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

F I N D I N G S

in Complaint

by

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

Complainers

against

YVONNE ROBBIE, 7 Ward Road, Dundee

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 Yvonne Robbie, 7 Ward Road, Dundee (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 heard on 22 November 2017 with a procedural hearing to call on 11 October 2017 and notice thereof was duly served on the Respondent.

5. Due to administrative reasons, the Chairman of the Tribunal discharged the procedural hearing for 11 October 2017 and a new date was fixed for 27 October 2017 and notice thereof was duly served upon the Respondent.

6. At the hearing on 27 October 2017, the Law Society was represented by its Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was absent but was represented by James

McCann, Solicitor, Clydebank. On joint motion, the Tribunal allowed the parties 14 days to adjust and ordered that an adjusted Record be lodged by 8 November 2017. Thereafter, the Complaint was continued to the hearing previously fixed for 22 November 2017.

7. At the hearing on 22 November 2017, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and was represented by James McCann, Solicitor, Clydebank. The Fiscal invited the Tribunal to allow the adjusted Record to be received, together with a Joint Minute between the parties. The Respondent having no objection, the Tribunal granted the Fiscal's motion. The Complainers led evidence from one witness, following which the Tribunal heard submissions from both parties.

8. The Tribunal found the following facts established:-

8.1 The Respondent is a solicitor enrolled in the Registers of Scotland and enrolled as a solicitor on 4 September 1995. Her date of birth is 1 August 1959 and she operates as the principal of Yvonne Robbie, Solicitors, 7 Ward Road, Dundee.

8.2 On or around 19 January 2015, the Respondent was instructed by Mrs A in respect of matters arising from her separation from her husband, Mr A. Those parties had separated in December 2014. There was one child of their marriage, born to Mrs A and adopted by Mr A. Those parties had informally agreed up until around 21 January 2015, certain arrangements for the care and upbringing of the said child. The said child attended a local primary school.

8.3 In or around January 2015, Mr A consulted with his then solicitors but they did not undertake court work so he consulted Mr Gary McIlravey of Messrs Lawson, Coull & Duncan, (hereafter "GM"). Mr A instructed GM to raise Sheriff Court proceedings in which he primarily sought a residence order in relation to the said child, failing which a contact order. Said proceedings were lodged for warranting on 21 January 2015 and GM sought an immediate hearing to seek interim orders.

8.4 The said GM appeared at Court on 21 January 2015 at around 10.00am at a hearing in chambers. The presiding Sheriff indicated that he was not prepared to grant an interim residence order but if the Initial Writ were amended to include a crave for

interdict and interim interdict to prevent the removal of the said child from the care and control of Mr A, he would be prepared to grant an interim interdict in those terms. GM duly amended the said Writ and an interim order in those terms was granted. A further hearing was assigned for 28 January 2015 for both parties to be heard in respect of the interim orders sought by Mr A in the proceedings.

8.5 Whilst awaiting the said interlocutor being signed and issued by the Sheriff Clerk's office, GM met Alison Morris (hereafter "AM"), an assistant solicitor in the employ of the Respondent in the agents room within said Court. GM enquired of AM if her firm acted for Mrs A and AM confirmed she recognised the name but she did not act personally for Mrs A. GM then advised AM that he had raised proceedings for his client Mr A against Mrs A and had obtained that morning an interim interdict on behalf of his client, and that said order interdicted Mrs A from removing the parties' said child from the care and control of Mr A. GM also enquired of AM if the Respondent would accept service of the Writ on behalf of her client. AM advised GM that she would speak to the Respondent about those issues and revert to him. At approximately 11:30am, GM had a further conversation with AM on a staircase within said Court prior to leaving the building. He again enquired of AM if she would have the Respondent confirm if she would accept service of the writ and interim order. GM left to return to his office. AM still had business to attend to at Court.

