

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

**FINDINGS**

**in Complaints**

**by**

**THE COUNCIL OF THE LAW SOCIETY of  
SCOTLAND, Atria One, 144 Morrison Street,  
Edinburgh**

**Complainers**

**against**

**BRIAN TRAVERS, Solicitor, Marshall Wilson  
Law Group, 2 High Street, Falkirk**

**Respondent**

1. Four Complaints (Tribunal reference numbers DT/13/45 dated 24 December 2013; DT/13/46 dated 24 December 2013; DT/15/12 dated 16 April 2015; and DT/15/18 dated 29 May 2015) were lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Brian Travers, Solicitor, Marshall Wilson Law Group, 2 High Street, Falkirk (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer in Complaint DT/13/45, The Scottish Legal Aid Board, 44 Drumsheugh Gardens, Edinburgh. There was a Secondary Complainer in Complaint DT/13/46, Derek David Livingston, Solicitor, on behalf of Naftalin Duncan & Co, Solicitors, 534 Sauchiehall Street, Glasgow. There were Secondary Complainers in Complaint DT/15/12; Mr A; Mr and Mrs B; Ms C; and Mr D. There was a Secondary Complainer in Complaint DT/15/18, Mr E.
3. In accordance with the Rules, the Tribunal caused a copy of Complaints DT/13/45 and DT/13/46 as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed Complaints DT/13/45 and DT/13/46 to be heard on 26 May 2014 and notice thereof was duly served upon the Respondent.
5. On 26 May 2014 Complaints DT/13/45 and DT/13/46 called for procedural hearings. The Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was neither present nor represented. On the Complainers' motion the procedural hearings were continued to 30 June 2014.
6. On 30 June 2014, Complaints DT/13/45 and DT/13/46 called for procedural hearings. The Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was neither present nor represented. On the Complainers' motion a further procedural hearing was fixed for 29 August 2014.
7. On 29 August 2014, Complaints DT/13/45 and DT/13/46 called for procedural hearings. The Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The Respondent was neither present nor represented. The Fiscal advised that there were another two Complaints against the Respondent which would be lodged with the Tribunal shortly. On the Complainers' motion, the procedural hearings were adjourned to 9 December 2014 to allow the other two matters to call at the same time.
8. On 4 December 2014, the Chairman exercised the functions of the Tribunal under Rule 56 of the 2008 Tribunal Rules. Of consent and on the Complainers' motion, the Tribunal adjourned the procedural hearings fixed for 9 December 2014 to a date to be fixed.
9. In accordance with the Rules, the Tribunal caused a copy of Complaints DT/15/12 and DT/15/18 as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
10. In terms of its Rules the Tribunal appointed Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 to be heard on 15 June 2015 and notice thereof was duly served upon the Respondent.
11. On 15 June 2015, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The Complainers were represented by their Fiscal Jim Reid, Solicitor,

Glasgow. The Respondent was not present but was represented by David Burnside, Solicitor, Aberdeen. Hearings for all four Complaints were set down for 27 August 2015.

12. On 27 August 2015, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The matters had been set down for hearings but called as procedural hearings due to the ill health of the Respondent's solicitor. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. Mr Reid also appeared on behalf of David Burnside, Solicitor, Aberdeen. The Respondent was not present. Hearings were set down for 23 November 2015.
13. On 23 November 2015, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The matters had been set down for hearings but called as procedural hearings due to the ill health of the Respondent. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. The Respondent was not present and was represented by David Burnside, Solicitor, Aberdeen. On the Respondent's motion the cases were sisted to allow the Respondent to recover. The Chairman indicated that the Respondent should not return to work before these matters reached a conclusion. Mr Burnside was required by the Tribunal to advise his client that when the Respondent's doctor gave him an indication that he might be fit to return to work, an application for recall of the sist should be made immediately, in order that the matter be disposed of prior to the Respondent returning to work.
14. On 26 May 2016, Mr Burnside indicated that the Respondent's doctor had recommended a phased return to work for management duties only. On 1 June 2016, the Respondent provided a formal written undertaking to the Tribunal that although returning to work, he would not take or execute any client instructions.
15. On 27 June 2016, the Complainers submitted motions to recall the sists in Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18. The Complaints were set down for procedural hearings on 16 August 2016.
16. On 16 August 2016, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. All cases were continued to procedural hearings to call on 28 November 2016.

17. On 28 November 2016, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. On the Complainers' motion the Tribunal formally recalled the sists in all four cases. On the Complainers' motion these cases were continued to procedural hearings on 7 March 2017. The Respondent agreed that he would abide by the undertaking previously given that he would not take or execute any client instructions pending conclusion of these matters.
18. On 7 March 2017, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. Jim Reid also appeared on behalf of David Burnside, Solicitor, Aberdeen for the Respondent. Of consent, the Tribunal granted the Complainers' motion to sist the cases to await the Court of Session decision in Anderson Strathern v Scottish Legal Complaints Commission.
19. On 8 August 2017, the Complainers submitted motions to recall the sists in Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18. Procedural hearings were set down for 29 August 2017.
20. On 29 August 2017, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for procedural hearings. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. The Respondent was not present but was represented by David Burnside, Solicitor, Aberdeen. Of consent, the Tribunal granted the Complainers' motion to recall the sist. Joint Minutes of Admissions agreeing the averments of fact, duties and misconduct were lodged for Complaints DT/13/45, DT/13/46 and DT/15/18. The parties moved to amend Complaint DT/15/12 in terms of the Minutes of Amendment previously lodged. The Tribunal allowed the amendments. All four Complaints were set down for Hearings on 27 November 2017.
21. On 7 September 2017, David Burnside, Solicitor, Aberdeen, for the Respondent lodged motions to discharge the Hearings fixed for 27 November 2017 and fix other hearings due to the Respondent's holiday which had been booked prior to the Hearing on 27 November 2017 being set. Exercising the functions of the Tribunal under Rule 56 of the 2008 Tribunal Rules, of consent the Chairman adjourned the Hearings fixed for 27 November 2017 and fixed hearings for 22 January 2018.

22. On 22 January 2018, Complaints DT/13/45, DT/13/46, DT/15/12 and DT/15/18 called for hearings. The Complainers were represented by their Fiscal Jim Reid, Solicitor, Glasgow. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. A Joint Minute of Admissions was lodged in relation to Complaint DT/15/12. Mr Burnside moved the Tribunal to accept late lodging of a second inventory of productions for the Respondent. Of consent, the Tribunal granted the motion. Of consent, the Tribunal allowed the Fiscal's motion to conjoin the four Complaints under Rule 17 of the 2008 Tribunal Rules and directed that they be heard together. The Complainers led one witness in relation to one matter and the Respondent gave evidence on his own behalf in relation to that matter.
23. The Tribunal found the following facts established:-

**Complaint DT/13/45**

- 23.1 The Respondent acted for Ms F and provided her with Legal Advice and Assistance under SLAB.
- 23.2 On 9 November 2010 the Audit Compliance & Quality Assurance Section of SLAB wrote to the Respondent advising that his client may have made a false declaration and contravened the Legal Aid (Scotland) Act 1986 Section 35. Inter alia SLAB asked that the Respondent forward a copy of the Legal Aid Online Client Mandate Form, AALAO/CIV, or a copy of the Application Form signed and dated by the client.

The said letter went on to refer to the Advice & Assistance (Scotland) Regulations 1996, Regulation 21 with reference to the Board being entitled to recover from an Applicant sums paid out where an Applicant had wilfully failed to comply with the provisions of the Regulations or had knowingly made a false statement or false representation.

In addition, the letter referred to the 1986 Act, Section 35 and the Board referring the matter to the Procurator Fiscal to consider instituting Criminal Proceedings.

There was no response from the Respondent.

- 23.3 By letter dated 20 December 2010 SLAB wrote to the Respondent advising that under the said 1996 Regulations, Regulation 21, they had decided to seek to recover money paid out of the Legal Aid Fund to his client. The letter referred to the possibility of the matter being passed to the Procurator Fiscal to consider Criminal Proceedings. The letter asked the Respondent to provide information on the procedure followed when the client signed the Application Form and for information on the basis for the client qualifying financially. Confirmation was sought from the Respondent as to how he satisfied himself that the client qualified for Legal Advice and Assistance if she did not provide any vouching.

There was no response from the Respondent.

- 23.4 By letter dated 10 February 2011 SLAB wrote to the Respondent's firm, for the attention of the Senior Partner, referring to the previous requests for information, noting there had been no response and attaching a copy of the request of 20 December 2010.

The letter advised that the matter *"is now becoming particularly urgent as we are preparing a case to send to the Crown Office and Procurator Fiscal Service."*

There was no response.

- 23.5 By letter dated 4 March 2011 SLAB wrote to Messrs Marshall Wilson for the attention of the Senior Partner, referring to their letter of 10 February 2011, enclosing a copy and noting there had been no response. The letter referred to a staff member telephoning the Respondent's office in an attempt to obtain the Mandate and being met with an apparent refusal by anyone to speak to him. A message asking that the call be returned did not produce a call back.

The letter advised that the matter would now be the subject of a complaint to the "Scottish Legal Complaints Committee" and advised that a report in relation to the client would be sent to the Procurator Fiscal with a recommendation that the

Police be instructed to collect the Mandate from the offices of Messrs Marshall Wilson.

- 23.6 SLAB made a complaint to the Scottish Legal Complaints Commission (SLCC) and on 26 May 2011 the SLCC referred the matter to the Complainers.

The summary of complaint was:-

*“I, Mr G, on behalf of the Scottish Legal Aid Board, wish to complain about Mr Brian Travers of Marshall Wilson in that,*

- 1. Mr Travers has failed to provide the Scottish Legal Aid Board with a Client Mandate Form, AA/LAO/CIV, which was initially requested on 9 November 2010.*
- 2. Mr Travers has failed to respond to the Scottish Legal Aid Board’s correspondence of 20 December 2010, 10 February 2011 and 4 March 2011.*

*How has this affected the Complainer:-*

- 1. The delay in Mr Travers providing this documentation may affect the ability to prosecute Mr Travers’ client for deliberately giving false information to the Scottish Legal Aid Board which is a Criminal offence in terms of the Legal Aid (Scotland) Act 1986.”*

- 23.7 By letter dated 7 June 2011, the Complainers advised the Respondent that they had received a complaint from the SLCC and would be in contact with him.

- 23.8 By letter dated 21 June 2011 the Complainers wrote to the Respondent enclosing a Summary of Complaint. They requested a response within twenty-one days setting out his position and providing the relevant business files.

In the absence of any reply the Complainers wrote to the Respondent on 14 July 2011 issuing a Notice under the Legal Profession and Legal Aid (Scotland) Act

2007, Section 48(1)(a) calling upon him in terms of Section 48(2) to deliver the relevant documents to the Complainers.

On 14 July 2011 the Complainers wrote separately to the Respondent issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i).

Given a continued lack of reply from the Respondent, the Complainers wrote to him on 8 August 2011 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i) requiring him to give six weeks' notice of his intention to apply to take out a Practising Certificate.

23.9 By letter dated 8 August 2011 the Complainers intimated a further complaint to the Respondent setting out his failure to respond to the Law Society following formal intimation of the SLAB complaint dated 21 June 2011.

23.10 On 31 August 2011 one of the Complainers' employees spoke by phone to the Respondent. In respect of the SLAB complaint, the Respondent indicated he had discussed the matter with his Client Relations Partner (CRP) and had expected that the CRP would respond. The Complainers' employee noted that no response had ever been received from the Respondent and this had resulted in the intimation of a further complaint. The Respondent undertook to discuss the matter with his CRP and return to the Complainers.

On 2 September 2011 the Complainers wrote to the Respondent referring to the telephone conversation on 31 August 2011 and requesting a response within fourteen days.

By letter dated 23 September 2011, in the absence of any reply from the Respondent or his CRP, the Complainers intimated that they would begin preparation of a Report.

By letter dated 17 October 2011 the Complainers advised the Respondent that the additional head of complaint in relation to his failure to respond to correspondence from the Complainers would be considered in the context of the complaint by SLAB.



23.11 By letter dated 22 November 2011, the Complainers sent the Respondent a copy of the Report and advised that the matter would go to the Complainers' Professional Conduct Sub Committee for consideration.

Following responses to the Report from SLAB and the Respondent's firm, a Supplementary Report was prepared and a copy sent to the Respondent by letter dated 28 December 2011. The Respondent was advised that the complaint would be considered by a Sub Committee on 26 January 2012.

