September 2004 the Respondent rented a storage facility from Company 1 for the storage of client files. Company 1 was owned and operated by Mr E and Mrs F. On 10 October 2013 the Respondent was suspended from practice by the Guarantee Fund Sub Committee. Responsibility for the conduct of the Respondent's current files was assumed by the firm of MacHardy, Alexander & Whyte (MA&W). The Respondent's closed files remained his own personal responsibility.
- 13.34 The Respondent was sequestrated on 14 July 2014. From July 2014 onwards the Respondent failed to pay rent for the storage facility. Mr E and Mrs F wrote to the Respondent on 4 December 2014 demanding payment of outstanding rent or that the Respondent remove the files.
- 13.35 On 5 January 2015, Mr E and Mrs F brought the matter of the unpaid rent to the attention of the Administrators of the Respondent's former firm. On 8 January 2015, 4 March 2015 and 10 March 2015, the Administrators wrote to the Respondent reminding him that the files had not vested in the administration and that they remained his own personal responsibility. The letter from the Administrators to the Respondent dated 10 March 2015 is produced as document number 3.1 in the List of Documents for the Complainers. On 14 April 2015 the Respondent replied to the Administrators denying responsibility for the files in storage and disclaimed the undertaking he had given to the Law Society previously to safeguard the files.
- 13.36 Mr E and Mrs F sent further demands for payment to the Respondent on 9 August 2015, 8 September 2015, 23 September 2015, 9 October 2015, 1 December 2015 and 1 February 2016 but received no reply from the Respondent. The Respondent did not make arrangements to settle the rent or to remove the files.

Complaint 4 made by the Financial Compliance complaint made by the Law Society

- 13.37 The Financial Compliance Department of the Law Society (“the FCD”) inspected the Respondent’s firm on 25 and 27 June 2013 and on 4 July 2013. The Respondent provided a response to the FCD inspection team under cover of a letter dated 31 July 2013.
- 13.38 In the course of its inspection, the FCD found that the Respondent’s firm had held funds on its client account in connection with the executry of Mr J since 1975. The Executor of the estate had since died and no other executor had been appointed. In 2007 the balance of the executry funds held on the Respondent’s client account were taken by the firm as fees. The total funds taken to fees amounted to £5,828.43. A Law Society inspection which took place at that time required the Respondent to re-credit these funds to the client account. On 25 January 2010 the Respondent was advised by the Law Society’s Head of Financial Compliance that fees could not be taken for any transactions which were completed more than five years previously. The Respondent was further advised at that time that the full funds held in the name of the Mr J executry required to be paid to the beneficiaries if the executor could not be contacted, whom failing to the Office of the Queen’s and Lord Treasurer’s Remembrancer (QLTR) and that a receipt must be obtained and held.
- 13.39 On 10 May 2012 the Respondent sent a letter to Mrs K enclosing a fee note of same date in connection with Mr J’s executry. The letter stated, “*As previously explained, this Firm acted on behalf of your predecessor as Executor in the late [Mr JJ]’s Executry*”. The letter from the Respondent to Mrs K is produced as document number 4.1 in the List of Documents for the Complainers. The enclosed fee note was addressed to the executor of Mr J’s Executory care of Mrs K and related to fees of £5,165.92 plus VAT. This amount was the balance of funds held by the Respondent’s firm in connection with the executry. The letter of 10 May 2012 indicated that she was an Executor of the late Mr J’s estate. At the time of sending the letter of 10 May 2012 the Respondent knew that Mrs K was not an Executor of the late Mr J’s estate.

- 13.40 On 15 May 2012 the Respondent took the funds from the executry estate in settlement of the fee. The total funds taken at that time to fees amounted to £6,119.10. The Respondent was directed by the FCD to re-credit the funds to the client account. The funds were re-credited to the client account on 2 October 2013. As at the date of the Respondent's suspension on 10 October 2013 the funds had not been remitted to the QLTR.
- 13.41 The inspection by the FCD established the following further seven instances of fees having been taken from client accounts to fees in respect of transactions completed more than five years previously:
- 13.41.1 In respect of Mr N's executry, funds of £743.72 had been held on the client account since 2007 and a fee inclusive of VAT for that amount had been taken on 13 March 2013.
- 13.41.2 In respect of Company 2, funds of £307.61 had been held on the client account since prior to 2009 and a fee inclusive of VAT for that amount had been taken on 24 May 2013.
- 13.41.3 In respect of Mr O, funds of £208.98 had been held on the client account since 2007 and a fee inclusive of VAT for that amount had been taken on 3 June 2013.
- 13.41.4 In respect of Mr P's Trust, funds of £4,086.28 had been held on the client account since 2007 and a fee inclusive of VAT for that amount had been taken on 13 March 2013.
- 13.41.5 In respect of Ms Q's executry, funds of £1,408.67 had been held on the client account since 1999 and a fee inclusive of VAT for that amount had been taken on 13 March 2013.
- 13.41.6 In respect of Ms R's executry, funds of £6,419.27 had been held on the client account since 2008 and a fee inclusive of VAT for that amount had been taken on 13 March 2013.
- 13.41.7 In respect of Mr and Mrs S, funds of £524.90 had been held on the client account since 2004 and a fee inclusive of VAT for that amount had been taken on 21 March 2013.