8.6 At around 11.30am on 21 January 2015, GM obtained return of the principal Initial Writ with warrant for service and interlocutor containing the interim interdict. He contacted Mr A to advise of the outcome of the Court hearing. Mr A and Mrs A had previously agreed that Mrs A could collect the said child after school on 21 January 2015, the close of school being 3.30pm. In light of the terms of the interim order obtained, GM advised Mr A to attend at the said child's school prior to that time and collect the said child. GM advised Mr A that he would contact the said child's school to inform them of the circumstances and the terms of the interim order obtained. GM's secretary telephoned the school and advised the Head Teacher of the said child's school of the circumstances. The Head Teacher asked for a copy of the order to be emailed to the school. Whilst this was done, the email itself was not received by the school. Mr A also contacted

the said Head Teacher similarly. The said Head Teacher also suggested that Mr A attend earlier than 3.30pm to collect the said child.

8.7 At or around 2.40pm on 21 January 2015, the said Mrs A attended at the said child's school. She demanded to be allowed to remove the said child from school. Said order had not, as at that time and date, been formally served upon Mrs A or sent to the Respondent.

8.8 The said Head Teacher spoke to Mrs A and invited her into her office. She advised Mrs A that she had been in contact with Mr A and GM's firm and that she could not simply hand over the child to her. Mrs A requested to be allowed to contact her solicitor, which she did using the school's telephone. The said Head Teacher also spoke to the Respondent by telephone. The Respondent told the said Head Teacher that she had no right to refuse to release the said child to Mrs A and that the said order had not been served. The said Mr A had also arrived at the said school and, following discussions, agreed that Mrs A could remove the said child from school on that date.

8.9 A full copy of the said Initial Writ, warrant for citation and interlocutor containing interim interdict were sent by GM to the Respondent by Legal Post on 21 January 2015 and received by the Respondent on the 22 January 2015. GM instructed Killean & Co, Sheriff Officers, to serve the said writ, warrant and interlocutor on 21 January 2015, and they were formally served on Mrs A on 23 January 2015.

9. Having given careful consideration to the established facts and the detailed submissions made by both parties, the Tribunal found the Respondent not guilty of Professional Misconduct. Nor did the Tribunal consider that the conduct established met the test for unsatisfactory professional conduct and therefore it declined to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

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

Edinburgh 22 November 2017. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Yvonne Robbie, 7 Ward Road, Dundee; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision but that this publicity should include the name of the Respondent and her firm and should not include any details which might identify the child involved.

(signed)

Kenneth Paterson

Vice Chairman

11. 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 26 January 2018.

IN THE NAME OF THE TRIBUNAL

[redacted]

Kenneth Paterson

Vice Chairman

NOTE

At the hearing on 22 November 2017, the Fiscal for the Complainers invited the Tribunal to allow a Record to be received. The Respondent having no objection, the Tribunal granted this motion. Parties had entered into a Joint Minute, agreeing some of the averments of fact, the averments of duty and the content of an affidavit which was lodged as a Production for the Complainers. The Complainers had lodged one Inventory of Productions and the Respondent two.

The Complainers proceeded to lead evidence from one witness.

EVIDENCE FOR THE COMPLAINERS
WITNESS: GARY McILRAVEY

Mr McIlravey confirmed that he had been admitted as a solicitor in 1991 or 92 and had been a partner in his current firm for approximately 14 years. He knew the Respondent and had been involved in a number of cases where she represented the party on the other side. In January 2015 Mr A had instructed him to obtain a residence order in relation to his adopted son. He had prepared a writ to post to court but matters became more pressing when Mrs A had indicated to Mr A that she had found a new house and intended to move there with her son on 21 January. Mr A had contacted the witness and asked him to obtain an interim order as soon as possible. The witness had taken the writ to the appropriate sheriff court and had waited to see the sheriff in chambers. The writ had sought an interim residence order. The sheriff had indicated that this was not appropriate but to preserve the status quo he would be prepared to grant an interim interdict if the witness was prepared to amend his writ. He was prepared to do that and amended the writ accordingly. The hearing was fairly quick. The witness thereafter had to wait for the writ to be booked in and for the interlocutor to be signed. He did not leave the court until 11:30am.

