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

F I N D I N G S

in Complaints

by

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

against

CHARLES THOMAS NORBERT BRIEN, Solicitor, 13 Cameron March, Edinburgh
Respondent

1. On 10 August 2016 a Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Charles Thomas Norbert Brien, Solicitor, 13 Cameron March, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 7 December 2016 as a hearing and notice thereof was duly served on the Respondent.

5. At the hearing on 7 December 2016, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow. A fresh Complaint, Record and Joint Minute of Admissions were lodged and received by the Tribunal. The parties indicated that they

had come to an agreement on the factual position to be presented to the Tribunal. Submissions were made on behalf of both parties.

6. The Tribunal found the following facts established:-

6.1. The Respondent's date of birth is 16th February 1956. He resides at 13 Cameron March, Edinburgh. He was enrolled as a solicitor on 27th September 1979. Thereafter he was employed by Levy & McRae. Thereafter the Respondent was employed by John King & Co, Solicitors, Cullen and subsequently was a partner in that firm until February 1987 when he had a breakdown and took six months off. He was then employed in succession by Livingston Development Corporation, PC McFarlane & Co, Solicitors, Livingston, West of Scotland Water Authority, East of Scotland Water Authority and Scottish Water up until 14th March 2004. He then became an associate with the firm of Tods Murray, 66 Queen Street, Edinburgh. His employment there commenced on 30th April 2004 and ended with that firm's administration on 3rd October 2014 at which point he became an employee of Shepherd and Wedderburn LLP, Solicitors, 1 Exchange Crescent, Conference Square, Edinburgh. His employment was terminated by reason of redundancy on 25th November 2014. Thereafter the Respondent was employed as an associate by Gately Scotland LLP from 5th January 2015 until 21st August 2015. He is not currently employed by any legal firm.

Company 1 v Company 2

6.2. During his employment with Tods Murray the Respondent was instructed to represent the defenders in Hamilton Sheriff Court Company 1 v Company 2. At the outset of the case the sum sued for was £26,590. The case concerned a claim for payment by Company 1 in respect of the contract price of electrical works carried out by them at an address in Edinburgh on the instructions of the defenders. The defence pled was that the sum sued for had been calculated incorrectly, that certain work relating to solar panels had not been carried out as contracted for and that the defenders were entitled to retain a provision against further work requiring to be carried out. The action commenced in October 2013.

6.3. The case called for proof on 27 May 2014. The Respondent appeared for the defenders and intimated to the court that he was withdrawing from acting. The Respondent on 27 May 2014 emailed Mr A and Mr B of Company 2 at 17:58pm to advise that he had attended court that morning and that

"*the Sheriff took a harsh view of the case, and in order to ensure that he did not grant decree I declined to act but only to protect your position*".

"*You will thus receive a letter, probably tomorrow morning, from Firm A who act for Company 1, advising you of a further hearing on 11 June. I will be attending on your behalf at that time, but before then we need to go through the documentation that you have to identify where we can legitimately hold back money in respect of things either that Company 1 have not done, elements of the certification for example, or where we have a correct fear that certain things have not been done and hence it is correct of us to anticipate that a claim may be received at some time in the future. This exercise should also allow us to properly judge the case that we have. If we are content that circa 8000 should be paid, I would suggest that we should pay it.*

On the basis that you have the box of documents it may be easier if I came out to Livingston, but if you could take it in then we could meet here. I would suggest that we should meet within the next week to allow time to lodge documents before 11 June, and apart from tomorrow, Wednesday, I am reasonably clear …".

6.4. Both Mr A and Mr B responded to this email on the day following, 28 May 2014. The Respondent continued to give advice to the defenders notwithstanding his statement to the court that he no longer acted.

