

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

**FINDINGS**

**in Complaint**

**by**

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

**Complainers**

**against**

**PAUL KEVIN O'DONNELL, Solicitor,  
formerly of 44 Bracadale Road, Baillieston,  
Glasgow and now of 16 Kirkhill Avenue,  
Cambuslang, Glasgow**

**Respondent**

1. A Complaint dated 31 August 2016 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Paul Kevin O'Donnell, Solicitor 44 Bracadale Road, Baillieston, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Mr AG.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 1 November 2016 and notice thereof was duly served on the Respondent. On 25 October 2016 the Vice Chair, exercising the functions of the Tribunal under Rule 56 of its Rules, granted the Complainer's motion to adjourn the hearing fixed for 1 November 2016 and fixed a procedural hearing for 28 November 2016. Notice thereof was duly served on the Respondent.

5. At the hearing on 28 November 2016, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was not present or represented. The Fiscal made a motion to sist the proceedings to allow the Law Society to clarify their position following the recent judgement in Anderson Strathern LLP v Scottish Legal Complaints Commission [2016] CSIH 71. He indicated that the Complainers were also likely to bring a s53(1)(b) Complaint against the Respondent and it would be preferable to deal with matters together. The Tribunal granted the Fiscal's motion to sist.
6. On 15 March 2018, the Complainers lodged a motion to recall the sist of 28 November 2016. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 31 May 2018 and notice thereof was duly sent for service upon the Respondent.
7. On 31 May 2018, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was not present or represented. The Fiscal made a motion to proceed in the absence of the Respondent in accordance with Rule 14(4) of the Scottish Solicitors' Discipline Tribunal Rules 2008. However, following evidence on oath from the Clerk regarding service of the Notice of Hearing, the Fiscal instead moved the Tribunal to adjourn to a procedural hearing to allow him to instruct tracing agents. The Tribunal granted the Fiscal's motion and fixed 4 September 2018 as a procedural hearing. Notice thereof was served upon the Respondent at the address which the Fiscal intimated was the Respondent's last known place of residence.
8. On 4 September 2018, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was not present or represented. The Tribunal Clerk gave evidence on oath regarding service of the Notice of Hearing. It was reported that the Notice of Hearing was served by Sheriff Officers depositing it at 16 Kirkhill Avenue, Cambuslang, Glasgow. The Respondent had previously indicated to Sheriff Officers that this was the most suitable address for correspondence. The Tribunal was content that it was fair to proceed with the procedural hearing in the Respondent's absence. The Tribunal fixed a hearing for 7 November 2018. Notice thereof was served upon the Respondent at the address in the Complaint and at the Respondent's last known place of residence.
9. On 7 November 2018, the Complainers were represented by their Fiscal, James Reid, Solicitor, Glasgow. The Respondent was not present or represented. The Tribunal Clerk gave evidence on oath regarding service of the Notice of Hearing. The Tribunal was



satisfied that the Respondent had been given notice of the hearing and that it was fair to proceed in his absence. Also calling on 7 November 2018 were two other Complaints against this Respondent (2018/1809 and 2018/1810 refer). Although the Complaints were not formally conjoined, the Tribunal indicated that it would hear evidence in relation to all three Complaints together since the witnesses were expected to speak to more than one Complaint. However, the Tribunal would consider the Complaints separately and produce separate decisions. The Fiscal led evidence from three witnesses. Two spoke in connection with the present Complaint. The Tribunal also received evidence by way of affidavit. The Tribunal heard submissions on behalf of the Complainers.