The witness had waited in the agents' room for the interlocutor to be ready. Whilst there he had met the Respondent's assistant, Allison Morris, whom he had known for a number of years. The witness asked Ms Morris if she had been instructed by Mrs A as Mr A had suggested to the witness that Mrs A had instructed that firm. Ms Morris confirmed that the name rang a bell but that she was not personally instructed. The witness had explained to Ms Morris that he had lodged a writ seeking a residence order and had been granted an interim interdict preventing her client from removing the child from his client's care and control. Ms Morris had said that she would check to see if her firm was instructed. The witness had asked her if she would take instructions to accept service of the writ. She had responded that she

would make appropriate enquiry. The witness remained of the view that it was competent to serve an interim interdict in that way.

Ms Morris had other business at court. As the witness was leaving at about 11:30am, the witness passed Ms Morris on the stairs and reminded her to take instructions regarding accepting service.

Prior to leaving the sheriff court to return to his office, the witness thought he had phoned his client to advise him of the outcome. He had also phoned his secretary to ask her to contact the school to advise them of the court order. Both the witness and the head teacher at the school had given Mr A the same advice which was to attend at the school early to pick the child up to avoid any unpleasantness. Normally the child got the school bus home when the school closed at 3:30pm. The family lived in the country but quite close to the school and Mrs A was going to meet her son off the school bus.

He confirmed that Production 3 was a file note from his file recording conversations between his secretary and the head teacher. Production 4 was an email sent by his secretary at 2:03pm on 21 January which was returned as undelivered some five or six days later.

The witness had arrived back at his office some time after 12pm. Later on in the afternoon Mr A telephoned the office in a panic. He had attended at the school at 3pm, by arrangement, and by the time he had arrived Mrs A was already there. His client told him that the previous arrangement had been for Mrs A to collect her son from the bus and he could think of no reason for her to be at the school that afternoon other than that she had been told about the court order. By the time his client telephoned the office, the incident at the school was over and had concluded with the child leaving with his mother. His client had overheard an ongoing argument between Mrs A and the head teacher with the teacher saying that Mrs A had no right to take the child and Mrs A saying that the teacher had no right to prevent it. His client had then overheard a telephone conversation between the head teacher and the Respondent. The witness had prepared an affidavit for Mr A in relation to his sheriff court case and had also framed an affidavit for the teacher. The witness recalled that the teacher believed that the Respondent was aware of the interdict but was not aware of its terms. At the time of the incident at the school, the order had not actually been served. Neither the Respondent nor Mrs A had a copy in their possession. Production 5 was a letter which he had sent to Ms Morris by legal post and Production 6 was a letter to the sheriff officer which he believed was collected from his office. Production 8 was the execution of service by the sheriff officer showing that the initial writ and interim order were served on 23 January. He did not fax or email anything to the Respondent.

Prior to the next hearing of his client's writ in the sheriff court, the witness had prepared an affidavit of his client and of the head teacher. Production 7 was the affidavit for the head teacher. She had taken advice from the Council's legal department and the terms of the affidavit were re-drafted until she was happy to sign it. The witness had gone to lodge a motion for the hearing on 28 January to have the Respondent found guilty of contempt. He had framed and lodged this on the instructions of his client who had believed that the Respondent had told Mrs A to attend the school early in order to thwart the court order. The witness could not come up with any other explanation. Although family work was not the bulk of his business, he did undertake a fair amount of it. His instinct would have been to assume that any interim order would have been a non-harassment order. His practice would have been to speak to the solicitor involved to ask for a copy. The only call he had received from the Respondent's firm was a call or text from AM saying that she would not accept service but she did not request a copy. It was his standard practice to send courtesy copies of such writs/orders to the other side by legal post.

CROSS EXAMINATION

The witness accepted that at the time of these events he was 23 years' qualified, the Respondent 20 years' qualified and Ms Morris 6 years' qualified. The witness indicated that although the Respondent's firm was a relatively small one, it carried out a lot of family work. He denied that there was any history between him and the Respondent. The witness accepted that as a result of the Family Law Act 1995 such family matters were child centred and non-interventionist. He accepted that if a solicitor on the other side of such a family action were to make a mistake, it was appropriate to take into account the interests of the child and not take advantage of the mistake.