6.5. The case was due to call again in court on 11 June 2014. The Respondent instructed a local agent as follows:-

"*…. I would be grateful if you could appear for me tomorrow at Hamilton Sheriff Court when this case will next call. I represent the Defenders, Company 2, and Mr C of Firm A appears for the Pursuers. This case last called on 27*

May when I had asked for the Proof to be discharged because I had only recently been advised that there was information which would require the Defenders' case to be significantly adjusted. Mr C insisted on the Proof and I withdrew from acting. I am now reinstructed. Tomorrow, Mr C will no doubt repeat his Motion for the expenses of the aborted Proof Diet and my client cannot oppose that request. In addition, a fresh Proof Diet should be fixed. Amendment has already been permitted and I attach a copy of the Pleadings incorporating the amendment that had been permitted before the Proof Diet. That amendment should be permitted tomorrow and the Pleadings amended in accordance with the attached Second Record. In addition, I would ask that the Defenders be permitted to further amend or amend of new with, say, 14 days to amend and then the Pursuers 14 days to answer. I would suspect that the Proof Diet will be something like five weeks away ...."

6.6. On 11 June 2014 the local agent emailed the Respondent as follows:-

"Sheriff Carmichael has ordered the case to recall this morning. He wants to know why you turned up late for the Proof and when you did so withdrew from acting before the Sheriff refused to discharge the Proof and allow further amendment. Mr C is alleging abuse of process and seeking the expenses of the cause to date ..."

6.7. The Sheriff awarded the expenses occasioned by the discharged diet of proof on 27 May and the expenses of the hearing on 11 June in favour of the pursuers. A new diet of proof was assigned for 29 August 2014.

6.8. On 25 August 2014 the pursuer's solicitor sent a fax message to the Respondent. The pursuers' solicitor was aware (as was apparent from the message) that the Respondent had been instructed by the defenders to settle the case in advance of the proof. By this time, the principal sum had been amended to £21,087.60 (giving the defenders credit for a payment of £5,502.40 which had inadvertently been left out of account) and it was noted in the fax that the defenders had made a further payment to account of £12,500, bringing the outstanding principal sum sued for to £8,587.60. The total sum due to the pursuer, exclusive of expenses, but inclusive of interest and sums due under the Late Payment of Commercial

Debts (Interest) Act 1998, was said to be £11,691.16. A draft account of expenses was attached to the fax message bringing a sum due in that respect of £6148.78. The Respondent did not make a file note recording what happened in court on the date of proof. The proof must have been discharged on or about that date as it did not proceed and the case was scheduled to call again on 17th September 2014.

6.9. The parties remained in dispute over a Solar Panel Commissioning Certificate. The Respondent emailed the pursuer's solicitor on 12 September 2014 seeking confirmation that the solar panels were registered with a provider, and asked whether additional documentation was available.

6.10. On 12 September 2014 the Respondent was emailed by the pursuer's solicitor stating that the pursuers had been instructed to install, test and certify the panels, which had been done, and that the process of registration with a provider for feed and tariff was a matter for the end user. The pursuers' case was that they were not instructed to do that and that it did not form part of the contract.

6.11 On 16 September 2014 the pursuer's solicitor emailed the Respondent to advise that if the money was not paid that day, they would be moving for decree in the morning. The Respondent did not record on file what happened in court when the case called in court on the following day, 17th September 2014. A new diet of proof was assigned for 2nd December 2014. The Respondent failed to advise the defenders that this diet had been assigned.

6.12. On 3 October 2014 Shepherd & Wedderburn acquired the business and assets of the former firm Tods Murray. As at that date the Respondent became an employee of Shepherd & Wedderburn.

6.13. On 24 November 2014 the Respondent emailed Company 2 to advise that he would be leaving Shepherd & Wedderburn the following day. He provided a breakdown of the cases that were still in progress at that time. In relation to the Company 1 case he advised :-

"As earlier discussed I do not consider that there is a valid defence to this case in the absence of the original contract being found. The difficulty here is what we are trying to do is imply conditions which although reasonable from our contention are not supported by the contract as can be proved at present. In addition you would not be losing your right to go against Company 1 if a claim is subsequently made against you".