10. Having given careful consideration to the terms of the Complaint, the Tribunal found the following facts established

- 10.1 The Respondent's date of birth is 31 October 1981. He was enrolled as a Solicitor on 16 August 2007. He was employed by Thorley Stephenson SSC, 51 South Bridge, Edinburgh, from 1 November 2012 to 1 September 2014.
- 10.2 On 10 July 2013 AG met the Respondent who accepted instructions to act for AG in a building dispute with AK. AG wished to make a claim against AK and AK intended to make a claim against AG. AG had consulted Thorley Stephenson as he had been advised by SLAB that the firm carried out work for clients who required legal aid.
- 10.3 The Respondent wrote to AG on 2 August 2013 referring to their meeting and inter alia requesting financial information to consider the prospect of obtaining legal aid. On the same date he wrote to Sandemans Solicitors who were acting for AK. He advised that he had been instructed by AG and would respond within the next 14 days.
- 10.4 Sandemans replied by letter dated 12 August 2013 asking if Thorley Stephenson were able to accept service of proceedings.
- 10.5 The Respondent met AG on 19 August 2013 and the following day AG handed in bank statements and evidence of income. The Respondent then wrote to him on 21 August requesting various financial details to assess "full civil Legal Aid".

On 21 August the Respondent also wrote to Sandemans advising that the firm were prepared to accept service in AK v Company 1/AG.

- 10.6 AG understood from the Respondent that he (the Respondent) would apply for legal aid.
- 10.7 AG attempted to contact the Respondent but was unable to do so. The Respondent, from his home e-mail address, e-mailed AG on 6 December 2013 advising *inter alia* that he would provide AG with a copy of the initial writ “and advise you as to the court process.” AG replied stating that Falkirk Sheriff Court had advised him that they had no application for a writ in his name or in AK’s name. He asked the Respondent for a copy of the writ. The Respondent did not reply.
- 10.8 By e-mail dated 23 January 2014 AG asked the Respondent if he had heard from Sandemans and advising that if he didn’t hear by the middle of the next week he would go to Falkirk Sheriff Court and raise an action himself.
- 10.9 On 4 February 2014 AG e-mailed the Respondent asking if he had organised a surveyor. He sent a reminder on 10 February 2014.
- 10.10 On 19 February 2014 AG e-mailed the Respondent *inter alia* requesting sight of a notice to defend and the name of the surveyor who was going to check the works. The Respondent replied on 21 February advising that he was instructing McColl Associates to provide a report and said “I would advise that Sandeman had agreed this course of action based on my initial writ which he has a copy to outline the position in this case. I am perplexed at his change of position”.
- 10.11 The Respondent’s file shows no notes, documentation, correspondence or e-mails from 21 August 2013 until 27 February 2014 when a letter is sent to The Sheriff Clerk at Falkirk enclosing a Notice of Intention to Defend in the action AK v AG t/a Company 1. It does not contain any Initial Writ or copy writ at the instance of AG.



- 10.12 The file shows a Note dated 27 February to the effect that AG has instructed the firm on a private basis, that the Respondent is to speak to AG about paying the NID outlay and is “to look at recovering money from him.”
- 10.13 The Respondent wrote to AG on 27 February inter alia confirming the lodging of the NID, the instruction of a surveyor’s report, the need to discuss issues with AG and the need to discuss issues with Mr Sandeman. The letter makes no reference to refunding the NID outlay or to the matter being privately funded.
- 10.14 The Respondent wrote to AG on 13 March 2014 with the Court Timetable and asked AG to contact him. He wrote again on 20 March suggesting a meeting on 23 March.
- 10.15 On 9 April 2014 the Respondent wrote to AG advising he would be in touch about the expert’s report. On the same date he wrote to Sandemans with copy skeletal defences.
- 10.16 Sandemans intimated a motion seeking decree on the basis the defences lodged did not disclose a full defence. The Respondent instructed Russel & Aitken to appear and oppose the motion due to call on 23 April 2014. The letter of instruction of 23 April 2014 referred to an application for Civil Legal Aid having been made but a difficulty in obtaining emergency cover.
- 10.17 Following a query from a partner in the firm, the Respondent sent an e-mail from his home e-mail address to a work colleague explaining inter alia that an Options Hearing had been fixed for 21 May 2014 and that the 23 April 2014 Hearing should not have called. He explained that the motion was on the basis that no defences had been lodged but in fact defences had been lodged albeit skeletal (this did not truly reflect the terms of the motion on 23 April 2014 and his instructions to Russel & Aitken.) The e-mail also referred to AG being happy to place the firm in funds for the initial work and the expert report.
- 10.18 The Options Hearing of 21 May 2014 was continued to 18 June 2014 and the Respondent e-mailed AG on 23 May 2014 advising him of the continuation to obtain an expert report and deal with some issues raised by Sandemans.

