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

F I N D I N G S

in Complaint

by

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

Complainers

against

KENNETH WHITTON GRAY, Williams Gray Williams Limited, 10 St Catherine Street, Cupar

Respondent

1. A Complaint dated 12 July 2022 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Kenneth Whitton Gray, Williams Gray Williams Limited, 10 St Catherine Street, Cupar (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were two Secondary Complainers, Mr John and Mrs Lucy Jack, Barnsdale, Cottage, Haughs of Ballinshoe, Forfar.

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

4. In terms of its Rules, the Tribunal set the matter down for a virtual procedural hearing on 7 November 2022 and notice thereof was duly served on the Respondent.

5. By email dated 25 October 2022 from the Complainers, the Tribunal received a motion on behalf of both parties to adjourn the virtual procedural hearing and fix a one-day, in-person, full hearing. In terms of Rules 56 and 44 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 ("2008 Rules"), the Chair adjourned the virtual procedural hearing

administratively and set down a full hearing to take place in person on 24 January 2023. Notice thereof was duly served upon the Respondent.

6. At the hearing on 24 January 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. The Tribunal had before it the Complaint, Answers, two Inventories of Productions for the Complainers and one Inventory of Productions for the Respondent. A Joint Minute of Agreement was lodged. The Fiscal indicated he was not leading any evidence and sought to rely upon the Complaint, Answers and Joint Minute. The Respondent gave evidence. Both parties made submissions.

7. Having given careful consideration to the documents before it, the parole evidence of the Respondent and the submissions of both parties, the Tribunal found the following facts established:-

7.1 The Respondent is Mr Kenneth Whitton Gray, Williams Gray Williams Ltd, 10 St. Catherine Street, Cupar. He was born on 2 October 1971. He was admitted as a solicitor on the 15 January 1996. He was an employee of McQuitty's between 29 January 1996 and 7 August 1996. He was then employed by Innes Johnston & Co between 12 August 1996 and 2 April 1999. He was an employee of Murray Donald & Caithness between 5 April 1999 and 31 March 2005. He became a partner in Murray Donald and Caithness on 1 April 2005 and following a change of name to Murray Donald LLP remained a partner until 31 October 2014. He then became a partner in Thorntons Law LLP on 1 November 2014 and remained there until 3 July 2015. He became a director of Williams Gray Williams Limited on 29 July 2015. He is the anti money laundering partner and risk partner of Williams Gray Williams Limited, where he continues to practise.

7.2 The Secondary Complainers instructed the Respondent's colleague, Mrs Kinnear, at the then firm Murray Donald & Caithness in October 2005. The Secondary Complainers wished to purchase land from their neighbour which was then presently forming an old access to their neighbour's property. The neighbour had negotiated a new entry to their property with a developer. The purchase price was to be £800 and the Secondary Complainers were to retain a right of access over a

field to the south of their property and appropriate servitudes for services.

7.3 Mrs Kinnear entered into missive negotiations on behalf of the Secondary Complainers with the sellers' agents, Thorntons. Missives were concluded on 11 April 2006. Between April 2006 and June 2007 Mrs Kinnear entered into correspondence with Thorntons in respect of the disposition and a minute of agreement, variation of servitudes and standard securities. The Respondent assumed responsibility for the transaction from Mrs Kinnear on or around 20 June 2007. At that time neither the disposition nor the minute of agreement had been finalised with the sellers' agents.

7.4 The transaction thereafter continued at a slow pace due to the sellers' agents having ongoing negotiations with the developers.

7.5 By letter dated 6 September 2007, Thorntons forwarded to the Respondent a disposition which they instructed be held as undelivered. The Respondent had sight of that letter and disposition. The Respondent delegated the holding to the order of Thorntons of that letter and enclosure to his staff. He did not give direct instructions as to where the letter and disposition should be placed. The file indicates that the form to register the Disposition had been drafted and was also punched and inserted in the file.

7.6 On 11 October 2007 the Respondent wrote to Thorntons solicitors enclosing a cheque for £800 to be held as undelivered pending receipt of their letter of obligation. Thorntons returned the cheque as they were not in a position to complete the conveyance. The Respondent was advised to retain the disposition in favour of the Secondary Complainers on his undertaking that it was undelivered. The Respondent advised the Secondary Complainers he was placing the funds (£800) on deposit.

7.7 The Respondent wrote to the Secondary Complainers in July 2008 advising matters had still not concluded. The sellers were in disagreement with the developers.

