

**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

**STEVEN ARCHIBALD MURRAY, The
MMFW Partnership, 917 Shettleston Road,
Glasgow**

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Steven Archibald Murray, The MMFW Partnership, 917 Shettleston Road, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer.
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 appointed the Complaint to call at a Procedural Hearing to proceed on the virtual platform Zoom on 1 February 2021 and notice thereof was duly served upon the Respondent.
5. At the virtual procedural hearing on 1 February 2021, the Complainers were represented by their Fiscal, Elaine Motion, Solicitor Advocate, Edinburgh. The Respondent was present and was represented by Paul Sweeney, Solicitor, Glasgow.

Both parties confirmed to the Tribunal that they had entered into a Joint Minute. This Joint Minute admitted all of the averments of fact, duty and misconduct. Mr Sweeney confirmed that the Respondent's Answers should be treated as withdrawn. Given the extent of agreement between the parties, they made a joint motion to the Tribunal to convert the procedural hearing into a full hearing. Given the circumstances, the Tribunal granted this motion. The Fiscal made a motion to the Tribunal to be allowed to amend the Complaint which was not opposed by the Respondent and therefore granted by the Tribunal. The Tribunal proceeded to hear submissions from the Fiscal in relation to the question of misconduct. Mr Sweeney confirmed that he had no submissions at this stage.

6. The Tribunal found the following facts established:-

6.1 The Respondent was born on 2 April 1966. He was enrolled as a solicitor on 1 October 1990. The Respondent was employed as an employee in the firm McIntosh & Maclachlan from October 1990 to August 1997. He was then an associate in the same firm from September 1997 to June 2010. The Respondent became a partner in the firm The MMFW Partnership, which incorporated the firms McIntosh Maclachlan and Finlayson Wise, in July 2010. He has been the sole partner in the firm The MMFW Partnership since January 2016. He holds a current practising certificate.

6.2 The Secondary Complainer (MM) is the granddaughter of the late GD. GD had provided in her will that her estate was to be held in trust for her husband. In the event of his death the residue was to be held for the equal benefit of their two children, the Secondary Complainer's mother and aunt. On the death of either the share of the Trust belonging to the deceased would pass to their own children in equal shares.

6.3 GD died in 1946 and her husband died in 1952. The MMFW Partnership, which was McIntosh & Maclachlan at that time, dealt with the administration of the Trust. The trustees were required to pay the income from the Trust to each of the beneficiaries during their lives. On the death of either of them the share of the Trust belonging to the deceased was to pass to their own children in equal shares.

- 6.4 The Secondary Complainer was assumed as a trustee of the Trust on 29 January 1998 and another trustee resigned. From that time there were three trustees namely the Secondary Complainer, her mother and her aunt.
- 6.5 From 1998 the Trust was administered by another partner in the firm, Graham Bryson. He was absent from work for a period from 1 January 2014 and the Respondent then carried out work on the file in the administration of the Trust.
- 6.6 The Secondary Complainer's mother died on 12 October 2012. In terms of her will, dated 21 November 2005, the Secondary Complainer was appointed sole executrix of her estate. The deceased left a number of pecuniary bequests and the residue of her estate was to be divided equally among her four children. There was also a codicil dated 5 May 2009 in the form of a letter by the deceased to the partner, Mr Bryson, instructing a further legacy of £2000.
- 6.7 The Secondary Complainer sent a letter to Mr Bryson on 29 October 2012 advising that she was in the process of listing the estate and looking out share certificates and investments and would arrange to meet him shortly.
- 6.8 On 3 December 2012 Mr Bryson issued the firm's letter of engagement to the Secondary Complainer in respect of the executry. He referred to their recent meeting and enclosed a schedule which he said set out the estate's assets. He also advised that Trust accounts were being made up to determine the balance due to be paid from the Trust to the estate of the deceased.
- 6.9 The following day the Secondary Complainer provided Mr Bryson with details of an RBS investment and a letter from the Pension Protection Fund confirming the sum due to the estate.
- 6.10 On 12 December 2012 Mr Bryson sent a letter to the Secondary Complainer advising her that the provisional Trust accounts had been

prepared up to the date of death of her mother and that a sum due to the estate in respect of an underpayment of income from the Trust had now been transferred to the executry ledger account.

- 6.11 At some point after 4 December 2012 Mr Bryson prepared a statement of assets and liabilities for the estate of the Secondary Complainer's mother. This was only partially completed and revealed various companies who required to be contacted for valuations and date of death figures including Legal and General, BT Plc, HSBC Plc and Friends Life.
- 6.12 There were only three items of correspondence on the firm file in respect of the executry in the year 2013. According to the firm's ledger there were no credit or debit entries in 2013 aside from the issuing of a fee note on 1 July 2013 and the cancellation of said fee note on 25 November 2013. A fee note was not rendered in respect of the administration of the executry until 24 April 2014.
- 6.13 Mr Bryson was absent from work as from 1 January 2014. He had not obtained confirmation in the estate by this time. Thereafter the Respondent undertook work on the file and the administration of the estate.
- 6.14 The Respondent spoke to the Secondary Complainer on 27 January 2014. The Respondent made two file attendance notes in respect of this discussion. In the first one the Respondent updated the Secondary Complainer in relation to Mr Bryson's continued absence from work. The Respondent noted that he was to check the file in relation to contact with Philip Harker, an asset tracing agent, who had corresponded with Mr Bryson regarding an unclaimed asset due to the estate. The Secondary Complainer asked the Respondent to progress matters as soon as possible.

In the second file attendance note the Respondent noted that Mr Bryson had made little progress in the executry and he advised the Secondary Complainer that he would review the file and update her. The

Respondent also noted that the Secondary Complainer wished to make progress rather than taking the file elsewhere.

- 6.15 On 26 March 2014 the Secondary Complainer sent a letter to the Respondent enclosing a letter from Legal and General Assurance. She stated *"I understood that [Mr Bryson] was going to contact them to tell them Mum had died and to seek a final value. It looks as if this has not been done and I would be grateful if you could attend to this."* She also asked the Respondent to give her a timescale as to when the executry would be finalised.
- 6.16 The Respondent wrote to the Secondary Complainer on 31 March 2014. He stated that although Mr Bryson was *"in the process of returning to work, our Mr Murray will attend to the matters noted by you, including contacting Legal and General Assurance, we will then revert to you in the next 10-14 days with an update regarding the timescale for concluding matters."*
- 6.17 The Respondent sent a letter to Legal and General Assurance on 8 April 2014 seeking a date of death valuation. The Respondent sent a further letter to them on 7 May 2014 providing further information to enable them to trace the policy.
- 6.18 On 9 May 2014 the Secondary Complainer sent a letter to the Respondent stating *"In your last letter of 31 March 2014 you indicated that you would be back in touch in 2 weeks to give me some progress on the finalising of Mum's estate. I would be grateful if you could advise me as to what stage you are at."* The Secondary Complainer also asked the Respondent to contact the Royal Bank of Scotland because, although she had arranged for the accounts to be closed, she had received statements which she did not understand.
- 6.19 On 21 May 2014 the Respondent replied advising the Secondary Complainer that he had not yet received a reply from Legal and General Assurance with the date of death valuation to enable him to

progress matters. He also advised that he had written to the bank again requesting clarification of the date of death valuations of all holdings held by them.