When asked why the Sheriff had not made any order in relation to the child being picked up from school, the witness indicated he had seen no need for that. The order granted by the Sheriff was to preserve the status quo, simply a stay on any other changes with regard to child care and control. The school was not an issue as far as Mr A was concerned as he was to go and collect the child from school and take him home. In the witness's view there was no need for any order to regulate what took place at school. The witness was referred to Production 1 for the Respondent which was a copy letter of 12 February 2016. He was asked to explain why that letter indicated that Mrs A was going to school to pick up the child when his evidence had been that the arrangement was for her to pick the child up from the bus. The witness indicated that that part of the letter was wrong and that he had checked the file and clarified the matter before giving evidence.

When he had asked Ms Morris about acceptance of service he meant if the firm would accept service. Ms Morris had said that she would have to ask (a) if the firm was instructed and (b) if they could accept service. When he wrote to the firm he accepted that he had addressed the letter to Ms Morris but explained that was because he had spoken to her at court. He accepted that he had received a voicemail message indicating that it was the Respondent who was instructed by Mrs A and not Ms Morris. That voicemail message was received at 4:36pm and he believed the letter had already been prepared.

The witness accepted that he had no direct contact with the Respondent. The purpose of the order was to protect the status quo and the child. The witness had spoken to Ms Morris and also left a voice message for her. He thought he had discharged his duty. The immediacy for his client was for the order to be served on the defender, not on the Respondent. The witness had already spoken to the Respondent's assistant. He had explained that he had obtained an interim interdict. He had asked if the firm would accept service and by the time he got the message that they would not, the letter instructing sheriff officers had already been prepared. He had sent a courtesy copy to the firm and it was irrelevant that Ms Morris' name was on it. By the time he had received the message at 4:36pm the incident at the school was all over and the Respondent had already given her client advice and made comments to the head teacher based on an order that she had not seen. Mr A took the whole thing very badly. It had been clear to Mr A that the Respondent had advised Mrs A to go to the school early and the witness could not come up with any other explanation.

The witness believed that it was competent to obtain an interim residence order.

The motion asking for the Respondent to be found guilty of contempt was tabled on 28 January, without notice to the Respondent. The motion had been drafted quickly and the witness had taken everything with him to the court on the day. He had asked the sheriff if it might be appropriate to continue the hearing to allow the Respondent the opportunity to answer the allegations.

RE-EXAMINATION

The witness confirmed that it was his routine practice to send a courtesy copy of any writ to the solicitor on the other side. He could have emailed it or faxed it but did not do so on this occasion as he did not consider this an extraordinary case and he was not anticipating what in fact happened later.

There was no award of interim residence but the Sheriff had granted an interim interdict to preserve the status quo.

Mr A attended at the school early to stop the child from going on the bus. Mrs A got to the school first. The witness believed that Mrs A was given advice to go to school and uplift the child. In response to questions from a Tribunal member, the witness indicated that it was his belief that the Respondent had given advice to her client and he had reached this belief as he could not see any other reason for Mrs A attending at the school early. The witness went on to state that he would not give advice on any interdict he had seen. He indicated that his assumption in similar circumstances would have been that the interim order was a non-harassment order rather than one to do with the child.

The witness confirmed in answer to a further question from the Tribunal that the order was to preserve the status quo and keep the child in his home, at the same school and within the same circle of friends. The child was in the pursuer's care and control and he was the child's primary carer. He had given full information as to the content of the interim order to Ms Morris.

The Fiscal closed his case and Mr McCann indicated that the Respondent did not intend to lead any evidence. The Tribunal proceeded to hear submissions from both parties.

SUBMISSIONS FOR THE COMPLAINERS

Mr Knight explained that the averments of duty in this case were all set out in averment 3.1 of the Complaint and that copies of the Rules referred to had been produced for the Tribunal as item 3 on his List of Authorities. The Respondent had admitted the averments of duty.