7.8 The Respondent wrote to the Secondary Complainers in September 2009 and advised that the matter had still not settled, and he had chased Thorntons further on their behalf. There were further exchanges of correspondence between solicitors in 2009 and in early 2010. The matter sped up in March and April 2010 with the exchange of the appropriate deeds of restriction, disposition, standard security, Forms 1, 2 and 4. The Respondent wrote to the Secondary Complainers on 15 March 2010 advising of the steps required to settle the transaction.

7.9 On 27 April 2010 the Respondent wrote to Thorntons advising he would retain the deed of restriction and their Forms 2 and 4. He observed the developers had not closed off the existing access but did note the new access appeared to be in preferential use. He once again sent the cheque for £800 to be held as undelivered pending receipt of an updated form 11 and letter of obligation.

7.10 Thorntons letter of obligation was signed on 30 April 2010 and sent to the Respondent. The transaction therefore settled on 30 April 2010 at which point the Respondent ought to have recorded the disposition in favour of the Secondary Complainers. The Respondent did not do so. The Secondary Complainers' title was not recorded.

7.11 The Respondent then issued a fee note to the Secondary Complainers dated 30 November 2010 under cover of his letter dated 26 March 2011. The fee note detailed that the Respondent's firm would be incurring the cost of registering the disposition on behalf of the Secondary Complainers an outlay of £30. The fee note was corrected and re -issued on 19 April 2011. The fee funds were taken from the client account on 3 May 2011.

7.12 The Respondent's letter to the Secondary Complainers of the 26 March 2011 advised inter alia –

"I am pleased to advise that, the conveyancing in connection with area of ground at Bellmouth has indeed all now been completed." (sic)

7.13 The disposition in favour of the Secondary Complainers remained on the Respondent's file. It had been punched and filed.

7.14 The Respondent had received funds into his client account to meet the registration dues of the disposition.

7.15 The Respondent did not carry out any check on his file to satisfy himself that he had completed all work necessary, that he had carried out his full instructions and met all the duties owed to his clients, the Secondary Complainers.

7.16 The Respondent's firm, then called Murray Donald LLP, merged with Thorntons LLP in November 2014. The full client base and client account was transferred to Thorntons LLP. Had the Respondent fully considered at this time the client account he would have identified a client balance. A consideration of the file would have identified the balance represented the disposition registration dues and the principal disposition was on the file.

7.17 The Respondent's ledger in respect of the Secondary Complainers' instructions at Murray Donald Drummond Cook showed a credit balance of £30 between 3 May 2011 until 31 October 2014 when his firm merged with Thorntons, although for reasons not known the posting for the transfer of this credit balance in respect of the merger is dated 16 February 2018.

7.18 The Respondent left Thorntons LLP on 4 July 2015. In preparation of leaving, the Respondent prepared a record of his work. He identified in April 2015 that there was a client balance. The matter was brought to the attention of the lead partner in Thorntons LLP attending to the Respondent's departure. The Respondent did not deal with the credit balance before his departure in July 2015.

7.19 The Secondary Complainers' file was retained by Thorntons in terms of the merger agreement.

8. Having given careful consideration to the above noted facts and the submissions on behalf of both parties, the Tribunal found the Respondent not guilty of Professional Misconduct. Having regard to its duties in relation to Section 53ZA(1) of the Solicitors (Scotland) Act 1980, the Tribunal determined that the established facts did not meet the statutory test for

unsatisfactory professional conduct and accordingly it was not appropriate to remit the complaint to the Council of the Law Society of Scotland.

9. Having heard submissions from both parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 24 January 2023. The Tribunal having considered the Complaint dated 12 July 2022 at the instance of the Council of the Law Society of Scotland against Kenneth Whitton Gray, Williams Gray Williams Limited, 10 St Catherine Street, Cupar; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision.

(signed)

Beverley Atkinson

Vice Chair

10. 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 15 February 2023.

IN THE NAME OF THE TRIBUNAL

Beverley Atkinson

Vice Chair

NOTE

At the Hearing on 24 January 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by David Burnside, Solicitor, Aberdeen. Prior to the hearing, the Complainers had lodged two Inventories of Productions and the Respondent, one Inventory of Productions. At the hearing, a signed Joint Minute of Agreement was lodged on behalf of both parties. The Answers previously lodged on behalf of the Respondent admitted all of the averments of fact within the Complaint.