- 6.20 On 22 May 2014 the Respondent wrote to Messrs Harker & Co, International Probate and Genealogical Researchers advising that he acted on behalf of the executrix of the Secondary Complainer's mother.
- 6.21 The Respondent wrote to the Royal Bank of Scotland on 23 May 2014. He enclosed a death certificate verification form, asked them to take the required action and sought details of any investments held and their value as at the date of death for the purpose of administering the estate.
- 6.22 On 2 June 2014 the Secondary Complainer wrote to the Respondent stating that *"I thought Mr Bryson said he had applied for Confirmation of Estate but it looks like from the form that he has not. Does that mean it is not needed? The estate is not very big and Mum left a will."* The Secondary Complainer asked if any further information was needed to complete matters.
- 6.23 The Respondent replied to the Secondary Complainer on 4 June 2014. He stated that he had been endeavouring to deal with various matters in relation to her late mother's executry.

Despite the fact that the estate was not large, there were not many assets to ingather and Mr Bryson had prepared a draft statement of assets and liabilities in December 2013, the Respondent stated that *"as we are only now in a position to obtain date of death valuations, we have not as yet lodged an Application for Confirmation. We apologise if this was not brought to your attention previously by our Mr Bryson."* The Respondent advised that he would write to the Secondary Complainer within the next few days with an update.

- 6.24 The Respondent then engaged in correspondence with various organisations over a period of 6 months between 10 June 2014 and 8

December 2014 in relation to different assets in the Executry. His correspondence in respect of each asset was as follows:

- a) HSBC shares -the Respondent wrote to them on 6 and 10 June 2014 asking that a dividend cheque be re-issued in the name of the firm and latterly enclosing a mandate signed by the Secondary Complainer as executrix to enable this to happen. On 20 June 2014 an organisation called Computershare forwarded a Share Certificate in respect of the HSBC shares and stated the method by which the firm could calculate the date of death value of the holding.
- b) Royal Bank of Scotland accounts - these had been closed by the Secondary Complainer but on 11 June 2014 the Respondent wrote to the bank asking that all correspondence be sent to the firm and not the Secondary Complainer. The bank responded on 20 June 2014 confirming that their records had been updated. On 12 November 2014 RBS wrote to the firm noting that they still held balances which were due to the estate and advising that they were anxious to release them as soon as possible. They advised that they could release the funds if the enclosed Agreement form was signed by the Secondary Complainer if Confirmation was not required. The Respondent replied on 14 November 2014 advising that Confirmation would be required in relation to the estate and asking the bank to confirm that they were still able to release the funds. RSB confirmed on 18 November 2014 that a Certificate of Confirmation would be required to release the funds.
- c) Harker & Co Researchers - on 11 June 2014 the Respondent wrote to them referring to their letter of 11 July 2013 to the Secondary Complainer's aunt and their email of 22 July 2013 to the Secondary Complainer. The Respondent sought details of the value of the unclaimed asset so that he could include this in the Confirmation as an unrealised asset. Mr Harker advised that he could not provide an indication of the possible value of the asset unless he was able to make a claim. The Respondent wrote to the Secondary Complainer on 14 August, 11 and 25 September 2014 seeking instructions as to whether or not she wished to intimate a claim. On 3 October 2014

the Respondent instructed Mr Harker to proceed. Further correspondence was received from Mr Harker and on 6 November 2014 the Respondent advised him by email that he had not yet been able to frame an application for confirmation which is why he had not reverted to him.

- d) BT Plc shares - on 15 July 2014 the Secondary Complainer advised the Respondent that her late mother had two lots of BT shares. She advised that she would look through her papers for details. On 30 October 2014 the Respondent wrote to Equiniti in relation to the BT shareholding. He incorrectly stated that *"We act on behalf of the late [the Secondary Complainer] who passed away on 12th October 2012."* He enclosed a Death Certificate Verification Form and asked them to note the fact of the death and take such action as required. The Respondent also sought the value of any shareholding. The letter did not name the deceased. Equiniti replied on 6 November 2014 noting the Secondary Complainer as the shareholder and advising that the Respondent had not provided sufficient information for them to identify the shareholding. They sought the full name and address of the shareholder and a list of all companies in which shares were held. The Respondent sent the information on 18 November 2014 and sent a further letter on 4 December 2014 seeking confirmation of the shareholding which he again incorrectly stated to be in the name of the Secondary Complainer. On 8 and 12 December 2014 Equiniti advised that they could not identify any shareholdings in the name of *[the Secondary Complainer]*.
- e) Legal and General Assurance wrote to the Respondent on 9 December 2014 noting that they had not heard from him since their letter of 9 June 2014. They sought, among other things, the original death certificate and the certificate of confirmation. On 15 December 2014 the Respondent advised them by letter that he was not yet in a position to lodge an application for confirmation.
- f) Pension Protection Fund (PPF) - on the Respondent's file is a letter from them dated 29 November 2012 addressed to the Secondary Complainer confirming that an arrears of compensation amounting to £14,977.37 was due to the estate. The Secondary Complainer had

forwarded this to Mr Bryson on 4 December 2012. Having received no response PPF wrote to the Secondary Complainer again on 9 July 2014. The Respondent wrote to them on 29 July 2014 advising that he was acting on behalf of the Secondary Complainer. Despite the fact that he was already in possession of this, he sought the date of death valuation and advised that he was not yet in a position to obtain Confirmation but hoped to be "*in a position to progress matters within the next few weeks*". By letter dated 14 August 2014 PPF once again confirmed the figure of £14,997.37 as being due to the estate.

- g) ProSearch - on 7 August 2014, the Secondary Complainer's aunt, forwarded a letter to the Respondent from ProSearch about another unclaimed asset. She noted that the Secondary Complainer had sent a similar document to Mr Bryson some time previously. The Respondent wrote to ProSearch on 12 August 2014 advising that he acted on behalf of the executrix of the Secondary Complainer's mother and seeking details of the amount involved. On 29 August 2014 the Respondent sent a letter to the Secondary Complainer advising that the shares were with MMO2 and the valuation was £1235 less the fees of ProSearch. He sought her instructions about proceeding. He wrote to the Secondary Complainer again on 12 September 2014 seeking instructions. Having obtained instructions he wrote to ProSearch on 9 October 2014 instructing them to recover the funds referred to. On 14 October 2014 ProSearch advised that they could not take any action until Confirmation was granted.

6.25 The Respondent sent a letter to the Secondary Complainer on 13 November 2014 stating that draft Forms C1 and C5 were enclosed for her to check and discuss any additions or amendments required. The Secondary Complainer advised the Respondent on 24 November 2014 that the forms had not been enclosed. The Respondent sent replacement draft forms on 9 December 2014.

6.26 On 6 January 2015 the Respondent had a telephone conversation with the Secondary Complainer regarding revisals to the Form C1. The revisals

included "*consider adding info re codicil*" and also adding information regarding Diageo, Prudential and Axa Sun Life. The Secondary Complainer then sent an email to the Respondent advising that she had been unable to locate the AXA Sunlife policy. The Respondent wrote to them on 8 January 2015. He also wrote to Diageo on the same date seeking details of the shareholding.