23.12 The complaints were considered by the Complainers' Professional Conduct Sub Committee on 26 January 2012.

The Sub Committee determined that the Respondent's conduct in respect of:-

1. His failure to provide the Scottish Legal Aid Board with a Client Mandate Form AA/LAO/CIV, which was initially requested on 9 November 2010.
2. His failure to respond to the Scottish Legal Aid Board's correspondence of 20 December 2010 and 10 February and 4 March 2011.
3. His failure to respond to correspondence from the Law Society of Scotland, including formal intimation of a complaint on 21 June 2011, a Notice in terms of Section 15(2)(1) of the Solicitors (Scotland) Act 1980 and a further Notice in terms of Section 15(2) of the said Act dated 8 August 2011

appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable Solicitor; that it appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee determined that the complaints should be prosecuted in terms of the Solicitors (Scotland) Act 1980 Section 51.

By letter dated 7 February 2012 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee Determination.

**Complaint DT/13/46**

23.13 The Secondary Complainer acted for Mr H in relation to a “slopping out” claim raised against the Scottish Government. Agency was subsequently transferred to the Respondent in or around June 2008.

23.14 On 1 March 2010 the Secondary Complainer wrote to the Respondent at Marshall Wilson Law Group by letter. This letter referred to previous correspondence and requested the return of Naftalin Duncan & Company’s file for accounting purposes.

A response to this letter was received on 3 March 2010 which acknowledged receipt of the letter of 1 March 2010 and returned the file as requested.

23.15 By letter dated 20 May 2011 the Secondary Complainer wrote to the Respondent referring to the case raised by Mr H. This letter requested confirmation as to whether or not the action was still sisted and whether there had been any progression of Mr H’s case.

There was no response from the Respondent.

23.16 By letter dated 23 August 2012 the Secondary Complainer wrote to the Respondent referring to the case raised by Mr H. This letter requested confirmation as to whether or not the action was still sisted and whether there had been any progression of Mr H’s case.

No response was received from the Respondent.

23.17 By letter dated 4 September 2012 the Secondary Complainer wrote to the Respondent referring to the case raised by Mr H and to his letter of 23 August 2012. This letter states the following:

*“We note we wrote to you first on 20<sup>th</sup> May 2011 and consider that we are entitled to this information and it should be provided not just as a matter of a duty but also if you expect to receive legal aid files on the basis of a mandate when the account is unpaid.”*

No response was received to this letter.

- 23.18 On 17 September 2012 the Secondary Complainer wrote to the Senior Partner at Marshall Wilson Law Group Limited saying inter alia:

*“In this case we passed a file of papers to you whilst Mr H was in receipt of Advice & Assistance. This was done in April 2010 and we asked that you take our Advice & Assistance account into account at the time of submission. Some two years later we have heard nothing more. We have sent various letters without a response. Could you please have this matter dealt with and let us know whether the matter has been concluded or otherwise. We do not regard it as satisfactory that we are simply receiving no response to correspondence.*

*Should we not hear from you in satisfactory terms within the next 14 days we shall simply deal with matters by way of a complaint.”*

No response was received.

- 23.19 The Secondary Complainer then wrote to the Client Relations Partner at Marshall Wilson Law Group Limited on 10 January 2013. This letter enclosed copies of the correspondence since April 2010 between Naftalin Duncan & Company and Marshall Wilson Law Group Limited relating to Mr H. In the letter, the Secondary Complainer asked for this letter to be treated as a complaint and should no satisfactory response be received a complaint would be raised with the Legal Services Commission. The Secondary Complainer stated a period of four weeks would be allowed for a response.

No response was received.

23.20 The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC) and on 1 May 2013 the SLCC referred the matter to the Complainers.

The summary of complaint was:-

*“I, Mr Derek Livingston on behalf of Naftalin Duncan & Company Solicitors, wish to complain about the action/inaction of Mr Brian Travers of Marshall Wilson Law Group Limited, Solicitors, Falkirk, who was instructed by Mr Brian H in/around April 2010 in respect of a claim for “slopping out”, as evidenced by:-*

1. *Mr Travers has unduly delayed/failed to reply to our letters dated 20<sup>th</sup> May 2011, 23 August 2012, 4 September 2012, 17 September 2012 and 10 January 2013 requesting an update on the file.*

*How has this affected the Complainer:-*

2. *We consider the complete failure to respond to be misconduct but also to be an inadequate professional service to a third party.”*

23.21 By letter dated 14 May 2013, the Complainers wrote to the Respondent enclosing a Summary of Complaint. They requested a response within twenty-one days setting out his position and providing the relevant business files.

In the absence of any reply the Complainers wrote to the Respondent on 5 June 2013 issuing a Notice under the Legal Profession and Legal Aid (Scotland) Act 2007, Section 48(1)(a) calling upon him in terms of Section 48(2) to deliver the relevant documents to the Complainers.

On the same day (5 June 2013) the Complainers wrote separately to the Respondent issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i).

Given a continued lack of reply from the Respondent, the Complainers wrote to him on 26 June 2013 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i) requiring him to give six weeks' notice of his intention to apply to take out a Practising Certificate. The Respondent did not respond to this Notice.

- 23.22 By letter dated 2 July 2013, the Complainers acting *ex proprio motu* intimated a further complaint to the Respondent setting out his failure to respond to the Law Society in the following terms:

*“That Brian Travers may be guilty of professional misconduct and/or unsatisfactory professional conduct, in that he has failed and/or delayed in responding to correspondence sent to him by the Society in connection with a complaint raised by Mr Derek David Livingston.”*

The Complainers requested the Respondent reply to this letter within fourteen days setting out his position in respect of the complaint and to provide the relevant business files. No response was received.

- 23.23 On 17 July 2013 the Complainers wrote to the Respondent by Recorded Delivery advising the Society had not received a response to the intimation of an additional conduct issue and requested a response to this complaint within seven days.

The Respondent failed to respond to this letter and by letter dated 24 July 2013, in the absence of any reply, the Complainers intimated that they would begin preparation of a Report on the complaints raised by both Mr Derek David Livingston and The Council of the Law Society.

- 23.24 By letter dated 31 July 2013, the Complainers sent the Respondent a copy of the Report and advised that the matter would go to the Complainers' Professional Conduct Sub Committee for consideration.

- 23.25 The complaints were considered by the Complainers' Professional Conduct Sub Committee on 12 September 2013.

The Sub Committee determined that the Respondent's conduct in respect of:-

1. His failure to respond to correspondence from the Secondary Complainer and,
2. His failure to respond to correspondence from the Law Society of Scotland

appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable Solicitor; that it appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee determined that the complaints should be prosecuted in terms of the Solicitors (Scotland) Act 1980 Section 51.

By letter dated 24 September 2013 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee Determination.

### **Complaint DT/15/12**

#### **MR A**

- 23.26 The Secondary Complainer instructed the firm of Marshall Wilson Law Group Limited between the period of 2006 and 2008 in respect of various family matters relating to access to his son, and the sale of a house. The Respondent had primary responsibility for the complainer's instructions in the said matters.
- 23.27 The Secondary Complainer received a letter from Marshall Wilson Law Group dated 4 June 2010 enclosing a fee note (Ref: 136/22) for £352.50 (hereinafter referred to as 'the fee note'). The Secondary Complainer had not instructed Marshall Wilson Law Group Limited to undertake any work on his behalf since approximately 2008.
- 23.28 Upon receipt of the letter dated 4 June 2010, the Secondary Complainer contacted the Finance Department at Marshall Wilson Law Group Limited to clarify why the fee note had been issued. After investigating the matter, the Finance

Department in the course of a telephone conversation with the Secondary Complainer explained they had spoken with the Respondent and the Respondent had confirmed the fee note had been issued in error.

The Secondary Complainer requested confirmation of this in writing and subsequently received a letter dated 13 July 2010 stating:

*“We refer to our telephone conversation today and write to advise that fee note 136/22 issued on 4<sup>th</sup> June 2010 for £352.50 has been cancelled and apologize for any inconvenience this has caused.”*

23.29 The Secondary Complainer relocated to England to be closer to his son and required to instruct an English firm of solicitors, Hill Dickinson LLP, in respect of his rights of access to his son.

23.30 By letter dated 17 August 2011, Hill Dickinson LLP wrote to Marshall Wilson Law Group Limited with a mandate signed by the Secondary Complainer for delivery of the Secondary Complainer’s papers.

A response was received from the Respondent by letter dated 22 August 2011, stating:

*“We thank you for your letter dated 19 August enclosing mandate on behalf of Mr A. We would be happy to implement the terms of said mandate following upon payment by Mr A of our outstanding fee note referred to in our last letter to him, a copy of which is enclosed for your information.”*

The reference to “our last letter” referred to the letter received by the Secondary Complainer dated 4 June 2010.

23.31 Upon receipt of the Respondent’s letter dated 22 August 2011, Hill Dickinson LLP sent the Respondent a copy of the letter dated 13 June 2010 which confirmed the fee note had been cancelled. Despite this, the Respondent continued to withhold the Secondary Complainer’s papers and thereby delayed the Secondary Complainer’s attempts to secure rights of contact with his son.

23.32 By letter dated 16 September 2011, Hill Dickinson LLP complained to Marshall Wilson Law Group Limited on behalf of the Secondary Complainer, stating inter alia:

*“We responded on 1 September, advising that Mr A had received a letter from your firm dated 13 July 2010 advising him that the fee note referred to by your Mr Travers and issued on 4 June 2010 had been cancelled. We asked you to fax the copy papers.*

*As we received no response to chasing telephone calls, we faxed you on 14 September highlighting Mr A’s upset and distress at the delay in receiving his file of papers and court orders. On 15 September we received, by e-mail, a letter purportedly sent by post on 5 September (still not received).*

*From Mr A’s point of view, the letter makes no sense. He received a letter, from your company, in July 2010, informing him that the fees had been cancelled (a copy letter attached). The letter apologised for the inconvenience that your firm had caused to Mr A and it is, for this reason, that Mr A is particularly upset by your firm’s attempts to pursue him for payment of the bill.*

*We should be obliged if you would investigate Mr A’s complaint.”*

A response to this letter of complaint was received from Mrs Hamilton, the Clients Relations Partner at Marshall Wilson Law Group Limited, by letter dated 20 September 2011, stating:

*“It would appear that our firm concluded work on Mr A’s behalf sometime around April 2010 and a final note of account was sent on 4 June 2010. We understand that this correspondence was un-answered and that subsequent attempts to trace Mr A were unsuccessful and our Mr Travers advised our cashier that in these circumstances Mr A’s account was to be written off. When Mr A telephoned our Cashier he was erroneously advised that his fee note had been cancelled. This was not the case, our Mr Traver’s having taken the decision to write off the fee on the grounds that Mr A was untraceable.*



*In all of the circumstances our firm is now seeking payment in respect of work carried out on Mr A's behalf as instructed by him. We apologise for any inconvenience or confusion which has been caused as you will appreciate work has been undertaken on Mr A's behalf and payment is due. We confirm that we will be happy to release your client's file on payment of the outstanding balance. The release of the file would also be conditional on your client returning the Birth Certificate which our firm removed from the Court process at Falkirk Sheriff Court on his instruction."*

- 23.33 The Secondary Complainer's mandate was not actioned by the Respondent, and the Secondary Complainer was able to obtain some relevant papers he required directly from Falkirk Sheriff Court.

However, by letter dated 29 May 2012, Hill Dickinson LLP received a further letter from the Respondent requesting payment of the fee note within fourteen days, failing which the firm intended raising the appropriate court proceedings against the Secondary Complainer.

- 23.34 The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC). On 6 September 2012 the SLCC referred the matter to the Complainers.

The summary of complaint was:-

*"I, Mr A, wish to complain about the action/inaction of (a) Mr Brian Travers of Marshall Wilson Law Group Limited, (b) Mrs Sharon Hamilton, formerly of Marshall Wilson Law Group Limited, and (c) Marshall Wilson Law Group Limited, who have acted for me on various matters between the dates of 2007 and 2008, as evidenced by:-*

1. *Mr Travers failed to implement a mandate sent by my current solicitors, Hill Dickinson, and instead advised me that my files would only be released upon payment of an outstanding fee note of £352.50 (Ref 136/22). This is despite Marshall Wilson Law Group Limited informing me by telephone, at*

*approximately the end of July/beginning of August 2011, that Mr Travers had advised that the fee note for £352.50 had been sent to me in error and cancelled, and me receiving written confirmation of same on 13 July 2010.*

2. *Mr Travers, in correspondence dated 29 May 2012, contacted my current solicitors advising that final payment for the fee note of £352.50 must be made within 14 days of the letter or they intended to raise the appropriate court proceedings for the outstanding fee note. This is despite me receiving written confirmation on 13 July 2010 from Marshall Law Group Limited that the fee note for £352.50 had been sent to me in error and cancelled.*

How has this affected the Secondary Complainer:-

1. *I have continued to incur significant legal fees through my current solicitors trying to resolve this issue whilst chasing the release of my files. I have also incurred personal travel expenses and required to take annual leave from work in order to travel back and forth from Manchester to Scotland on numerous occasions to try and resolve this issue by getting the case papers directly from Falkirk Sheriff Court.*
2. *The delay in receiving the files has put additional stress and anxiety on me, as going through the courts for access to your son is already a stressful experience. The additional stress and anxiety has required me to receive medical treatment as a result.*
3. *I have suffered a delay in access to my son – I only have limited access due to my solicitor not having access to the court order files from the Scottish courts. As a result I have missed a number of key milestones in my son's life, which in turn has had a significant impact on my son as we both value our time together."*

23.35 By letter dated 11 October 2012, the Complainers wrote to the Respondent enclosing a Summary of Complaint and confirming a Report would be required to be prepared in respect of the complaint. The Complainers requested a response

within twenty-one days setting out the Respondent's position and requiring him to provide the relevant business files.