- 13.42 Following the FCD inspection in June and July 2013, the Respondent was directed to re-credit all seven fees referred to in paras 13.41.1 – 13.41.7 to the respective client accounts. The funds were re-credited to the client accounts on 30 September 2013. As at the date of the Respondent's suspension on 10 October 2013, the funds had not been remitted to the QLTR.
- 13.43 Following their inspection in June and July 2013 the FCD requested that the Respondent provide them with the files relating to the seven matters referred to at paras 13.41.1 – 13.41.7. The FCD also requested that the Respondent provide an explanation of the basis on which he was entitled to the fees taken. The Respondent failed to comply with either of these requests. The Respondent failed to produce evidence to show that the fees were rendered. The FCD ultimately viewed the files on a further visit to the Respondent's office in October 2013. There was no evidence on the files of any fee notes having been raised or rendered, or of work having been done to justify fees, or of any contact with the clients.
- 13.44 The FCD required the Respondent to provide details of his documented policies and procedures required in terms of Regulation 20 of the Money Laundering Regulations, and to advise when the policies and procedures were implemented. He was also asked to provide details of staff training undertaken in compliance with Regulation 21. The Respondent failed to respond to these requests. The FCD noted that no records were seen or produced in connection with client verification. The FCD found no evidence of processes in relation to client identification, training of staff or establishing sources of funds. The Respondent failed to evidence compliance with the Money Laundering Regulations despite the fact that the requirement to keep the relevant records had been communicated to him at a previous inspection of his firm in 2009.

Complaint 5 made by Ms G and Mr H

- 13.45 Ms G and Mr H (referred to under this as the "Secondary Complainers") are the daughter and son of the late Mr L and Mrs M. Mr L died on 5 May 1994. Mrs M died in November 2014. Mrs M was the Respondent's cousin.

- 13.46 The Respondent was instructed in connection with the executry of Mr L. Mrs M and the Secondary Complainers were appointed Executors. Confirmation was obtained to the title of Property 1 and £16,905 of other assets.
- 13.47 Ms G instructed Gavin Bain and Company, Solicitors, in or around 2009/2010 in connection with concerns regarding the administration of the executry of Mr L. Gavin Bain and Company obtained mandates from the Secondary Complainers addressed to the Respondent seeking all files and papers in connection with the executry. These were submitted to the Respondent by letter dated 29 June 2011. No response was received from the Respondent. Gavin Bain and Company wrote to the Respondent on a further nine occasions between 8 September 2011 and 15 May 2013 but the Respondent failed or delayed to implement the mandates. In particular, the executry file was not delivered to Gavin Bain and Company. The full circumstances of that correspondence is as condescended upon in paras 2.86.1 to 2.86.26 of the Complaint.
- 13.48 Prior to his death the late Mr L held title to Property 1 (“the property”). In or around May 2008 the Respondent received instructions from the Secondary Complainers to transfer the property to Mrs M in liferent and the Secondary Complainers in fee. A disposition was executed on or around 2 May 2008. On 15 May 2008 the Respondent wrote to Mrs M confirming that the transaction was complete and enclosing a fee note. The letter from the Respondent to Mrs M is produced as document number 5.1 in the List of Documents for the Complainers. On 22 May 2008 the Respondent wrote again to Mrs M stating: *“For the avoidance of doubt, and sake of clarity, you have confirmed that you are content to proceed with the transfer in liferent and fee transaction relative to [Property 1]. In the circumstances, we shall complete the necessary formalities”*.
- 13.49 The disposition was submitted to Registers of Scotland on 9 June 2008. It was not accepted by Registers of Scotland and returned to the Respondent.
- 13.50 On 26 November 2009 Ms G requested the Respondent to provide confirmation of the status of the title to the property. On 27 September 2010 the Respondent explained that the disposition had not been accepted by

Registers of Scotland previously because the disposition lacked a deduction of title clause between the executry estate of Mr L and Mrs M. That disposition had proceeded on the erroneous basis that the title was held by Mrs M. A further disposition was prepared and registered with Registers of Scotland on or around 18 October 2010.

13.51 On 28 January 2014 MA&W wrote to Gavin Bain and Company enclosing a cheque in the sum of £2,424.78. The cheque represented the balance of the executry funds in respect of the estate of the late Mr L held on the client ledger by the Respondent's firm.

14. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct individually in respect that:-

Complaint 1 – Ms A and Ms B

14.1 He failed to advise the Secondary Complainers that the fee for the executry would be materially higher than the percentage fee and failed to advise them when the limit of the percentage fee was approached and separately when it was exceeded;

14.2 He failed to advise the Secondary Complainers that he was suspended and his client account frozen;

Complaint 4 – Law Society of Scotland

14.3 He took client funds to fees in breach of Rule B6.5.1(d);

14.4 He failed to remit sums to the QLTR as required by Rule B6.11.5;

14.5 He misled Mrs K by suggesting she was an executor in order to obtain payment of fees;

14.6 He failed to comply with Rule B6.23 and the Money Laundering Regulations 2007;

Complaint 5 – Ms G and Mr H

14.7 He failed to act in his clients' best interests;

14.8 He failed to carry out instructions competently and within a reasonable period of time; and

14.9 He failed to communicate effectively with his clients and others;

and the Tribunal found the Respondent guilty of professional misconduct *in cumulo* in that:-

Complaint 2 – Mr C

14.10 He failed to render a fee note to Mrs D prior to debiting the joint account in settlement of a matrimonial fee;

14.11 He failed to seek the written authority of Mr C and Mrs D prior to debiting the joint account in settlement of a matrimonial fee; and