- 6.27 On 19 January 2015 Sun Life sent a letter to the Respondent confirming the sums due to the estate in respect of two policies held by the deceased. They asked the Respondent to complete and return a claim form and a payment request form so that they could continue dealing with the claims.
- 6.28 On the same date Diageo sent a letter to the Respondent advising that they could not locate a shareholding. The Respondent sent a further letter to Diageo on 21 January 2015 seeking details of the shareholding but providing them with no additional information.
- 6.29 On 22 January 2015 the Respondent sent an email to Mr Harker advising that he hoped to be in a position to obtain Confirmation within the next two to three weeks.
- 6.30 On 26 January 2015 Friends Life wrote to the firm asked for further information including policy numbers and any reference on previous AXA Sunlife correspondence.
- 6.31 The Respondent wrote to the Secondary Complainer on 27 January 2015 advising her that Sunlife had identified two policies with sums payable to the estate but these could not be obtained until confirmation was granted. He also advised that Diageo could not locate information regarding her late mother's shareholding and asked if the Secondary Complainer had any information which could assist.
- 6.32 On 13 February 2015 the Respondent called Diageo regarding the shareholding and on 16 February 2015 they confirmed that the Secondary Complainer's mother and aunt were the registered shareholders and sought

a certified copy death certificate together with the share certificates for replacement *"as requested in our letter to you dated 2 May 2014"*.

- 6.33 On 24 February 2015 the Respondent wrote to the Secondary Complainer advising that it appeared that the Diageo holding related to the Trust and calculated that the date of death value of one half of this shareholding would be £38,829.55. He asked the Secondary Complainer to confirm whether she would accept this valuation for confirmation purposes.
- 6.34 The Respondent spoke to the Secondary Complainer on 27 February 2015. She indicated that she thought the position regarding Diageo was as stated in recent correspondence. The Respondent advised that he should still make enquiries and once complete then consider whether the Trust fund needed to be allocated.
- 6.35 The Respondent sent a copy of GD's will to the Secondary Complainer on 11 March 2015 so that she could consider the terms of same with regard to the future administration of the Trust.
- 6.36 The Respondent had a telephone conversation with the Secondary Complainer on 12 March 2015 discussing the application for confirmation. The Secondary Complainer's siblings were concerned by the delay and the Respondent noted her instructions to progress matters.
- 6.37 On the same date he wrote to Diageo advising that he was still attempting to establish whether the shareholding was held by the Secondary Complainer's mother and aunt as trustees. He asked them to confirm if this was correct.
- 6.38 Mr Harker sent an email to the Respondent on 16 March 2015 noting that it was 7 weeks since he had heard from the Respondent. The Respondent replied the following day advising that *"unfortunately we are not yet in a position to lodge an application for Confirmation as we are attempting to clarify whether this shareholding in Diageo PLC is to be included within the estate of the deceased, or, had alternatively, as we suspect, being*

held in trust by her as a trustee. Hopefully we will resolve this matter within the next few weeks and revert to you further at that time."

- 6.39 The Respondent had a meeting with the Secondary Complainer on 25 March 2015. They discussed the position regarding the executry and the Secondary Complainer asked the Respondent why the trust was not included in the application for Confirmation. She also asked the Respondent how the figure of £16,000 had been arrived at in respect of Trust income. The Respondent advised the Secondary Complainer that the capital of the Trust was not to be included in her mother's estate and the figure of £16,0000 was half of the income held on account for the Trust as at the date of death.

The Respondent's file note of that meeting noted that the Trust was to be excluded and also the Diageo shares which were Trust investments.

- 6.40 On 27 March 2015 the Secondary Complainer sent an email to the Respondent stating, "*I am hopeful that Mum's estate can be wound up with some speed.*"
- 6.41 On the same date the Respondent wrote to the Secondary Complainer enclosing revised Forms C1 and C5 for her perusal.
- 6.42 On 31 March 2015 Diageo wrote to the Respondent and confirmed that the shares had originally been registered in the names of the Secondary Complainer's mother and aunt and a third person and that the third person had been removed in November 1999. They stated that there was no reference to the GD Trust.

The three named persons were the trustees of the Trust until the resignation of the third person in 1998.

- 6.43 On 2 April 2015 the Respondent wrote to each of the Secondary Complainer's siblings advising that he was now in a position to lodge an application for Confirmation. He further advised that the timescale for the

lodging and processing of this was 4 to 6 weeks and that he should be able to ingather most of the estate within a period of 6 to 8 weeks thereafter.

- 6.44 The Respondent sent further Forms C1 and C5 to the Secondary Complainer and on 2 June 2015 she wrote to him advising that she had now signed and returned Forms C1 and C5. She stated, *"I trust we will now be in a position to move things on swiftly and finalise settlement of my late mother's estate."*
- 6.45 On 8 June 2015 the Secondary Complainer sent a letter to the Respondent stating: *"I emailed you before I left on holiday on 25 May 2015 asking for a reply on my return regarding progress with my Mother's estate. In the letter to my siblings you committed to progress by the end of May. Neither they nor I have heard from you. Is there a problem causing further delay?"*
- You were also going to arrange an appointment for me of [sic] give me details of someone I could discuss Inheritance Issues with in regards to the Trust.*
- If I do not hear from you in the next two weeks I am going to take further action."*
- 6.46 On 9 June 2015 the Secondary Complainer sent an email to the Respondent acknowledging receipt of Forms C1 and C5. She queried why the Diageo shares were mentioned in the inventory as she thought that they had agreed that the shares belonged to the Trust and therefore shouldn't form part of her mother's estate. She also questioned the figure for the net value of the estate for inheritance tax stating: *"Could you please check box 22 on page 5. It may be that is correct but it just seems strange to me?"*
- 6.47 The Respondent replied on 12 June 2015 apologising for the inclusion of the Diageo shares and enclosing revised Forms C1 and C5. He sent the principals to the Secondary Complainer for signature on 19 June 2015.

- 6.48 The Respondent sent the application for confirmation to the Sheriff Clerk at Greenock Sheriff Court on 24 June 2015, some 18 months after working on the estate file up to July 2014 and then taking over the administration of the estate and 2 years and 8 months after the date of death.

The Respondent's covering letter to the Sheriff Clerk stated that the application for Confirmation, deceased's will and firm cheque were enclosed. There was no reference in the letter to the codicil dated 5 May 2009 which the deceased had sent to Mr Bryson.

In a letter to the Secondary Complainer on 30 June 2015 the Respondent confirmed that he was lodging her "*late mother's will and principal Form C1 and Form C5*".

The Respondent did not submit the codicil to the Sheriff Clerk in respect of the application for Confirmation.