Averment 3.2 in the Complaint set out how the duties had been breached. Although there was a blanket denial in the Answers for the Respondent, it was clear that the Respondent was accepting at least parts of that statement of fact, for instance that she did know that there was an interim interdict granted on the morning of the 21 January, although she did not know the terms of it.

Averment 3.3 sets out an esto position on the basis that, if knowledge on the part of the Respondent had not been established, then the Respondent's conduct was reckless.

The Complainers made three averments of professional misconduct at averment 4.1 headed paragraphs (a) (b) and (c), listed in order of their seriousness.

With regard to paragraph (a), Mr Knight conceded that the Complainers required to establish that the Respondent had knowledge not only of the interim order having been granted but also of its terms. To do that the Tribunal would require to find the evidence of GM credible and reliable. The Tribunal also had the affidavit from the head teacher which was Production 7 which was admitted as true and accurate. The evidence disclosed that the Respondent knew about the terms of the order. GM's evidence was not challenged and there was no evidence led to suggest that he was mistaken. The witness had said in evidence that he could think of no alternative scenario, other than that the Respondent had spoken to her client, which would have led Mrs A to attend at the school early. The witness was not cross-examined on this part of his evidence. Mr Knight submitted that his evidence had to be accepted. No document had been produced to challenge his evidence.

Questions had been put as to how the Respondent got knowledge of the order. The Respondent admitted that she knew about the existence of the order and so she must have been spoken to her assistant. If the Complainers' primary position is accepted, then the Tribunal has prima facie evidence that the Respondent knew of the order and knew of its terms.

Mr Knight accepted that he had a hurdle to overcome in establishing a link between the conversation between AM and GM and the acts of the Respondent. He pointed to the affidavit which had been agreed which disclosed that the Respondent knew there was an interim order. That, taken together with there being no explanation for Mrs A attending at the school early other than that she had been tipped off, amounted to a link between the conversation between GM and AM and then thereafter the conversation with the head teacher. He argued that there was a sufficiency before the Tribunal to establish paragraph (a) and if this paragraph was established the inevitable conclusion was a finding of professional misconduct.

If the Tribunal was not satisfied that paragraph (a) had been established, Mr Knight submitted that paragraph (b) did not require actual knowledge of the terms of the interim order. He accepted that the Respondent had not seen a copy of the interim order as at the time of the telephone conversation with the head teacher. However, the Respondent, knowing that an interim interdict had been granted, gave the head teacher incorrect legal advice. To suggest to the head teacher that there was "no legal obstacle or barrier" was wrong as a mater of law and given the consequences of making those statements, the Respondent was acting in a manner calculated to circumvent or frustrate the operation of the interim order. If there was sufficient knowledge of the order, there was no formal requirement for the interim order to be served. Mr Knight referred to page C486 of the Parliament House Book at paragraph 6 and to the case of Henderson-v-MacLellan (1874) 1 R 920. He argued that the Respondent was an agent with

knowledge of the interim interdict and so there was a presumption of knowledge on the part of the defender, Mrs A. The lack of a copy, and the lack of service, were not relevant when there was knowledge of the existence of the order.

The final averment of misconduct at paragraph (c) is an esto case advanced to the Tribunal on the basis that it is not convinced about the evidence of the Respondent's knowledge of the interim order and its terms. He invited the Tribunal to have in mind that the Respondent admitted that she knew that an interim order had been granted. That being said, she made no enquiry as to its terms. There had been some mild criticism of GM that he should have handed the writ immediately to sheriff officers and sent a copy to the Respondent but GM was not the one facing the Complaint.

The Respondent made reckless, inaccurate and misleading statements predicated on the view that the interim order required to be served upon her client. This was wrong as a matter of law and a competent solicitor should know that. Reckless conduct can amount to misconduct and in this relation he referred to Paterson & Ritchie, paragraph 1.24, Barton, paragraph 7.04, and the case of the Law Society of Scotland-v-Ross Jones SSDT 2 April 2015.