In the absence of any reply the Complainers wrote to the Respondent on 9 November 2012 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i). No response was received.

Given a continued lack of reply from the Respondent, the Complainers wrote to him on 4 December 2012 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i) requiring him to give six weeks' notice of his intention to apply to take out a Practising Certificate. The Complainers, at the same time, also wrote to the Respondent giving him notice that his failure to respond to the Complaint would be taken into consideration as a discrete issue. No response was received from the Respondent.

- 23.36 The Complainers, in light of the continuing lack of reply from the Respondent, began the preparation of a Report on both the complaint raised by the Secondary Complainer and the issue of the Respondent's failure to respond to the Council of the Law Society of Scotland.
- 23.37 By letter dated 15 January 2013, the Complainers sent the Respondent a copy of the Report and advised that the matter would go to the Complainers' Professional Conduct Sub Committee for consideration.
- 23.38 The complaints were considered by the Complainers' Professional Conduct Sub Committee on 11 April 2013.

The Sub Committee determined that the Respondent's conduct in respect of:-

1. His failure to implement a mandate sent by the Secondary Complainer's current solicitors, Hill Dickinson LLP, and instead advising the Secondary Complainer his files would only be released upon payment of an outstanding fee note, despite the Secondary Complainer being advised said fee note had been sent in error and had been cancelled;

2. His letter of correspondence dated 29 May 2012 to Hill Dickinson LLP advising final payment for the fee note of £352.50 (Ref: 136/22) must be made within fourteen days or they intended to raise the appropriate court proceedings for the outstanding fee note, despite the Secondary Complainer receiving written confirmation said fee note had been sent in error and had been cancelled; and
3. His failure to respond to the enquiries of the Law Society of Scotland and to the Statutory Notices sent in furtherance thereof

appeared to amount both individually and *in cumulo* to a serious and reprehensible departure from the standard of conduct expected of a competent and reputable Solicitor; that it appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee determined that the complaints should be prosecuted in terms of the Solicitors (Scotland) Act 1980 Section 51.

By letter dated 29 April 2013 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee Determination.

### **MR AND MRS B**

23.39 In or around October 2011 Mr and Mrs B, the Secondary Complainers, instructed the Respondent to defend a Court of Session action raised by the Accountant in Bankruptcy, as the permanent Trustee on the sequestrated Estate of Ms I v the Secondary Complainers. The court action was for *inter alia* production and reduction of a disposition by the said Ms I in favour of the Secondary Complainers in respect of the heritable subjects situated at Property 1 (hereinafter referred to as 'the heritable subjects').

The former firm of Marshall Wilson had previously acted on behalf of the Secondary Complainers in the purchase of the heritable subjects from the said Ms I in or around 2004.

23.40 By email to the reception of Marshall Wilson Law Group Limited on 9<sup>th</sup> October 2011, Mr B attached correspondence and a copy Summons received in respect of the aforementioned Court of Session action. His email was in the following terms:

*“Sir/Madam please read the email below and attachments and provide a response as a matter of urgency. We purchased this property through your firm and are shocked to find ourselves in this position. Regards Mr and Mrs B”*

The Summons referred to a disposition granted by the said Ms I in favour of the Secondary Complainers registered in the Land Register of Scotland on 16 April 2004. The said Ms I was sequestrated on 1 April 2005 and the Accountant in Bankruptcy was appointed permanent Trustee on the sequestrated Estate by Act and Warrant on 8 November 2005.

It was averred the disposition bore to be granted for a consideration of £60,000 but only £30,000 was paid by the Secondary Complainers for the heritable subjects in exchange for allowing the said Ms I and her husband to continue to reside at the property. The Accountant in Bankruptcy sought to challenge the sale of the heritable subjects on the ground the disposing of the subjects constituted a gratuitous alienation in terms of section 34 (1)b) of the Bankruptcy (Scotland) Act 1985.

23.41 On 10 October 2011 the Respondent emailed the agent acting for the Accountant in Bankruptcy stating, *inter alia*:

*“The above named clients have contacted us in relation to the draft Summons. I am trying to locate our file & hope to be in a position to revert shortly. I would be grateful if you would refrain from taking any action until we are in a position to respond more formally.”*

On the same day, the Respondent sent an email to Ms L as follows:

*“Ms L open new file for Mr and Mrs B – defend action of reduction.”*

- 23.42 On 21 October 2011 the Respondent emailed Mr B regarding the potential court action advising *inter alia*:

*“Mr B, after our conversation earlier today I think it is imperative that I have a face to face meeting with both you and your wife so that there is no misunderstanding as to the position and perhaps more importantly I have specific instructions as to how this matter is to be approached.”*

A meeting took place between the Secondary Complainers and the Respondent on the 25<sup>th</sup> October 2011.

- 23.43 The agent acting on behalf of the Accountant in Bankruptcy emailed the Respondent on 28<sup>th</sup> October 2011 asking whether the Respondent had taken instructions and had located the original file.

Later the same day the Respondent responded by email stating, *inter alia*:

*“Tried to call but you were on the telephone. No to file yet. We moved our storage facilities earlier this year & it’s been a bloody nightmare trying to find anything. I met the clients earlier this week. Mr. B works abroad so it’s hard to get to meet him at times.”*

- 23.44 By email on 1 November 2011, the Respondent emailed the Secondary Complainers enclosing a copy of his Standard Terms of Engagement letter and stated *inter alia*:

*“You will also recall that you had initially indicated some concerns with regard to not having been advised at the time of purchase taking place as to the potential consequences in the event of the seller ultimately becoming sequestrated as indeed has occurred here. You indicated, however, notwithstanding having been told of that potential consequence you would still have proceeded with the transaction.”*

- 23.45 By email to the Respondent dated 13 May 2012, the agent acting on behalf of the Accountant in Bankruptcy advised if the Secondary Complainers were to put

forward an offer to pay £20,000, his client would circulate the creditors and providing none objected, the offer would be accepted.

The Respondent, by email dated 14 May 2012, sought the Secondary Complainers instructions on the proposal put forward on behalf of the Accountant in Bankruptcy.

A series of email exchanges between the Respondent and Mrs B were sent in the period of 14 to 17 May 2012 in relation to the best way to proceed in the matter.

- 23.46 On 23 May 2012 the Secondary Complainers sent an email to the Client Relations Partner at Marshall Wilson Law Group attaching a copy of the Summons. The email was headed up 'client complaint'.
- 23.47 On 24 May 2012, the Respondent emailed Mrs B to confirm he was withdrawing from acting, stating:

*"Mrs B, we have just received a complaint from Mr B & in the circumstances I have decided I cannot properly continue to act here. I have notified the other side and suggest they write to you both directly. Regards, Brian."*

On the same day the Respondent emailed the agent on behalf of the Accountant in Bankruptcy in the following terms:

*"For reasons I won't bore you with I am no longer acting. Would suggest you write directly to them. Kind regards, Brian."*

- 23.48 By email dated 6 June 2012, the Client Relations Partner at Marshall Wilson wrote to the Secondary Complainers in response to their email of 23 May 2012. The email explained given the Secondary Complainers raised a complaint against the Firm, Mr Travers has advised them the Firm could no longer continue to represent their interests. The Client Relations Partner requested further information and clarification regarding the complaint made against the Firm in order for the complaint to be investigated fully.

23.49 The Secondary Complainers made a complaint to the Scottish Legal Complaints Commission (SLCC) against the Respondent. By letter dated 11 October 2012 the SLCC intimated to complaint to the Respondent and attaching a Summary of the Complaint.

By letter dated 5 February 2013 the SLCC wrote to the Respondent advising an additional issue was to be added to the complaint which was considered a conduct issue. The summary of the complaint was:-

*“We, Mr B and my wife, Mrs B, wish to complain about the actions/inactions of [REDACTED] formerly of Marshall Wilson Solicitors, who acted for us in the purchase of my wife’s father’s house at Property 1 and Mr Brian Travers of Marshall Wilson who has been acting for us in the defence of a Court of Session action of “Gratuitous Alienation” as evidenced by:-*

*6. Mr Travers accepted instructions to act for Mr & Mrs B in relation to the action raised by the Accountant in Bankruptcy whilst being aware that the firm had acted for Mr & Mrs B in the original conveyancing matter and there was a potential for a fault on the firms part in relation to the transaction.”*

23.50 The SLCC referred the matter to the Complainers and by letter dated 17 December 2013 the Complainers wrote to the Respondent intimating a complaint and requesting the Respondent provide a response within a period of 21 days.

By letter dated 23 January 2014 the Respondent wrote to the Complainers to confirm he was seeking professional advice before responding to the complaint.

On 11 April 2014 the Respondent’s agent wrote to the Complainers with the Respondent’s response to the complaint. The letter explains another partner at the Firm had dealt with the Secondary Complainers purchase of the heritable subjects and states *inter alia*:

*“After he investigated the position Mr Travers explained the situation. He was aware of the possible conflict of interest, but was keen to try and assist Mr and Mrs B in the difficulty which had arisen. He did ask Mr and Mrs B that, if the*



*position had been explained to them as to them as to the degree of risk, would they have proceeded with the transaction in any event. Mr and Mrs B responded in the affirmative to that question...*

*I would respectfully suggest that this is a situation where there is not a conduct issue. Mr Travers had not been involved in the original transaction, but was consulted when the problem arose. Once he had established that the couple would have in effect "taken the risk" in any event, it does not appear to me that a conflict would have arisen."*

- 23.51 The Complainers instructed a Reporter whose report was provided to the Respondent by the Complainers in a letter dated 19 June 2014 together with intimation that the Complaint would be considered by the Complainers' Professional Conduct Sub Committee. By email dated 15 July 2014 the Complainers advised the Respondent that the Complaint would be considered by the Professional Conduct Sub Committee on 7 August 2014.
- 23.52 On 7 August 2014 the Complainers' Professional Conduct Sub Committee considered the matter. The Sub Committee determined the conduct of the Respondent in accepting instructions to act on behalf of the Secondary Complainers whilst being aware that the firm had previously acted for the Secondary Complainers in the original conveyancing transaction, and that there was potential fault on the firm's part in relation to the original transaction, appeared to amount to a serious and reprehensible departure from the standard of conduct expected of a competent and reputable solicitor.
- The Sub Committee determined a Fiscal should be appointed in terms of section 51 of the Solicitors (Scotland) Act 1980 to prosecute the Respondent before the Scottish Solicitors Discipline Tribunal.
- 23.53 On 19 August 2014 the Complainers wrote to the Respondent enclosing a copy of the Sub Committee Determination.

MS C

23.54 On or around 25 June 2007, Ms C the Secondary Complainer met the Respondent and instructed Marshall Wilson Law Group Limited in respect of a medical negligence claim she wished to pursue on behalf of her infant daughter. The Respondent had the responsibility for the complainer's instructions in the said matter.

On the same date, Marshall Wilson Law Group Limited wrote to the Secondary Complainer referring to her recent meeting with the Respondent. The letter stated the Respondent would be responsible for carrying out work on her behalf and that an application had been made to the Scottish Legal Aid Board for Advice and Assistance Legal Aid cover.

23.55 The Respondent took no further action to progress the claim until 20 November 2008.

Between January 2008 and October 2008, the Secondary Complainer made numerous phone calls to the Respondent to enquire as to progress. The Secondary Complainer left various messages for the Respondent. There was no response from the Respondent.

23.56 The Secondary Complainer contacted the Marshall Wilson Law Group Limited on 18<sup>th</sup> November 2008. A Marshall Wilson internal email from a Ms J to the Respondent dated 18<sup>th</sup> November 2008 noted:

*"I have had a Ms C on the phone asking about the claim on behalf of her daughter Ms K...She has been at Yorkhill with her daughter and the Dr there said he had never had a letter from us requesting a medical report. She said that the fault lay with Stirling Royal Infirmary at the birth of her daughter. There is nothing on the screen to indicate we have written to anyone apart from her sending her out a TOB letter in 2007..."*

In his response on the same date, the Respondent noted:

*"Get Ms M to look out the file. It rings no bells"*

23.57 By letter dated 20 November 2008, the Respondent wrote to the Secondary Complainer referring to "*a recent telephone call*" she had made to the firm, and apologised for a delay in contacting her which had risen due to an "*administrative oversight*". The letter enclosed a medical mandate and asked the Secondary Complainer to complete and return it, in order the firm may obtain "*your medical records with a view to obtaining an independent consultant's report*".