- 10.19 The Respondent and AG met on 29 May 2014 when various issues including an expert report were discussed. AG was not asked for any funds to settle fees or outlays.
- 10.20 The Respondent lodged adjustments on 3 June and e-mailed Sandemans on 12 June re access for a surveyor.
- 10.21 When the action called on 18 June 2014 AG was not represented but the Court fixed a Diet of Debate for 14 August 2014 on the Pursuer's plea with a Preliminary Hearing on 30 July 2014. The Respondent wrote to AG on 17 July 2014 advising him of these dates.
- 10.22 AG e-mailed the Respondent on 7 August asking about access for the surveyor and whether Sandemans were refusing access. The Respondent did not reply, and AG e-mailed him again on 11 August 2014 saying "If I don't receive a meeting this week from a surveyor, I want to cancel your services. You have messed me about long enough. I simply can't believe a word that comes out of your mouth and I don't have any confidence in you. Don't contact me back because my next meeting will be with Mark Thorley."
- 10.23 The Respondent replied by e-mail on 12 August 2014 saying inter alia that he was unclear whether AG wished him to continue with the case on Thursday (the Debate) and that there were issues which he needed to discuss urgently with AG otherwise given the terms of AG's e-mail he would need to withdraw from acting. According to file notes, on 12 August 2014 the Respondent sent AG a text message and left two messages on his mobile phone.
- 10.24 AG replied to the Respondent on 12 August advising that he was in hospital. He outlined various concerns that he had with the Respondent's handling of his case. He said the Respondent should show a copy of his e-mail to Mark Thorley and he (AG) would be happy to meet with him.
- 10.25 The Respondent's file contains an e-mail to AG date 14 August 2014 at 10.50 saying only "Letter sent to him on Monday". There is no indication in the e-mail



or on the file as to what this may refer. There are no letters on the file dated either Monday 11 or Monday 18 August 2014. The Court Interlocutor of 14 August 2014 shows that decree by default was granted to the Pursuer the Defender's agents having withdrawn from acting and there being no appearance for the Defender. The Respondent's file does not contain any letters or e-mails to Sandemans, the Sheriff Clerk or AG intimating a withdrawal from acting.

10.26 AG consulted Moore & Partners Solicitors and on 19 August 2014 they wrote to Thorley Stephenson enclosing a mandate and requesting the file of papers. They commented that they understood AG had legal aid and asked for the relevant reference. By letter dated 30 September 2014 Thorley Stephenson sent the file to Moore & Partners.

10.27 On 7 September 2014 AG made a Complaint to the SLCC in respect of conduct and service. In July 2015 the SLCC referred the conduct aspect to the Complainers.

10.28 The Complainers intimated the complaint to the Respondent at his home address on 21 July 2015. The letter set out the relevant issues, referred him to his professional obligation to respond within a set timescale and advised that a failure to respond would result in the service of Statutory Notices and possibly a further conduct complaint in respect of failure or delay in responding.

10.29 The relevant issues were:

I, Mr AG wish to complain about the action/inaction of Mr Paul O'Donnell, formerly of Thorley Stevenson SSC who I instructed in March 2013 in relation to a civil litigation case, as evidenced by:

1. Despite Mr O'Donnell advising me in August 2013 that he had submitted an application for legal aid, he had not, in fact, done so.
2. Despite Mr O'Donnell advising me in February and August 2013 that he had made arrangements to obtain a valuation of the works carried out by me, he had not, in fact, done so.

3. Despite Mr O'Donnell advising me on/around 24 February 2014 that he had lodged an Initial Writ at Falkirk Sheriff Court, he had not, in fact, done so.
  4. Despite Mr O'Donnell advising me on 19 February 2014 that he had issued productions to the court, he had not, in fact, done so.
  5. ...
  6. Mr O'Donnell failed to obtain an expert report, despite advising me on 23 May 2014 that he would do so.
  7. Mr O'Donnell withdrew from acting for me without good reason on the morning of the Debate Hearing on 14 August 2014
  8. On 11 November 2014, Thorley Stephenson SSC confirmed that they have been unable to locate original photographs that I handed to Mr O'Donnell in May 2013 which form a major part of my defence.
- 10.30 Given the lack of any response, on 17 September 2015 the Complainers issued to the Respondent by Recorded Delivery, Notices under the Solicitors (Scotland) Act 1980 Section 15(1) and the Legal Profession and Legal Aid (Scotland) Act 2007 Section 48.