14.12 He failed to maintain in the joint account the total sum due to be shared between Mr C and Mrs D; and

Complaint 3 – Mr E and Mrs F

14.13 He failed to communicate effectively with the Complainers in breach of Practice Rule B1.9;

14.14 He failed to ensure that client confidentiality was maintained in breach of Practice Rule B1.6; and

14.15 He failed to act in the best interests of his clients in breach of Practice Rule B1.4.

15. Having heard submissions on behalf of the Complainers and the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 27 March 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against John Fleming Hamilton, 7 Forfar Road, Kirriemuir; Find the Respondent guilty of professional misconduct

individually in respect that (1) he failed to advise Ms A and Ms B that the fee for the executry would be materially higher than the percentage fee and failed to advise them when the limit of the percentage fee was approached and separately when it was exceeded; (2) he failed to advise Ms A and Ms B that he was suspended and his client account frozen; (3) he took client funds to fees in breach of Rule B6.5.1(d); (4) he failed to remit sums to the QLTR as required by Rule B6.11.5; (5) he misled Mrs K by suggesting she was an executor in order to obtain payment of fees; (6) he failed to comply with Rule B6.23 and the Money Laundering Regulations 2007; (7) he failed to act in his clients' best interests; (8) he failed to carry out instructions competently and within a reasonable period of time; and (9) he failed to communicate effectively with his clients and others; and guilty of professional misconduct *in cumulo* in respect that (10) he failed to render a fee note to Mrs D prior to debiting the joint account in settlement of a matrimonial fee; (11) he failed to seek the written authority of Mr C and Mrs D prior to debiting the joint account in settlement of a matrimonial fee; (12) he failed to maintain in the joint account the total sum due to be shared between Mr C and Mrs D; (13) he failed to communicate effectively with the Complainers in breach of Practice Rule B1.9; (14) he failed to ensure that client confidentiality was maintained in breach of Practice Rule B1.6; and (15) he failed to act in the best interests of his clients in breach of Practice Rule B1.4; Order that the name of the Respondent be Struck Off the Roll of Solicitors in Scotland; Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order shall take effect on the date on which the written findings are intimated to 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 Complainers 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.

(signed)

Alan McDonald
Vice Chairman

16. 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 30 APRIL 2019 .

IN THE NAME OF THE TRIBUNAL



**Alan McDonald
Vice Chairman**

NOTE

The Tribunal had before it the Complaint dated 21 January 2019, a Joint Minute dated 27 March 2019, an Inventory of Productions for the Complainers and an Inventory of Productions for the Respondent which was clarified was to be referred to in mitigation only.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal took the Tribunal through his written submissions which are reproduced below:-

1 Introduction**1.1 Respondent admits professional misconduct and a Minute of Agreement is agreed**

1.2 The Complaint alleging professional misconduct against the Respondent was lodged with the Tribunal on 21 January 2019. The terms of the Complaint were finalised following detailed discussions between the parties. The Respondent admits the terms of the Complaint in its entirety.

1.3 In addition to agreeing the terms of the Complaint, the parties have lodged a Minute of Agreement. The Minute summarises the key facts of the Complaint.

1.4 Although the Respondent admits the Complaint both parties recognise that the question of professional misconduct is a decision solely for the Tribunal.

1.5 The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 134:-

“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.”

1.6 The Law Society asks the Tribunal to find the Sharp test satisfied and find the Respondent guilty of professional misconduct on a separate or an *in cumulo* basis.

2 Review of facts and duties for each separate complaint

2.1 The Respondent has admitted the facts as contained in the Complaint. The key facts have been summarised in the Minute of Agreement which has been lodged with the Tribunal. I rely on the admitted Complaint and the Minute of Agreement in support of this submission.

2.2 The Complaint is made up of five individual complaints. For each individual complaint I will:-

- Review the facts
- Review the relevant duties
- Submit that the Respondent's breaches of these duties amounts to professional misconduct.

3 Complaint made by [Ms A & Ms B]

3.1 Review of facts

3.2 The Respondent was instructed in connection with an executry. The secondary complainers were the executors.

3.3 On a number of occasions the Respondent took his fees from executry funds and then presented this to the secondary complainers as a fait accompli. He did this on ten separate occasions. In each case taking monies to settle fees and then sending the secondary complainers a fee note afterwards saying this is what he had done.

3.4 The secondary complainers sought clarification from the Respondent on the level of executry funds and legal fees to date on a number of occasions as referred to in the Minute of Agreement. On various occasions the Respondent failed to provide that clarification.

3.5 He resisted providing a breakdown of the cost of his services when requested to do so.

3.6 In the end it transpired that the Respondent's total fees taken from the executry exceeded the percentage fee he had agreed with the secondary complainers at the outset. The Respondent didn't raise this with the secondary complainers. Instead they noted the position when the final executry account, the account of charge and discharge, was provided by the Respondent.

3.7 On 10 October 2013, in amongst the dispute on the Respondent's account, he was suspended from practice by the Law Society in connection with other matters. The effect of that suspension was to vest his client account in the Law Society as a result of which he could not complete the executry.

3.8 He did not explain this to the secondary complainers and even when they sought to drop their objections to his fees he said that he required to send his file to law accountants for an independent assessment. He maintained that he required to do this even when the secondary complainers asked him not to.

3.9 The secondary complainers then learned that he has been suspended from practice.

3.10 Review of duties

3.11 Duty to communicate effectively – the Respondent provided a cost at the outset. He exceeded that cost without advising the secondary complainers. He failed to respond to their requests for updates on executry funds and legal costs.

3.12 Duty to act with trust and personal integrity – the Respondent's failure to advise the secondary complainers that he had been suspended and that the client account now vested in the Law Society was in breach of this duty.

3.13 Submission on misconduct

3.14 It is submitted on behalf of the Council that these breaches of duty amount to professional misconduct.

3.15 The Tribunal has often emphasised the importance of client communication, and keeping the client fully informed on developments. In the current matter the Respondent repeatedly failed to take the opportunity to provide clear communication on the level of funds held in the executry and the fees deducted from the executry, despite repeated requests that he do so.

3.16 Then, when he was suspended from acting he concealed this fact from the secondary complainers. That was particularly important because he was not in a position to conclude matters when his client account had vested in the Law Society because of his suspension.

4 Complaint made by [Mr C]

4.1 Review of facts

4.2 The secondary complainer, Mr [C], and his wife were separating. The Respondent was instructed to carry out the sale of the matrimonial home. He was also instructed in relation to the separation agreement by Mr [C]'s wife. The agreement provided that certain joint costs would be met from the sale proceeds of the matrimonial home, and that thereafter the remaining sum would be divided equally between Mr [C] and Mrs [D].