- 6.49 In the application for Confirmation the Respondent included in the inventory of the estate the sum of £16000 in respect of "*entitlement from GD's Trust (Est.)*". The total estate for Confirmation purposes was £273,144.98. This was below the threshold of £325,000 for inheritance tax purposes.
- 6.50 Confirmation was granted on 17 July 2015. The estate was not extensive and the Form C1 narrated the following:

1. Jewellery	£ 3,000.00
2. Friends Provident Life Policies	£ 37.00
3. RBS accounts (a) and (b)	£ 1,417.30
4. Entitlement from the Trust	£ 16,000.00
5. HSBC Holdings shares	£ 672.69
6. BT Plc shares	£ 1,202.85
7. MM02 shares	£ 1,238.00
8. Legal and General Assurance - contract numbers	£ 231,579.77
9. Pension Protection Fund	£ 14,977.37
10. AXA Sun Life Policy	£ 3,020.00
TOTAL	£ 273,144.98

6.51 The Respondent advised the Secondary Complainer that it was not necessary to include the deceased's share of the capital of the Trust in the Form C1.

6.52 The Trust was a pre-2006 (pre Finance Act 2006) interest in possession (or liferent) trust. Accordingly the applicable law is contained in the Inheritance Tax Act 1984 section 49 (1) (as amended by the Finance Act 2006) which states that:

"A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists."

Accordingly the Secondary Complainer's mother's one half share of both the capital and accrued income of the Trust should have been included in the inventory of her estate in the application for confirmation.

6.53 In respect of the Trust income from 2008 to September 2012 the Secondary Complainer's mother and aunt had been paid £200 each per month from said income. These payments were made by Mr Bryson.

On 31 December 2012 the sum of £490.08 was transferred from the Trust ledger to the Executry ledger. There were no further payments of Trust income made to the Executry after this date.

From November 2012 the income payments to the Secondary Complainer's aunt were increased to £400 per month.

From the time the Respondent was dealing with the Trust and the Executry in January 2014 payments of £400 per month were made to the aunt until July 2014. Thereafter the payments were increased to £800 per month and those payments continued with the last payment being issued on 6 November 2015.

- 6.54 The provisions of Clause 5(d) of GD's will clearly state that on the death of one of her daughters, that daughter's interest passed to her children. Accordingly on the mother's death, one half interest in the Trust vested in her children and her share of the income should have been paid to her children not to the aunt.
- 6.55 The Secondary Complainer wished to obtain further advice about how the Trust should be dealt with in her mother's estate and asked the Respondent to recommend an accountant who understood trusts.
- 6.56 On 16 June 2015 the Respondent wrote to Mr John Cleary, a chartered accountant at Aiton & Co Glasgow, in relation to the Trust and provided documentation so that Mr Cleary could provide the Secondary Complainer with some assistance.
- 6.57 On 17 September 2015 the Secondary Complainer also wrote to Mr Cleary in advance of a meeting she had arranged with him on 21 September 2015. In particular the Secondary Complainer sought clarification as to how the sum of £16,000 was calculated in relation to the Trust in the Confirmation to her mother's estate and whether or not it was correct that her aunt should now be receiving her mother's share of the Trust income.
- 6.58 Having met with the Secondary Complainer, Mr Cleary sent an email to the Respondent on 21 September 2015 seeking details of the shareholdings and funds held by the Trust as at the date of death of the Secondary Complainer's mother. Mr Cleary stated: *"From my reading of the will it would seem that on [her] death her half share of the Trust would pass to her children, thereafter the remaining income would be due to [the aunt] and eventually form part of her estate. At the end of the day all assets would eventually pass to [the Secondary Complainer's] children as they are the beneficiaries of [the aunt]? Does this sound right to you?"*

At the moment [the aunt] ... is receiving all of the income, though she would be happy to only receive half. The four 'children' may have mixed views on this matter."

6.59 The Respondent replied the following day. He did not comment on Mr Cleary's understanding of the position but provided details of the Trust's shareholdings.

6.60 On 19 October 2015 the Respondent sent an email to Mr Cleary referring to previous discussions regarding GD's will which created the Trust. The Respondent stated that he had reviewed the will in detail and that clause 5 subsection (c) onwards governed the present position. In particular he referred to subsection (d) in terms of which he stated that the income of the Trust was to be paid to each of GD's children during their lifetime and after their death the Trustees were to stand in possession of the capital and income of such share for the children of the deceased children. He therefore concluded that a one half share of the capital and income of the Trust should be paid to the Secondary Complainer and her siblings. The Respondent's view was that the Trust would continue to run for the lifetime of the children of the Secondary Complainer's mother.

6.61 GD's will, dated 12 July 1927, at paragraph 5 thereof, in respect of her residuary trust fund devised and bequeathed her Trustees:

"(b) to pay the income arising therefrom unto my husband during his lifetime.

(c) Subject as aforesaid and also subject as hereinafter mentioned as to the capital as well as the income of my residuary trust fund for all or any of my children or child who being male attain the age of twenty one years or being female attain that age or marry under that age and if more than one in equal shares.

(d) I Direct that my Trustees shall stand possessed of the share of each child or the investments representing the same UPON TRUST to pay the income thereof to such child for his or her life.....and from and after his or her death to stand possessed of the capital and the income

of such share for his or her children or child who being male attain the age of twenty one years or being female attain that age or marry under that age and if more than one in equal shares."

- 6.62 Mr Cleary provided the Secondary Complainer with a copy of the Respondent's email. He stated that his reading of the Respondent's reply was that the deceased's share of the Trust should be included in her estate but he asked him to clarify the position in simple terms.

The Secondary Complainer stated that this was the first time that it had been mentioned by the Respondent that the Trust was to continue for the lifetime of her and her siblings. She had expected that the Trust would be wound up on the death of her aunt.

- 6.63 The Respondent then wrote to Mr Cleary on 23 October 2015 setting out his interpretation of the Trust. He stated that as the Trust was an on-going Trust he did not consider that any capital funds from the Trust fell to be included in the estate of the deceased but that her entitlement to receive income from the Trust passed to her children on her death. He explained that, on this basis, he lodged an application for Confirmation including a notional figure of £16,000 representing any income which had accrued up to the date of death but which had not been paid out to the deceased.

The Respondent asked if Mr Cleary had a different view on the Trust capital standing that the Trust was not being wound up at that time.

On receipt of this letter Mr Cleary sent a copy to the Secondary Complainer noting that its content was not as clear as he would like and advising that the Secondary Complainer may wish to obtain a second legal opinion and also instruct another firm to take over the administration of the Trust.

- 6.64 On 28 October 2015 the Secondary Complainer sent a letter to the Respondent stating that she had been in touch with Mr Cleary several times regarding the Trust and how it should be accounted for in her

mother's estate and that she had concluded that she required another legal opinion. Accordingly she had asked a solicitor at the firm Turcan Connell to look at the Trust documentation to advise her.

The Secondary Complainer further stated that as it had been so difficult for the Respondent's firm to produce tax certificates and make regular payments to her aunt and mother, she had asked Turcan Connell to take over the administration of the Trust.

She advised that Turcan Connell would be in touch with him shortly for the information required and hoped that the Respondent would send that to them speedily. She stated that: *"It is important that my Mother's estate is settled quickly and that the correct approach is taken of the Trust for Confirmation purposes. I trust I will hear further from you with regard to my Mother's estate very soon."*

- 6.65 The Secondary Complainer also wrote to Turcan Connell on the same date confirming that she wished them to take over the administration of the Trust.
- 6.66 On 3 November 2015 Turcan Connell sent a letter to the Respondent's firm advising that they had been instructed by the Secondary Complainer in respect of both the administration of her mother's estate and the Trust. They requested the following documents:
- a) The Trust Deed;
 - b) The IHT100 recording the termination of the mother's interest in the Trust;
 - c) The mother's will and Confirmation;
 - d) The C5 or IHT400 for the mother;
 - e) Any tax information and references for the Trust and the Estate;
 - f) Any other relevant paperwork in relation to both the Estate and the Trust.

