

**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

**JAMES THOMAS CLARKE, having his place
of business at 28 Glasgow Road, Blanefield**

Respondent

1. A Complaint dated 15 September 2020 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that James Thomas Clarke, having his place of business at 28 Glasgow Road, Blanefield (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was no Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be set down for a Procedural Hearing on 4 December 2020, to be heard on the virtual platform Zoom. Notice thereof was duly served on the Respondent.
5. Prior to the Procedural Hearing both parties invited the Tribunal to discharge the Procedural Hearing administratively and to fix a Hearing. In accordance with Rule 56 of the Tribunal Rules the Procedural Hearing was discharged and a full Hearing set down

for 1 February 2021, to proceed on the virtual platform Zoom. Notice thereof was served upon the Respondent.

6. At the virtual Hearing on 1 February 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. A Joint Minute between the parties agreeing all of the averments of fact and duty had been lodged with the Tribunal. Accordingly, no evidence required to be led and the Tribunal heard submissions from both parties.

7. The Tribunal found the following facts established:-

7.1 The Respondent has his place of business at the address in the instance. His date of birth is 15 August 1963. He was admitted to the roll of solicitors on the 29 August 1994. He was employed by Graham Walker between 1 September 1994 and 4 April 1997 and Sinclair McCormack & Guisti Martin between 7 April 1997 and 4 December 1998. He then practised as James Clarke between 10 December 1998 and 11 June 2001. He returned to employment with John J Smith & Co between 11 June 2001 and 18 April 2002 and then Hughes Dowdall between 1 November 2002 to 26 June 2009. He then practised as James Clarke between 31 August 2009 and 15 March 2011. He was employed by the Public Defence Solicitors Office from the 15 March 2011 until 3 October 2016. He has practised as James Clarke Solicitor since 22 December 2016.

7.2 The Respondent's third period of practising as a sole practitioner began on the 22 December 2016. The Society communicated with him in the early months of 2017 reminding him of the financial obligations of a solicitor generally and making some specific comment upon working as a sole criminal legal aid practitioner. In particular on the 21 May 2017 he was advised that he must maintain a cashbook, prepare a firm bank reconciliation and firm trial balance at the month end and that the records required to be prepared from the date of trading.

7.3 The Society emailed the Respondent on the 14 August 2017 pointing out that he had to submit an Accounts Certificate by 21 January 2018. On the 2 October 2017 the Society wrote by recorded delivery advising that an inspection was to

take place on 17 October 2017. The letter called upon the Respondent to arrange for delivery of his books and records to the Society's offices by that date. The Respondent practised from his home address and the Society's practice is not to inspect a solicitor at a residential address. The letter advised the practice rules require the whole books of accounts, bank passbooks, loose leaf bank statements, statements of account and any other documents relating to the practice. The letter enclosed a questionnaire to be completed and returned by the Respondent in advance of the inspection. The books were not produced timeously. The Respondent sought an extension of the time. The Society granted an extension to the 26 October 2017. The Respondent failed to produce his books by the 26 October. The Society required production by 9.30 a.m. on 8 November 2017. The Respondent again failed to produce his books.

- 7.4 A further deadline was set for the 18 December 2017. The Respondent once again failed to comply with this date. The Inspection of the Respondent's practice was accordingly two months overdue as a result of his failings. The Respondent did not communicate at all with the Society following the request for an extension in October.
- 7.5 The Society intimated to the Respondent on the 20 December 2017 that as a result of his failure to provide his books for inspection the Society had not been able to ascertain whether the Respondent had complied with the Accounts Rules nor was it able to determine the business's true financial position. As a result it was determined that the Respondent should be referred to the Client Protection Sub Committee [CPSC]. The Respondent was invited to submit comments by noon on the 25 January 2018 for consideration by the CPSC on the 1 February 2018.
- 7.6 The Society reminded the Respondent by email on the 17 January 2018 that his Accounts Certificate was due on 21 January 2018. The Respondent did not lodge a certificate timeously. A reminder was sent on the 24 January 2018. The Society intimated this failure would be added to the considerations of the CPSC on the 1 February. An accounts certificate was emailed to the Society on the 25 January 2018. It was incorrectly completed to 21 December 2018. On the 29 January 2018, the Respondent was reminded by the Society that a correctly

completed Accounts Certificate to 31 December 2017 had not been submitted, that he had still not produced his books and records for inspection nor offered an explanation for these failures.