The Fiscal confirmed that he intended to rely upon the Complaint, Answers and Joint Minute and did not intend to lead any further evidence.

Mr Burnside called the Respondent to give evidence.

EVIDENCE FOR THE RESPONDENT

The Respondent confirmed that this transaction related to the purchase of a parcel of ground in order to form an alternative mode of access to a farm owned by his clients, the Secondary Complainers. A neighbouring steading was being developed and issues of access had arisen as a result of planning permission. Missives between the owners of the parcel of ground, the developers and the Respondent's clients were concluded in around 2007 or 2008. The next step of the transaction was to arrange a conveyance of the parcel of ground from the then owners to the Respondent's clients. This could only take place after completion of some of the development work.

A delay then occurred due to issues involving the developer and the seller. The delay was not caused by either the Respondent or his clients and he was unaware of the exact causes. It was not until the beginning of 2010 that the sellers' agents indicated that they were in a position to settle the transaction. In April 2010, the sellers' agents forwarded some documentation to the Respondent. They had already sent him a signed disposition in 2007 which he had been holding on his file, as undelivered. The Respondent sent the settlement cheque to the sellers' solicitors, asking that they hold this as undelivered pending delivery of a letter of obligation and an updated search report.

The Respondent indicated that he was unclear as to exactly what exchange of correspondence had taken place thereafter. He explained that the copy file that was provided to him by Thorntons, in order to answer the complaint that was made to the Scottish Legal Complaints Commission ("SLCC"), was silent

after April 2010. The copy file provided by Thorntons to the SLCC, and to the Law Society for the purposes of this case, did include other correspondence including a letter of obligation from Thorntons. The Respondent could recall discussions taking place with his clients regarding an additional fee and he had, prior to the hearing, seen the fee note dated November 2010 and his copy letter of April 2011.

He confirmed that settlement was effected in 2010 and his clients paid the additional fees in around April 2011. He confirmed that the disposition and the form for submission of it to the Registers of Scotland appeared to have been punched and put on the file. The disposition was not sent to the Register.

The Secondary Complainers were originally clients of one of the Respondent's partners. That partner preferred all correspondence to be in her name. The file was under her reference, although the Respondent was the one carrying out the work. At some point the clients became aware that it was the Respondent who was dealing with their transaction rather than his partner and the file was transferred into his name.

He accepted that the transaction had taken an inordinate period of time to settle but explained that was caused by the developer.

His own area of practice was heavily weighted towards domestic conveyancing up to 2008. However, following the downturn in the economy and the effect of that on domestic conveyancing, his focus moved more to commercial conveyancing. His firm had taken on a commercial partner in about 2006 and that partner had generated more commercial conveyancing. The Respondent had been based in the Leuchars office until 2008 when the office was closed and he moved to work in the St Andrews office. In 2010, he was asked to move to the Cupar office to be the partner in charge there. His files were moved from Leuchars to St Andrews and then to Cupar. He was unable to say whether this file moved with him from St Andrews to the Cupar office or not.

He accepted that this file had fallen out of consideration due to an oversight on his part. He believed that the disposition had gone to the Keeper for registration. He accepted that this was a failing on his part as he did conduct file checks and the client credit balance was not picked up.

The Respondent explained that it was not he who filed the disposition and nor did he instruct anyone to do that. It was contrary to his practice to punch and file deeds in this way. It was his practice to leave deeds that required to be registered loose on the file, either in a pocket file or held loose between the

missives, which should be punched and filed on the left hand side, and copy correspondence, which was punched and filed on the right hand side.

The Respondent did not become aware that the disposition had not been registered until the SLCC wrote to him in April 2019. The only other occasion he could remember the file being highlighted to him was when he left Thorntons.

Discussions with regard to the merger with Thorntons had taken place at the end of 2013. The merger itself occurred in November 2014. The Respondent was told that he would be working in the business law department of Thorntons. It was made clear to him that there would be no room for any conveyancing work. He, accordingly, went to work in the business law department which was based in the Dundee office. His files did not travel with him and he was told that the people from the Forfar office would come in to deal with these.

The Respondent explained that, when the file was opened by Murray Donald, the fee earner was his partner. She had remained noted as the fee earner even though the Respondent was carrying out the necessary work. He was aware that at some point the reference was changed to his reference but he could not say exactly when that had taken place. When he was arranging to leave Thorntons, he had seen a client ledger that was under his reference and at that time he had highlighted the credit balance to Thorntons. At that stage he was working in Dundee and the file was in Cupar.