23.58 By letter dated 25 November 2008 the Respondent wrote to Stirling Royal Infirmary enclosing a completed mandate and asking that the Secondary Complainer's daughter's medical records delivered.

A reminder letter to Stirling Royal Infirmary was sent by the Respondent on 12 December 2008.

23.59 The Respondent received a reply from the NHS dated 09 December 2008 enclosing a *pro forma* application / mandate for access to the said medical records. The Respondent duly forwarded the *pro forma* /mandate to the Secondary Complainer on 15 December 2008 and asked her to complete and return in order that medical records could be obtained.

23.60 Upon receipt of the letter dated 15<sup>th</sup> December 2008, the Secondary Complainer contacted Marshall Wilson Law Group Limited. A Marshall Wilson file entry dated 16 December 2008 detailing the conversation noted:

*"Attendance at telephone with Ms C. She advised that she had received a form to sign in order that we could get her medical records. She said that it was Yorkhill who held the records for her daughter. Advising that we wanted to get the medical records for herself which would be with Stirling Royal and asking her to sign the form and hand it back in to us"*

23.61 By letter dated 14 January 2009 the Respondent wrote to Stirling Royal Infirmary enclosing the completed *pro forma* and a completed mandate. A reminder letter to Stirling Royal Infirmary was sent by the Respondent on 25 February 2009.

- 23.62 By letter dated 12 March 2009, NHS Forth Valley wrote to the Respondent enclosing the medical records for the Secondary Complainer.

By letter dated 19 March 2009 the Respondent wrote to the Secondary Complainer confirming that he had received the medical records from NHS Forth Valley and asked the Secondary Complainer to make an appointment with him *“to discuss matters further with a view to progressing the claim”*.

- 23.63 By letter dated 22 April 2009, the Respondent wrote to Stirling Royal Infirmary noting the medical records they had delivered related to the Secondary Complainer, whereas the records which were required were those of her daughter. The Respondent requested that the correct records be provided.

The Respondent wrote to Stirling Royal Infirmary again on 14 July 2009, returning an invoice which had been received for delivery of the Secondary Complainer’s own medical records. He requested that the hospital forward the Secondary Complainer’s daughter’s records together with a fresh invoice.

- 23.64 By letter dated 29 July 2009, NHS Forth Valley wrote to the Respondent referring to their telephone conversation of 28<sup>th</sup> July 2009. The letter stated inter alia:

*“I enclose an application form for access to Ms K’s medical records.*

*To enable us to process your request I would be grateful if you could arrange for the form to be completed by Ms C on behalf of her daughter.”*

By letter dated 06 August 2009, the Respondent wrote to the Secondary Complainer forwarding the forms received from NHS Forth Valley. The letter asked the Secondary Complainer to complete and return the forms in order to obtain the Secondary Complainer’s daughter’s medical records.

By letter dated 01 September 2009, the Respondent wrote again to the Secondary Complainer with enclosing a fresh mandate form. This letter stated inter alia:

*“Please ensure that you complete Ms K’s details and that you sign it on her behalf. And after it has been completed please return to us as a matter of some urgency”*

The Respondent wrote another letter, with similar terms dated 14 October 2009 to the Secondary Complainer.

23.65 Between August 2009 and February 2010, the Secondary Complainer made numerous phone calls to the Respondent to enquire as to the progress. The Secondary Complainer left various messages for the Respondent with his secretary. Her calls were not returned.

23.66 By letter dated 04 November 2009, the Respondent wrote to Stirling Royal Infirmary enclosing a completed mandate in respect of the Secondary Complainer’s daughter’s records and requesting the relevant medical records to be forwarded in due course.

The Respondent thereafter sent a reminder letter dated 24 November 2009 to Stirling Royal Infirmary referring to his letter of 04 November 2009.

23.67 By letter dated 11 February 2010, the Respondent wrote to the Secondary Complainer inviting her to make an appointment to discuss matters further.

On the same letter, a hand written file note dated 25 February 2010 states:

*“Att (sic) Client discussing matters  
Advising still having difficulties re obtaining the appropriate record....”*

23.68 There were no further entries on the Respondent’s file until 05 April 2012.

A telephone attendance note dated 11 April 2012 stated that the records office at Forth Valley Hospital had contacted the firm, advising that they were still looking for the relevant medical records. The note stated that papers were not to hand, and it was agreed by the firm and the hospital that it *"would be best to start afresh. Noting sending mandate by email to send to client"*. A draft medical mandate,

dated 12 April 2012 and addressed to Yorkhill Children's Hospital in Glasgow, was thereafter retained on the file.

- 23.69 By letter dated 19 June 2012, Messrs Brophy & Company wrote to the Respondent with a signed mandate which had been executed by the Secondary Complainer, noting that they had been instructed by her, and asking that the firm's files and papers be delivered in early course.

There was no response from the Respondent.

- 23.70 A reminder letter dated 12 July 2012 was sent by Messrs Brophy & Company to the Respondent noting that the mandate had yet to be implemented, and asked that the papers be delivered within the next 7 days.

There was no response from the Respondent.

- 23.71 By letter dated 14 January 2013, Messrs Brophy & Company wrote again to the Respondent observing that the file had still not been delivered, and that unless it was received within 7 days consideration would be given to raising an action for delivery.

There was no response from the Respondent.

- 23.72 The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC) on or around 21 July 2012.

On 26 February 2014 the SLCC referred the matter to the Complainers.

The summary of complaint was:-

*"I, Ms C wish to complain about the action/inaction of Mr Brian Travers of Marshall Wilson Law Group Limited and [another named solicitor] who were instructed by me in respect of a medical negligence claim on or around May 2007 as evidenced by:*

1. *Mr Brian Travers has failed to progress my medical negligence case despite my instructions for him to do so on or around May 2007.*
2. *Mr Brian Travers has failed to communicate with me via telephone, letter and in person despite my requests made on or around Jan – Dec 2008 and thereafter monthly following a 6 month break from August 2009 and every month until May 2010. In August 2010 I appeared for an appointment and was told he was in court. In 2011 it was scattered phone calls month to month.*
3. *Mr Brian Travers has failed to retrieve copy medical records relating to my daughter's birth despite me signing mandates giving him authority to do so on or around July and August 2007, January and August 2008 and February and November 2009.*
4. *Mr Brian Travers failed to transfer my case papers to my new solicitors Brophy and Co despite receiving a signed mandate authorising their release dated 14 June 2012.*

23.73 By letter dated 28 February 2014 the Complainers wrote to the Respondent intimating a complaint and requesting the Respondent provide a response within a period of 21 days.

In the absence of any reply the Complainers wrote to the Respondent on 29 April 2014 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i).

On the same day (29 April 2014) the Complainers wrote separately to the Respondent issuing a Notice in terms of Section 48(1)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007 requiring delivery of “*All books, accounts, deeds, securities, papers and other documents in your possession or control relating to Ms C’s claim on behalf of her daughter, Ms K, against the NHS in respect of alleged medical negligence.*”

A response dated 30 April 2014 on behalf of the Respondent was received from Marshall Wilson Law Group Limited Client Relations Manager, Fiona Munn. Mrs

Munn provided a copy of the firm's file, which had been reconstituted from their computer records as the Principal had been lost. The Respondent's position was stated to be as per the firm's response to the SLCC's investigation of the service aspects of the complaint, specifically in respect of each issue as follows:

1. The file was lost, and the firm consequently did not have any details of notes taken by the solicitor during any discussion with the complainer.
2. The Respondent could not specifically recollect any meeting which had been scheduled with the complainer in August 2010, although it was fair to say that from time to time he did get stuck in court and had to telephone the office to ask for appointments to be cancelled and rearranged.
3. The file reflected that the solicitor did indeed attempt to retrieve medical records falling upon mandates signed by the complainer; and had issued reminder letters to the medical authorities in respect of same.
4. The mandate was not implemented because the file had been lost. Numerous searches had been undertaken, but had not uncovered the file.

(In or about October 2014 the principal file was found and provided to the Secondary Complainer's new agents.)

23.74 The Complainers instructed a Reporter whose report was provided to the Respondent by the Complainers in a letter dated 20 June 2014 together with intimation that the Complaint would be considered by a Professional Conduct Sub Committee.

23.75 On 7 August 2014 the Complainers' Professional Conduct Sub Committee considered the matter.

The Sub Committee determined that the Respondent's conduct in respect of:-

1. His failure to progress the Secondary Complainer's medical negligence case despite having instructions from around May 2007



2. His failure to communicate with the Secondary Complainer via telephone, letter and in person (all as set out in the Determination)
3. His failure to retrieve copy medical records relating to the Secondary Complainer's daughter's birth despite the signing of mandates
4. His failure to transfer the Secondary Complainer's case papers to her new solicitors Messrs Brophy and Co despite receiving a signed mandate

appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that it appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee determined a Fiscal should be appointed in terms of section 51 of the Solicitors (Scotland) Act 1980 to prosecute the Respondent before the Scottish Solicitors Discipline Tribunal.

#### **MR D**

- 23.76 In or around late 2009 Mr D, the Secondary Complainer instructed the Respondent to act on his behalf *inter alia* in a dispute between himself and HM Revenue and Customs ('HMRC') in connection with an outstanding fine and seizure of the Secondary Complainer's motor vehicle. The matter related to the use of rebated fuel within the Secondary Complainer's vehicle.

On 3 November 2009 the Respondent issued the Secondary Complainer with his Terms of Engagement letter.

- 23.77 By letter dated 3 November 2009 the Respondent wrote to HMRC referring to a Notice of Seizure under the Customs and Excise Management Act 1979 confirming *inter alia* he was instructed to act on behalf of the Secondary Complainer. The letter also referred to the intention of the Secondary Complainer to obtain a sample of fuel for independent testing and enclosed a notice of claim in terms of Schedule 3 of the said Act.

23.78 On 12 March 2010 the Respondent wrote to HMRC by letter noting the Secondary Complainer had been contacted directly by an officer of HMRC advising his vehicle was to be disposed of. The Respondent advised the Secondary Complainer was contesting the matter and had identified an appropriate independent chemist. The Respondent requested no further steps be taken until such time as the Secondary Complainer had been able to have an independent test conducted.

The Respondent thereafter instructed an independent expert to analyse a sample of fuel by letter dated 25 March 2010. The results of the test were inconclusive and in a file note dated 1 April 2010, which referred to a telephone conversation between the independent expert and the Respondent, it was noted there had been some contamination of the fuel sample.

23.79 The Respondent contacted HMRC by telephone on 1 April 2010 and in a note of the discussion the Respondent documented that HMRC were to propose returning the Secondary Complainer's vehicle to him subject to the Secondary Complainer making payment of any penalties, charges and duties owed to HMRC. The Respondent advised HMRC he would take the Secondary Complainer's instructions on this matter.

By letter dated 08 April 2010, the Respondent wrote to the Secondary Complainer enclosing a copy of an email from HMRC containing the proposal. On the same day, the Respondent wrote separately to the Secondary Complainer enclosing the fuel sample report. In that letter, the Respondent requested the Secondary Complainer to consider the report and to call back at his earliest convenience.

23.80 A Charge for Payment was served by HMRC upon the Secondary Complainer on or about 6 October 2010. By letter dated 7 October 2010 the Respondent wrote to HMRC on behalf of the Secondary Complainer stating *inter alia*:

*"Our client would wish to seek to time to make payment of the sum referred to in the Charge. Our client is proposing to settle the payment in full within 6 months by equal monthly instalment."*

- 23.81 The Respondent wrote to the Debt Management department of HMRC, Edinburgh by letter on 22 November 2010 stating *inter alia*:

*“As advised our client accepts the sums are due as referred to in the Charge of Payment served on our client. You will see from our recent letter to your office in Cumbernauld that our client had made a payment proposal with regard to that. Needless to say we have heard nothing further in response. With regard to the most recent assessment that is still in dispute.”*

On the same date the Respondent wrote to the Secondary Complainer. The letter to the Secondary Complainer was headed “Warning of Bankruptcy Action – Oils Duty £17,179.10” and a copy of the letter sent to the Debt Management department of HMRC, Edinburgh was enclosed.