There was no contact from the Respondent and the Complainers, on 16 October 2015 by Recorded Delivery, issued a 1980 Act Section 15(2) Notice to the Respondent. They issued a separate letter on the same date by ordinary post intimating the issue of the Section 15(2) Notice and advising that the Society might consider raising its own conduct complaint.

- 10.31 There was no response from the Respondent. Accordingly, by letter dated 2 November 2015 the Complainers intimated a further conduct complaint to the Respondent in respect of his failure and/or material delay in responding to the Complainers' correspondence.



10.32 The Complainers instructed a Complaints Investigator whose report was provided to the Respondent by the Complainers in a letter dated 25 April 2016 together with intimation that the Complaint would be considered by a Professional Conduct Sub Committee. The Complaints Investigator also completed a Supplementary report which was provided to the Respondent by the Complainers in a letter dated 13 May 2016.

10.33 The complaint was considered by the Complainers' Professional Conduct Sub Committee on 9 June 2016 and it decided as follows:

Having carefully considered all of the information before it, the Sub Committee determined that the conduct of Mr Paul K O'Donnell in respect of:

#### Issue 1

Despite Mr. O'Donnell advising me in August 2013 that he had submitted an application for Legal Aid, he had not, in fact, done so;

#### Issue 2

Despite Mr. O'Donnell advising me in February and August 2013 that he had made arrangements to obtain a valuation of the works carried out by me, he had not, in fact, done so;

#### Issue 3

Despite Mr. O'Donnell advising me on/around 24 February 2014 that he had lodged an Initial Writ at Falkirk Sheriff Court, he had not, in fact, done so;

#### Issue 6

Mr. O'Donnell failed to obtain an expert report, despite advising me on 23 May 2014 that he would do so;

## Issue 7

Mr. O'Donnell withdrew from acting for me without good reason on the morning of the Debate Hearing of 14 August 2014;

## Issue 9

Paul Kevin O'Donnell has failed and/or materially delayed in responding to correspondence issued by The Law Society of Scotland in relation to a conduct complaint raised against him, including Section 15 and Section 48 Notices issued on 17 September 2015 and Section 15(2) Notice issued on 16 October 2015.

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.

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 said Paul K O'Donnell before the Scottish Solicitors Discipline Tribunal.

10.34 By letter dated 22 June 2016 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee's Determination.

11. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

11.1 His failure in breach of Rules B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011 to be trustworthy and act honestly at all times so that his integrity was beyond question and to communicate effectively with his client; and

11.2 His failure to cooperate with the Complainers in their investigation of a conduct complaint against him.



12. Having heard the Solicitor for the Respondent in mitigation the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 7 November 2018. The Tribunal having considered the Complaint dated July 2016 at the instance of the Council of the Law Society of Scotland against Paul Kevin O'Donnell, Solicitor 44 Bracadale Road, Baillieston, Glasgow; Find the Respondent guilty of professional misconduct in respect of his failure in breach of Rule B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011 to be trustworthy and act honestly at all times so that his integrity was beyond question and to communicate effectively with his client, and his failure to cooperate with the Complainers in their investigation of a conduct complaint against him; Censure the Respondent; Fine him in the sum of £2,500 to be forfeit to Her Majesty; 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 Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the office of the Tribunal.

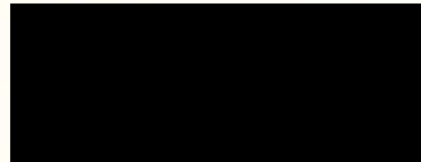
**(signed)**

**Colin Bell**

**Vice Chairman**

13. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 30 NOVEMBER 2018 .