4.3 One of the joint costs to be paid from the sale proceeds before they were divided was the legal costs of the sale – £750 plus Vat. These were payable to the Respondent.

4.4 However the Respondent also, without permission, deducted a further sum of £956.34 from the sale proceeds, in settlement of his fee for matrimonial advice to Mrs [D]. He had no authority to take these fees from the sale proceeds and it was expressly contrary to the position agreed between the parties.

4.5 Review of duties

4.6 The Respondent had a duty to keep in his client account all sums due. He had a duty not to take monies out of a client account without written authority. He had a duty not to act dishonestly in his financial affairs. By deducting monies contrary to the agreement and without seeking permission, he was in breach of these duties.

4.7 Submission on misconduct

4.8 It is submitted on behalf of the Council that these breaches of duty amount to professional misconduct.

4.9 I have explained that the Law Society considers that each of these five complaints amounts to professional misconduct in its own right. But I would also note that across a number of the matters in this Complaint the Respondent can be seen taking client funds to fees without having the permission to do so.

4.10 It is often said that it is a privilege for solicitors to hold funds for clients, and that an abuse of this privilege should be viewed as a very serious matter, if trust in the profession is to be upheld. I will return to this point in my conclusion.

5 Complaint made by [Mr E and Mrs F]

5.1 Review of facts

5.2 The Respondent rented storage space from [Mr E and Mrs F]. When he was suspended from practice in October 2013 his ongoing files were transferred to another firm. He continued to have a responsibility for the safekeeping of the closed files held at storage.

5.3 He was sequestrated in July 2014. He stopped paying the storage fees for these closed files at that time and maintained they were no longer his responsibility. [Mr E and Mrs F] pursued him for payment, and alternatively asked him to remove the files. He failed to do either.

5.4 Review of duties

5.5 The Respondent had a duty to communicate effectively with his clients and others. He failed to respond to correspondence from [Mr E and Mrs F] in connection with the payment of storage or removal of files.

5.6 He had a duty to maintain client confidentiality in relation to closed files. As the practice rule notes, *"You must maintain client confidentiality. That duty is not terminated by the passage of time."* By failing to retain responsibility for the closed files he had placed in storage the respondent failed to maintain the duty of client confidentiality. This failure also represented a breach of his duty to act in his client's best interests. In my submission these breaches of duty amount to professional misconduct.

6 Complaint made by the Law Society of Scotland following a Financial Compliance inspection

6.1 Following a financial inspection in January 2010 the Respondent was instructed by the Law Society that, where executry funds had been held on a client account for more than five years, these funds could not be taken in settlement of fees. He was instructed that where executors and beneficiaries could not be located, then funds held on the client account must be transferred to the Office of the Queen's and Lord Treasurer's Remembrancer (QLTR). As a result he had been required to reverse fees amounting to £5,828.43 in connection with the executry of [Mr J]. That is background – the misconduct relates to what happened next.

6.2 Despite this instruction from the Law Society in 2010, in 2012 the Respondent again sought to take funds held on account in the [Mr J] executry to fees. He issued a fee note to Mrs [K], suggesting she was an executor of Mr [J]'s estate when she was not, and then deducted funds to meet that fee note.

6.3 The Law Society's Financial Compliance Department (FCD) discovered this during an inspection in June and July 2013 and instructed the Respondent to re-credit these funds to the client account. That happened on 2 October 2013.

6.4 The FCD inspection identified a further seven instances of the Respondent taking to fees sums that had been held on a client account for more than five years. In each case these funds had been taken as fees in 2013 – that is after the Law Society had instructed the Respondent in 2010 that it was not an acceptable practice.

6.5 The FCD also sought explanations as to what work had been done to merit these fees being taken. The Respondent provided no explanation. The FCD reviewed the files and could find no basis for deducting fees in 2013 in connection with these historic matters, nor could they see any evidence of fee notes being raised and rendered for these amounts.

6.6 During the 2013 FCD inspection the Law Society also identified a failure to have in place the necessary client procedures to comply with the Money Laundering Regulations.

6.7 Review of duties

6.8 The Respondent's conduct in connection with these executry matters was a breach of his duty not to intromit with client funds held on account without having written permission to do so. He was also in breach of his duty to place historic funds in the hands of the QLTR, where these could not be returned to beneficiaries or executors.

6.9 The Respondent breached these duties on a number of occasions in 2013, and he did so despite the fact that he had already been clearly instructed by the Law Society in 2010 that this practice was not permitted.

6.10 Separately, the absence of evidence of money laundering procedures was in breach of the AML duties placed on the Respondent.

6.11 Submission on misconduct

6.12 It is submitted on behalf of the Council that these breaches of duty amount to professional misconduct. Again it follows the pattern of the Respondent seeking to access client funds to meet his fees without authority to do so. In this case the Respondent's conduct is particularly concerning because he sought to take these client funds to fees after having been expressly instructed not to do so by the Law Society. This was a wilful breach of the practice rules on protecting the client account and a wilful ignorance of Law Society instructions not to take historic funds to fees.

7 Complaint made by [Ms G and Mr H]

7.1 Review of facts

7.2 In this complaint the Respondent was instructed in connection with the executry of the late [Mr L] who died in 1994. The secondary complainers were the executors of the estate together with the deceased's widow.

7.3 After the late Mr [L]'s death there was some confusion about the status of the matrimonial home. His widow, Mrs [M], had understood that the home had been transferred by the Respondent to herself in liferent, and to her children (the secondary complainers) in fee, on her late husband's instructions. It transpired that this had not been done and Mrs [M] instructed the Respondent to arrange that transfer in 2008.