6.14. The Respondent ceased to be an employee of Shepherd & Wedderburn following the redundancy consultation process on 26 November 2014. The case called again at Hamilton Sheriff Court on 2 December 2014. The Respondent appeared, purportedly on behalf of the defenders. At that point he was not employed by any Scottish legal firm and did not have the benefit of professional indemnity insurance cover. The Respondent failed to advise the court or the pursuer's agents that he no longer had employment. In any event the Respondent had no instructions to represent the defenders at the diet, of which the defenders were unaware.

6.15. The interlocutor dated 2 December 2014 records that the Respondent attended court on behalf of the defender that day and sets forth the following :-

"The Sheriff on the unopposed motion of the pursuers, discharges today's diet of proof and thereafter grants decree against the Defenders for payment to the Pursuers of the sum of £6,191.16...."

The Respondent had no instructions from the defenders to allow decree to pass.

Company 3 v Company 2

6.16. The Respondent was instructed to represent the defenders in a commercial action by Company 3 against Company 2 in the sheriff court at Glasgow. In the action the pursuers sued for the price of doors which had been supplied by them. The principal sum sued for was £7,548.38 in total. On 27 August 2014 the Respondent emailed Company 2 following a case management call with the court that morning. He advised that the Sheriff considered

"the issue as being quite focussed, are the doors compliant or not?"

6.17. The Respondent advised that the Sheriff was of the view one day for the proof was sufficient to be allocated later that year. The Respondent asked his client to confirm his availability and to notify him of any days to be avoided *"between now and Christmas"*. The Respondent advised that Mr B should be a witness together with an installer to speak to the quality of the doors.

6.18. On 18 September 2014 the Sheriff Clerk emailed the parties firstly to establish any dates to be avoided prior to fixing the proof and thereafter to advise the case would be assigned 6th November 2014.

6.19. On 19 September 2014 the Sheriff Clerk emailed the Respondent with an interlocutor assigning a diet of proof before answer. The interlocutor dated 18 September 2014 assigned 6 November 2014 at 10am as a diet of proof before answer before Sheriff Deutsch.

6.20. As hereinbefore condescended upon, on 3 October 2014 Shepherd & Wedderburn acquired the business and assets of the former firm Tods Murray and the Respondent became an employee of Shepherd & Wedderburn by virtue of the acquisition process.

6.21. On 24 October 2014 (thirty five days after the diet had been assigned) the Respondent emailed the defenders, to advise that a date for the proof had been allocated for Thursday 6 November 2014 at 10am at Glasgow Sheriff Court. He requested that the client contact him as soon as possible. The Respondent advised his clients that he required to have a meeting with them before the proof.

6.22. On 27 October 2014 the defenders' director advised the Respondent that he would be out of the country on 6 November 2014 and therefore would be unable to attend the proof diet. Also on 27 October 2014 the Respondent emailed the defenders asking whether he could speak to them on Thursday of that week by telephone and stating that he "would look into getting the court date postponed".

6.23. On 6 November 2014 decree was granted against Company 2 for the sum of £5,402.18 plus expenses. The Respondent appeared on behalf of the defenders. He did not make any file note recording what happened at court on 6 November 2014.

6.24. On 21 November 2014, the pursuers wrote directly to the defenders enclosing a copy of the pursuers' account of expenses and intimating a diet of taxation within the Auditor of Court's Office at Glasgow Sheriff Court to take place on 5 December 2015. An entry in the account recorded that on 6th November 2014 the proof called at 10.10 and concluded at 10.25 and that two of the pursuer's witnesses were in attendance.

6.25. On 24 November 2014 the Respondent emailed Mr B of the defenders in the following terms:-

"The Sheriff was unwilling to delay the case, Mr B, even though you were not available. He was of the view that the case had to proceed and that from the documentary evidence the position was clear. The terms and conditions dictated that notwithstanding what Mr D may have said in his emails he did not have authority to bind Company 3. Replacement doors had been provided and a discount had been issued, in these circumstances the sums sued for are due".