**IN THE NAME OF THE TRIBUNAL**



**Colin Bell**  
**Vice Chairman**



**NOTE**

At the hearing on 7 November 2018, the Fiscal made a motion in terms of Rule 14(4) of the Tribunal Rules 2008 for the Tribunal to proceed to hear and determine the Complaint in the absence of the Respondent. The Tribunal heard evidence on oath from the Clerk regarding the service of the Notice of Hearing. Service had been effected on 18 September 2018 by Sheriff Officers depositing the Notice of Hearing in a sealed envelope in to the dwelling place at 16 Kirkhill Avenue, Cambuslang, Glasgow. That address was the Respondent's last known place of residence and the address where the Restriction of Liberty Order had required him to reside for the duration of the order. Service had also been effected on 18 September 2018 by Sheriff Officers depositing Notice of Hearing in a sealed envelope in to the dwelling place at 40 Bracadale Road, Baillieston, Glasgow, which was the address on the Complaint. The Tribunal was satisfied both in terms of its Rules and section 64 of the Solicitors (Scotland) Act 1980 that the Respondent had been given proper notice of the hearing. The Fiscal advised that the List of Witnesses, List of Productions and the productions had been served by Sheriff Officers and left in the hands of the Respondent's mother-in-law at the 16 Kirkhill Avenue, Cambuslang, Glasgow.

The Tribunal considered whether it was fair to proceed in the Respondent's absence. The Tribunal had regard to R-v-Jones [2002] UKHL 5 and the need to exercise its discretion in this matter "*with great caution and close regard to the overall fairness of the proceedings.*" The Tribunal noted that Sheriff Officers had indicated that the Cambuslang address where service had been effected was believed to be a relative's home. The Respondent had previously indicated to Sheriff Officers that it was the most suitable address for correspondence. The Tribunal was also aware that the Respondent had contacted the Tribunal Clerk on 2 September 2016 indicating that he did not intend to take part in Tribunal proceedings. It seemed likely therefore that he had chosen not to attend the hearing. The Tribunal considered that if it heard the case in the Respondent's absence there would be a disadvantage to him in being unable to give his account of events. However, he had been given notice of the date and there was no reason to be confident he would attend on another occasion if the hearing were adjourned. It is in the public interest that regulatory proceedings take place within a reasonable time. The fair, economical, expeditious and efficient disposal of allegations against solicitors was an important consideration. In these circumstances, the balance lay in favour of proceeding in the Respondent's absence. Therefore, the Tribunal granted the Fiscal's motion to proceed.

At the hearing on 7 November 2018, the Tribunal had before it the Complaint, an Inventory of Productions for the Complainers, a List of Witnesses for the Complainers, and an Affidavit by Mr Ian Ritchie.

## **EVIDENCE FOR THE COMPLAINERS**

### **Witness One: Mark Thorley**

The witness gave evidence on oath. He confirmed that his name was Mark Thorley and that he was a partner in Thorley Stephenson Limited, a company which had started out as a partnership. He has been a solicitor for thirty years. His firm employed the Respondent as a solicitor.

The witness confirmed that he was aware of the Secondary Complainer. Mr AG had contacted the Respondent with regard to a building dispute. The witness confirmed that Production 1 in the Complainers' Inventory of Productions was his firm's file in relation to the matter. The witness confirmed that the entry of 10 July 2013 on p76 was a file note relating to AG. It noted that the Respondent had met with the Secondary Complainer on that date. Handwritten notes from that meeting were contained on pages 77-79 of Production 1. The witness confirmed that there was reference in these to building estimates and costs. The witness confirmed that p74 of Production 1 was a letter dated 2 August 2013 from the Respondent to Sandeman's, the solicitors on the other side of the dispute. The witness confirmed that there was a letter dated 2 August 2013 to the Secondary Complainer from the Respondent at p75 of Production 1. It referred to a "recent" meeting. The witness confirmed that he was not familiar with the case while the Secondary Complainer was a client. He only knew about the case after the firm had withdrawn from acting. The witness said that the file (Production 1) first of all went on to the next firm of solicitors and was recovered from there by the SLCC. As far as he was aware, the file was complete.