- 7.4 The Respondent wrote to the Mrs [M] in May 2008 confirming that this had been done and enclosed his fee for the work. However in June 2008, Registers of Scotland rejected the disposition which sought to arrange the transfer. The disposition was rejected because of a drafting flaw.
- 7.5 In November 2009 the secondary complainers raised questions about the transfer with the Respondent. In September 2010 the Respondent confirmed that the disposition had indeed been rejected. A new disposition was registered in October 2010.
- 7.6 The secondary complainers instructed the firm of Gavin Bain and Company to assist them to investigate the position with the registration of the disposition. Mandates seeking all files and papers in connection with the executry were submitted to the Respondent in June 2011. No response was received from the Respondent. Gavin Bain and Company wrote to the Respondent on a further nine occasions between 8 September 2011 and 15 May 2013. The Respondent failed or delayed to implement the mandates and the executry file was never delivered up.
- 7.7 Finally in January 2014, funds held in respect of the original executry– just under £2,500 – were transferred to the secondary complainers by the firm of MacHardy, Alexander & Whyte. (Remembering that firm had taken on the Respondent’s live matters following his suspension in October 2013).
- 7.8 Review of duties
- 7.9 The Respondent had duties to act in his client’s best interests and to carry out instructions adequately and within a reasonable period of time. His failure to complete the disposition after being instructed to do so in 2008 was a breach of this duty.
- 7.10 He also had a duty to communicate effectively with his clients and others. His failure to respond to the Gavin Bain and Company mandates was a breach of this duty.
- 7.11 The Respondent should have transferred the remaining executry funds at the conclusion of the executry. His failure to do so was in breach of his client’s interests.
- 7.12 Submission on misconduct
- 7.13 It is submitted on behalf of the Council that these breaches of duty amount to professional misconduct. The Respondent failed to progress the disposition and subsequently failed to respond to mandates seeking the executry file. Producing the file may have shed light on the reasons for the disposition being rejected, and would have assisted the secondary complainers to better understand

the difficulties in this matter. The failure to respond to the mandates denied the secondary complainers that clarity.

7.14 In connection with mandates the Professional Practice Committee of the Law Society of Scotland Guidelines on Mandates for Solicitors (Parliament House Book, Volume 1, at F1293 provide:-

“Receiving Mandates:-

The simple rule (except that there is no specific practice rule on the matter) is, and always has been, that when you receive a Mandate you must respond to it “timeously” either by sending the items requested to the new Solicitor or stating that you are exercising a lien pending settlement of fees and outlays. A delay in doing so will normally be misconduct.”

7.15 In my submission there is no reason to depart from that approach in this matter.

7.16 The misconduct in this matter is completed by another example of the Respondent holding client funds on account for an extended period of time. Funds engathered in connection with an executry commenced in 1994 were finally transferred to the secondary complainers 20 years later.

8 Summary on why these breaches of duty amount to professional misconduct

8.1 There are a range of different breaches across the five matters contained in this Complaint. With a few exceptions the Respondent’s breaches of duty can be considered broadly as either (1) communication failures or (2) Accounts Rules failures. In closing this submission I focus on why these types of failures amount to professional misconduct.

8.2 Communication failures

8.3 Smith & Barton, at paragraph 7.03, consider the duty of keeping clients informed when carrying out their business. In a case where a solicitor was found guilty of professional misconduct the Tribunal stated:-

“...it is of cardinal importance that a solicitor should at all times keep his client fully informed regarding his progress in dealing with his client’s business....” (case 751/89)

8.4 In the current matter we can see across a number of the complaints that the Respondent has failed to keep his clients informed on progress and key developments.

8.5 Accounts Rule failures

8.6 Paterson and Ritchie note at para 9.02 of Law, Practice and Conduct for Solicitors (second edition) that:-

“Solicitors often either forget or fail to appreciate that they have a special privilege in being allowed to handle clients’ money, sometimes in very large amounts. The price to be paid for this is proper regulation, meaning not just a set of rules to be followed, but also active monitoring by the regulatory body of compliance with those rules coupled with real sanctions for significant breaches of them and compensation to the victims of such breaches.”

8.7 The Tribunal has also noted on many occasions it is imperative that solicitors comply with the Accounts Rules for the public to have confidence in the profession. As the Tribunal noted in Michael and Martin Kerr, 25 May 2016, at page 22:-

“The Accounts Rules are in place in order to provide protection to the public. Solicitors are in a privileged position of holding monies belonging to others. It is well accepted that the Tribunal will treat breaches of the Accounts Rules as a serious matter.”

8.8 In the current matter we can see across a number of the complaints the Respondent taking client funds in settlement of fees in breach of the Accounts Rules. In the financial compliance investigation from 2013 we can see the Respondent has taken executry funds to fees in a number of matters, contrary to specific advice given by the Law Society not to do so.

9 Conclusion

9.1 The parties are agreed that the Respondent is guilty of professional conduct in respect of each matter as a result of his failure to comply with the duties set out in the Complaint and summarised in this submission.

9.2 For the reasons that I have given in this submission, I would ask you to find that the Respondent is guilty of professional misconduct in accordance with the terms of paragraph 4 of the Complaint, which sets out the individual breaches of duty in respect of each matter.

9.3 If you make that decision I would also ask that you make an award of expenses against the Respondent.

The Tribunal asked the Fiscal some questions during his submissions. The Chair noted in relation to complaint one that a solicitor can take fees on the same day they are rendered without permission from the client. The Fiscal agreed that this was the case and that the Complainers did not allege any breach of the Accounts Rules, but rather focussed on the failure in communication. In relation to complaint 2,

it was confirmed that £956.34 was re-credited to the joint account. Mr Logan indicated that after the Respondent ceased practising, this case was transferred to another firm and they sorted the situation out. Mrs D paid the fee out of her share of the funds. In relation to complaint 3 the Chair asked whether Mr E and Mrs F were really the Secondary Complainers or whether it should be Company 1. The Fiscal said that Mr E and Mrs F were the Secondary Complainers.

