

**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

**NEIL BRENNAN BARNES, residing at 1
Foinavon Gardens, Thornliebank, Glasgow**

Respondent

1. A Complaint dated 18 September 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Neil Brennan Barnes, residing at 1 Foinavon Gardens, Thornliebank, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Company 1.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 27 January 2020 and notice thereof was duly served on the Respondent.
5. At the hearing on 27 January 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor-Advocate, Edinburgh. The Respondent was present and represented by Michael Foster, Solicitor, Glasgow. On the unopposed motion of the Respondent, the Tribunal received the Respondent's Answers although they had been submitted late. A Joint Minute dealing with various Productions lodged on behalf of the Complainers was lodged. No evidence was led. Parties made submissions.

6. Having given careful consideration to the terms of the Complaint, the Joint Minute, the Complainers' Productions referred in said Joint Minute and the parties' submissions, the Tribunal found the following facts established:-

- 6.1 The Respondent is Neil Brennan Barnes. He resides at 1 Foinavon Gardens, Thornliebank, Glasgow. His date of birth is 25 February 1974. He was admitted to the roll of solicitors on the 5 August 2004. He was employed by McAuley, McCarthy & Co between August 2004 and August 2010. He became partner in Loughran Barnes in August 2010. Thereafter in June 2011 he became the sole practitioner in Neil Barnes Solicitor Limited where he practised until the 5 July 2019 when the company entered compulsory liquidation. The Respondent's practising certificate was withdrawn under Section 40 of the Solicitors (Scotland) Act 1980 by decision of the Society's Client Protection Sub Committee on the 5 September 2019.
- 6.2 The Respondent practised immigration law. An element of his instructions was to raise judicial review proceedings in the Court of Session in Edinburgh. This work was generally legally aided. The Respondent instructed Edinburgh agents to carry out administrative work in these cases. The Respondent instructed the Secondary Complainer to act as his Edinburgh agents. The Court of Session work the Respondent carried out was legally aided.
- 6.3 The Respondent was instructed by two clients to raise judicial review proceedings. He obtained legal aid certificates for both. The H case concluded in September 2014, the C case (subject to finalisation of payment of the expenses of the action) in 2016. C was successful and the Government made payment of the judicial expenses to the Secondary Complainer who, as they are obliged to do, paid the sums to the Scottish Legal Aid Board (SLAB). The H case was unsuccessful.
- 6.4 In both cases the Secondary Complainer prepared accounts in line with legal aid rates for submission to SLAB. The Respondent was the holder of the legal aid certificate. He too required to prepare accounts of expenses for submission to SLAB on behalf of his clients. It was his obligation to submit the account to

SLAB (including his Edinburgh agents account). The Respondent forwarded both his and the Secondary Complainer's accounts in the case of C to SLAB. The Respondent received payment from SLAB in respect of the account he submitted on behalf of C this included an element due to the Secondary Complainer.

- 6.5 The H account was forwarded to the Respondent in December 2014. The account totalled £503.14 including VAT. The Respondent failed to prepare his account in the H case. The Respondent did not submit the Secondary Complainer's account in respect of H to SLAB and as a result of that failure did not recover the Secondary Complainer's account. He did not recover any fees for himself.
- 6.6 The Secondary Complainer was cognisant that the fees for the cases were to be met from the public purse. It did not immediately on conclusion of the cases and preparation of the legal aid account submit a fee note to the Respondent for the work they carried out. It was prepared to await the Respondent being paid by SLAB before expecting payment from him. The Secondary Complainer's director and her staff entered into protracted correspondence with the Respondent pressing for updates as to his progress in recovering the fees from SLAB. Letter/emails were written to the Respondent from the Secondary Complainer on the 19 January 2015, 3 June 2016, 7 June 2016, 15 July 2016, 4 August 2016. The Respondent replied to some of these queries but did not confirm whether an account had been submitted or, offer a reasonable explanation as to why that had not happened or, explain when he expected the Secondary Complainer to be paid.
- 6.7 By 27 September 2016 the Secondary Complainer was not content with the limited responses it had received from the Respondent in respect of the C case and issued a fee note for the sum of £1132.40 including VAT to the Respondent.
- 6.8 By January 2017 the Secondary Complainer again was not content with the comments of the Respondent in respect of the H case and a fee note was issued in the sum of £503.14 inclusive of VAT to the Respondent for work done on the 10 January 2017.

6.9 The Secondary Complainer's director and staff continued to send correspondence to the Respondent pressing for payment on the 10 January 2017 (C case only), 20 February 2017, 28 February 2017, 23 March 2017, 20 April 2017, 30 May 2017 and 21 July 2017. On the 3 August 2017 the Secondary Complainer wrote noting that SLAB had paid the Respondent the sums due in respect of the C case and querying why the invoice had not been paid. A recorded delivery letter was sent on the 20 September 2017 seeking payment within in 5 days. A final email pressing for payment was sent on the 5 December 2017.