- 23.82 By letter dated 21 June 2011 the Respondent wrote to HMRC referring to a Charge of Payment in the sum of £18,027.90 served on the Secondary Complainer on 14 June 2011. The letter states *inter alia*:

*“Please treat this letter as formal confirmation on behalf of our client that he does not accept that the sums referred to in the said Charge are due and that the said Charge is not accepted by him.”*

- 23.83 A file note dated 15 November 2011 prepared by the Respondent headed ‘Court Instructions’ refers to a petition for sequestration at the instance of HMRC and raised against the Secondary Complainer calling on 16 November 2011 at Falkirk Sheriff Court.

The Respondent wrote to the Secondary Complainer by letter dated 22 November 2011 referring to the hearing of 16 November 2011 and advising a period of 14 days was granted to allow Answers to be lodged to the Petition and an Evidential Hearing was assigned for 24 January 2012.

On 28 November 2011 an appeal was lodged by the Advocate General for Scotland for and on behalf of the Commissioners for HMRC against the Sheriff’s Interlocutor of 16 November 2011. The Appeal was lodged on the basis fixing of

a Diet of Proof was not in conformity with the terms of the Bankruptcy (Scotland) Act 1985.

On 21 February 2012 the Respondent wrote to the Secondary Complainer advising that his case was calling 25 April 2012 at 1.45 at Falkirk Sheriff Court and that his attendance would be required. A further letter was sent by the Respondent on 4 April 2012 advising the Secondary Complainer that his attendance would not be required.

In a meeting a few days after the Appeal Hearing of 25<sup>th</sup> April 2012 the Respondent advised the Secondary Complainer that as a result of the hearing he had been sequestrated.

23.84 Around May 2012, the Secondary Complainer paid £19,151.34 to the Respondent to allow the Respondent to seek Recall of the Sequestration Order.

On 16 May 2012 the Respondent wrote to the Secondary Complainer acknowledging receipt of a cheque in the sum of £19,151.34. The sum was credited to the complainer's ledger on 18 May 2012 and thereafter moved to other funds on 31 July 2012.

23.85 By letter dated 25 July 2012, Agents Orme Business and Property Law who were acting for the Secondary Complainer in respect of a sale of a residential property wrote to the Respondent. The letter stated *inter alia*:

*"We [...] understand that you acted for Mr D in relation to a Court Action, which we believe has now settled.*

*However, we enclose a copy section of Form 12A report and as you can see there is still an outstanding Sequestration Order against Mr D. Mr D thought the Interlocutor had been recalled. Can you please attend to this as a matter of urgency as we cannot obviously complete our client's sale until such time as this has been resolved?"*

There was no response from the Respondent and as a result a reminder letter was issued to the Respondent by the selling Agents on 1 August 2012.

23.86 Around August 2012, the Secondary Complainer phoned to enquire as to the progress and left various messages for the Respondent with his secretary. There was no response from the Respondent.

23.87 In a letter dated 18 October 2012, Wylie & Bisset enclosed a breakdown of the sums due to HMRC and the Accountant in Bankruptcy's fees and outlays, totalling £19,996.02. The letter requested a cheque in the sum of £2,264.02 which represented the total costs due to Wylie & Bisset. The sums due to HMRC required to be paid directly to HMRC.

By letter dated 26 October 2012, the Respondent wrote to Wylie & Bisset enclosing a cheque in the sum of £19,996.02 and asking them to confirm that they would not oppose an application to recall the Secondary Complainer's Sequestration. On the same day the Respondent wrote to the Secondary Complainer enclosing a copy of the letter to Wylie & Bisset.

By letter dated 01 November 2012, the Respondent wrote to Wylie & Bisset acknowledging return of the firm's cheque. The Respondent enclosed a further cheque in the sum of £2,264.02 made payable to the Accountancy in Bankruptcy and said he would revert with regard to the recall of the Sequestration.

23.88 By letter dated 10 January 2013, Wylie & Bisset wrote to the Respondent requesting an update on the progress of the recall of the Secondary Complainer's Sequestration.

There was no response from the Respondent noted on the file.

23.89 By email dated 18 January 2013, the Secondary Complainer wrote to the Respondent's firm requesting a confirmation as to when the application for a recall of the Sequestration had been made and to which Court.

There was no response from the Respondent.

By letter dated 28 January 2013, the Secondary Complainer wrote to the Respondent noting he had not received a response to a previous e-mail and requesting information on the recall of his sequestration.

There was no response from the Respondent.

- 23.90 By letter dated 15 January 2013, the Secondary Complainer's new Agents Sandemans wrote to the Respondent enclosing a mandate for the Secondary Complainer's file.

There was no response from the Respondent.

- 23.91 On 05 April 2013, the Secondary Complainer wrote a letter of complaint to the Respondent. The letter stated *inter alia* that he had provided the Respondent with his diesel receipts for onward transmission to HMRC and couldn't understand why the Respondent had not provided these to HMRC, that the Respondent was aware that the Secondary Complainer had the money to pay funds to HMRC however the Respondent had advised him to wait for the Court Hearing. Thereafter the Respondent had informed his wife that the Secondary Complainer had been sequestered. The Secondary Complainer also noted that he had provided the Respondent with £19,996.02 to pay to HMRC but this money was never transferred to HMRC.

On 10 April, the said balance held on the Secondary Complainer's behalf were transferred to Agents Sandemans as per the Secondary Complainer's request.

By letter dated 14 May 2013, Sandemans wrote to the Respondent requesting a delivery of all papers which he had received from the Secondary Complainer, including the VAT receipts.

- 23.92 The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC). On 28 November 2013 the SLCC referred the matter to the Complainers.

The summary of complaint was:-

I Mr D, wish to complain about the action/inaction of Mr Brian Travers of Marshall Wilson Law Group Limited, in relation to my dealings with HMRC between 2009 and October 2012, as evidenced by

2. Mr Travers did not send my diesel receipts to HMRC which I gave him at the end of 2009 and despite me reminding him at an appointment, which resulted in me being fined £8,500.
3. Mr Travers failed to pay my debt to HMRC despite instructing him to do so on 9 May 2012 and paying him the money to do so.
6. Mr Travers failed to apply for a recall of my bankruptcy despite paying him £20,000 in May 2012.
7. Mr Travers failed to communicate effectively with me by failing to respond to my various messages in relation to the recall of the decree of bankruptcy.
8. Mr Travers failed to respond to my complaints of 18 January 2013 and 28 January 2013.

How has this affected the Secondary Complainer:

1. My Business has been damaged as I cannot get credit
2. My son cannot get his mortgage approved.
3. It has made me unwell due to the pressure of the situation as I have been off work since May 2012.
4. My wife and sons have suffered from stress as they had to complete my work as well as their own.

23.93 By letter dated 13 December 2013, the Complainers wrote to the Respondent enclosing a Summary of Complaint and confirming a Report would be required to be prepared in respect of the complaint. The Complainers requested a response

within twenty-one days setting out the Respondent's position and requiring him to provide the relevant business files.

In the absence of any reply the Complainers wrote to the Respondent by Recorded Delivery on 07 January 2014 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i).

On the same day (07 January 2014) the Complainers wrote separately to the Respondent issuing a Notice in terms of Section 48(1)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007 requiring delivery of "*All books, accounts, deeds, securities, papers and other documents in your possession or control relating to Mr D's compensation claim against MTM solicitors and also his dealings with HMRC*"

There was no response from the Respondent.

23.94 Given a continued lack of reply from the Respondent, the Complainers wrote to the Respondent on 03 February 2014 to intimate an additional complaint in respect of his failure to respond to the Complainer's correspondence and, in particular, the initial intimation of the complaint on 13 December 2013 and the Notice served on 7 January 2014.

23.95 On 30 April 2014, the Complaints Investigator had a telephone conversation with Fiona Munn, the Respondent's partner. Fiona Munn provided the Complainers with a copy of her letter dated 19 July 2013 to the SLCC in response to the service complaint.

By letter dated 19 May 2014, Fiona Munn confirmed that the Respondent was content for her correspondence to be treated as his response to the conduct complaint under investigation. Mrs Munn's letter to the SLCC stated *inter alia*:

*"[...] In respect of the matters relating to HMRC and the petition for sequestration and its recall Mr Travers sent the final amount due to the Revenue's agents on 1st November 2012 and indicated that thereafter he would seek to recall*



*the sequestration. He received a mandated (sic) on 22nd February 2013 when Mr Travers obviously stopped acting in that matter.*

[...]

*In relation to the complaint made by Mr D about the sequestration this arose as a result of a further incident of Mr D having red diesel in his vehicle. The settlement proposals had been put to the Revenue. Mr Travers file reflects the fact that various different people in the Revenue were dealing with matters. There was a breakdown in communication within the Revenue itself. In any event the sequestration petition was raised and Mr Travers successfully opposed that on the basis that he had been trying to settle it with the Revenue. The opposition was successful at the first hearing and the court allowed a continuation for matters to be resolved. The Revenue appealed the decision of the sheriff and successfully argued that was not a good reason for the continuation. Accordingly the sequestration was granted. Mr Travers continued to liaise [with] the Revenue thinking that the best chance of securing a recall would be if all the sums were paid. Theses (sic) were paid in October and in November 2012 and he was about to seek recall of the sequestration.”*

- 23.96 Extensive queries were raised by the Complaints Investigator with the Respondent’s firm in an effort to locate the Secondary Complainer’s files. Ultimately this resulted in the firm supplying incomplete reconstituted files for the work which the solicitor had carried out on the Secondary complainer’s behalf and also copies of files received from his previous agent. The Complaints Investigator began the preparation of a Report on both the complaint raised by the Secondary Complainer and the issue of the Respondent’s failure to respond to the Council of the Law Society of Scotland.
- 23.97 By letter dated 18 July 2014, the Complainers sent the Respondent a copy of the Report and advised that the matter would go to the Complainers’ Professional Conduct Sub Committee for consideration.
- 23.98 The complaints were considered by the Complainers’ Professional Conduct Sub Committee on 11 September 2014.

The Sub Committee determined in that:

- (1) The Respondent failed to pay the Secondary Complainer's debt to HMRC despite being instructed to do so on or about 9 May 2012 and being paid the money to do so.
- (2) The Respondent failed to apply for a recall of the Secondary Complainer's bankruptcy despite being paid approximately £20,000 in May 2012.
- (3) The Respondent failed to communicate effectively with the Secondary Complainer by failing to respond to various messages in relation to the recall of the Decree of Bankruptcy.
- (4) The Respondent failed to respond to the Secondary Complainer's complaints of 18 January and 28 January 2013.
- (5) The Respondent failed to respond to the Complainers' correspondence, including the initial intimation of complaint on 13 December 2013 and the Notice served on 7 January 2014.

The Respondent's conduct appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that it appeared capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee determined that the complaints should be prosecuted in terms of the Solicitors (Scotland) Act 1980 Section 51.

By letter dated 18 September 2014 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee Determination.

**Complaint DT/15/18**

23.99 The Secondary Complainer, Mr E, was the principal director and shareholder of Company 1. On or around November 2012 he instructed Marshall Wilson Law Group Limited to recover a debt due by Company 2. The Respondent accepted the complainer's instructions in the said matter.

23.100 By letter dated 14 November 2012 the Respondent wrote to Company 2 advising the firm had been instructed by the Secondary Complainer in relation to the return of a deposit of £29,928. The letter requested a payment of the Secondary Complainer's deposit within 7 days under threat of a Court Action.

On the same day Marshall Wilson Law Group Limited wrote to the Secondary Complainer referring to his recent meeting with the Respondent and enclosing a copy of the letter sent to Company 2 and stating they would be in touch as soon as there was a response from Company 2. The letter also enclosed a standard terms of engagement letter. The letter and its attachments was emailed to the Secondary Complainer on 14 November 2012.

23.101 The Respondent took no further action to progress the claim until 21 January 2013.

By letter dated 21 January 2013, the Respondent wrote to the Secondary Complainer advising that nothing had been heard from Company 2. The letter requested the Secondary Complainer to make an appointment with the Respondent to discuss how he wished to proceed.

On 4 February 2013, the Secondary Complainer attended a meeting with the Respondent's at the Respondent's office.

23.102 By email dated 5 February 2013, the Secondary Complainer wrote to the Respondent referring to the meeting of 4<sup>th</sup> February and forwarding the relevant information to enable the Respondent to take further action. The Secondary Complainer concluded the email by noting *inter alia*:

*"I hope this is not the company which dissolves itself at the first sign of trouble!"*

23.103 In absence of an update, the Secondary Complainer sent email to the Respondent on 16 May 2013. The email stated:

*“I refer to earlier communications and have not heard from you about the contract dispute action for a considerable length of time. I am concerned because the company may shut down....*

*I would be grateful, therefore, for a brief update on progress so far and any programme you may have drafted to reach, hopefully a successful outcome.”*

There was no reply from the Respondent.

23.104 By email dated 14 June 2013, the Secondary Complainer wrote to the Respondent referring to his email of 16 May and repeated his request for an update.