6.26. On 9 December 2014 the Respondent attended a meeting with Partners from Shepherd and Wedderburn. The note of the meeting records that the Respondent stated that he had moved to discharge the hearing but that the sheriff had rejected this motion. The note records that the Respondent explained that he withdrew from acting because he thought that was the only way the Sheriff would grant a continuation, and accepted that following the proof he had not sent any communication to the defenders who in turn did not know that decree had been granted until the Respondent sent them the email dated 24 November 2014.

Company 4 v Company 2

6.27. In this case the Respondent again represented the defenders. The action concerned construction work carried out by the pursuers in terms of a subcontract relating to a site at Dollar, and commenced in early 2013. The sum sued for was a *cumulo* amount of just under £16,000. Settlement discussions began on 18 February 2014 when the pursuer's solicitor emailed the Respondent at 12.34pm setting out the pursuers' proposals. The pursuers would accept payment of the sum of £15,000 with the VAT thereon of £3,000 together with expenses of £2500, which proposal was open for acceptance by 5pm that night. The Respondent intimated the offer to his client at 15.36pm.

6.28. The Respondent did not create any files notes recording his actings in relation to this case on 19 February 2014.

6.29. On 20 February 2014 at 09.42am the pursuer's solicitor sent an email to the Respondent referring to a telephone conversation the previous day. He "*was pleased to confirm that my client accepts your client's offer. As discussed the terms of settlement are as follows:-*

- *Your client will pay the principal sum of £15 000 plus VAT*
- *Your client will pay the sum of £2500 in terms of expenses....*"

6.30. The Respondent responded to the pursuer's solicitor by email on 20 February 2014 at 09.49 as follows: - "*David Thanks, the only issue is the request that payment is by 28 February. As discussed yesterday that may happen but I would ask that that date be put out to 7 March given that I will be meeting with my clients on 28 February .....*"

6.31. On 20 February 2014 the pursuer's solicitor emailed the Respondent at 10.07 am to confirm that his client was happy to accept payment on or before 7 March 2014. The parties agreed that local agents would be instructed and in the event that the Respondent's client defaulted in that regard the pursuer would move for decree.

6.32. On 21 February 2014, on Joint Motion, the Proof before Answer was discharged and the case continued to 21 March 2014 to allow settlement terms to be implemented.

6.33. On 5 March 2014 the pursuer's solicitor emailed the Respondent to enquire whether payment would still be made on or before Friday.

6.34. On 6 March 2014 the Respondent emailed his clients and referred to a meeting with them the previous Friday. He asked them to confirm whether they intended to send a cheque for £18,000 made payable to Company 4 or to put him in funds for that sum of money. The Respondent emailed the defenders as follows as follows:-

"I am now being pushed re the settlement sum, can you either send me a cheque for £18,000 made payable to Company 4 or put me in funds to that sum ..."

Prior to 6th March 2014 the Respondent had not advised the defenders of the amount which the pursuers had agreed to accept. The total of the sums which the pursuer would accept was in any event £20,500.

6.35. On 10 March 2014 the pursuer's solicitor emailed the Respondent at 10.39 am to advise that payment had not been issued and that if his client was not in receipt of cleared funds by 5 pm that day he would be instructed to move for decree.

6.36. On 11 March 2014 the Respondent sent to his clients an e-mail of high priority to advise that if the principal sum was not received that day then the pursuer would enrol for decree.

6.37. On 14 March 2014 the Respondent received an email from a partner at Shepherd and Wedderburn to advise him that a motion had been intimated for decree to be granted concerning "*an extra judicial settlement you reached but which has not been paid...*" The pursuer's solicitor intimated the motion by fax at 16.31pm that day specifying within the minute for the pursuer, the terms of settlement agreed on or about 20 February 2014.

6.38. On 17 March 2014 the Respondent's clients emailed him to advise that funds should now be in his firm's client account.