- 7.7 The true position was that the Respondent had not kept properly written up accounting records. He had no books or records to provide to the Society as at 1 February 2018. The CPSC on the 1 February determined to invite the Respondent for interview. The interview was fixed for the 15 February 2018.
- 7.8 The Society received an Accounts Certificate for the period to 31 December 2017 on the 8 February 2018. It was dated 25 January 2018. The Respondent certified: that he submitted accounts to SLAB for payment to his own account; that he made any payments due to third parties from his bank account in advance of, or at any rate not later than, the date on which the matching remittance was lodged in the practice unit's bank account; that he had not handled client monies during the accounting period and had not operated a client bank account; that Rule B6.23 and the Money Laundering Regulations 2007 were not relevant to the Practice Unit; and that, if circumstances changed with the result that he required to hold or intromit with client monies, he would immediately advise the Council.
- 7.9 The Respondent submitted a statement in advance of the hearing of the 15 February 2018. In the statement the Respondent accepted that:-
- 7.9.1 he failed to acquire and maintain the skills necessary to discharge his responsibilities as cashroom manager.
 - 7.9.2 he failed to lodge an accounts certificate timeously.
 - 7.9.3 he failed to co-operate with Financial Compliance Inspectors in that he accepted that the accounting records had not been produced.
- 7.10 The Respondent attended at Interview on the 15 February 2018. A "Note of Interview" was completed. During the interview the Respondent admitted that he was not in a position to maintain his practice units record; he had not prepared day books, reconciliations or trial balances; he had no records since he commenced trading; there were no books in existence in proper form; that he

had failed to remedy these breaches; that he had failed to evidence his practice's true financial position; he apologised for his lack of co-operation but could offer no proper explanation. The interview panel recommended the Respondent be permitted to continue practising and that he should be given an opportunity to remedy his accounts, which would be subject to follow up inspection. The CPSC on the 12 March followed this recommendation.

8. Having given careful consideration to the above noted facts and the detailed submissions for both parties, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect that:-

- a) He failed to keep any records required by Rule B6.7.3 of The Law Society of Scotland Practice Rules 2011 [2011 Practice Rules], was unable to show his firm's true financial status and he failed to balance his books monthly all in complete disregard for the rules;
- b) In failing to keep any of the records required by Rule B6.7.3 and by failing to remedy all errors in terms of Rule B6.4.1 of the 2011 Practice Rules he illustrated his failure to maintain the skills necessary to discharge his cashroom manager responsibilities in contravention of Rule B6.13.2 of the 2011 Practice Rules;
- c) In failing to submit his practice information or provide a proper explanation following four requests from the Financial Compliance team, he failed in his obligation to provide reasonable co-operation to the Complainers in contravention of Rule B6.18.7 of the 2011 Practice Rules; and
- d) Knowing that he was in breach of a number of the Accounts Rules, he failed to take steps to remedy the breaches in contravention of Rule B6.4 of the 2011 Practice Rules.

9. The Tribunal having heard further submissions from both parties in respect to mitigation, expenses and publicity, pronounced an Interlocutor in the following terms:-

By Video Conference, 1 February 2021. The Tribunal having considered the Complaint dated 15 September 2020 at the instance of the Council of the Law Society of Scotland

against James Thomas Clarke, having his place of business at 28 Glasgow Road, Blanehead; Find the Respondent guilty of professional misconduct *in cumulo* in respect of his contraventions of Rules B6.4.1, B6.7.3, B6.13.2, and B6.18.7 of The Law Society of Scotland Practice Rules 2011; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Kenneth Paterson

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 1 APRIL 2021 .