6.10 The Respondent did not reply to any communications between March and December 2017.

6.11 The Respondent has accepted that he erred in the submission of two accounts. He explained this was as a result of personal illness. He has accepted he was undoubtedly in the wrong. He made a payment to the Secondary Complainer's firm of £500 in or around February 2018. The Secondary Complainer did not accept this as full payment of H fee.

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

- (a) Failed to settle the Secondary Complainer's fee notes and acted in contravention of his statutory obligation to make payment, that contravention continuing for such a period of time that the continued failure of the Respondent brought the profession into disrepute;
- (b) Failed to communicate effectively with the Secondary Complainer in particular failing to provide a clear and comprehensive explanation as to the present position of the status of the two clients' legal aid accounts from January 2015 to December 2017 in contravention of Rule B1.9.1 of the 2011 Practice Rules; and
- (c) Failed to offer clear, regular and accurate explanations as to the status of the two clients' legal aid accounts and submitted a cheque in settlement of two invoices

in a sum less than that due by the Respondent in contravention of Rule B1.14.1 of the 2011 Practice Rules.

8. Having considered the Respondent's submissions in mitigation and the submissions of parties regarding expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 27 January 2020. The Tribunal having considered the Complaint dated 18 September 2019 at the instance of the Council of the Law Society of Scotland against Neil Brennan Barnes, 1 Foinavon Gardens, Thornliebank, Glasgow; Find the Respondent guilty of professional misconduct in respect that he (a) Failed to settle the Secondary Complainer's fee notes and acted in contravention of his statutory obligation to make payment, that contravention continuing for such a period of time that the continued failure of the Respondent brought the profession into disrepute; (b) Failed to communicate effectively with the Secondary Complainer in particular failing to provide a clear and comprehensive explanation as to the present position of the status of the two clients' legal aid accounts from January 2015 to December 2017 in contravention of Rule B1.9.1 of the 2011 Practice Rules; (c) Failed to offer clear, regular and accurate explanations as to the status of the two clients' legal aid accounts and submitted a cheque in settlement of two invoices in a sum less than that due by the Respondent in contravention of Rule B1.14.1 of the 2011 Practice Rules; 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; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Colin Bell
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 *24 February 2020*.

IN THE NAME OF THE TRIBUNAL



**Colin Bell
Vice Chair**

NOTE

At the hearing on 27 January 2020, the Tribunal had before it the Complaint, Answers, a Joint Minute, a List of Productions for the Complainers and a List of Authorities for the Complainers. The Joint Minute agreed that Productions 1 and 3 – 18 for the Complainers were true copies of the correspondence passing between the Respondent and the Secondary Complainer and were to be treated as the evidence of the communications between those parties. The Joint Minute also agreed that Productions 19 and 20 for the Complainers were true copies of the correspondence passing between the Respondent and the Complainers and were to be treated as the evidence of the communications between those parties.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal described the Respondent's conduct. Reference was made to a number of Productions which were the letters and emails referred to within the Complaint. The Fiscal noted that the Respondent replied to some queries. A number of emails were sent throughout the course of 2017. The Secondary Complainer received no substantive response. The Fiscal noted that the Respondent accepted that he had erred in the submission of two accounts due to personal illness. He made payment to the Secondary Complainer's firm of £500 in or around February 2018. In his correspondence with the Complainers he accepted his responsibility.

The Fiscal referred to Section 30 of the Solicitors (Scotland) Act 1980 and quoted it in full. He noted that the Respondent practised as an incorporated practice. However, the Respondent accepted that he had professional obligations in terms of Section 30 as he was the sole director and shareholder of the practice. Mr Foster confirmed this was the case.

The Fiscal submitted that the Respondent had breached Rules B1.9.1 and B1.14.1 in addition to Section 30 of the 1980 Act. He said this was serious and reprehensible conduct in terms of the Sharp test. The Fiscal referred to the authorities he had produced. These were excerpts from Paterson & Ritchie's "*Law Practice and Conduct for Solicitors*", 2nd Edition, and Smith & Barton's "*Procedures and Decisions of the Scottish Solicitors Discipline Tribunal*". The Fiscal noted that no medical evidence had been produced by the Respondent. He said it would be unfair of the Complainers to say they were unaware of the Respondent's difficulties. However, they did not know the extent of these. The Fiscal noted the Tribunal's approach is that ill-health only goes to mitigation.

A Tribunal member asked the Fiscal about the relevance of the Respondent's state of mind. It was noted that the Fiscal accepted that the Respondent had not sought to mislead the Secondary Complainer. The member asked to what extent this went to culpability. The Fiscal noted that the Respondent's culpability was in not dealing with the correspondence. The issue was his omission to reply. He said that if one never quite gets to it, one is still culpable.