He submitted that the circumstances in the current Complaint before the Tribunal were similar to the case of Jones in that the Respondent had given inaccurate and misleading information to a head teacher with a view to advancing the position of her client. This was not careless conduct but reckless and therefore misconduct.

Mr Knight indicated to the Tribunal that his primary position was that it should convict the Respondent of all three sub-paragraphs of averment 4.1. Alternatively, the Tribunal could convict the Respondent of both paragraphs (b) and (c) or only paragraph (c). If the Tribunal was not satisfied with regard to the question of misconduct, it could take the view that the matter should be referred back to the Complainers on the basis of it being unsatisfactory professional conduct and he submitted that at the very least the actings of the Respondent fell into that category.

In answer to a question from the Tribunal, Mr Knight accepted that it was Mrs A who contacted the Respondent from the school. When asked if he was submitting that the affidavit disclosed sufficient evidence that the Respondent knew the nature of the order granted, Mr Knight responded that in the conversation with the teacher the Respondent had referred to the teacher holding on to the child, although he accepted that at that stage neither Mrs A nor the Respondent had a copy of the order.

SUBMISSIONS FOR THE RESPONDENT

Mr McCann submitted that this whole case hinged upon the concept of knowledge. He argued that knowledge should be construed as "sufficient knowledge" for the purposes of a solicitor carrying out his job to advise a client properly to comply with court orders. He suggested that on no view did the information held by the Respondent amount to sufficient knowledge to advise a client. The case referred to by Mr Knight and quoted in the Parliament House Book described sufficient knowledge of the court order. Had the witness faxed or emailed a copy of the court order to the Respondent then there could be a reasonable inference of knowledge on the part of Mrs A. The person interdicted was Mrs A. This Complaint is an attack on an agent.

Mr McCann emphasised that it was beyond doubt that neither the Respondent nor her client had seen any document. All that had been reported was a fragmentary report of a conversation. In his submission it could not be said that the conversation that took place in the agent's room could be seen to be sufficient. Mr McCann directed the Tribunal's attention to paragraph 5 of the head teacher's affidavit. There the teacher had stated "there was a lot of legal jargon which I have to confess I did not follow completely". It was the Respondent's position that what she indicated to the teacher was her honest belief that she honestly believed was correct in law. He again directed the Tribunal's attention to the content of the affidavit where in paragraph 6 the Respondent had indicated that she had not seen any order.

The Respondent's assistant being told that there was an interim interdict was not in his submission sufficient to import knowledge to the Respondent. Matters developed within the knowledge of GM and it was for him to send a copy of the order to the Respondent.

What actually happened was the kind of thing that should not occur and ignored the welfare of the child concerned. It was Mr McCann's submission that GM had been well informed of Mrs A's intention to collect the child. The order that GM had received had not been what he had hoped for. An interim order of residency was not competent in these circumstances. The order he got was one interdicting Mrs A from removing the child from the custody and care of Mr A. It did not order delivery of the child. It did not interdict her from anything at the school. This could all have been prevented if GM had given the Respondent a full copy of the writ and interim order. The Respondent could have advised that Mrs A was entitled to attend at the school but could not take the child to her home, which was in another town.

He submitted that the criticism of the Respondent was harsh and failed to take account of the actual circumstances. He invited the Tribunal to bear in mind that the Respondent was faced with an incoming

phone call from a distressed mother at the school. The Respondent had not seen the writ or order. The order refers to service of the writ and warrant. For the Respondent to have sufficient knowledge then she required to see a copy of the writ that had the detailed facts upon which the order was granted. GM had not recognised the advantage to all concerned that would be gained by giving the Respondent a copy of all documents. Mrs A had telephoned the Respondent in a distressed state and then had put the head teacher on the telephone. Until the order was seen, there was no legal basis for refusing to give Mrs A the child. The school had not received a copy of the order. The Respondent had not received a copy of the order. Mr A had attended the school but was not equipped with a copy of the order.