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson

Vice Chair

NOTE

At the Hearing on 1 February 2021, the Tribunal had before it an amended Complaint and a Joint Minute agreeing all of the averments of fact and duties. The Respondent confirmed that the Joint Minute superseded his Answers and that the Answers should be treated as withdrawn. Both parties confirmed that they would proceed by way of submissions.

The Fiscal for the Complainers indicated that he had lodged an Inventory of Productions with the Tribunal Office and invited the Tribunal to receive that late. It contained one document, the minute from the Client Protection Sub Committee interview of 15 February 2018 which was referred to within the Complaint. The Respondent indicated that he had no objection to that motion and accordingly the Tribunal allowed the Production to be lodged late. The Fiscal confirmed that the other document referred to within the Complaint could not be found and he was content to proceed without lodging that.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal took the Tribunal through the averments of fact. In the course of his submissions, the Fiscal highlighted certain factors. He emphasised to the Tribunal that this was the Respondent's third period of working as a sole practitioner. He explained that it was the Law Society's practice to write out to practitioners to remind them about their obligations to comply with the Practice Rules and the Cashroom Rules. Reminders of his obligations were sent to the Respondent over a period of few months. In particular, a letter was sent on 21 May 2017 reminding the Respondent that he required to maintain a cashbook and complete reconciliations and trial balances every month. The Law Society wrote to the Respondent in August 2017 reminding him of his obligation to produce an Accounts Certificate.

The Law Society wrote to the Respondent intimating an inspection date for his firm. The first date set down for the inspection was 17 October 2017. At the request of the Respondent, the inspection was postponed to 26 October 2017. The inspection was again postponed to 8 November and finally 18 December 2017. No explanation for his non-cooperation was offered by the Respondent during this time period.

Reminders required to be sent to the Respondent with regard to his Accounts Certificate.

The Fiscal drew the Tribunal's attention to the Respondent's admission that as at 1 February 2018, he still had no books or records to provide to the Law Society and that was despite at least four months of communications from the Law Society during which he could have remedied the deficiencies.

The Fiscal submitted that whilst he accepted that the Respondent did not hold client funds, the bulk of his work being either agency or legally aided, the Respondent had failed to cooperate with the financial compliance inspectors for a period of at least four months. The Respondent must have been aware of his Accounts Rules breaches in October and yet failed to remedy any of the issues.

The Fiscal drew the Tribunal's attention to the Production that he had lodged late. That note indicated that the Respondent was unable to offer any explanation for his apparent non-cooperation and lack of communication with the Financial Compliance Department. In the same note, the Respondent confirmed that he had no records from the time he commenced trading in December 2016 and that he required to re-build his books. In the same note, the Respondent confirmed to the Sub Committee that he was aware of his duties to remedy any breaches of the Accounts Rules and that as at the date of the interview, he had still not remedied any of the breaches.

The Fiscal drew the Tribunal's attention to the averments of duty which included references to Rules B6.4.1 (duty to remedy), Rule B6.7.3 (requirement to keep properly written up records), Rule B6.13.2 (obligations of cashroom manager), and Rule B6.18.7 (obligation to cooperate with the Council of the Law Society of Scotland).

The averments of misconduct were set out in paragraphs 5.2 to 5.5. Paragraph 5.2 referred to the lack of books and records in terms of Rule B6.7.3. Paragraph 5.3 related to the Respondent's failure to display the necessary skills of a cashroom manager in contravention of Rule B6.13.2. Paragraph 5.4 explained a breach of Rule B6.18.7, in the Respondent failing to cooperate with the Financial Compliance Team. Paragraph 5.5 set out the Respondent's failure to remedy his breaches in contravention of Rule B6.4.