Another Tribunal member asked to be referred to the email referred to at paragraph 4.19 of the Complaint said to be sent on 5 December 2017. The Fiscal confirmed this was not lodged. Mr Foster said the Respondent did not dispute that it was sent.

SUBMISSIONS FOR THE RESPONDENT

Mr Foster began by apologising for the late submission of the Answers. He said this was due partly to the Respondent experiencing a period of ill-health and also IT difficulties face by Mr Foster's firm. He apologised for any inconvenience caused to the Tribunal.

Mr Foster had not obtained a medical report. However, he noted that he could obtain one if the Tribunal wished him to do that. He would ordinarily have submitted a medical report but to a degree this demonstrated the Respondent's inability to deal with matters. He said that the Respondent had suffered from depression for a number of years.

Mr Foster submitted that the "factual matrix" was not in dispute. The duties were accepted. The only question was whether the Sharp test was breached and misconduct established. In Mr Foster's submission the threshold was not met and therefore the behaviour did not constitute professional misconduct.

Mr Foster described the Respondent's circumstances. He is 45 and single. His professional practice was his life. He specialised in immigration work and was good at it. He is currently employed as an administrative assistant, effectively working as a solicitor without the salary or status. If he is successful before the Tribunal, he intends to apply to have his practising certificate restored. The Respondent has no intention or desire ever to be a principal again. He recognises that the stress would be likely to lead a relapse in his condition. He wishes to be an employed solicitor. Mr Foster had enquired with the Law Society whether there was a mechanism whereby the Respondent's practising certificate could be restricted without a disciplinary finding. However, this was not possible.

Mr Foster said that the Complaint amounted to two issues, namely the delay in making payment and the failure to correspond which related to payment. Mr Foster noted that the interests of clients were not impugned in any way.

At the time of the conduct, the Respondent experienced a number of traumatic events which added to his mental burden. Mr Foster gave details of these to the Tribunal.

With regard to the circumstances of the Complaint, Mr Foster noted that the Secondary Complainer acted in three cases as Edinburgh correspondent for the Respondent's firm although his usual practice had been to instruct Drummond Miller. The Secondary Complainer had been a personal friend and had asked him to pass work to her. One account was paid without difficulty. In the second, the Respondent paid £500 towards an account of £503.14. At the time he had no access to the invoice and thought he was paying in full. The third account comprised of two components. The Respondent did not believe he should be liable for one of those components. Mr Foster said the problem was the Respondent allowed his sense of injustice to overcome his legal knowledge. Once given certain advice, the Respondent borrowed money and this was paid to the Secondary Complainer through Mr Foster's client account. The Chair asked whether the Secondary Complainer had now been paid in full. Mr Foster replied that if the Secondary Complainer thinks that more is due then she can correspond with him regarding payment.

Moving on to the issue of the correspondence, Mr Foster acknowledged that the Respondent's medical condition would not exculpate him but said it was a factor that the Tribunal could take into account regarding whether the threshold for misconduct was reached. He noted the number of items of correspondence. He said that the Respondent met with the Secondary Complainer in March 2017. He apologised and said he would deal with the matter but became unwell again. Mr Foster submitted that this was not a case where the Respondent took on too much work. He maintained adequate staffing. His client work was not affected.

A Tribunal member asked Mr Foster to address the Tribunal on the length of time the Respondent took to deal with the correspondence. Mr Foster referred to the issues in the Respondent's personal life and other issues which arose at work. The first of these matters occurred in July 2014 and continued to July 2016.

In answer to a question by the Chair, Mr Foster confirmed that he was consulted in October 2019 regarding the Law Society Sub Committee proceedings, but it was only last week that he was instructed with regard to this Complaint.

A Tribunal member asked whether the Respondent had been practising and working throughout the period in question. Mr Foster said that administrative staff had done most of the work. They called the Respondent in when he was required to do anything. Working was his way of coping although he was only working part time. Another Tribunal member asked why the Respondent had not paid the component of the sum due in relation to the disputed fee. Mr Foster said he was simply not able to deal with some things. Once the firm was in liquidation, he had no access to the papers and by then had bigger things on his mind. Mr Foster confirmed that the firm went into liquidation in July 2019. However, from Summer 2016 onwards the Respondent had experienced a constant struggle because fees were not received.