SUBMISSIONS FOR THE RESPONDENT

Mr Logan indicated that the Respondent was a sole practitioner in Forfar and Kirriemuir from 1991 to 2013. He practised with some distinction. He was a member of the Council of the Law Society of Scotland for nine years. He did not come to the adverse attention of the Complainers before 2013. It is a matter of great regret to the Respondent to appear before the Tribunal.

Mr Logan explained that the Respondent's practising certificate was suspended by the Complainers, but not as a result of these charges. Due to a banking error in May 2013, clients' money was withheld by a bank to account for money owed by the firm. This created a deficit on the client account. The money was eventually passed on by the bank but by that time the firm was "effectively destroyed". The Respondent had to report the financial position to the Law Society every day. No Judicial Factor or firm was appointed locally to deal with the business. He therefore tried to clear things up himself with a view to the firm being wound up. In March 2014, the business was sold to MacHardy, Alexander & Whyte. In July 2014, the Respondent was sequestrated by HMRC for business debts. According to the Respondent, the trustee told him not to deal with any creditors.

Mr Logan explained that the Respondent became very unwell. He under enormous stress. Mr Logan referred to the medical report submitted on the Respondent's behalf. The Respondent's "life's work was falling apart". At the same time, his father was suffering from dementia.

Mr Logan submitted that with the benefit of hindsight, the Respondent had "rather taken his eye off the ball". However, he asked the Tribunal to consider the context. The Respondent was suspended for four and a half years despite the original problem arising as a result of a banking error. He has also suffered as a result of being out of the profession for a long time.

Mr Logan submitted that the Respondent has had no access to the relevant books and files for some time. There are instances in the Complaint and Joint Minute where there is simply a lack of record. The Respondent's position is that there were agreements about certain matters but cannot dispute that

there is a lack of records about these things. However, the Respondent does accept his culpability. This was a plea in mitigation and Mr Logan invited the Tribunal to make a finding of professional misconduct *in cumulo*.

Complaint 1

Mr Logan explained that the Respondent accepted that the agreed executry fee was to be 3.75% of the estate. However, he believed more fees were due because the executors asked for more work to be done. His fault was in failing to communicate with the executors in response to their questions and requests for breakdown of the fees. The house was sold for much less than anticipated and so the percentage fee was also reduced. The Respondent accepted that he did not tell the executor when his practising certificate was suspended. His position is that he was told by individuals in the Law Society not to do so. In this case, the files were sent to the auditor and the audited fees were higher. However, the fees were repaid and the matter resolved by the professional indemnity insurer.

Complaint 2

According to the Respondent, he spoke to Mr C's solicitor and agreed he could take the fee from the joint account and that this would be sorted out between the parties later. There are no records to support this. There was never any intention that Mr C would pay Mrs D's divorce fees. There was no loss to Mr C. He got all his money. However, there was a failure in record keeping.

Complaint 3

Mr Logan explained that the Respondent told him that following on his sequestration, he was told that all questions should be referred to the Trustee. The failure here was to communicate effectively. It is not the failure of a sequestrated solicitor to pay for storage. Mr Logan submitted that the significance of the breach was questionable and on its own was relatively trivial.

Complaint 4

Mr Logan acknowledged that this complaint raised questions of integrity. The Respondent purchased the firm in 1991. It was the practice of the previous owner not to take all the money to which he was entitled. He had a practice of keeping it in the client account and drawing on it for bills. This is the background to the series of credit balances which became more and more historic. The Respondent did not know anything about the business which related to these credit balances. The firm was doing well and did not feel he had to do anything about them. However, between 2010 and 2013, the Law Society put increasing pressure on firms to clear credit balances. The Respondent therefore started this process with his cashier. He sent some money to the QLTR and they returned it because he could not say to

whom the money belonged. He sought advice from HMRC. He said that HMRC told him that as he did not have the original fee notes, he would have to render new fee notes with VAT to clear the balances. He tried to clear up the balances as best he could.

Mr Logan submitted that given this background, namely that the Respondent paid for the credit balances as part of the capital of the firm, there was no lack of integrity or dishonesty. He should have taken the fees in 1991. By the time he came to do it, the paperwork was not available or at least it could not be demonstrated that the money was properly due to him. Mr Logan made reference to Ivey-v-Genting Casinos (UK) Limited T/A Crockfords [2017] UKSC 67 and its application by the Tribunal in the Law Society of Scotland-v-Thomas Duff. Mr Logan noted that the Tribunal should ascertain the state of mind of the Respondent and then consider whether a reasonable person would consider the conduct to be dishonest. He submitted that the context meant that the conduct was not dishonest, although the Respondent accepted that what he did was contrary to the Complainers' advice and guidance.

Complaint 5

Mr Logan accepted that the Respondent should have admitted much earlier that these files were lost and failure to do so was a failure in communication.

With reference to the Complaint as a whole, Mr Logan submitted that a number of things had gone wrong for the Respondent. Each was relatively trivial but had a cumulative effect. The real crisis was caused by the banking error. If he had been left in situ he might have been able to sort these things out. Mr Logan urged the Tribunal to make no finding of dishonesty.

The Tribunal asked Mr Logan a question about whether the solicitor's duty of confidentiality continues after sequestration. Mr Logan accepted that it did, for example if the files were in the solicitor's garage. However, once sequestered he had no control or responsibility for the files which vested in someone else. Mr Logan agreed that the reason why the Respondent might have been unable to find the files in relation to complaint 5 was because they were probably in storage.

Mr Logan indicated that the Respondent was suspended on 10 October 2013. He confirmed that there were no documents available to support the Respondent's contention about his advice from the QLTR or HMRC. He did not seek advice from colleagues or the Law Society of Scotland. He had no documentary evidence to support the Respondent's position that individuals in the Law Society advised the Respondent not to tell clients he was suspended.