The telephone call from Mrs A to the Respondent was at most a couple of hours after the order was signed at court. The witness had not obtained the signed order until approximately 11:30. AM still had business in court and had to return to her office before she could tell the Respondent anything. Arrangements to get Mr A to the school early were already in place.

Mr McCann explained that his primary position was that the Respondent did not have sufficient knowledge and that at best she only had fragmented knowledge. Even if the Tribunal took the view that the advice given by the Respondent was not as good as it could have been, he argued that it did not amount to professional misconduct. The conduct proved, he submitted, did not meet any of the three options in the Complaint. He submitted that the Respondent had been placed in an impossible position and that the Tribunal should not convict her of professional misconduct.

In response to a question from a member of the Tribunal, Mr McCann explained that it was unreasonable to expect the Respondent to have telephoned the witness to ask about the court order. He highlighted that the Respondent had been faced with an incoming telephone call from someone at school where it was indicated that no one involved had a copy of the court order. The telephone call took place at 2:40pm and even GM had indicated that the interdict could have been for a number of things. Mr McCann argued that it was not reasonable to expect the Respondent to go off and ascertain the nature of the action raised or the order obtained. He went further and argued that it was not fair to categorise anything she had done as culpable where she was expecting due service of the writ and order.

In answer to these submissions, the Fiscal emphasised that there was no evidence led on the part of the Respondent to support these submissions. He argued that the Tribunal did not know what the Respondent had been told or when. The Tribunal did not know what happened in the phone call with the head teacher with regard to what was said by the Respondent as it had not heard it. The Tribunal did know that she

knew there was an order in place because she accepts that. The Fiscal suggested that the sensible course of action for the Respondent would have been to ask her client for five minutes in which to call her back.

In answer to a question from the Tribunal, the Fiscal confirmed that it was his position that Mrs A knew about the interdict because there was no other explanation for her going to the school when she did so. He invited the Tribunal to draw the appropriate inference.

In response to further questions, Mr McCann emphasised that the interdict granted made no reference to the school and no intervention into what happened at school.

DECISION

Before the Tribunal could consider whether or not the Respondent had breached any of the averments of duty, it required to be satisfied beyond reasonable doubt of the facts. A Joint Minute between the parties had agreed some of the averments of fact within the Complaint. However, the essential facts had not been agreed and required to be proved in the course of the hearing. The onus of proof lay upon the Complainers.

The only evidence before the Tribunal was the parole evidence of GM, together with the documentary productions referred to by him, and the affidavit for the head teacher, which had been agreed in the Joint Minute. Whilst, on the whole, the Tribunal found the witness to be credible and doing his best to recount what had taken place, there were essentials gaps in the evidence which he was not in a position to fill.

The first averment of misconduct for the Complainers was in the following terms:-

"The Respondent in the knowledge that an interim order had been granted in favour of her client's opponent in family proceedings in relation to the care and control of their child, she advised her client to attend at the school of the child to collect the child in order that the said client might thereby circumvent or frustrate the order of the court".

This averment requires, as conceded by the Fiscal, knowledge on the part of the Respondent not only of the interim order having been granted but also of its terms. No evidence was led as to what communication, its content or form, had taken place between Ms Morris and the Respondent. At best the evidence before the Tribunal was the reference within the affidavit to the Respondent knowing "that an order had been granted". The affidavit makes plain that it was Mrs A who telephoned the Respondent

and that during that telephone conversation Mrs A had repeatedly said to the Respondent that the teacher "won't give him to me". Thereafter, the teacher spoke to the Respondent, who by then was aware that the issue was the school handing the child over to Mrs A. No inferences could therefore be drawn from the fact that the conversation took place. Nor was the Tribunal prepared to make the assumption that the Respondent's assistant must have passed on all of the information to her. The order was only signed at approximately 11:30am. The Respondent's assistant was still involved in business at court. The telephone call from the school took place at 2:40pm. The Sheriff Court concerned is some distance from the Respondent's office.