On the same day, the Respondent replied to the Secondary Complainer’s email stating

*“I sent a copy of the draft writ to you some time ago. From your email can I take it you have not received it/ [sic]”*

The Secondary Complainer responded by email dated 27 June 2013. He stated *inter alia* that he “*did not receive a draft writ*”.

23.105 By email dated 6 August 2013, the Secondary Complainer wrote to the Respondent. In his email, the Secondary Complainer stated:

*“Further to previous emails on the subject I still have not had any tangible evidence of action taken by you on the issue since you wrote a letter to [Company 2] in November 2012.*

*In June this year, following my enquiry on progress, you referred to having sent me a draft writ “some time ago”. Even though I replied stating I had not received it, the draft still did not arrive. Are you making ANY progress on the dispute or is*

*there a problem such as determining the actual company to whom the writ will be served: you may recall my initial concern following my own research as to the title of the company claiming to have limited liability? Does your company have the skill set and/or resources to allow any necessary action to be followed properly through?*

*About a year has passed now since you so confidently took on the case stating you would do everything necessary to bring the issue to a conclusion through the court if necessary. I have been patient, whilst repeatedly expressing the need not to delay with action – and that is exactly what appears to have happened!*

*I have, in the past had all my legal work done by [the firm] without any complaint whatsoever. However, I am now becoming disillusioned by [the firm] and would request a full explanation of exactly what is going on within 72 hours of this email.”*

- 23.106 By letter dated 6 September 2013, Messrs Mellicks wrote to the Respondent advising they had been consulted by Company 1. The letter referred to a Mandate sent directly to Marshall Wilson by the Secondary Complainer and requested implementation of the Mandate.

There was no response from the Respondent.

- 23.107 A reminder letter dated 16 January 2014 was sent by Messrs Mellicks to the Respondent noting that the Mandate had yet to be implemented. The letter insisted that the Mandate was implemented by return or failing that, a full explanation was tendered for the failure to implement the Mandate.

There was no response from the Respondent.

- 23.108 A further reminder letter dated 13 February 2014 was sent by Messrs Mellicks to the Respondent enclosing a print of the reminder letter dated 16 January 2014. The letter formally called on the Respondent to implement the Mandate or failing that, provide an explanation as to why he was unable to do so. The letter sought a reply from the Respondent within 14 days.

There was no response from the Respondent.

23.109 By letter dated 4 June 2014 Messrs Mellicks wrote to the Respondent referring to a telephone conversation with the Respondent on 12 May 2014. The letter stated:

*“We had understood you were to revert to us with papers within a few days. We have not heard from you further. In the circumstances we shall be pleased to hear from you by return.”*

There was no response from the Respondent.

23.110 The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC) on or around 7 May 2014.

The Summary of the complaint was:

*“I, Mr E wish to complain about the action/inaction of Mr Brian Travers of Marshall Wilson Law Group Limited and/or Marshall Wilson Law Group Limited who acted for me between November 2012 and September 2013 in connection with my debt recovery case against Company 2, as evidenced by:*

- 1. Mr Travers and/or Marshall Wilson unduly delayed in progressing my case between November 2012 and September 2013 and in particular they delayed in preparing a draft Writ.*
- 2. Despite my new solicitor, Mr Lang of Mellicks, sending a Mandate to Mr Travers on 6 September 2013 and sending subsequent reminders on 16 January 2014 and 13 February 2014, Mr Travers has failed and/or unduly delayed in releasing my file and failed to explain why he could not do so.*

How this has affected the Secondary Complainer:

1. *I lost £30,000 deposit and had to pay additional fees for my new solicitor, Mr Lang due to continuing delay/lack of communication from Mr Travers and Marshall Wilson.*
2. *As a consequence of undue delays on the part of Mr Travers and Marshall Wilson, the Company 2 had been wound up by the time Decree had been secured against them.*
3. *It has caused considerable strain on me and my marriage."*

23.111 By letter dated 22 May 2014, the SLCC wrote to the Client Relations Partner at Marshall Wilson advising that a complaint had been received and requested confirmation: (i) the firm/solicitor had received the complainer's letter of complaint sent to the firm on 6 August 2013 and that this had been responded to, (ii) whether or not the mandate and related correspondence stated to have been sent by Mellicks had been received and if this had been responded to and (iii) of any comments the firm might wish to make on the Summary of Complaint.

In response, a letter dated 27 May from Marshall Wilson to the SLCC noted that the Client Relations Partner would obtain information from the Respondent and revert. The SLCC sent a further reminder letter to Marshall Wilson dated 4 June 2014.

23.112 By email dated 10 June 2014, the Secondary Complainer wrote to the SLCC advising *inter alia* that Company 2 now had a nominated liquidator and the Secondary Complainer did not have any papers to back up his case for a potential share of the assets. It was noted the Respondent delayed action in the previous year when Company 2 had been trading. The Respondent had taken £300 to write a short letter to Company 2 and not followed the action up as requested.

23.113 By email dated 11 June 2014, the Client Relations Partner at Marshall Wilson wrote to the SLCC advising she had spoken to the Respondent. The Respondent confirmed to the Client Relations Partner that he had received the Secondary Complainer's email dated 6 January however was unable to locate the principal file.

The Respondent also could not say for certain if he responded to that email but his recollection was that subsequent to the email of 6 January 2014, he met with the Secondary Complainer. The Respondent also confirmed he received the mandate from Messrs Mellicks dated 6 September 2013 however he was unable to confirm if he had received the subsequent reminders from Mellicks dated 16 January and 13 February 2014. The Respondent confirmed he spoke to Mellicks on 12 May 2014 and advised them he was trying to locate the file.

- 23.114 The SLCC referred the matter to the Complainers and by letter dated 11 July 2014 the Complainers wrote to the Respondent intimating a complaint and requesting the Respondent provide a response within a period of 21 days.

In the absence of any reply the Complainers wrote to the Respondent on 4 August 2014 issuing a Notice in terms of the Solicitors (Scotland) Act 1980, Section 15(1)(i)(i)

On the same day the Complainers wrote separately to the Respondent issuing a Notice in terms of Section 48(1)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007 requiring delivery of "*All books, accounts, deeds, securities, papers and other documents in your possession or control relating to Mr E in connection with his debt recovery case against Company 2..*"

The Royal Mail's Track and Trace service evidence that both notices were delivered on 6 August 2014.

- 23.115 In absence of any reply the Complainers wrote to the Respondent at Marshall Wilson's address on 25 August 2014 issuing a notice in terms of the Solicitors (Scotland) Act 1980, Section 15(2)(i)(i). The Royal Mail's Track and Trace service evidence that the notice were delivered on 26 August 2014.

- 23.116 By letter dated 3 September 2014, the Complainers wrote to the Respondent at Marshall Wilson's address advising an additional issue was to be added to the complaint.



## Additional Issue

*“Mr E complains that Brian Travers may be guilty of professional misconduct or unsatisfactory professional conduct by failing to respond to Law Society correspondence including Notices, dated 4 August 2014, in terms of Section 15 of the Solicitors (Scotland) Act 1980 and Section 48 of the Legal Profession and Legal Aid (Scotland) Act 2007.”*

There was no reply from the Respondent and the Complainers sent a further letter on 12 September 2014.

- 23.117 By letter dated 22 September 2014, the Complainers wrote to the Respondent referring to the letter of 12 September and inviting a response from the Respondent in advance of 24 September. The letter attached a copy of email correspondence from the Secondary Complainer and asked the Respondent to clarify the position regarding the Initial Writ.

By letter dated 24 September 2014, the Respondent responded to the Complainers referring to their “letter of 4<sup>th</sup> September”. The letter stated:

*“I have continued to look for the file since receiving it but unfortunately cannot locate it. As indicated by colleague I need the file to give you my full and detailed reply and would be grateful if you could extend the time limit for replying by one further week. Please rest assured that I am actively addressing this matter.”*

- 23.118 By letter dated 25 September 2014, the Complainers wrote to the Respondent confirming the one week extension. The letter also stated:

*“I would remind you that I asked that you specifically confirm the position as regards the draft initial writ. Please send me a copy of the same or explain why this is not available. I note that even although your position is that the file cannot be located your Client Relations Partner was able to provide me with copy correspondence from the “computer”. Please address why the initial writ is also not able to be sourced from the “computer”.”*

By letter dated 19 November 2014, Marshal Wilson wrote to the Complainers stating:

*“...unfortunately, notwithstanding the extension of time granted, Mr Travers has simply been unable to locate the original file for Mr E.”*

23.119 The Complainers instructed a Reporter whose report was provided to the Respondent by the Complainers in a letter dated 4 December 2014 together with intimation that the Complaint would be considered by a Professional Conduct Sub Committee. The Reporter also completed a Supplementary report which was provided to the Respondent by the Complainers in a letter dated 14 January 2014.

23.120 On 12 February 2015 the Complainers' Professional Conduct Sub Committee considered the matter.

The Sub Committee determined that the Respondent's conduct in respect of:-

1. Delay in progressing the complainer's case between November 2012 and September 2013 and in particular his delay in preparing a draft Writ (Issue 1);
2. Failure and/or delay in releasing the complainer's file and failure to explain why he could not do so, despite the complainer's new solicitor sending a Mandate to Mr Travers on 6 September 2013 and sending subsequent reminders on 16 January 2014 and 13 February 2014 (Issue 2); and
3. Failure to respond to Law Society correspondence including Notices, dated 4 August 2014, in terms of Section 15 of the Solicitors (Scotland) Act 1980 and Section 48 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the Additional Issue)

appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that they appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

Further, the Sub Committee determined that a Fiscal should be appointed in terms of Section 51 of the Solicitors (Scotland) Act 1980 to prosecute the Respondent before the Scottish Solicitors' Discipline Tribunal.

24. Having considered the accepted facts, the parole evidence, and the submissions in relation to the question of professional misconduct, the Tribunal found the Respondent guilty of Professional Misconduct individually and *in cumulo* in respect of the following:

**Complaint DT/13/45**

- (a) He failed to respond to the SLAB correspondence in respect of a possible false declaration by a client and contravention of the Legal Aid (Scotland) Act 1986 Section 35 and,
- (b) He failed to respond to the Complainers, notwithstanding the service of various Notices;

**Complaint DT/13/46**

- (a) He failed to respond to the Secondary Complainer's correspondence dated 20 May 2011, 23 August 2012, 4 September 2012, 17 September 2012 and 10 January 2013 and;
- (b) He failed to respond to the Complainers, notwithstanding the service of various Notices;

**Complaint DT/15/12**

**Mr A**

- (a) Having received a Mandate on 17 August 2011, he delayed and failed to implement the Mandate;
- (b) He, despite giving an express undertaking on 13 July 2010 that the fee note had been cancelled, unjustifiably threatened the Secondary Complainer with court proceedings;
- (c) He failed to respond to the Complainers, notwithstanding the service of various Notices;

**Mr and Mrs B**

- (a) He acted in a conflict or potential conflict of interest situation in that the Respondent was aware that his firm may have been negligent while acting for the Secondary Complainers in the purchase of the heritable property;

**Ms C**

- (a) He failed and/or delayed to properly progress the Secondary Complainer's claim over a period of time in excess of 6 years and failed to properly communicate with her;
- (b) Having received a Mandate in a letter dated 19 June 2012, he delayed and failed to implement the Mandate;

**Mr D**

- (a) He delayed to settle the Secondary Complainer's debt to HMRC and to apply for recall of Sequestration;
- (b) He failed to communicate properly and effectively with both the Complainers and Secondary Complainer;

**Complaint DT/15/18**

- (a) He failed and/or delayed to progress the Secondary Complainer's case against Company 2 and in particular he delayed in preparing a draft Writ;
- (b) He failed to communicate properly and effectively with both the Complainers and the Secondary Complainer;
- (c) He failed to implement a Mandate.