When the two firms merged, they had both operated a different office management system. The Thorntons IT team had arranged for the necessary transfer of information from the Murray Donald system to Thorntons' system. Although this had occurred mostly automatically, there were some files that had required manual input. He had no recollection of this file being mentioned at the time of the merger.

The Respondent expressed surprise at the ledger card produced by the Complainers in this case that suggested the recording dues of £30 were not transferred until 2018. The Respondent was aware that the £30 had shown in the client ledger card in 2015. He had not seen any evidence of what had happened to the £30 credit balance after he left Thorntons in 2015.

He was not the cashroom partner in Murray Donald nor was he the cashroom partner for Thorntons. He accepted that there were checks on client credit balances from time to time and was puzzled by his failure to pick up this credit balance and deeply regretted it. He could not explain why this file had fallen into a

blind spot but emphasised that he had believed that the deed had gone for registration. His time working in Thorntons had been difficult both professionally and in terms of support. When the terms of departure had eventually been thrashed out, it was agreed that he should leave rapidly. He had gone through a list of client trial balances, annotated this and dictated any necessary notes. The credit balance on this file was one of the balances noted. He had also offered to return to the Cupar office during July 2015 to sort out any issues in relation to his files which were stored there. This was refused point blank and he was told that Thorntons would "take it from here". It was agreed that this file would remain with Thorntons. He believed that if he had been given this opportunity, he would have identified the problem at that point. He did not suggest that this would have excused his earlier failure however. He had told one of the managing partners in Thorntons that this file needed to be investigated. The Respondent had no idea what happened after that.

His failure to record the deed had been completely unsatisfactory. There was no lender and therefore no standard security involved. The failure to record the disposition meant that the purchasers did not obtain a real right to the land. They had a right to possession of the land but they did not have the protections that were provided by acquiring a real right. It could have been a potential issue for his clients, for instance, if the sellers' heritable creditor had attempted to recover the property.

The Respondent understood that in 2019 the Secondary Complainers had instructed another firm of solicitors, Blackadders. They had mandated the file from Thorntons. At that point, Thorntons, who had previously acted for the sellers, took the view that they could no longer represent the sellers. The sellers instructed a colleague of the Respondent. The Respondent was aware that either Thorntons or Blackadders had taken the view that the unrecorded disposition did not meet the Keeper's then requirements with regard to the description of the land to be conveyed. It was therefore decided that there required to be a fresh disposition prepared. The Respondent did not agree with the steps taken. He personally would have tried to register the disposition and believed that the Keeper might well have accepted it. If the disposition was not accepted, he would then have dealt with it by way of what it is called a notice of title rather than preparing a fresh deed.

Mr Burnside asked the Respondent to look at the averments of duty. The Respondent did not accept that he had at any stage breached Rule B1.4.2, B1.4.3, B1.9, B1.10 or B6.11. The only explanation he could provide for the failure to register the disposition in this case was that it was a human error that occurred due to oversight.

CROSS-EXAMINATION

The Respondent confirmed that the file was opened in August 2005 and he took responsibility for the transaction on 15 May 2007. He explained that before 2008 he had worked with an experienced paralegal. His practice was, when a transaction settled, to pass the disposition to the paralegal who would then draft the appropriate forms for submission to the Keeper of the Registers. He would approve the draft and then the deeds plus forms would be submitted to the Registers of Scotland. He never had a problem with this system. Post-2008, he was then working as one of five fee earners sharing one secretary. He considered they still had a robust checking system. Registration of deeds normally took place within the first 14 days after settlement although sometimes it could be up to 30 days.

He confirmed that it was his practice to use a checklist when closing any file. Files would only be closed once the registered deeds had been returned to him by the Registers of Scotland. No file closure checklist was done in this transaction because the deeds had not been returned as registered. He explained that this transaction was not a normal conveyancing transaction. In cases involving the conveyance of parcels of land where the application to the Registers of Scotland was for first registration on the Land Register, the process took much longer and he had experience of some transactions taking as long as five years for the deeds to be registered.

He considered that there were two ways that the error on this file could have been have caught. The first was by way of a physical file check. Such a check would have found any loose unrecorded disposition on the file. He knew he had carried out physical file checks on all his files sometimes as a six-monthly check and sometimes as a one-year check. The other way the error could have been detected was by noting a credit balance on the client ledger.