Even more importantly, however, there was no evidence whatsoever that the Respondent had contacted her client to advise her to attend at the school. This allegation is an extremely serious one and the test of beyond reasonable doubt is a significant standard to meet. The Fiscal had invited the Tribunal to draw an inference from the fact that Mrs A had attended school early that the Respondent had contacted her. Although GM had suggested in evidence that he could think of no other explanation, it appeared to the Tribunal that there were a number of other possible explanations and so it was not prepared to draw such an inference.

Having regard to both of these deficiencies in the Complainers' case, the Tribunal had no hesitation in holding that this ground of professional misconduct had not been established.

The second averment of professional misconduct is that:-

"The Respondent in affirming in the course of a telephone conversation with the head teacher of the child's school that there was no legal obstacle to the school handing the child over to her client, as the interim order of the court had not yet been served on that client, thereby misled the head teacher as to the nature and effect of the order of the court in the manner calculated to circumvent or frustrate it".

The Tribunal took the view that this allegation described deliberate conduct on the part of the Respondent to mislead the teacher in a manner calculated to circumvent or frustrate a court order. To be guilty of this allegation, the Tribunal concluded that the Respondent would require to have had sufficient knowledge of the nature of the court order to have properly formed a deliberate intent to frustrate it. The evidence before the Tribunal was that the Respondent was aware that "an order had been granted". There was no evidence that Mrs A had been made aware of the nature of the order. In the Fiscal's submissions, it was put to the Tribunal that the interim order would become operative when the Respondent or defender became sufficiently aware of its contents and that awareness by the defender can be inferred

from the sufficient awareness by the defender's agent. As described above, the evidence before the Tribunal was that the Respondent was aware that "an order had been granted". On the evidence before it, the Tribunal was not prepared to hold that this amounted to "sufficient awareness" for it to hold that this averment had been established.

The third averment of misconduct before the Tribunal was that:-

"Esto she was not aware of the terms of the interim order, the Respondent in her assertion to the head teacher as to the nature and effect of an order of the court of which she had no clear knowledge represented conduct of a reckless, inaccurate and misleading nature which would have the effect of circumventing or frustrating the order of the court".

In this averment the Tribunal is invited to proceed on the basis that the Respondent was not aware of the terms of the interim order. This raises the issue of whether it could then be said that the Respondent was sufficiently aware of the court order for it to have been operative. The Tribunal only had the affidavit of the teacher as evidence of the content of the conversation between the teacher and the Respondent. In that affidavit the teacher refers to "a lot of legal jargon which I have to confess I did not follow completely". Bearing in mind this concession made by the teacher, the Tribunal concluded that it had insufficient information before it on which to hold that the advice or information given by the Respondent had been reckless.

Having concluded that misconduct had not been established in relation to all three heads, the Tribunal thereafter required to consider whether in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 it required to remit the Complaint to the Council of the Law Society of Scotland to consider the question of unsatisfactory professional conduct. The standard of proof for unsatisfactory professional conduct is significantly lower, being one of balance of probabilities. However, the Tribunal concluded that the evidence before it would not have entitled it, even on a balance of probabilities, to have held as established sufficient facts for the conduct to meet the test for unsatisfactory professional conduct. Accordingly, the Tribunal declined to refer the matter back to the Council of the Law Society of Scotland.

The Tribunal then invited both parties to make submissions in respect of expenses and publicity. Mr McCann invited the Tribunal to award expenses in favour of the Respondent. He asked the Tribunal to consider that the Sheriff had made no finding, the police had made no finding, the Law Society investigator had recommended to the Sub Committee that no proceedings be taken and now the

Respondent had been acquitted. The Respondent is not a member of the Legal Defence Union and was paying her own expenses. The Fiscal invited the Tribunal to consider making no award of expenses.

Having considered these further submissions, the Tribunal considered it appropriate and fair in the circumstances to make an award of expenses in favour of the Respondent.

With regard to publicity, the Tribunal was concerned that these matters involved a child and that the public interest would not be served in any way by the decision containing any information which might identify that child. It therefore considered that the appropriate order with regard to publicity was that the decision should contain the name of the Respondent and her firm but not contain any information that might lead to the child being identified.

Kenneth Paterson

Vice Chairman