The Fiscal referred the witness to Production 2. The witness confirmed that this production contained email correspondence. He indicated that production 2/1 was an email from the Respondent to the Secondary Complainer. It came from the Respondent's own personal email address and not the firm's. There was also a response from the Secondary Complainer to the Respondent. The witness agreed that the Secondary Complainer was looking for an initial writ to be prepared. There was an implication that the writ had been sent to the other solicitor for service. There is an email from the Secondary Complainer noting that the Sheriff Clerk at Falkirk informed him that there was no trace of any initial writ.



The witness was referred to Production 2/3. He confirmed that this production contained an email dated 19 February 2014 at 0920 hours from the Secondary Complainer to the Respondent. The second email on the page was another email from the Secondary Complainer to the Respondent which indicates that up until that point the Secondary Complainer was under the assumption that the Respondent was issuing the initial writ but "Falkirk Office" assures him that no application had been lodged. The witness confirmed that no writ was ever lodged by the Respondent on behalf of the Secondary Complainer and during this period, the person on the other side of the dispute had actually served a writ upon the Secondary Complainer.

The witness was referred to Production 2/5 which contained an email dated 11 August 2014 from the Secondary Complainer to the Respondent indicating that he wished to cancel the Respondent's services. The witness said his understanding was that the Secondary Complainer was pressing the Respondent to act but nothing was happening. The Secondary Complainer expected a writ to be prepared and various investigations to take place, including the instruction of surveyors. However, none of this happened. Eventually the Secondary Complainer ran out of patience, the Respondent withdrew from acting and the Secondary Complainer went to another firm. The witness met the Secondary Complainer after the firm had withdrawn from acting. He had reviewed the file by that stage. An action had been defended but very little preparation had been undertaken and no action instigated on behalf of the Secondary Complainer. The Fiscal asked the witness whether the Secondary Complainer had a legitimate expectation that the Respondent would have done certain things. The witness confirmed that was the case and it was essential in this type of case that a surveyor's report was obtained.

In answer to a question from a Tribunal member, the witness indicated that the file was transferred to another firm. Decree passed against the Secondary Complainer and there was an appeal but he had no direct knowledge of the case.

**Witness Two: Mr AG, the Secondary Complainer**

The witness gave evidence on oath. He confirmed his name, date of birth and address. He is a roofing contractor. He engaged the Respondent in relation to a dispute. He was owed money by a customer (AK).

The Fiscal referred the witness to Production 1 which was his client file. While referring to the file note contained on page 1/76, the witness confirmed that he had a meeting with the Respondent on 10 July 2013. He confirmed that the letter contained at page 1/75 dated 2 August 2013 referred to that meeting.

The Fiscal asked the witness what he wanted the Respondent to do. The witness said he wanted the Respondent to present a case in court. He was being sued by AK through Sandeman's. He had sent a bill to AK but he refused to pay it. The Fiscal asked whether he wanted the Respondent to raise an action. The Secondary Complainer said that he wanted the Respondent to raise a counter-claim. The Fiscal asked the witness whether, at the point he consulted the Respondent, there was already an action. The witness explained that he sent the bill to AK. AK didn't pay. The witness received the writ from Sandeman's regarding breach of contract. The Fiscal asked the witness whether he received the writ before he met the Respondent. The witness said that he could not remember exactly. He thought perhaps that it happened about the same time as he wanted to raise an action. Both things happened in close proximity. That writ was for the witness to get payment. That's why he consulted the Respondent. The witness agreed that he asked Thorley Stephenson to act on his behalf but shortly thereafter an action was raised by AK in which the Respondent counter-claimed.

The witness agreed that Production 1/73 is a letter from Sandeman's to Thorley Stephenson dated 12 August 2013. That letter said, "We were just about to have the proceedings raised and served." The witness agreed that Production 2/1 contained a series of emails between himself and the Respondent. In particular there was an email dated 6 December 2013 from the Secondary Complainer to the Respondent which noted that "Falkirk Sheriff Clerk has emailed me stating that they have had no application for a writ..." The witness confirmed that by 6 December 2013, no one had raised an action. The Fiscal asked the witness what writ he was referring to and he said it was the writ against him by AK. The Fiscal asked what had happened to the Secondary Complainer's writ. The witness said that it was put to one side once AK sued him. The witness was referred to Production 2/2 which contains an email of 9 December 2013 from the Secondary Complainer to the Respondent seeking a copy of the writ. Within that same production there is an email of 23 January 2014 in which the witness informed the Respondent that he was dissatisfied with the way matters were failing to progress. By that date, the witness said he still did not know what was going on.