- 6.67 On 12 November 2015 the Secondary Complainer sent an email to the

Respondent in relation to the progress of her mother's executry. She concluded by stating *"I hope that you have now sent [Turcan Connell] all the information pertaining to GD's Trust and would be grateful if you could confirm this to me."*

- 6.68 The Secondary Complainer sent an email to Turcan Connell on 16 November 2015 advising that she had just spoken to the Respondent who said that he would send the requested information to them that day or the following day.

The Respondent had advised the Secondary Complainer that he had found an old metal box containing old information on the Trust and the Secondary Complainer advised him that she wanted this sent to Turcan Connell in case there was anything useful in it. She also offered to deliver it herself.

- 6.69 Having received no response from the Respondent, Turcan Connell sent a further letter to the Respondent's firm on 23 November 2015 enclosing a copy of their previous letter and requesting the information contained therein as soon as possible.

- 6.70 On 25 November 2015 the Secondary Complainer sent an email to the Respondent stating that she was very disappointed to receive an email from Turcan Connell advising that they had not yet received the information in relation to the Trust. She asked the Respondent to pass this to them very quickly and stated that she would come to his office to transport the metal file.

- 6.71 The Respondent replied on Friday 27 November 2015. He stated: *"We apologise for the delay in reverting to the solicitors now instructed in connection with GD's Trust. We would advise you that the letter had requested substantial information, not just in relation to the operation of the Trust."*

The Respondent stated that he had located "*the Trust box*" which he would forward to Turcan Connell but in the interim he would provide them with current information including the Confirmation documentation and copy papers previously sent to the Secondary Complainer and the accountant Mr Cleary.

The Respondent advised that the documentation should be received by them by "*Monday morning at the latest*" (Monday being the 30 November 2015). The Respondent stated that he would then make arrangements with Turcan Connell for providing them with the remaining documentation.

- 6.72 On the same date the Respondent sent a letter to Turcan Connell asking them to note that he had only recently been dealing with certain aspects of the Trust mostly insofar as they tied in with the estate of the Secondary Complainer's mother. He stated that the Trust had been ongoing for a considerable period of time and that the information from the early days of the Trust was located in his firm's basement storage. In the meantime he provided them with certain items which were not specified in the letter.
- 6.73 On 1 December 2015 Turcan Connell sent an email to the Secondary Complainer advising her that they had not yet received the papers and asking her to obtain an update from the Respondent.
- 6.74 On 7 December 2015 the Secondary Complainer instructed the Respondent to make interim payments to the residuary beneficiaries of her mother's estate. The Respondent made these payments between 9 and 14 December 2015.
- 6.75 The Secondary Complainer attended for an appointment at the office of Turcan Connell on 8 December 2015 and, on discovering that the Respondent had not yet provided all the requested papers and documents, the Respondent instructed Turcan Connell to take over the administration of her mother's estate and signed a mandate authorising the Respondent to send all papers in relation to both the Trust and the Executry to Turcan Connell.

- 6.76 Turcan Connell then sent a further letter to the Respondent on 8 December 2015 enclosing the mandate signed by the Secondary Complainer requesting all papers in connection with both the Trust and the deceased mother's executry.

They commented that the Respondent had been instructed on several occasions by the Secondary Complainer to send the paperwork to Turcan Connell and they sought all of the information requested in the mandate as a matter of urgency, failing which, they would be contacting the Law Society of Scotland regarding the delay by the Respondent.

The mandate stated that the Secondary Complainer authorised the Respondent's firm to deliver to Turcan Connell "*all papers, files, trust deeds, valuation of the Trust as at 12 October 2012, testamentary writings, executry files, "Black Tin" of papers, all cash balances and any other papers and correspondence files held by you on my behalf as Trustee of the above Trust and as Executrix of the above Estate.*"

- 6.77 On 11 December 2015 the Respondent sent a letter to the Secondary Complainer enclosing documentation from HSBC for her to complete and return to him in relation to her late mother's estate. He did not mention the mandate from Turcan Connell or seek clarification from her as to whether or not he still had any instructions in respect of the Executry.
- 6.78 On 17 December 2015 the Respondent sent a letter to Turcan Connell enclosing "*copy account and original trust deed*".

The following day Turcan Connell sent a letter to the Respondent asking him to send the items referred to in the mandate as soon as possible.

- 6.79 On 21 December 2015 Mr Bryson discontinued working in the firm and left the partnership on 31 December 2015. The Respondent was thereafter the sole principal of the firm. The Respondent was also the client relations manager of said firm.

- 6.80 By the beginning of January 2016 Turcan Connell had still not received all of the papers from the Respondent in relation to the Trust and the Executry. They wrote to the Respondent again on 6 January 2016 acknowledging receipt of the registered extract will of GD and copy bank statements and sought the following, previously requested, items as a matter of urgency, failing which they said that they would consult the Law Society regarding the Respondent's failure to obtemper the Secondary Complainer's mandate:
- a) Files relating to the Trust and the Estate;
 - b) A valuation of the Trust as at 12 October 2012;
 - c) All executry papers for the estate of the Secondary Complainer's mother;
 - d) Black tin of papers;
 - e) All cash balances;
 - f) Any other papers and correspondence files connected with the Trust and the Estate.

- 6.82 The Respondent sent an email to the Secondary Complainer on 7 January 2016 advising that he had tried to deliver the black box of papers to Turcan Connell between Christmas and New Year but had been unable to gain access to their office building.

He noted that the letter from Turcan Connell related also to all executry papers in relation to the Secondary Complainer's mother's estate and that since instructing that firm the Secondary Complainer had also instructed him in relation to various distributions and had continued to provide him with instructions.

Despite the mandate referring clearly to both the Trust and the Executry the Respondent asked the Secondary Complainer to clarify whether her mandate related to the Trust on its own or if she also wished him to forward the file papers in relation to the Executry to Turcan Connell.

6.82 On 8 January 2016 Turcan Connell wrote to the Respondent advising that their office had been open between Christmas and New Year and had they been notified that he wished to deliver the papers out with office hours they would have made arrangements to receive them. They confirmed that their instructions from the Secondary Complainer were in relation to both the Trust and the Executry and that the mandate signed by her clearly referred to both matters.

They advised that they expected the Respondent to obtemper the mandate in full in respect of both matters as a matter of urgency.

6.83 On 12 January 2016 the Respondent wrote to Turcan Connell enclosing various papers namely:

- a) File papers and ledger card for the Executry;
- b) File papers and ledger card for the Trust;
- c) A cheque in respect of the credit balance for the Executry;
- d) Black box of Trust papers.

The Respondent advised that a cheque in respect of the credit balance for the Trust was to follow.

6.84 On 28 January 2016 Turcan Connell wrote to the Respondent, having reviewed the Trust papers sent to them, requesting the following:

- a) Deeds of Assumption and Conveyance and Minutes of Resignation in respect of the Trustees;
- b) The most recent set of Trust Accounts (the most recent ones within the papers delivered were dated 2010/2011);
- c) A cheque and full ledger prints for the balance in the Trust Account.