The Fiscal submitted that the test for misconduct was set out in the case of Sharp v Council of the Law Society of Scotland 1984 SC129. The Respondent had set up his business in December 2016. He had kept no records. A reminder was sent to him in May 2017. He was then invited to produce his documents for inspection. On all of these occasions, the Respondent had failed to remedy his breaches of the Accounts Rules.

The Respondent's only communication with the Financial Compliance Team was to ask for one of the extensions. Whilst the Respondent was candid at the interview referred to within the Complaint, the Fiscal submitted that it was the Respondent's duty to be candid with the Financial Compliance Team at a much earlier stage. The Respondent should have explained to the team in October that he had no books and records to produce.

The Fiscal submitted that all of these failures taken together satisfy the requirement of serious and reprehensible conduct.

The Fiscal referred the Tribunal to the cases of *SSDT-v-Harold Joseph* [November 2019]; *SSDT-v-Christopher Forrest* [March 2019]; *SSDT-v-Caroline McCallum* [December 2017]. He submitted that in each of these cases, the Tribunal had emphasised the obligations on a solicitor to keep properly written up books and records and to comply with all of the Practice Rules.

In answer to a question from the Tribunal, the Fiscal confirmed that the duty to remedy any breach of the Accounts Rules applied to a firm account as well as a client account.

SUBMISSIONS FOR THE RESPONDENT

The Respondent submitted that his journey in relation to this Complaint had been an education. The word that had come into his mind in connection with his conduct here was "dilatory". He accepted that in his dealings with the Law Society, he had been dilatory. He accepted that his conduct was inexcusable. Whilst he accepted that his conduct met the standard for unsatisfactory professional conduct, he submitted that it did not meet the test set out for professional misconduct. His awakening to the fact that his conduct had amounted to unsatisfactory professional conduct was established through the intervention of the Law Society and the assistance that the Society had afforded to him to understand how records required to be kept. Members of staff within the Financial Compliance Department had demonstrated to him how simple it could be to adhere to the Rules.

He accepted that he had not remedied any defects in contravention of Rule B6.4. He accepted that he had not acquired the necessary skills of a cashroom manager and had not kept his books in a proper form. He had acknowledged all of this in the interview previously quoted by the Fiscal.

He invited the Tribunal to hold that although he had been dilatory in his dealings with the Law Society, in this case, it did not amount to misconduct. He asked the Tribunal to look at the whole

circumstances of his case and to accept that the gravity was mitigated by the fact that he did not have a client account, that his failings damaged only his own business and that the public were not exposed to any risk. He argued that the foundation of the 2011 Rules was to protect the public. He submitted that any risk to the public was absent here.

He accepted that he had not kept his records in proper form but submitted that it was not correct to say that he had no records at all. If he had not had any financial records, he would not have been able to go back and reconstruct books and accounts. Throughout 2018, the Respondent had been able to demonstrate to the Law Society that he was able to manage his own business.

He asked the Tribunal to accept that there was no active dishonesty on his part here. His conduct was effectively an error on his part in failing to equip himself with the necessary skills of a cashroom manager. He acknowledged that there were failings on his part but argued that they did not amount to serious and reprehensible conduct and did not, therefore, meet the test for professional misconduct.

DECISION

The parties had entered into a Joint Minute agreeing the averments of fact and duties. The averments of misconduct were not accepted. Even if the Respondent had accepted that his conduct amounted to professional misconduct, it would have continued to be a matter for the Tribunal to be satisfied that the conduct described met the test for professional misconduct as set out in Sharp v Council of the Law Society of Scotland 1984 SLT 313 where it is said: -

“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.”

In this case, the Respondent conceded that his conduct amounted to unsatisfactory professional conduct. That is that his conduct fell below the standard to be expected of a competent and reputable solicitor. He argued that his conduct did not amount to a serious and reprehensible departure from this standard of conduct.