On 4 February 2014, the witness chased the Respondent with regard to the surveyor's report. The witness explained that he needed a surveyor to get a valuation of the works completed. The witness said that the Respondent told him an Edinburgh firm was going to carry out the survey. However,



when he called that firm, he found that they had not been engaged by the Respondent. With reference to the email of 20 February 2014, the witness explained that the counterclaim came later and he had to defend the writ against himself. The Fiscal quoted from that email the section where it is said, "Up until now, I was under the assumption that we were issuing the writ" and asked the witness how that fitted with his evidence that AK issued the writ and the witness defended. The witness said that by February he still did not have a served writ. He called the firm of surveyors and they had not heard of his case. With reference to the email of 21 February 2014 from the Respondent to the witness, the Fiscal asked whether there was a suggestion that the Respondent had produced an initial writ. The witness said that he was not aware of any initial writ. He did not believe anything the Respondent told him. He confirmed that it was at this stage that AK's writ appeared.

With reference to the emails contained at production 2/4, the witness indicated that nothing happened between February and August 2014. No report appeared from the surveyors who were supposed to have been instructed. The witness instructed his own surveyor. The witness was referred to the email of 12 August 2014 from the Respondent to the witness. The witness indicated that the email contained falsehoods. There was no question of access because the surveyor was never instructed. With reference to production 2/6, the witness told the Tribunal that he was in hospital on 12 August 2014 and asked the Respondent to pass his email on to Mark Thorley.

The Fiscal asked the witness how the action was to be funded. The witness indicated that he qualified for legal aid. He provided bank statements and filled in the legal aid forms. The Respondent told him he qualified for legal aid but he never received a certificate. From his perspective, he believed he had legal aid. The Respondent never asked him for any money. Once the file was passed on to the other solicitors, the witness found out that he did not have legal aid.

Matters came to a head in August 2014. All of a sudden the Respondent asked the witness whether he wanted him to act or not. The Respondent did not turn up in court for the debate. The witness had not attended on the Respondent's advice. The court found against the witness and he had to appeal to get the case back on track again.

In summary, the witness agreed that he originally instructed the Respondent in July 2013. No writ appeared by either party until February 2014 when the AK writ was served. No surveyor was ever instructed. The counter-claim was lodged but the witness lost. He had to represent himself. He did not lodge a surveyor's report as part of the counter-claim and so he lost.

In answer to a Tribunal member's question, the witness confirmed that another solicitor agreed to take on his case. However, she withdrew from acting and he had to represent himself. No other firm would take his case. The witness had no success at all in the case involving AK. In answer to another question, the witness indicated that his relationship with the Respondent was good at the beginning but things started to go bad when he realised that the Respondent had not instructed a surveyor.

### **Witness Three: Ian Ritchie**

The Tribunal received this witness' evidence by way of affidavit. The witness' full name is Ian David Ritchie. He is 65 years old and he is employed by the Law Society of Scotland as one of the Clerks to the Society's Professional Conduct Sub Committee. The Secondary Complainer made a Complaint to the SLCC regarding the Respondent's conduct. The SLCC remitted that complaint to the Law Society in July 2015. The Society wrote to the Respondent intimating the complaint. No response was received. Statutory notices were served on the Respondent. These were not returned but he did not respond. The Law Society investigated the complaint. A complaints investigator produced a report. The complaint and report were considered by the Professional Conduct Sub Committee on 9 June 2016. The report was attached to the affidavit along with a copy of the Complaint and the List of Productions for the Complainers.

### **SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal invited the Tribunal to make a finding of professional misconduct. He noted that the Tribunal had been able to consider the Secondary Complainer's file which was spoken to by Mark Thorley. The Tribunal had also heard from the Secondary Complainer. On the basis of that evidence, he said, it was clear that the matter had not been handled as it should have.