6.39. The defenders, on 17 March 2014, paid the sum of £18,000 to Tods Murray.

6.40. Also on 17 March 2014 the pursuer's solicitor emailed the Respondent to advise that his client intended to enrol a separate motion seeking to arrest and that he hoped that it would not come to that if the matter settled as agreed. On the same date the Respondent asked for sight of the motion and advised that he understood that funds were on their way to him and that he would hope to be in a position to confirm settlement later that day.

6.41. Later on 17 March 2014 the pursuer's solicitor emailed the Respondent to advise that any cheque should be made payable to Company 4, but that the cheque should be sent to Firm B at the Glasgow office.

6.42. On 18 March 2014 the Respondent wrote to Firm B by First Class Post. The Respondent enclosed the cheque for the sum of £18,000 in respect of the agreed principal sum of £15,000 plus VAT. He sought confirmation that the pursuers would no longer be insisting on their motion for decree. He advised *"I will revert to you with regards to the expenses in early course."* On the same date the Respondent emailed the pursuer's solicitor to confirm that the principal sum was being sent by cheque that evening.

6.43. On 18 March 2014 the pursuer's solicitor emailed the Respondent at 16:48 pm. He referred to the delay in making payment by ten days after the agreed date and stated that his client was requesting cleared funds by 5 pm the following day. His client was not prepared to accept a cheque and he also referred to the pursuer seeking expenses which were incurred post settlement. The pursuer's solicitor requested that funds be transmitted by BACS transfer on the day following.

6.44. On 18 March 2014 the Respondent emailed Firm B at 16.55 to advise that the cheque had already been sent to them. He advised that the cheque was a Tods Murray cheque and that if he cancelled that cheque and sent it by BACS it would

be no faster than the process already being implemented. The Respondent also wrote the following:-

"I await your further advices, re the expenses being claimed".

6.45. On 18 March 2014 the pursuer's solicitor emailed the Respondent at 16:57 and apologised. He explained that he thought the cheque was coming from his clients and that he was happy to accept the Tods Murray cheque. He also referred to the expenses and advised he would be in touch shortly.

6.46. On 19 March 2014 the pursuer's solicitor emailed at 12:02 pm to advise that he had received the cheque for the sum of £18,000 and that his client planned to cash the cheque, but for the avoidance of doubt the said cheque was not in full and final settlement of the matter. "The sum of £2,500 *in terms of expenses, and in accordance with the settlement agreement, remains outstanding and due".* He made further reference to the issue of expenses incurred post 7 March 2014 also remaining to be dealt with and said that he would revert shortly with the sum due in that respect.

6.47. On 20 March 2014 the Respondent emailed the pursuer's solicitor at 12.13pm and confirmed that the cheque was not proffered "*in full and final settlement*" as his letter clearly showed. The cheque was proffered in settlement of the principal sum, with expenses still due and in respect of this element he noted that he was still to hear from the pursuer's solicitor.

6.48. On 20 March 2014 the parties continued their e-mail exchange and reference was made to a procedural hearing dated 21 March 2014. The pursuer's solicitor sought the Respondent's agreement to having the procedural hearing continued for a period of two weeks to allow the outstanding settlement terms to be implemented. He referred to the agreed expenses in the sum of £2,500 remaining outstanding and said that he hoped to be able to resolve outstanding matters in the interim period. He also confirmed that he was still to quantify the expenses post 7 March 2014. On 20 March 2014 the Respondent emailed the pursuer's solicitor back and agreed that continuing the procedural hearing for two weeks to enable settlement terms to be implemented was sensible and said

that he looked forward to hearing from him further with regard to the further expenses.

6.49. On 20 March 2014 the pursuer's solicitor agreed to arrange appearance on behalf of both parties at the hearing the following day. On 20 March 2014 the pursuer's solicitor emailed local agents and copied the Respondent in to the terms of the instructions. The motion was to have the matter continued for two weeks to allow settlement terms to be fully implemented.

6.50. On 21 March 2014 the pursuer's solicitor emailed the Respondent and referred to the expenses incurred post 7 March 2014. They asked the Respondent for a reason as to why his client was still withholding the £2,500 in the interim despite the agreement. The Respondent did not reply.