25. The Tribunal heard evidence in mitigation from the Respondent and witness Fiona Munn and submissions in mitigation. Having given careful consideration to the evidence and submissions, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 15 February 2017. The Tribunal having considered the Complaints at the instance of the Council of the Law Society of Scotland against Brian Travers, Solicitor, Marshall Wilson Law Group, 2 High Street, Falkirk; Find the Respondent guilty of professional misconduct in respect of four complaints; in relation to Complaint **DT/13/45**, (a) he failed to respond to the SLAB correspondence in respect of a possible false declaration by a client and contravention of the Legal Aid (Scotland) Act 1986 Section 35 and (b) he failed

to respond to the Complainers, notwithstanding the service of various Notices; in relation to Complaint **DT/13/46**, (a) he failed to respond to the Secondary Complainer's correspondence dated 20 May 2011, 23 August 2012, 4 September 2012, 17 September 2012 and 10 January 2013 and (b) he failed to respond to the Complainers, notwithstanding the service of various Notices; in relation to Complaint **DT/15/12**, in relation to the conduct involving Mr A, (a) having received a Mandate on 17 August 2011, he delayed and failed to implement the Mandate, (b) he, despite giving an express undertaking on 13 July 2010 that the fee note had been cancelled, unjustifiably threatened the Secondary Complainer with court proceedings, (c) he failed to respond to the Complainers, notwithstanding the service of various Notices; in relation to the conduct involving Mr and Mrs B, he acted in a conflict or potential conflict of interest situation in that he was aware that his firm may have been negligent while acting for the Secondary Complainers in the purchase of the heritable property; and in relation to the conduct involving Ms C, (a) he failed and/or delayed to properly progress the Secondary Complainer's claim over a period of time in excess of 6 years and failed to properly communicate with her and (b) having received a Mandate in a letter dated 19 June 2012, he delayed and failed to implement the Mandate; and in relation to the conduct involving Mr D, (a) he delayed to settle the Secondary Complainer's debt to HMRC and to apply for recall of the Sequestration, (b) he failed to communicate properly and effectively with both the Complainers and Secondary Complainer; and in relation to Complaint **DT/15/18**, (a) he failed and/or delayed to progress the Secondary Complainer's case against Company 2 and in particular he delayed in preparing a draft Writ, (b) he failed to communicate properly and effectively with both the Complainers and the Secondary Complainer and (c) he failed to implement a Mandate; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that any practising certificate held or issued to the Respondent shall be subject to such restriction that he will not take or execute any client instructions and that for an aggregate period of at least three years; 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 written claim for compensation with the Office of the Tribunal.

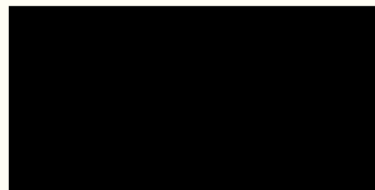
**(Signed)**

**Kenneth Paterson**

**Vice Chairman**

26. 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 **8 MARCH 2018** .

**IN THE NAME OF THE TRIBUNAL**



**Kenneth Paterson**  
**Vice Chairman**

**NOTE**

At the hearing on 22 January 2018 the Tribunal had before it four Complaints as amended and four signed Joint Minutes of Admissions. By way of Joint Minutes of Admissions in relation to Complaints DT/13/45, DT/13/46 and DT/15/18, the Respondent admitted all the facts in relation to said Complaints and admitted that the breaches of duties amounted to professional misconduct. By way of the Joint Minute of Admissions in relation to Complaint DT/15/12, the Respondent admitted all the facts except those relating to Mr A and Mr and Mrs B. Mr Burnside noted that the conduct in relation to Mr and Mrs B was admitted in the Answers. He was content that the Tribunal proceeded on the basis that the facts averred in the Complaint in relation to Mr and Mrs B were admitted but that the Respondent denied that the admitted conduct constituted professional misconduct. The parties agreed that where there was any conflict between the Answers and the Joint Minutes, the Joint Minutes were to be preferred. Of consent, the Tribunal allowed the Fiscal's motion to conjoin the four Complaints under Rule 17 of the 2008 Tribunal Rules and directed that they be heard together. Of consent, under Rule 47 of the 2008 Tribunal Rules, the Tribunal allowed Mr Burnside to lodge a second inventory of productions after the time limit provided in Rule 12.

**WITNESS ONE – MR A**

The witness indicated that he had previously been a client of the Respondent and Marshall Wilson. The Respondent's firm had dealt with the sale of a property and a child access issue for him around October 2007.

The witness agreed that page 3 of the Second Inventory of Productions for the Respondent contained the State for Settlement between himself and Marshall Wilson dated 1 October 2007. The witness agreed that subsequent pages were copies of other fee notes to him from Marshall Wilson from 2007. The witness indicated that following the sale of his house, he moved to Property 2.

The Fiscal referred the witness to Production C1 of the First Inventory of Productions for the Complainers which was a letter to the witness addressed to him at his address at Property 2 dated 4 June 2010. The witness agreed that this letter included a fee note. The witness said that prior to this letter, he had not had any contact with Marshall Wilson for two years. The witness said that he phoned the firm and spoke to various people including the Respondent and was then informed that the fee note had been sent in error and was cancelled. He asked for confirmation of the cancellation in writing and received it through the post after enquiring another twice by telephone. He confirmed that the letter



cancelling the fee was contained at C2 of the First Inventory of Productions for the Complainers and was dated 13 July 2010.

The witness moved to England due to his employment and to be closer to his child. He consulted solicitors in England about contact with his child. Marshall Wilson refused to provide his file to his new solicitors until he had paid the fee referred to in their letter of 4 June 2010. There followed correspondence between the two firms regarding the fee. The witness agreed that letter C5 of the First Inventory of Productions for the Complainers was a letter from Marshall Wilson to the witness' English solicitor dated 5 September 2011. In that letter, Marshall Wilson contended that although the fee note was cancelled, the witness was still liable for it. It was suggested that the witness had moved address and Marshall Wilson had decided not to pursue him for the fee. The witness noted however, that the letter of 4 June 2010 had been sent to him and received by him at his address at Property 2. He had taken action to contact them in response to that letter. He said that the firm knew he had moved there after the sale of his house and had previously sent correspondence there. Marshall Wilson continued to insist that a fee be paid and in their letter of 29 May 2012 contained at C9 of the First Inventory of Productions for the Complainers, threatened to sue the witness for payment.

During cross-examination the witness said that he was not able to say whether any work had been done after October 2007. However, he was sure that there was no work done in 2010 as suggested in Marshall Wilson's letter of 20 September 2011 (Production C8 First Inventory of Productions for the Complainers) which notes that *"It would appear that our firm concluded work on Mr A's behalf sometime around April 2010 and a final note of account was sent on 4 June 2010."*

Mr Burnside asked the witness whether he remembered being at court on 7 November 2007 when he was awarded interim contact with his child. The witness indicated that he could not remember being at court that day. Mr Burnside asked the Tribunal to accept late lodging of a Third Inventory of Productions for the Respondent containing a Court Attendance Sheet and Court Report. The Fiscal did not object to the late lodging or the production being put to the witness. Therefore, the Tribunal allowed the production to be lodged. The witness indicated that he could not confirm or deny that he was at Falkirk Sheriff Court in November 2007. However, he noted that no work was being done on his behalf in April 2010. The witness indicated that in his view if the firm cancelled a fee note then that should be honoured.

During re-examination the witness indicated that he had never seen the Court Attendance Sheet and Court Report before and did not think it could justify a fee in June 2010. He remembered being present at Falkirk Sheriff Court many times but could not give specific dates.

## WITNESS TWO – THE RESPONDENT

The Respondent indicated that he remembered Mr A. Another solicitor in the firm had originally dealt with the long running dispute between Mr A and his former wife. The Respondent had been asked to take over the case in mid-2007.

The Respondent noted that the most recently lodged production was an internal court report from him to another solicitor in the firm to describe the outcome of a court hearing. The Respondent confirmed that he had appeared at this hearing on 12 September 2007 and Mr A had been present. Overleaf was a handwritten note with instructions regarding a Child Welfare Hearing on 7 November 2007.

The Respondent indicated that the action was sisted on 7 November 2007 to allow contact to be monitored. The Respondent said that later he received a request from Mr A to uplift a birth certificate lodged in the court process. The Respondent reviewed the file. Nothing had happened for some time. The disputed fee note was sent to Mr A under the Respondent's reference. The Respondent noted that the date of issue was "4 June 201" and noted that this should have referred to 4 June 2010. He said that the reference to September was to September 2007, the date of the last fee note issued. The Respondent agreed that the work had been complete for some years. He restricted the fee and thought it was fair. The Respondent denied speaking on the telephone to Mr A about the fee in June 2010.

The Respondent disagreed that someone from the firm had told Mr A that the fee was cancelled. His practice was to issue a fee note to the client and then issue 2-3 reminders. A decision had to be made whether to pursue the fee by litigation or other means. The Respondent said he was told that the correspondence had been returned marked "addressee gone away". The prospect of getting the fee, the cost of recovery and the level of fee meant that he took the view that it made economic sense to write it off. An instruction was given to the cash room to write off the fee and seek recovery of VAT. This was an internal matter. If the client were to come back and re-instruct the firm, the fee would still have to be paid. The Respondent said that the fee had been written off but that should not have been intimated to the client. If he had been aware that Mr A had been in contact, the letter "cancelling" the fee would never have been sent out. Reference was made to C3-C5 of the Complainers' First Inventory of Productions. The Respondent indicated that he was entitled to exercise a lien over the file. No substantial inconvenience was caused to Mr A by retention of the file. Interlocutors could have been obtained directly from the court. The Respondent would have been happy to submit the fee for taxation.

During cross-examination, the Respondent confirmed that the fee was issued on 4 June 2010 and written off on 13 July 2010 and that this was a period of about six weeks. He agreed that it had been incorrect for the firm to note in correspondence that work on Mr A's behalf had been ongoing in April 2010. He estimated that he last did work for Mr A in 2008. He last spoke to Mr A between September and November 2007.

In answer to a question from a Tribunal member, the Respondent recognised that the letter of 13 July 2010 had confused matters considerably. However, the Respondent said that he had acknowledged the confusion and the situation was properly explained to Mr A's solicitors. He said that Mr A must have known that there would be more fees due. He had received correspondence from them and was at court in November.

### **SUBMISSIONS FOR THE COMPLAINERS**

In relation to Complaint DT/13/45, the Fiscal noted that the admitted circumstances of the alleged professional misconduct were as set out in the Complaint. SLAB wrote to the Respondent regarding a possible false declaration by a client. The Respondent failed to respond to SLAB and the Law Society. It was significant that SLAB was investigating a potential legal aid fraud. The Respondent had a duty to respond. The Fiscal submitted that these circumstances were sufficient for an individual or *in cumulo* finding of misconduct.

In relation to Complaint DT/13/46, the Fiscal noted the Respondent's failure to respond to the Secondary Complainer and the Law Society and submitted that these circumstances were sufficient for an individual finding of misconduct.

In relation to Complaint DT/15/12, the Fiscal noted Mr A's evidence. The Fiscal acknowledged that the Respondent relied upon a defence of lien. The Fiscal clarified that the Complainers did not suggest that Mr A was prejudiced by the Respondent's action. He said that the issue was more fundamental than that. Mr A received a letter and fee note dated 4 June 2010. The fee note referred to a period of "September to date". Mr A queried this fee. The fee note was cancelled by the letter of 13 July 2010. Thereafter no real explanation justifying the fee was given and it was only at the hearing that a court attendance sheet was produced. Mr A cannot remember whether he was at court on those dates. The Fiscal submitted this was unsurprising given the passage of time.

The Fiscal accepted that if a firm writes off a fee because it cannot find the client, the fee can be reinstated once the client is traced. However, these were not the circumstances in the current case. Mr A got the fee note, queried it, and had the cancellation confirmed in writing. The Fiscal referred to Production C8 First Inventory of Productions for the Complainers where the Respondent's colleague refers to work being concluded "sometime around April 2010". The Fiscal noted that all the work to recover the fee apparently happened between 4 June 2010 and 13 July 2010. The Fiscal submitted that this was not credible. In his submission, Mr A was perfectly entitled to proceed on the basis that the fee was cancelled. It was not acceptable for the Respondent to exercise a lien. No proper reason or justification was ever given for the reinstatement of the fee or the use of the lien. The Fiscal submitted that this conduct was sufficient individually to amount to professional misconduct.

The Fiscal described the admitted conduct in Complaint DT/15/12 in relation to Mr and Mrs B. He noted the email contained at C21 of First Inventory of Productions for the Complainers of 9 October 2011 which drew the Respondent's attention to the fact that the property had been purchased through his firm and that the Accountant in Bankruptcy was of the view that adequate consideration had not been paid. The Fiscal made reference to various productions in the First Inventory of Productions for the Complainers including an email from the Respondent to Mr B dated 1 November 2011 contained at C26 which notes that, *"You will also recall that you had initially indicated some concerns with regard to not having been advised at the time of this purchase taking place as to the potential consequences in the event of the seller ultimately becoming sequestrated as indeed has occurred here."*

The Fiscal submitted that the Respondent was aware of what was being alleged by the Accountant in Bankruptcy and the potential consequences for his firm at least by 1 November 2011 if not in October 2011. In the Fiscal's submission there was a clear warning of conflict due to the possibility of a claim being made against the firm for its actings in 2004 at the time of the purchase. Notwithstanding, the Respondent continued to act and the position was not resolved until May 2012 when the complaint was made and the Respondent withdrew from acting. It was the Fiscal's submission that the Respondent should have been aware of a conflict and withdrawn in October 2011 at a point when the clients could have been referred elsewhere. The judgement of whether a conflict exists should not be left to the client. The Fiscal submitted that there was more than a potential for conflict. There was a clear possibility that there might be a claim. Therefore, an actual conflict had occurred and constituted professional misconduct. The Fiscal did not accept that the mediated settlement between former partners of Marshall Wilson neutralised the potential conflict. The agreement to indemnify one set of partners as a result of claims arising from their work was only as good as the ability to pay and did not affect whether a conflict existed or not.