The Secondary Complainer thought that he had legal aid. He had provided the appropriate documents to the Respondent. He was never asked for any money. The Respondent did not tell him that he was not in receipt of legal aid.

There was evidence in the emails spoken to by the witnesses that the Respondent had undertaken to instruct a surveyor's report. The Secondary Complainer spoke to the fact that the surveyor was not instructed. Between February and August, nothing happened on the file. The Respondent's



communication with the Secondary Complainer regarding instruction of a surveyor's report was misleading to say the least.

The Respondent withdrew from acting for the Secondary Complainer. The Secondary Complainer gave evidence that the Respondent told him he was not required at the Debate and did not inform him that he had withdrawn from acting. Decree passed against him because there was no appearance on his behalf.

In relation to the charge of failing to respond to the Law Society, the Fiscal referred the Tribunal to Mr Ritchie's affidavit.

In all the circumstances, the Fiscal submitted that there was sufficient evidence to justify a finding of professional misconduct. The Fiscal noted that he had not said anything about the writ and the counter-claim. He said that he had no evidence to put before the Tribunal regarding the failure to lodge an initial writ on behalf of the Secondary Complainer.

The Tribunal asked to be addressed on the reference in the complaint to the Respondent's failure to act with trust and integrity. The Fiscal indicated that if a client justifiably thinks he has legal aid and his solicitor is getting a report, it reflects badly on the solicitor's integrity if he does not obtain legal aid or a report and does not communicate this to the client. The Fiscal submitted that by telling the Secondary Complainer that he had instructed McColl's, the Respondent's conduct was dishonest.

## **DECISION**

The Tribunal accepted the witnesses' evidence as credible and reliable. With the exception of the instruction of the initial writ on behalf of the Secondary Complainer, the Tribunal was satisfied beyond reasonable doubt that the Respondent had acted in the manner set out in the Complaint. According to the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313, there are certain standards of conduct to be expected of competent and reputable solicitors and a departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.

The Respondent led the Secondary Complainer to believe that he was going to apply for legal aid but did not do so. He told the Secondary Complainer that he had instructed a surveyor to provide a report on the valuation of the works in question. He had not done so. He withdrew from acting for the

Secondary Complainer without informing him, having previously told him that he did not have to attend the diet of Debate. Decree then passed against the Secondary Complainer. The Respondent failed to respond to correspondence issued by his regulator.

It is essential that solicitors are honest, truthful and act with integrity. The Respondent fell far short of these standards when he misled his client regarding legal aid and the instruction of a report. The solicitor did not do the best for his client when he withdrew from acting for him and did not communicate effectively with him so that the Secondary Complainer could take action to be present or represented at the Debate. Solicitors must respond to their regulator to allow the Law Society to perform its statutory duties. Solicitors who fail to engage in this process bring the profession into disrepute. The public cannot have faith in the profession if solicitors do not cooperate with the Law Society. The Tribunal considered that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors and therefore met the Sharp test.

In addition to this Complaint, on the date of this hearing, the Tribunal also considered two other Complaints against this Respondent (2018/1809 and 2018/1810). In relation to Complaint 2018/1809, the Tribunal ordered that the Respondent's name be struck off the roll of solicitors in Scotland. Having made that order, the Tribunal considered that its powers were limited in the present case by Section 53(3A)(a) of the Solicitors (Scotland) Act 1980. In relation to a former solicitor who has been struck off the roll, the disposals which the Tribunal can impose are those laid out in Section 53(2)(bb) to (e). The Tribunal noted that the public was already protected by the order for strike off. The Tribunal considered that the conduct was at the middle of the scale of professional misconduct. It therefore considered that the appropriate sanction was Censure and a Fine to mark the gravity of the offending, in particular, the misleading of the Secondary Complainer. The appropriate level of fine in the circumstances was £2,500.

Following submissions from the Fiscal on expenses, the Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Fiscal made a motion that publicity be given to the decision but that only the Respondent need be named. The Tribunal therefore ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and any individual referred to paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests. The Tribunal allowed the Secondary Complainer 28 days from

the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.



**Colin Bell**  
**Vice Chairman**