6.51. On 27 March 2014 the pursuer's solicitor emailed the Respondent and apologised for not yet sending him a sum in connection with the expenses incurred post 7 March. He mentioned that he was enrolling a new motion on 26 March 2014. The motion intimated was for decree in terms of the outstanding sums due relative to the settlement agreement reached between the parties on or around 20 February 2014. The Respondent did not respond.

6.52. On 2 April 2014 the pursuer's solicitor emailed the Respondent chasing him for an update in terms of whether or not he had instructions and also pointing out that the case was to call again on Friday of that week. The Respondent did not reply.

6.53. On 4 April 2014 decree was granted for the sum of £2,789.05, representing £2,500 plus interest and expenses. The Respondent failed to advise his client of this significant development.

6.54. On 21 May 2014 Mr A emailed the Respondent. He attached a copy of a Charge for payment. The Charge stated that it proceeded on the decree pronounced on 4 April 2014 for the sum of £2,789.05.

6.55. On 16 September 2014 the pursuer's solicitor emailed the Respondent asking for confirmation that the former firm of Tods Murray was still acting for Company 2, and advising that the pursuers Company 4, had never received payment of the agreed expenses despite service of the charge. He advised that he was instructed to petition the court to wind up the defenders. On the same date, i.e. 16 September 2014, the Respondent forwarded the e-mail to the defenders.

6.56. On 24 November 2014 the Respondent emailed the client to advise he was leaving the firm the following day and to advise:-

"The issue here is the payment of the balance of the expenses circa £1,700. As last discussed there is no real defence to this and it would be better to have it paid at this time rather than waiting further action on the part of their lawyers".

7. Having given consideration to the admitted facts and the parties' submissions in relation to the question of professional misconduct, the Tribunal found the Respondent guilty of Professional Misconduct as follows:-

7.1 individually in respect of his appearance at Hamilton Sheriff Court on 2nd December 2014 (a) without instructions from the defenders for whom he purported to appear, (b) in circumstances in which he was not entitled to practice at all, having neither employment nor professional indemnity insurance cover and (c) in circumstances in which he failed to advise the court of his status;

7.2 and *in cumulo* in respect of:

(1) his failure to advise Company 2 that a proof had been fixed at Hamilton Sheriff Court for 2 December 2014;

(2) his appearance at Hamilton Sheriff Court on 2nd December 2014 (a) without instructions from the defenders for whom he purported to appear, (b) in circumstances in which he was not entitled to practice at all, having neither employment nor professional indemnity insurance cover and (c) in circumstances in which he failed to advise the court of his status;

(3) his unconscionable delay in advising Company 2, until 24 October 2014, that a Proof Diet had been assigned for 6 November 2014 at Glasgow Sheriff Court, despite having been made aware of this on 19 September 2014;

(4) his allowing decree to pass against his clients on 6th November 2014 without the instructions of his clients; and

(5) despite the Respondent agreeing with the solicitors acting on behalf of Company 4 on 20 February 2014, that Company 2 would pay their client the sum of £15,000 plus VAT, a total of £18,000 plus expenses of £2,500, his failure to advise his client of the position in relation to expenses, and his advice to Company 2 to pay the amount of £18,000 on 6 March 2014;

(6) his failure to advise Company 2 that a decree for the sum of £2,789.05, being the sum of £2,500 plus interest and expenses, had been awarded against them at Glasgow Sheriff Court on 4 April 2014, so that they did not become aware of this until a charge for payment was served on them on or around 21 May 2014 and as a result, the defenders became liable for further expenses in relation to the winding up petition.