The Respondent stated that he accepted it was his file and he accepted it was ultimately his responsibility to have the deed registered. He believed he would have delegated the drafting of the forms for the submissions of the disposition to the Registers of Scotland to a quasi-paralegal who worked for him. He considered that there was some confusion as to when the transaction would be considered as settled. When he had written to Thorntons enclosing the settlement cheque, he had asked for a number of things to be sent to him. It was not clear on the file when these things were sent to him, although he accepted they must have been as he had accepted that the transaction had settled and asked his clients for the registration dues. Once the registration dues had been paid the deed should have been registered. He accepted that he had dictated a fee note dated 30 November 2010. He recollected that there had been some discussions with his clients regarding an additional fee. He conceded that he would have known

that the fee was paid in 2011 and he should have then presented the deed for registration. He could not explain why he did not pick up that the disposition remained on the file.

The Respondent accepted that the credit balance would have appeared on his list of client credit balances. The first evidence he has of him taking any affirmative action in relation to the credit balance for this file was when he flagged it up on his departure from Thorntons. The figure of £30 would not have automatically been a red flag alert to an unrecorded deed. Recording dues had been increased at the beginning of 2011. The figure of £30 was the same figure as a fairly common bank charge that required to be passed on to clients. Regardless of that, he accepted that this was his responsibility and that any unexplained credit balance requires to be checked.

In answer to a question from the Tribunal, the Respondent explained that when he was originally answering the complaint made here, the copy file provided to him ended in March 2010. Since then, he had seen further copy correspondence including the letter from him dated 27 April 2010 enclosing the settlement cheque and asking that it be held as undelivered pending delivery of the letter of obligation and a further updated search report. Whilst a copy letter of obligation has since been produced, he has not seen a letter from Thorntons in response indicating that they had produced the letter of obligation and updated search and were now treating the cheque as encashable. Given the lack of information on the file, he was unable to recollect exactly what had occurred between his letter of 27 April 2010, the issuing of the fee note in November 2010 and the eventual payment of that fee in 2011.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal indicated that the Complainers were no longer relying upon Rules B1.4.2, B1.4.3, B1.9, B1.10, or B6 of the Law Society of Scotland Practice Rules 2011 ("Practice Rules 2011"). It was his submission that the admitted failure to register the disposition in this case amounted to a breach of Rule B1.4.1 of the Practice Rules 2011 (acting in the best interests of the client) and the common law obligation of a solicitor to act in his client's best interests and to complete the instructions given to him.

He submitted there was no dispute that the Respondent had failed to register the disposition. The explanation given by the Respondent was that this was an oversight caused by human error.

The Fiscal accepted that the Tribunal might question whether one error in relation to one file related to one client could amount to professional misconduct. He submitted that in the circumstances of this case the Respondent's failure met the test for professional misconduct set out in the case of Sharp v Council

of the Law Society of Scotland 1984 SLT 313. The Fiscal referred the Tribunal to the case The Council of the Law Society of Scotland v Alison Baxter SSDT 8 March 2013. He argued that this case was support for his submission that one such failure could amount to professional misconduct.

He emphasised that the Respondent assumed responsibility for this transaction in 2007. The Secondary Complainers did not find out that the deed had not been registered until 2018. The Respondent had noted the credit balance on the client ledger in 2015.

Whilst the Fiscal conceded that, in the Baxter case, the solicitor had been aware that the disposition was not recorded and in this case the Respondent indicated that he believed the deed had been sent for recording. It was, however, the Fiscal's position that there were a number of occasions when the Respondent should have become aware that the disposition had not been sent for registration. The preparation of the fee note and the credit balance appearing on the client ledger should have alerted the Respondent to his failure. The Fiscal submitted that the Respondent did not act in the best interests of his client and he invited the Tribunal to find him guilty of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Burnside invited the Tribunal to distinguish the present case from that of Baxter. He submitted that the facts were quite different. In the Baxter case, the Respondent had admitted professional misconduct which had included the solicitor ignoring correspondence from clients and not communicating effectively with them.

Mr Burnside drew the Tribunal's attention to the test for professional misconduct set out within Sharp. He invited the Tribunal to hold that the circumstances here, which he described as amounting to one omission, did not meet the test for professional misconduct. He invited the Tribunal to consider that issues of misconduct required an element of *mens rea*, be that either intent or complete disregard. The Respondent accepted that he had made a mistake. This mistake, however, fell well short of the test for professional misconduct.