The Respondent had practised as a sole practitioner from December 2016 until his interview in February 2018 without maintaining financial records. He had been reminded of his obligations on a number of occasions and had had several opportunities to remedy any defect. Four different dates had been allocated for the inspection of his books and records. No information had been provided by him to the Financial Compliance Team during this time. In fact, no explanation was offered until his interview on 15 February 2018. Throughout that period, the Respondent had taken no steps at all to comply with the accounts rules.

This Tribunal has emphasised on many previous occasions the importance of the accounts rules in maintaining public confidence in the profession. Solicitors are in a privileged and onerous position of dealing with client funds. It is important that the public can have trust and confidence in the profession handling such funds appropriately. The Law Society, in this respect, has the regulatory function of inspecting the profession to ensure that all rules are complied with. If the profession does not cooperate with the Law Society as its regulatory body, then this will undermine public confidence and bring the profession into disrepute.

To have practised for the period of time that the Respondent did without complying with Rule B6.7.3 in keeping adequate financial records and then persistently failing to remedy these defects and failing to cooperate with the Law Society in its execution of its duties to regulate the profession, the Respondent has put at risk public confidence and the reputation of the profession.

In these circumstances, the Tribunal had no hesitation in holding that the Respondent's conduct, *in cumulo*, met the test of serious and reprehensible conduct set out within Sharp and found the Respondent guilty of professional misconduct.

The Tribunal did have one reservation in respect of one of the averments of misconduct. The facts within the Complaint were not clear as to when the Accounts Certificate should have been lodged by the Respondent. Different dates are mentioned within the Complaint. In these circumstances, the Tribunal considered it inappropriate to consider the lateness or otherwise of the Accounts Certificate when considering the whole conduct of the Respondent.

DISPOSAL

The Tribunal invited both parties to make further submissions with regard to the appropriate disposal of the case.

The Fiscal lodged an extract from the Respondent's record card held by the Law Society and confirmed that there were no previous findings of unsatisfactory professional conduct or professional misconduct against the Respondent. The Fiscal emphasised that the Respondent had cooperated with the prosecution and had signed a Joint Minute at an early stage.

The Respondent confirmed that he is 58, married and has three children who all remain at home. He explained that the one-month suspension of his practising certificate that occurred in 2018 was as a result of this case.

The Respondent explained that his family had experienced some difficult personal issues in the course of 2015 and 2016 which he asked the Tribunal to hold were not unconnected with his failures in this case.

He explained to the Tribunal that he has required to pay significant accounting fees to have his books and records brought up to date. He wanted to emphasise to the Tribunal the shame that he felt as a result of this Complaint being brought against him. He invited the Tribunal to consider that the appropriate penalty here should be one commensurate with the risks associated to his conduct. On the basis that he did not deal with client funds, he submitted that a censure would be sufficient.

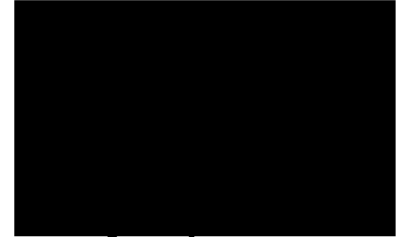
The Fiscal moved for expenses to be awarded in his favour and indicated that he had no submissions with regard to publicity. The Respondent acknowledged that expenses follow success and indicated that he understood that publicity was necessary.

DECISION RE DISPOSAL

This Respondent has been in practice for just over 26 years with no other findings of a disciplinary nature and no outstanding cases. He had cooperated fully the Fiscal in the prosecution of this Complaint and signed a Joint Minute at an early stage. He continues to practise solely criminal law and does not deal with client funds. In this case, there was no loss to any member of the public.

Having regard to the whole facts and circumstances, the Tribunal concluded that the appropriate order was one of censure.

Given the concession made by the Respondent, the Tribunal made the usual order with regard to expenses and publicity.



Kenneth Paterson
Vice Chair