8. The Tribunal heard further submissions from both parties in relation to disposal. Having given careful consideration to these submissions, the Tribunal pronounced an Interlocutor in the following terms:-

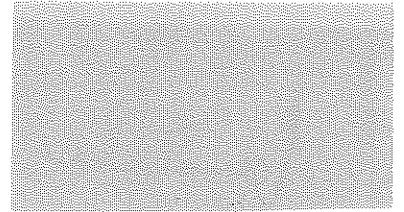
Edinburgh 7 December 2016. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Charles Thomas Norbert Brien, 13 Cameron March, Edinburgh; Find the Respondent guilty of professional misconduct individually in respect of his appearance at Hamilton Sheriff Court on 2nd December 2014 (a) without instructions from the defenders for whom he purported to appear, (b) in circumstances in which he was not entitled to practice at all, having neither employment nor professional indemnity insurance cover and (c) in circumstances in which he failed to advise the court of his status; and *in cumulo* in respect of his failure to advise Company 2 that a proof had been fixed at Hamilton

Sheriff Court for 2 December 2014; his appearance at Hamilton Sheriff Court on 2nd December 2014 (a) without instructions from the defenders for whom he purported to appear, (b) in circumstances in which he was not entitled to practice at all, having neither employment nor professional indemnity insurance cover and (c) in circumstances in which he failed to advise the court of his status; his unconscionable delay in advising Company 2, until 24 October 2014, that a Proof Diet had been assigned for 6 November 2014 at Glasgow Sheriff Court, despite having been made aware of this on 19 September 2014; despite the Respondent agreeing with the solicitors acting on behalf of Company 4 on 20 February 2014, that Company 2 would pay their client the sum of £15,000 plus VAT, a total of £18,000 plus expenses of £2,500, he failed to advise his client of the position in relation to expenses, and erroneously advised Company 2 to pay the amount of £18,000 on 6 March 2014; and his failure to advise Company 2 that a decree for the sum of £2,789.05, being the sum of £2,500 plus interest and expenses, had been awarded against them at Glasgow Sheriff Court on 4 April 2014, so that they did not become aware of this until a charge for payment was served on them on or around 21 May 2014 and as a result, the defenders became liable for further expenses in relation to the winding up petition; 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 should not include the names of the Secondary Complainers or parties other than the Respondent.

(signed)
Nicholas Whyte
Chairman

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 26 JANUARY 2017.

IN THE NAME OF THE TRIBUNAL



Nicholas Whyte

Chairman

NOTE

At the hearing on 7 December 2016 the Tribunal had before it an amended Complaint, Record and Joint Minute of Admissions. The Fiscal indicated that the Complainers no longer insisted upon the averment of professional misconduct contained at paragraph (a) on page 22 of the Record. Evidence did not require to be led and the Tribunal proceeded to hear submissions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal gave a narrative of the circumstances with reference to the averments of fact, duty and misconduct contained within the Complaint and Record.

In the Fiscal's submission, the conduct described by him and admitted by the Respondent was sufficient to meet the Sharp test. The Respondent had failed to advise Company 2 that a proof had been fixed at Hamilton Sheriff Court for 2 December 2014. The Respondent had appeared at Hamilton Sheriff Court on 2 December 2014 (a) without instructions from the defenders for whom he purported to appear, (b) in circumstances in which he was not entitled to practise at all, having neither employment nor professional indemnity insurance cover and (c) in circumstances in which he failed to advise the court of his status. The Respondent had unconscionably delayed in advising Company 2, until 24 October 2014, that a Proof Diet had been assigned for 6 November 2014 at Glasgow Sheriff Court, despite having been made aware of this on 19 September 2014. The Respondent failed to advise his clients that decree had passed on 6 November 2013. Despite the Respondent agreeing with the solicitors acting on behalf of Company 4 on 20 February 2014, that Company 2 would pay their client the sum of £15,000 plus VAT, a total of £18,000 plus expenses of £2,500, he failed to advise his client of the position in relation to expenses. He erroneously advised Company 2 to pay the amount of £18,000 on 6 March 2014. The Respondent failed to advise Company 2 that a decree for the sum of £2,789.05, being the sum of £2,500 plus interest and expenses, had been awarded against them at Glasgow Sheriff Court on 4 April 2014, so that they did not become aware of this until a charge for payment was served on them on or around 21 May 2014. As a result the defenders became liable for further expense in relation to the winding up petition.