In Complaint DT/15/12 in relation to Ms C it was alleged that the Respondent had failed or delayed to progress a claim for over six years. There was also an admitted failure to properly communicate with Ms C and a failure with mandates. The Fiscal submitted that these circumstances were so serious that they merited a finding of misconduct on this issue alone.

In Complaint DT/15/12 the Respondent admitted causing a significant delay in settling a debt to the HMRC and application for recall of sequestration. The Fiscal noted that Mr D instructed the Respondent in late 2009 but the money was not paid until May 2012. The Fiscal submitted that these circumstances were so serious that they merited a finding of misconduct on this issue alone.

In Complaint DT/15/18, the Fiscal noted the admitted failure or delay to progress Mr E's case despite the Secondary Complainer's efforts to engage with the Respondent. The company in question was eventually liquidated with no actions raised against them on Mr E's behalf.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr Burnside noted that there was only a dispute regarding a small number of facts before the Tribunal, namely the Mr A and Mr and Mrs B matters. He noted that the correspondence in the Mr A case had led to a very unfortunate result. However, he submitted that work had been done after the last account. It was clear that the previous account had been issued in September. It was clear that it referred to the whole period from the last account. Mr A must have known that other work had been done. Mr Burnside admitted that the bill could have been better prepared. However, the firm believed the work had been done. One letter was sent out and returned by the Post Office marked "addressee gone away". Mr Burnside noted that commercially it did not make sense to pursue the debt. It might seem like a short period but internally a firm can wish to write off a fee in order to recover the VAT. If the work was properly done then Mr A was due to make payment. Therefore, the right of lien exists. The unfortunate wording of the letter of 13 July 2010 was regrettable. However, the situation was fully explained to Mr A's solicitors. Sloppy accounting practices led to the letter of 13 July 2010 being sent out but in Mr Burnside's submissions, this fell short of being professional misconduct.

In relation to the Mr and Mrs B issue, Mr Burnside noted that Mr B required urgent advice. An appointment was made with the Respondent who knew nothing about the matter. It was proper that the Respondent tried to do what he could to help, particularly if Mr and Mrs B had been let down by the firm. Mr Burnside noted that the position was analogous with one where a solicitor fails to lodge a writ

timeously. A colleague could investigate whether there was a discretion to have the writ lodged late. If it became clear nothing else could be done, the solicitor should withdraw. In this case, the Respondent came close to brokering a deal between the Accountant in Bankruptcy and the clients. He continued to try to help until they said they would make a claim. Mr Burnside noted that the indemnity provided by the departing solicitors had a worth and that any claim would be dealt with by the insurer. There was no personal advantage to the Respondent. There was no conflict until a claim was intimated. There was no harm to the client. The clients indicated that if they had been told of the risk, they would have acted in the same way. The Respondent's actions did not make the position any worse for Mr and Mrs B who still had a claim against insurance.

Mr Burnside noted the other admitted cases of misconduct followed similar patterns of the Respondent failing to deal with instructions over significant periods of time and indicated that the Respondent would give evidence in mitigation addressing his personal circumstances at that time.

## **DECISION REGARDING MISCONDUCT**

The Tribunal retired for deliberations. The Tribunal noted that the Respondent admitted the averments of fact, duty and misconduct contained in Complaints DT/13/45, DT/13/46 and DT/15/18. The averments of fact contained in Complaint DT/15/12 were also largely agreed, except those relating to Mr A and Mr and Mrs B. The Tribunal heard evidence from Mr A and the Respondent. In relation to Mr and Mrs B, the parties invited the Tribunal to proceed on the basis of the admitted facts. Professional misconduct in relation to Mr A and Mr and Mrs B was not admitted. The Tribunal noted that professional misconduct was a matter for it to determine. The standard of proof to be applied by the Tribunal was that beyond reasonable doubt.

The Tribunal accepted the evidence of Mr A as credible and reliable. It appeared to the Tribunal that he gave his evidence in a straightforward manner and it was not surprising that he was unable to answer some questions due to the passage of time which had elapsed. The Respondent also gave evidence. The Tribunal did not accept his explanation regarding the correspondence which he alleged had passed between his office and Mr A in June and July 2010. Generally, it preferred the evidence of Mr A where it conflicted with the Respondent and consequently, the Tribunal made the findings in fact above.

### Complaint DT/13/45

The Respondent failed to communicate effectively with SLAB and the Law Society of Scotland. A solicitor should cooperate with SLAB when it is investigating a potential fraud by the solicitor's client.

Solicitors have a duty to cooperate with the Law Society. Failure to do so obstructs the Complainers in the performance of their statutory duty. This is prejudicial to the reputation of the profession and is likely to bring it into disrepute.

#### Complaint DT/13/46

The Respondent failed to communicate effectively with another solicitor and the Law Society of Scotland. As is noted above in relation to Complaint DT/13/45, failure to comply with the Complainers as noted above is conduct likely to bring the profession into disrepute.

#### Complaint DT/15/12

After indicating in writing to Mr A that a fee was not due, the Respondent insisted on payment before releasing the file to his new solicitors. It was incorrect to exercise a lien when the firm had confirmed in writing that the fee was cancelled and then to threaten that client with court action to recover the fee. The Respondent failed to comply with the Complainers which as noted above is conduct likely to bring the profession into disrepute.

The Respondent acted for Mr and Mrs B where there was a potential conflict of interest between those clients and the interests of his practice unit. He did not exercise sufficient caution in the circumstances and should have withdrawn from acting. It was known at least as early as 1 November 2011 that there was a potential claim against his firm by Mr and Mrs B. The Tribunal accepted that there might be limited circumstances where a solicitor might continue to act to assist a client, for example, asking a court to exercise its discretion to lodge a writ late. However, in the present circumstances, the Respondent should not have continued to negotiate a settlement with the Accountant in Bankruptcy as he could not give independent advice free from external influences or personal interests. The duty to mitigate the loss for the partnership would conflict with his duty to his clients. Independent advice to the client was likely to have been against the interests of the Respondent and his firm. A client is entitled to a relationship of mutual trust with his/her solicitor. It was not sufficient to have gained a concession from the clients that they would have given the same instructions had they been properly advised. Conflict of interest is a matter for the solicitor's judgement, not the client.

The Respondent failed for a substantial period to properly progress Ms C's claim and failed to properly communicate with her. He failed to implement mandates.

The Respondent failed Mr D in several ways. He failed to pay his debt to HMRC, failed to apply for a recall of bankruptcy, failed to communicate effectively with Mr D or respond to his complaints and failed to respond to the Complainers.

#### Complaint DT/15/18

The Respondent failed to progress a case against a company by delaying the preparation of a draft writ. The company was eventually liquidated before any claim was intimated on Mr E's behalf. The Respondent failed to communicate properly and effectively with Mr E and failed to implement a mandate.

In summary, the Respondent had followed a course of conduct whereby he failed to communicate effectively with his clients, other solicitors, SLAB and the Law Society. Due to his inaction, cases were significantly delayed. When clients tried to recover their files, he failed to implement mandates. In addition, he insisted on payment of a fee which his firm had indicated in writing to a client was cancelled and acted in a potential conflict of interest situation. When the Law Society attempted to investigate these issues, he did not communicate with them.

The test for professional misconduct in terms of Sharp v The Council of the Law Society of Scotland 1984 SC 129 is that the conduct proved must represent a departure from the standards to be expected of a competent and reputable solicitor that would be regarded as serious and reprehensible. The Tribunal considered the admitted facts and the parole evidence and found the Respondent guilty of professional misconduct individually and *in cumulo* in respect of all averments of professional misconduct.

#### **SUBMISSIONS IN MITIGATION**

Mr Burnside invited the Tribunal to hear from the Respondent in mitigation.

#### **WITNESS TWO – RESPONDENT**

The Respondent gave evidence that not long after the partnership dispute in his firm, he began to experience difficulties with his mental health. Various medical reports were provided to the Tribunal in this regard. He sought help from his partners and his GP and was referred for further assistance. He took a leave of absence for a year. He made progress and when he returned to work agreed with his partners that he would have no face-to-face contact with clients. He provided an undertaking to the Tribunal to that effect at that time. He still has no face-to-face contact with clients and carries out no client instructions. He does not go to court. He supervises the trainees and supports staff. He gives



opinions to colleagues when asked. He is the Money Laundering Officer and Cashroom Manager. He gave evidence that it was important for him on a personal level to retain a practising certificate but that this was also important for the business which was a limited company. He is a director and shareholder of the company. If he were to cease to be a principal, it would be difficult for everyone to extricate themselves. The firm benefits from his experience and knowledge, as do the clients. He indicated that he was prepared to work under a restricted practising certificate which contained the condition specified in the undertaking provided to the Tribunal on 1 June 2016. Reference was made to a letter from the Respondent and partners dated 19 January 2018 which indicated the firm's willingness to continue with him in a director's role on this basis.

### **WITNESS THREE – FIONA MUNN**

The witness gave evidence that she was a director of Marshall Wilson. She confirmed that since his return to work, the Respondent had been responsible for dealing with staff. He had set up branch offices. He provided opinions to the solicitors and trainees. He liaises with the bank and the accountants. He liaises with the cash room. He has no responsibility for any client file. He has some limited contact with clients but never on his own. She hoped that the Respondent could continue to be a director as there would be financial implications for the firm if he was not a director.

### **DECISION REGARDING SANCTION**

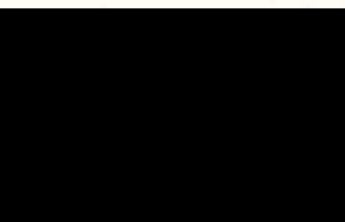
The Fiscal tendered previous findings of the Tribunal against the Respondent dated 23 September 2010 in respect of an analogous matter where the Respondent had delayed and failed to implement a mandate, failed to provide files to the Complainers and failed to provide any explanation as to why the papers had not been produced timeously. The Tribunal had regard to its previous findings and the several instances of professional misconduct established in these four conjoined Complaints.

Given the level of seriousness of the course of professional misconduct, the Tribunal determined that a restriction on the Respondent's practising certificate would be appropriate in order to protect the public and that the restriction should be in similar terms to the undertaking previously provided to the Tribunal, namely that any practising certificate held or issued to the Respondent shall be subject to such restriction that he will not take or execute any client instructions and that for an aggregate period of three years. Although the Tribunal considered the conduct to be serious, it did not consider the conduct sufficiently grave to require the Respondent to be struck from the Roll or suspended. The Tribunal was of the view that a restriction would provide the necessary reassurance that the public would be protected. The

restriction would not include any time when the Respondent was not working as a solicitor in terms of his restricted practising certificate.

During deliberations it became apparent that if the Tribunal was to restrict the Respondent's practising certificate in any way, this would prevent him undertaking the role he currently fulfils within Marshall Wilson. According to the Law Society of Scotland Practice Rules 2011, Rule 2.1.2 "*You shall not practise as a manager unless you hold an unrestricted practising certificate.*" Mr Burnside was therefore invited to make further representations to the Tribunal. He requested that instead of imposing a condition on the Respondent's practising certificate, the Tribunal should instead accept an undertaking from the Respondent to that effect, given either to the Tribunal or the Law Society of Scotland. The Tribunal had concerns regarding this approach. Seeking an undertaking from a Respondent is not one of the powers of the Tribunal specified in section 53 of the Solicitors (Scotland) Act 1980 and in any event, even if it were competent, the Tribunal would have no power to ensure that the Respondent complied with such an undertaking. The Tribunal considered that its reason for imposing a restriction, namely the protection of the public, was paramount in this case and therefore the Respondent's practising certificate should be subject to the condition that he will not take or execute any client instructions for an aggregate period of three years. The Respondent would have to deal with any personal impact the Law Society's Practice Rules created. It would not be appropriate for the Tribunal to seek to impose an alternative sanction not provided for in the legislation to assist the Respondent to maintain his current working practice.

Following submissions on expenses and publicity, the Tribunal determined that the Respondent should be liable in the expenses of the Complainers and the Tribunal. Publicity would be given to the decision in due course and should include the name of the Respondent but need not identify any other person as publication of the personal data of individuals might be detrimental to their interests. The Secondary Complainers will be allowed 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Office of the Tribunal.



**Kenneth Paterson**  
**Vice Chairman**