Mr Marshall noted “some friction” between Mr Logan’s submissions and the Joint Minute. He said where there was any conflict, the Tribunal should rest on the Joint Minute. The Complainers did not accept the submissions about things the Respondent was allegedly told by third parties.

Both parties accepted that honesty and lack of integrity were questions to be determined by the Tribunal.

DECISION

The Respondent admitted the facts contained within the Joint Minute of Admissions. It was for the Tribunal to consider whether the admitted conduct met the test as set out in Sharp v The Law Society of Scotland 1984 SLT 313. There are certain standards of conduct to be expected of competent and reputable solicitors and 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 considered each of the five complaints which made up the Complainers’ Complaint in turn.

Complaint 1 was made by Ms A and Ms B. The Respondent failed to communicate effectively with his clients. He told them that his fee would be 3.75% of the value of the estate. He advised them that there would be no additional costs. He failed to communicate with them properly regarding the fees he took despite their repeated requests for a breakdown. He failed to advise them that he had been suspended from acting as a solicitor and that his client account was vested in the Law Society. He continued to correspond with them about the executry and his fees. By acting in this way, the Respondent allowed his personal integrity to be called into question. The Tribunal was satisfied that this conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and that the test for professional misconduct was satisfied in relation to each averment of professional misconduct in complaint 1.

Complaint 2 was made by Mr C. The Respondent failed to comply with his duties under the Accounts Rules. He debited money from a joint account in settlement of fees which were payable only by Mr C’s wife without seeking their written authority and without raising a fee note. As a result, he failed to maintain in the account the total sums due to be shared between them. The Fiscal had alleged dishonesty in relation to this conduct by including reference to Rule B6.12.1 in the averments of duty. However, the Tribunal was not satisfied that there was sufficient evidence to draw an inference of

dishonesty rather than recklessness or negligence. The Tribunal was not satisfied that on its own, this complaint would have met the test for professional misconduct. However, along with complaint 3 and *in cumulo* with the rest of the Complaint, it was satisfied that the behaviour constituted professional misconduct.

Complaint 3 was made by Mr E and Mrs F. The Respondent failed to communicate effectively with them regarding the files he left at their storage facility. They had asked him to pay the outstanding rent or remove the files. The Tribunal accepted that as he was sequestered, the Respondent would not have been able to pay the outstanding rent and makes no finding regarding this. However, a solicitor's duty of confidentiality to clients does not end on his/her sequestration. Rather it is personal to him. He should have retrieved the files and delivered them to the appropriate person. The Respondent failed to act in the best interests of his clients. Failure to do so put clients' confidentiality at risk. A data breach arising from these circumstances could have had serious consequences for the clients concerned and the reputation of the profession. However, no such consequences flowed from this breach. The Tribunal was not satisfied that on its own and in these particular circumstances where the Respondent was sequestered, this particular complaint would have met the test for professional misconduct. However, along with complaint 2 and *in cumulo* with the rest of the Complaint, it was satisfied that the behaviour constituted professional misconduct.

Complaint 4 was made by the Law Society. In 2010 the Complainers informed the Respondent that fees could not be taken for any transactions which were completed more than five years previously. Despite this, in 2012 and 2013, on eight occasions, the Respondent took client funds in settlement of fees when he ought to have remitted the funds held to the QLTR. The Tribunal had regard to the test for dishonesty described in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. According to that case, the Tribunal should first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. When that is established the question whether his conduct was honest or dishonest is determined by applying the objective standards of ordinary decent people.

The Respondent claimed that he believed that this money belonged to him because it represented debts due to the firm when he bought it. The Tribunal rejected this submission when considering his knowledge or belief as to the facts. If the money was due to the firm, it would and should have been taken at the time. The money was client money. It was held in the client account and on client ledgers. The Respondent could not demonstrate that the money was properly due to him. This casts doubt on the genuineness of the Respondent's belief. He took to fees the amount outstanding on the

client ledgers with no reference to any work carried out. The fees were not rendered. They were taken many years after any work was done on the files. He had taken money to fees previously and been ordered to recredit the balances. The Law Society had told him that he could not take fees for work completed many years ago and that the money should be remitted to the QLTR. Despite this, the Respondent took money to fees again in the same circumstances. Taking the money in these circumstances was dishonest by the standards of ordinary decent people. The essential qualities of a solicitor are honesty, truthfulness and integrity. It is imperative that if the public is to have confidence in the legal profession that solicitors maintain the standards of conduct expected of competent and reputable solicitors. The Respondent's conduct included serious and reprehensible departures from those standards at the most serious end of the scale. Accordingly, the Tribunal found him guilty of professional misconduct.

In addition, the Respondent failed in his anti-money laundering duties. He did not apply adequate customer due diligence measures, he failed to keep up to date the documents obtained for applying customer due diligence measures, he failed to keep records, he failed to ensure that appropriate and risk sensitive policies and procedures were established and maintained and he failed to ensure that appropriate training measures had been taken in relation to relevant employees. The Tribunal was satisfied that this conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and that the test for professional misconduct was satisfied in relation to each averment of professional misconduct in complaint 4.

Complaint 5 was made by Ms G and Mr H. The Respondent failed to respond to correspondence and comply with mandates, breaching his duty to act in the best interests of his clients and to communicate effectively. He failed to carry out work within a reasonable time. He retained £2,500 in executry funds for almost twenty years in breach of his duty to act in the best interests of his client and to communicate effectively. The Tribunal was of the view that the error in title in itself was not professional misconduct. However, failure to correct it in a reasonable time and failing to communicate with the client was a serious and reprehensible departure from the standards of competent and reputable solicitors, as was the failure to comply with mandates. The Tribunal was satisfied that this conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and that the test for professional misconduct was satisfied in relation to each averment of professional misconduct in complaint 5.