In the Fiscal's submission, the most serious averment of professional misconduct was the one pertaining to the Respondent's appearance at Hamilton Sheriff Court on 2 December 2014 without

instructions, an employer, or professional indemnity insurance cover. The Fiscal relied upon the Gillespie case (reference number 864/93) from 1993 to support his averment that this behaviour could of itself constitute professional misconduct. In that case, the solicitor had acted without insurance and a practising certificate. The Fiscal submitted that all averments of misconduct could stand alone but that some were more serious than others and professional misconduct could also be established *in cumulo*.

In response to a question from the Chair, the Fiscal confirmed that the complaint was originally brought by Shepherd and Wedderburn. That firm had paid compensation to Company 2 and neither wanted to take part in this case as a Secondary Complainer.

SUBMISSIONS FOR THE RESPONDENT

Mr Ferguson referred to his written plea in mitigation, copies of which had been provided to the Tribunal. He highlighted to the Tribunal that the Respondent had cooperated with the Complainers and agreed as much evidence as possible. He indicated that the Respondent "admitted almost all the facts of the Complaint." In response to a question from the Chair, Mr Ferguson confirmed that the whole facts as contained in the Joint Minute were admitted, and if there was any variation between what he had to say and what was contained within the Joint Minute, this was by way of explanation only.

Mr Ferguson indicated that Company 2 had been one of the new clients he had attracted to his firm but that they were difficult to manage. With hindsight the Respondent thought that perhaps he should not have continued to act for the company but that commercial pressures dictated that he had to retain them as clients. During the time the professional misconduct occurred, the Respondent's firm was facing an uncertain future and the firm was eventually taken over by another company. The atmosphere was difficult and morale was low. The Respondent was concerned about his job security.

Mr Ferguson indicated that the Respondent accepted that he was wrong and foolish to appear in Court when he was no longer employed by the firm which had instructions to appear on behalf of Company 2. With hindsight he blames his impaired judgement on the loss of his employment, anxiety and depression and general confusion and loss. It was not for any personal benefit and the Respondent's motivation was to assist the client to complete matters.

Mr Ferguson indicated that the Respondent was suffering from depression and coping with a difficult period at work and his private life, particularly due to family bereavements and caring responsibilities. Mr Ferguson provided a number of references to the effect that the Respondent was generally a good, hardworking solicitor who had a high level of expertise and was able to communicate effectively.

DECISION

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

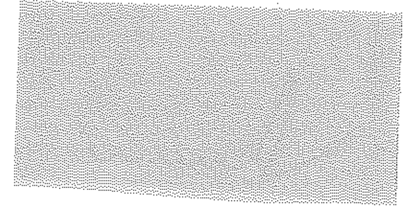
"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

The Tribunal was satisfied that the Respondent's behaviour was serious and reprehensible and met the test for professional misconduct, albeit at the lower end of the scale of professional misconduct. The Tribunal considered that the appearance at Hamilton Sheriff Court on 2 December 2014 constituted professional misconduct in and of itself. The Tribunal was of the view that all averments remaining for its consideration, including the incident on 2 December 2014 but not the averment which had been withdrawn, constituted professional misconduct *in cumulo*.

Having regard to the various mitigatory circumstances put forward by Mr Ferguson, the Tribunal were of the view that the appropriate disposal in this case would be to censure the Respondent. The Tribunal did not consider that a fine was appropriate in the circumstances and that any stronger sanction would be disproportionate to the seriousness of the professional misconduct. The Tribunal had regard to the fact that the Respondent had retired and had not renewed his practising certificate.

Following submissions regarding publicity and expenses, the Tribunal found the Respondent liable in the expenses of the Complainers and of the Tribunal. Publicity will be given to the decision. However, the Tribunal considered that it was not appropriate to identify the Secondary Complainers or

any other parties other than the Respondent and his relevant employers as their interests might be damaged if they were identified in these findings given the personal and financial information and opinions disclosed during the hearing.



Nicholas Whyte

Chairman