DECISION

The Respondent failed to settle his Edinburgh agent's fee notes for a long period, failed to communicate with that company effectively about two accounts and failed in his duty to act with other regulated persons with mutual trust and confidence. The facts of the case were admitted but professional misconduct was denied. The Tribunal had to consider whether the admitted conduct met the test 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 carefully the level of culpability in the case and was satisfied that it met the Sharp test. The long period of time during which the Secondary Complainer had sought a response from the Respondent was critical. The Tribunal also noted with concern that in the C case, the Respondent had received money from SLAB and did not pass on the element due to the Secondary Complainer. Even if there had been a dispute regarding payment, he retained the funds and did nothing about it. This was a serious and reprehensible departure from the standards of competent and reputable solicitors, even if the Complainers made no allegation of lack of integrity. His omission to act was likely to bring the profession into disrepute and was sufficient in these circumstances to meet the Sharp test.

The Tribunal noted the submissions made on the Respondent's behalf regarding his health. The Complainers accepted there was a medical background to the conduct. However, it was difficult to understand the extent of this, or the effect on his practice, without medical evidence. This Tribunal is concerned with professional misconduct. At present, no "fitness to practise" scheme exists for Scottish

solicitors. Generally, ill health only goes to mitigation and not to culpability in these Tribunal proceedings.

SUBMISSIONS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal produced the Respondent's record card and highlighted the unsatisfactory professional conduct finding on it from May 2018. This related to delay in respect of payment of Counsel's fees. The Fiscal confirmed that he had spoken to the director of Company One and the Secondary Complainer no longer wished to claim compensation. He moved for expenses.

Mr Foster explained that the unsatisfactory professional conduct case was a separate matter which also arose during time when the Respondent was unwell. Payment was eventually made to the advocate. The Fiscal confirmed that the advocate attempted to withdraw his complaint but the regulatory committee decided it should proceed.

Mr Foster said he understood that publicity was standard and had no special reason to oppose this. He did not oppose the motion for expenses but noted the Respondent's full degree of cooperation (admittedly belatedly) and the Respondent's mental health. He said these were grounds for asking for an exception to the normal rule.

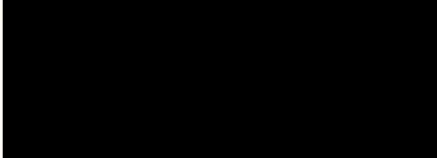
Mr Foster explained in mitigation that the Respondent's medical situation did not affect the Respondent's day-to-day activities as a lawyer. His job gave him relief from depression. He very much enjoyed being a lawyer. However, he recognised that he cannot cope with running a business. He wished to obtain a practising certificate and get back to work as an employed solicitor. Mr Foster noted that the amounts involved in the case were quite small. The Respondent made the first payment from his own funds. The time taken to fully resolve the matter was due to the Respondent's inability to face up to the facts. Once he received advice from Mr Foster, payment was made within 48 hours. This is not a case where the Respondent was deliberately trying to thwart payment.

Mr Foster encouraged the Tribunal to take the medical factors into account as mitigation. He submitted that if it was not for the depression, the Respondent would not be appearing before the Tribunal. The Respondent ran a fairly successful business with a large case load. There was never any problem with his usual Edinburgh agents. He did meet with the Secondary Complainer but had a relapse after that. Mr Foster suggested that the misconduct was at the lower end of the scale.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal noted Mr Foster's submissions regarding the Respondent's health but without medical evidence was not able to give as much weight to this as it might have done had a medical report been produced. The Tribunal considered that the misconduct was at the lower end of the scale. The record card disclosed an analogous finding of unsatisfactory professional conduct. The Tribunal noted that the unsatisfactory professional conduct occurred during the same period as that in the current Complaint. The Respondent cooperated with the Fiscal and the Tribunal. He made payment to the Secondary Complainer through his solicitor. A fine would be difficult for him to pay in his current financial position. The Tribunal noted Mr Foster's comments that he had sought advice from the Society on a restricted practising certificate for the Respondent, and the suggestion that his mental health had played a part in the misconduct. After a great deal of consideration, the Tribunal concluded that it would not be appropriate to impose a restriction on any practising certificate issued to the Respondent. The misconduct was at the lower end of the scale and there was no direct risk to client money as a result of his conduct. In these circumstances, the Tribunal would not wish to unduly inhibit the Respondent's future employment. The finding of misconduct and Censure is sufficient to mark the gravity of the offence, protect the public and uphold the reputation of the profession.

The Tribunal considered Mr Foster's submissions on expenses but saw no reason to depart from its usual practice regarding an award to the successful party. Expenses are not part of the sanction. Therefore, the Tribunal awarded expenses to the Complainers. The Tribunal ordered that publicity should be given to the decision and that the Respondent ought to be named in the decision. However, there was no requirement to name any other person as publication of their personal data was likely to be detrimental to their interests. The Fiscal noted that the Secondary Complainer did not wish to make a claim for compensation, and this was confirmed to the Tribunal Office by the Secondary Complainer by email. Therefore, no arrangements were made regarding a claim for compensation.



Colin Bell
Vice Chair