Turcan Connell reminded the Respondent that these papers had been detailed on the original mandate signed by the Secondary Complainer and sought them as a matter of urgency.

Having received no further papers from the Respondent, Turcan Connell sent a further letter to the Respondent on 8 February 2016 enclosing a copy of their letter dated 28 January 2016. They also sought share certificates for the Trust's shareholdings in various companies.

In respect of the Executry they also noted that the funds held in the deceased's RBS accounts had not been ingathered by the Respondent and asked if he had now received these funds.

- 6.85 On 8 February 2016 the Respondent sent a letter to Turcan Connell enclosing the Deed of Resignation and Assignment in respect of the appointment of the Secondary Complainer as a Trustee of the Trust.
- 6.86 On 26 February 2016 a solicitor at Turcan Connell, spoke to the Respondent on the telephone to enquire whether or not the Respondent had managed to trace the papers relating to the Trust and in particular the previous accounts and tax returns. The Respondent explained that he was awaiting a response from Mr Bryson who had previously dealt with the Trust.
- 6.87 On 29 February 2016 Turcan Connell prepared an interim report for the trustees of the Trust. The Report is incorrectly dated 29 February 2015. They noted that despite requesting all relevant papers and files the documents provided were incomplete and that they still awaited further documents from the Respondent.

The Report confirmed that the Secondary Complainer's mother was entitled to receive an income from the Trust after the taxation of trusts changed in March 2006 and the inheritance tax rules stated that the capital value of her interest in the Trust should be aggregated with the value of her own personal estate when calculating the total inheritance tax liability.

Turcan Connell estimated that her one-half share of the Trust capital would be £90,000 (subsequently calculated to be £123,880.52) and this figure would therefore need to be added to the figure of £273,000 which

had been returned by the Respondent on the Confirmation application for her estate. The total value of the estate should have been £363,000 and as such in excess of the nil rate band of £325,000 for inheritance tax purposes.

Turcan Connell explained in the report that they would be asking HMRC to exercise its discretion to allow a late claim to transfer to the estate any remaining nil rate band from the estate of her late husband.

Turcan Connell advised that the Trustees should consider making a complaint to the SLCC regarding the way in which the Respondent had behaved in relation to the transfer of papers to them and the time taken to do so and also in relation to the deficiency in the advice provided to the Trustees.

- 6.88 Turban Connell spoke to the Respondent again on 11 April 2016 advising that they urgently required printouts of the firm ledger in respect of the Trust and the Executry so that they could identify the balance of each as at the date of death. This information was required as part of the inheritance tax return for the Trust and an amended C5 return for the Estate. The Respondent advised that he would need to speak to his cashier when she returned the following day.
- 6.89 Turban Connell did not receive this information from the Respondent and they called the Respondent's firm on 13 and 14 April 2016 leaving messages for the Respondent to call back. They then sent a facsimile to the Respondent on 14 April seeking the information requested and advising that they required to provide the information to HMRC as a matter of urgency as interest and penalties were running on the outstanding balance of inheritance tax due. They advised that failure to provide the information would result in a claim being made to the Respondent's firm's Professional Indemnity Insurer.
- 6.90 On 22 April 2016 the Respondent provided Turcan Connell with further correspondence in relation to the shareholdings of the Trust.

- 6.91 Turcan Connell wrote to the Secondary Complainer on 12 July 2016 and advised her that they were still chasing the Respondent for further papers in relation to the Trust.

In particular they stated that they did not have all of the tax certificates and had requested these on numerous occasions and the most recent income and expenditure breakdown was from 2011. As they did not have previous tax returns and accounts for the Trust their tax and accounts team were trying to establish the position.

- 6.92 On 25 January 2017 Turcan Connell sent a letter to the Respondent advising that certain share certificates for the Trust were missing and that others were no longer valid.

- 6.93 The Respondent replied to this letter on 7 March 2017 advising that he could not locate the share certificates.

- 6.94 On 10 February 2017 the Secondary Complainer sent a letter of complaint to the Respondent. In particular she stated that the administration of the Trust had not been managed correctly, there had been a delay in obtaining Confirmation for her mother's estate and the Confirmation submitted to the Inland Revenue was incorrect. She sought a response within 28 days from the date of her letter.

- 6.95 The Respondent did not reply to the Secondary Complainer in relation to her letter of complaint.

He sent a letter to Turcan Connell on 7 March 2017 in response to their letter of 25 January regarding share certificates. He did not mention the Secondary Complainer's letter of complaint.

- 6.96 The Respondent then wrote to Turcan Connell on 24 March 2017 stating that he had received a letter from the Secondary Complainer *"regarding various aspects of [GD's] Trust"*.

He further stated that:

"As you are currently agents acting for [the Secondary Complainer] in relation to the Trust, we would propose to respond to this letter direct to yourselves.

If, however, you wish us to reply to [the Secondary Complainer] please advise ourselves accordingly."

The Respondent advised that he awaited a response from them as to whom he should issue a response to the complaint.

6.97 The above letter was date stamped as being received by Turcan Connell on 28 March 2017 and they sent a response on the same date suggesting that the Respondent should respond directly to the Secondary Complainer in relation to any enquiries raised by her.

6.98 The Secondary Complainer submitted a complaint to the SLCC regarding the Respondent on 30 March 2017.

6.99 The Respondent did not, at any time, reply to the Secondary Complainer in relation to her letter of complaint.

7. Having regard to the foregoing facts and the submissions from the Fiscal, the Tribunal found the Respondent guilty of Professional Misconduct *singly* in respect that:-

- a) In the period between 1 January 2014 and 17 July 2015 he unduly delayed in obtaining confirmation in the estate of the late RW;
- b) In the period between 8 December 2015 and 12 July 2016 he unduly delayed and/or failed to timeously implement a mandate sent by the Secondary Complainer's new agents seeking all papers and documents in relation to both the Trust and the Executry despite repeated requests from the Secondary Complainer's new agents; and

- c) He failed to comply with his responsibilities as client relations manager of the firm by failing to send a response to the Secondary Complainer in relation to her letter of complaint dated 10 February 2017.

And, *in cumulo* with the above, in respect that:-

- a) In the period between 1 January 2014 and 8 December 2015 he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly advised the Secondary Complainer that the late RW's share of the Trust capital should be excluded from the application for confirmation and thereafter submitted an application for confirmation excluding said capital; whereas a capital sum of approximately £90,000 should have been included thus bringing the whole value of the estate above the threshold for inheritance tax purposes; and
- b) In the period between 1 January 2014 and 8 December 2015 he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly paid the late RW's share of the income from the Trust to the Secondary Complainer's aunt, whereas said share of the Trust income should have been paid to the late RW's children.