Following its deliberations, the Chair announced that the Tribunal found the Respondent guilty of professional misconduct individually in respect of complaints 1, 4 and 5 and *in cumulo* with regard to

complaints 2 and 3. He noted that the Tribunal had found dishonesty in relation to complaint 4. The Fiscal noted that the Respondent had one finding of unsatisfactory professional conduct on his record from December 2015. He informed the Tribunal that the Respondent was censured and fined in relation to this finding but did not provide any details of the conduct.

SUBMISSIONS IN MITIGATION

Mr Logan told the Tribunal that his client was 62 years old. He had practised as a sole practitioner for a number of years. Following his suspension, he was sequestered and his suspension remains in place. He has lost his firm, savings and investment properties. His wife had to buy his share of the matrimonial home from the Trustee. His health was poor for a period, and a letter was produced to the Tribunal from his GP (Production 3 for the Respondent). When his health improved, the Respondent worked for a time for Muir Myles Laverty as a paralegal dealing with conveyancing. In May 2016 that firm was inspected by the Complainers in the usual way. It was noted that the firm had employed the Respondent and the view expressed that this was inappropriate. The Respondent had effectively been on “gardening leave” since that time. He made an application to the Complainers for a practising certificate and this seems to have brought these matters to a head, resulting in this Complaint coming before the Tribunal.

The Respondent was anxious if at all possible to obtain a practising certificate. He accepted that there would have to be a limitation on any certificate issued. He does not want to return to practice on his own account or become a partner in a firm. However, he did want to earn some money before his retirement. He was told that in Dundee he might earn £30,000-£40,000 as a conveyancing assistant. Mr Logan urged the Tribunal to impose a restriction which would allow the Respondent to work as a solicitor until he reaches retirement age. A letter was produced to the Tribunal from John Muir at Muir Myles Laverty Solicitors at Production 1 for the Respondent regarding possible employment there.

The finding of dishonesty is a matter of regret for the Respondent. However, he maintained his position in relation to these. The balances were unsatisfactory in a variety of respects, but Mr Logan adhered to the point he made earlier, namely that “it was his money, it was just in somebody else’s name”. The balances should have been properly dealt with by the previous owner of the firm in 1991 and then as they arose by the Respondent. Mr Logan acknowledged that the Tribunal had found the Respondent’s conduct to be dishonest. However, he urged the Tribunal to accept that this is not a case where someone has gone out to try and deceive another. To take it at its highest, the Respondent

couldn't prove that he actually had ownership of that money because the documentation didn't vouch for it. This was not the same as, for example, a solicitor helping themselves to executory funds. Even with a finding of dishonesty it would be possible to allow the Respondent to earn some money as a solicitor before his retirement.

The Fiscal sought the usual order with regard to expenses and publicity but asked that the identity of third parties be anonymised. Mr Logan did not oppose the Fiscal's motions.

DECISION ON SANCTION

A great deal was said on behalf of the Respondent regarding his banking difficulties in May 2013 which led to his suspension in October 2013 and sequestration thereafter. The Tribunal noted, however, that much of the misconduct described in this case took place before May 2013. The Tribunal did not take into account the finding of unsatisfactory professional conduct from 2015 since it had no information about the nature of that conduct.


The Tribunal had regard to Bolton v Law Society [1993] EWCA Civ 32. In that case the Court of Appeal noted that the essential issue is "*the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.*" The reputation of the profession is more important than the fortunes of any individual member. Similarly, in McMahon v Law Society of Scotland 2002 SC 475, it was noted that membership of the legal profession is a privilege. Those who exercise that privilege undertake a duty throughout their professional lives to conduct their clients' affairs to their utmost ability and with complete honesty and integrity. Clients and colleagues should be able to expect these qualities of every solicitor as a matter of course. If the public is to give the profession its respect and trust, it must be assured that when solicitors fail in these duties, they will be suitably dealt with by the profession's disciplinary system. A solicitor who has been guilty of dishonesty with clients' money has forfeited the respect and trust of the public and colleagues and has disgraced the profession.

The Tribunal also considered the Tribunal case of Law Society of Scotland v Thomas Duff. In that case, the Tribunal made a finding of dishonesty relating to the taking of historic client balances as fees. The Tribunal censured Mr Duff, imposed a fine of £2,000 and restricted his practising certificate for five years. That case had involved two historic balances of £140 and £200 taken within days of each other. The Tribunal noted that they had been taken not for personal financial gain but as an exercise of very poor judgement to cut corners when dealing with credit balances. The dishonest conduct in the

present case was much more significant. The fees amounted to £19,898.53, inclusive of VAT. The circumstances also involved the Respondent having taken fees in relation to one executry and being advised by the Complainers' Head of Financial Compliance that fees could not be taken for any transactions completed more than five years previously. Having received this guidance, the Respondent wrote a misleading letter to an individual advising her that she was an executor when the Respondent knew she was not, and then taking that money again as fees, in addition to other historic balances. The dishonest conduct in the present case put the public at risk and was likely to have a detrimental effect on the reputation of the profession.

When considering the appropriate sanction, the Tribunal had regard to the fact that the Respondent had cooperated with the Complainers and entered into a Joint Minute. He attended the Tribunal in person. However, it also had regard to the variety of misconduct which included dishonesty. It did not consider that the Respondent had demonstrated insight into his conduct, as he continued to advance the position that historic balances belonged to him. The conduct across the whole Complaint demonstrated a danger to the public and was likely to seriously damage the reputation of the legal profession. His conduct showed that he was not a fit person to be a solicitor.

Therefore, the Tribunal ordered that the Respondent's name be struck off the roll of solicitors in Scotland. In terms of Section 53(6) of the Solicitors (Scotland) Act 1980 the Tribunal directed that the order shall take effect on the date on which the written findings are intimated to the Respondent. The Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent. However, 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 Complainers will have 28 days from intimation of these findings to lodge a claim for compensation.



Alan McDonald
Vice Chairman