Mr Burnside drew the Tribunal's attention to his Production, the report from the Professional Conduct Sub Committee dated 7 April 2022. He invited the Tribunal to consider that this case was one on the outer margins and did not meet the test for serious and reprehensible conduct. Mr Burnside categorised the conduct in the present Complaint as "a sin of omission". He invited the Tribunal to find the Respondent not guilty.

DECISION

The admitted averments of fact and the additional matters in the Joint Minute were found to be established and are repeated in the findings in fact at paragraph 7 above.

The only parole evidence before the Tribunal was that of the Respondent, who the Tribunal considered to be a reliable and credible witness. He gave his evidence in a measured way, offering relevant background information without attempting to evade personal responsibility. The Tribunal accepted his explanation that he had believed that the disposition had gone for registration. The relevant form for submission to the Registers of Scotland had been completed but unfortunately was also punched and filed amongst the correspondence. Whilst he could not explain precisely why he failed to notice the credit balance on the client ledger before 2015, he explained that the credit balance of £30 would not have been an alert to an unregistered deed. The Tribunal accepted that, when he noted the credit balance in 2015, he passed the information on to the relevant individual in Thorntons who retained possession of the file.

The Tribunal accepted the Respondent's explanation that the disposition had not gone for registration due to a human error caused by oversight.

The test for professional misconduct is set out in the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313 where it is stated:-

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

The Fiscal submitted that the case of Baxter was support for his contention that the conduct here amounted to misconduct. The Tribunal did not agree. In Baxter, the Respondent was well aware that deeds, including a standard security, had not been registered for some eight years and had failed during this time to correspond effectively with her lender client, explaining the circumstances. The degree of culpability on the part of the Respondent in Baxter was quite different to that on the part of the

Respondent in the present case. In Baxter, the Tribunal had considered the conduct, even though, to be at the lowest end of scale for misconduct.

In all of the circumstances, the Tribunal found the Respondent not guilty of professional misconduct.

The Tribunal is bound by Section 53ZA of the 1980 Act, where it finds the Respondent was not guilty of professional misconduct, to remit the complaint to the Council of the Law Society of Scotland, if the Tribunal considers that the Respondent may be guilty of unsatisfactory professional conduct.

The test for unsatisfactory professional conduct for a practitioner who is a solicitor is set out within Section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 as:-

"professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services."

In the case of Hood-v-The Law Society of Scotland [2017] CSIH 21 Lord Drummond Young said:

"Unsatisfactory professional conduct is measured against the standard of the competent and reputable solicitor...Unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional service at the lesser end and determining where the conduct complained lies on that spectrum is a question for evaluation by the relevant disciplinary tribunal, either the Council of the Respondents or the Scottish Solicitors Discipline Tribunal."

The facts found to be established in this case did not reflect on the reputation of the solicitor. Nor was there a question of the competence of the Respondent, in particular the Fiscal withdrew consideration of Rule B1.10 of the Practice Rules 2011. The Tribunal concluded that the conduct here did not meet the test for unsatisfactory professional conduct and therefore it was not appropriate to remit the complaint back to the Council of the Law Society of Scotland.

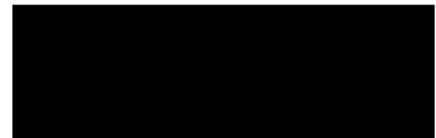
The Tribunal invited further submissions in relation to expenses and publicity.

The Fiscal indicated that he was not aware of any factor affecting the question of publicity including the names of the Secondary Complainers. In relation to the matter of expenses, he acknowledged the approach that expenses follow success and had no submission to make.

Mr Burnside invited the Tribunal to award expenses on the usual scale to the Respondent. He acknowledged that the Tribunal had little or no discretion with regard to publishing the decision including the Respondent's name.

The Tribunal gave careful consideration to the case before it. It had determined that the conduct established did not meet the tests for either professional misconduct or unsatisfactory professional conduct. It appeared to the Tribunal that the case did not involve any complex question of law or principle that the Complainers might have desired the Tribunal to take a decision upon. In these circumstances, the Tribunal concluded that the fair and appropriate award of expenses was one in favour of the Respondent, on the usual scale.

With regard to publicity, the Tribunal noted the terms of Paragraph 14 and 14A of Schedule 4 to the 1980 Act. There was no information before the Tribunal that would allow it to anonymise any details in terms of 14A. The Tribunal directed that publicity should be given to this decision.



Beverley Atkinson

Vice Chair