- 8. Having heard further submissions from the parties, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 1 February 2021. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Steven Archibald Murray, The MMFW Partnership, 917 Shettleston Road, Glasgow; Find the Respondent guilty of professional misconduct *singly* in respect that (a) In the period between 1 January 2014 and 17 July 2015 he unduly delayed in obtaining confirmation in the estate of the late RW; (b) In the period between 8 December 2015 and 12 July 2016 he unduly delayed and/or failed to timeously implement a mandate sent by the Secondary Complainer's new agents seeking all papers and documents in relation to both the Trust and the Executry despite repeated requests from the Secondary Complainer's new agents; and (c) He failed to comply with his responsibilities as client relations manager of the firm by failing to send a response to the Secondary Complainer in relation to her letter of complaint dated 10 February 2017 and *in cumulo* in

respect that (a) In the period between 1 January 2014 and 8 December 2015 he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly advised the Secondary Complainer that the late RW's share of the Trust capital should be excluded from the application for confirmation and thereafter submitted an application for confirmation excluding said capital; whereas a capital sum of approximately £90,000 should have been included thus bringing the whole value of the estate above the threshold for inheritance tax purposes; and (b) In the period between 1 January 2014 and 8 December 2015 he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly paid the late RW's share of the income from the Trust to the Secondary Complainer's aunt, whereas said share of the Trust income should have been paid to the late RW's children; Censure the Respondent; Fine him in the sum of £1,000 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; Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.

(signed)

Kenneth Paterson

Vice Chair

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 19 APRIL 2021 .

IN THE NAME OF THE TRIBUNAL



Kenneth Paterson
Kenneth Paterson
Vice Chair

NOTE

This Complaint was set down to call as a procedural hearing on the virtual platform Zoom on 1 February 2021. Prior to that date, both parties had entered into a Joint Minute which agreed all of the averments of fact, duty and misconduct. When the case called, both parties invited the Tribunal to convert the procedural hearing into a full hearing so that the Complaint could be dealt with on that date. In all the circumstances, the Tribunal granted the motion. Both parties confirmed that they would proceed by way of submissions only. Mr Sweeney confirmed that the Answers previously lodged on behalf of the Respondent should be treated as withdrawn. The Fiscal made a motion to amend the Complaint, these amendments being set out in an amended Complaint that had been emailed to the Tribunal Office. Mr Sweeney confirmed he had no objection to that motion and accordingly it was granted.

The Tribunal proceeded to hear submissions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal explained that there were five central points to the alleged misconduct on the part of the Respondent. These were:-

1. Undue delay, between January 2014 and July 2015, in obtaining confirmation in an estate.
2. Failing to lodge a codicil to the will with the confirmation.
3. Failing to exercise the appropriate level of skill demonstrated by (a) giving the wrong advice about the share of the trust forming part of the deceased's estate and (b) making payment from the trust incorrectly to the wrong recipient.
4. Undue delay (seven months) in implementing a mandate.
5. Failing to respond to the Secondary Complainer's complaint.

She explained that the background to the circumstances began with the creation of a trust in 1952, set up by the Secondary Complainer's great grandmother. This trust was predominantly handled by the Respondent's partner until December 2013 when the partner fell ill. The Secondary Complainer's mother, RW, was a beneficiary and trustee of this trust. She died on 12 October 2012, a little over a year before the Respondent's involvement. The Secondary Complainer was the sole executrix on her grandmother's estate.

The Respondent began to be involved in January 2014. There are comments in the file attendance notes, made by the Respondent, noting that his partner had made little progress. On the basis that the Respondent had recognised the failure in making progress in the confirmation, the Respondent was under an obligation to move forward as quickly as possible, whilst taking into account that he had had to take on the file unexpectedly.

The file discloses that the Respondent was chased by the Secondary Complainer to make progress on a regular basis. The Respondent seems to take steps to progress matters but in the course of this makes fundamental mistakes which add to the delay. The Secondary Complainer expressed concern to the Respondent regarding the delay in progressing matters. In March 2016, the Respondent gave the Secondary Complainer the mistaken advice that the deceased's share of the trust need not be included in the application for confirmation. The Secondary Complainer continued to express concerns. Overpayments were being made from the trust to the wrong recipients. The Secondary Complainer sought advice elsewhere because of her concerns. Her new agents sent a mandate to the Respondent on 8 December 2015, although the Respondent was well aware sometime before that of the Secondary Complainer's intention to transfer her business elsewhere. Following delay in implementing that mandate, the Secondary Complainer made a formal complaint on 10 February 2017.

One of the members of the Tribunal enquired of the Fiscal in relation to the Respondent's failure to lodge the codicil with the application for confirmation whether it would have been absolutely necessary to do so. In her submission, the lodging of the testamentary documents with the application for confirmation was not simply to identify the executors. She submitted that if all codicils were not also lodged, there was a risk that when an executor took on his/her duties something could be missed. She confirmed that the codicil in this case simply added an extra beneficiary.

The Fiscal invited the Tribunal to find the Respondent guilty of misconduct singly in relation to all of the averments of misconduct. If the Tribunal was not satisfied that each averment amounted to misconduct, she submitted they at least amounted to misconduct *in cumulo*.

SUBMISSIONS FOR THE RESPONDENT

Mr Sweeney confirmed that the Respondent accepted that professional misconduct had been established as set out within the Complaint and that he had no comment to make at this stage in proceedings.

DECISION

The Tribunal had before it a Joint Minute agreeing all of the averments of fact and accordingly, the Tribunal found the averments of fact established. The Joint Minute also agreed the averments of professional misconduct. However, the Tribunal itself must always be satisfied that conduct established before it meets the test for professional misconduct. That test is set out in the case of Sharp v Council of the Law Society of Scotland 1984 SLT 313,

“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 Tribunal proceeded to consider the six averments of professional misconduct, having the Sharp test in mind.

The first averment of misconduct concerns the delay in obtaining confirmation in the estate. It had taken the Respondent some 18 months to obtain confirmation. There was no explanation for this or any suggestion that the estate was complicated or large. The Respondent, himself, in file notes had acknowledged a previous lack of progress on the part of his partner. In these circumstances, the Tribunal was satisfied that this was conduct that fell below the standard to be expected of a competent and reputable solicitor and that the delay was substantial enough to meet the serious and reprehensible part of the test.

The second averment of misconduct related to the failure to lodge the codicil with the application for confirmation. The Tribunal was not satisfied that this met the test for misconduct even on an *in cumulo* basis.

The third and fourth averments of misconduct relate to the Respondent failing to exercise the appropriate levels of skill expected of a competent practitioner by providing incorrect advice and by making incorrect payments. The Tribunal was not satisfied that these averments in themselves

amounted to professional misconduct. However, it was satisfied that taken on an *in cumulo* basis with other averments of misconduct they should form an *in cumulo* finding of professional misconduct.

The fifth averment of misconduct related to the delay in obtempering the mandate. In this case, the delay was one of seven months set against a background of repeated correspondence from the new agents. Delaying in obtempering a mandate from a client potentially puts that client's interest at risk. It also puts at risk the reputation of the profession. Accordingly, the Tribunal was satisfied that this averment on its own amounted to professional misconduct.

The final averment of misconduct related to the failure to respond to the Secondary Complainer's complaint. It is extremely important that the profession retains the confidence of the public if it is to operate effectively. A client complaint is the first step of a potential regulatory process. To fail to cooperate and to respond to this complaint puts at risk the reputation of the profession. In the circumstances here, the Tribunal was satisfied that this averment of misconduct on its own met the test for professional misconduct.

The Tribunal invited parties to make further submissions with regard to disposal, expenses and publicity.

SUBMISSIONS FOR THE COMPLAINERS re DISPOSAL

The Fiscal provided the Tribunal with a copy of the Respondent's record card. This made reference to a finding of professional misconduct before the Tribunal on 8 May 2018. The Fiscal explained that the majority of this finding related to a different type of conduct, although there was one element of it relating to the delay in concluding an executry. She referred the Tribunal to pages 23 and 24 of the Tribunal Findings.

The Fiscal invited the Tribunal to have regard to the degree of cooperation given by the Respondent from the outset of these proceedings and submitted that any sanction imposed should be at the lower end of the scale. She explained that she was aware that some agreement had been reached between the Secondary Complainer and the Respondent.

She invited the Tribunal to make an award of expenses in favour of the Complainers and confirmed that she had no submissions to make with regard to publicity.

SUBMISSIONS FOR THE RESPONDENT

Mr Sweeney emphasised that from the outset of his involvement in this case from September 2020 it had been his instructions to resolve the matter. He had been in constant communication with the Complainers. It was noted in the Complaint that the Secondary Complainer was seeking compensation in the sum of £38,132.93. The maximum the Tribunal can award is £5,000. The Respondent had in fact paid the Secondary Complainer £12,000 in full and final settlement of his share. This did not preclude the Tribunal in these proceedings making a further compensation order but did ensure that after these matters were concluded a line was drawn under the matter.

The Respondent is 56 years of age, qualified as a solicitor in 1990 and has enjoyed a career as a solicitor for more than 30 years. The Respondent trained with the firm MacIntosh & MacLachlan before becoming an associate and finally a partner of that firm in 2010. The only other partner in the firm at that time was Graham Bryson. There were no other legal staff. In 2011, they were approached by the sole partner of Finlayson Wise and invited to consider a merger. A merger was agreed when some time later the partner of Finlayson Wise conceded that he had financial problems. As a result, the merger effectively became a takeover. The firm of Finlayson Wise had significant indebtedness in relation to mortgage repayments. The partner of Finlayson Wise was taken on as a consultant of the new firm when the takeover eventually occurred in 2012. Following that the firm suffered a significant number of departures of staff. The firm's executive manager, the consultant, who had been sequestered and a couple of other staff left in 2013 followed by Mr Bryson on 31 December 2015. This had been a turbulent time for the firm. This had had an effect on the health of Mr Murray who was referred to a cardio clinic by his GP. It was confirmed that the Respondent did not suffer any cardio issues but that the stress was telling on him. Mr Bryson also had health issues.

Outside of the firm, the Respondent had a successful career with the Territorial Army, which had now become the Army Reserves. He had reached the rank of Major. When Mr Bryson resigned from the firm, that had left the Respondent as the only qualified member of staff. The Respondent resigned from the Army Reserves to allow him to devote his time to the management of the firm.

The Respondent recognised there were issues with the running of the firm. He had taken a decision to close the branch office in Shawlands and consolidate the business into one office. He had recognised the financial issues for the firm which included cashflow issues, costs and the departure of Mr Bryson. The firm was only able to survive as the result of a significant input of finances into the firm by the

Respondent. Since then, the Respondent has made payment of the firm's PAYE, national insurance and VAT commitments timeously. The firm runs without an overdraft facility.

Mr Sweeney submitted that the Respondent made only a modest living out of practising as a solicitor. He continued to employ several members of administrative staff out of loyalty to them and to the detriment of his income. In the last financial year, the firm's turnover was £125,000. The Respondent draws approximately £25,000 - £30,000 per annum. These figures are likely to have been affected by the ongoing pandemic.

In hindsight, the Respondent accepts that he should have done things differently in the period 2012 to 2015. Mr Bryson should have been asked to take the trust file with him. If for any reason he was unwilling to do so then another lawyer with the requisite skills should have been instructed. The Respondent accepts that he was under a duty to satisfy himself of the position rather than take Mr Bryson's word for it. He accepts that he should not have relied upon the advice given by Mr Bryson.

The Respondent is truly sorry for the distress suffered by the Secondary Complainer and any impact that there may have been on her relationship with other members of the family.

He asked the Tribunal to have regard to the involvement of others in the advice given to the Secondary Complainer regarding the share of capital in the trust, although the Respondent accepted ultimate responsibility.

The previous finding before the Tribunal related to conduct spanning 2012 to 2015. The Respondent was censured and fined. The changes that the Respondent had put into place had not had time to take full effect by the time he was dealing with this executry.

He asked the Tribunal to bear in mind that the Respondent had attended personally at the offices of Turcan Connell with regard to delivering papers but unfortunately the offices had been closed for the festive period. He asked the Tribunal to accept that this was not a wilful disregard of the mandate on the part of the Respondent. Other papers had not been immediately available but were delivered when they became available. The Respondent accepted however that there was unacceptable delay.

With regard to the client complaint, the Respondent had contacted the new agents to ask to whom he should address his response. By the time the new agents responded to him, the Respondent had received notice of the formal complaint by the Secondary Complainer.

Mr Sweeney confirmed that the Respondent has no other matters pending. He invited the Tribunal to accept that if the timing of this Complaint had been slightly different then the matters within this Complaint might have been part of the issues before the Tribunal in 2018.

The Respondent plans to retire and return to a life of academic study at university.

Mr Sweeney submitted that this was not a case that required the Respondent's name to be removed from the Roll of Solicitors. He submitted that the Respondent had taken steps to make sure there was no repeat of such problems. He had made significant changes to office procedures. Additionally, the Respondent had paid more in compensation to the Secondary Complainer than the Tribunal can award in compensation. In those circumstances, he invited the Tribunal to hold that it was not appropriate to award any further compensation to the Secondary Complainer.

The Respondent has also agreed to cooperate with the Law Society in connection with giving evidence in another matter.

In all of these circumstances, he submitted that the appropriate disposal was one of censure and fine. He conceded that an award of expenses in favour of the Complainers was the appropriate order. He made no submissions with regard to publicity.

DECISION REGARDING DISPOSAL

The Tribunal accepted that there was some overlap between this Complaint and the Complaint before it in 2018. Both had arisen out of the same period of disruption. The Respondent appeared to have taken significant steps to address the issues raised by that disruption. He had cooperated fully with the present proceedings and had already made a significant payment to the Secondary Complainer. The Respondent had no other pending disciplinary matters.

The conduct was not of a character that the Tribunal would consider either suspension or strike to be appropriate. Given the steps taken by the Respondent to remedy matters and the fact that he had no other pending matters, it appeared that a restriction was not appropriate.

The Respondent had demonstrated insight into the issues and remorse.

Accordingly, the Tribunal considered that the appropriate disposal was one of censure together with a fine of £1,000.

Given the parties submissions, the Tribunal agreed that the appropriate award of expenses was one in favour of the Complainers. With regard to publicity, the Tribunal recognised that the Complaint contained personal and sensitive information and ordered that publicity should include the name of the Respondent but need not include the name of any other individual. The Secondary Complainer will have 28 days from the intimation of these Findings to lodge any claim for compensation.



Kenneth Paterson

Vice Chair