

**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**

**against**

**ANDREW FORMAN, Donaldson & Henderson  
Solicitors, 75/77 High Street, Nairn**

1. A Complaint dated 25 January 2018 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Andrew Forman, Donaldson & Henderson Solicitors, 75/77 High Street, Nairn (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, Mr C.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 30 March 2018 and notice thereof was duly served upon the Respondent.
5. The hearing took place on 30 March 2018. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow. The Respondent was neither present nor represented. The Tribunal had regard to a letter provided by the Respondent's agent. On the Fiscal's Motion, the Tribunal adjourned the hearing and fixed a procedural hearing for 24 May 2018 for the Fiscal to make further enquiries regarding the Respondent's health.

6. The procedural hearing took place on 24 May 2018. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow. The Respondent was neither present nor represented. The Respondent's agent had written to the Tribunal seeking an adjournment of the procedural hearing for four weeks or alternatively seeking a date for a hearing. The Respondent's agent confirmed that the Respondent was fit to participate and give instructions in the Tribunal case. Of consent, the Tribunal granted the Fiscal's Motion to fix a hearing for 10 September 2018.
7. The hearing took place on 10 September 2018. The Complainers were represented by their Fiscal, Paul Reid, Solicitor-Advocate, Glasgow. The Respondent was neither present nor represented. The Tribunal had regard to the Respondent's written submissions and those made the Fiscal at the hearing.
8. The Tribunal found the following facts established:-
  - 8.1 The Respondent is Andrew Forman. The Respondent was born 16 January 1942. The Respondent was enrolled and admitted as a Solicitor on 6 November 1968. From on or about 1 September 1970 to date the Respondent has been a partner in the firm Donaldson & Henderson, Solicitors, 75/77 High Street, Nairn.
  - 8.2 Mr C is the Secondary Complainer. His father died on 10 November 2014. Mr C instructed Wink & Mackenzie, Solicitors to act on his behalf in connection with the administration and winding up of his late father's estate. Mr C understood that his father had produced a Will which was held by Donaldson & Henderson, Solicitors. The Respondent is a partner of that firm. An enquiry was made of the firm as to whether a Will was held by that firm. The Respondent wrote to Wink & Mackenzie advising that they held a Codicil prepared by the deceased but that the original Will was in the hands of the deceased himself.
  - 8.3 It was necessary on behalf of Mr C for consideration to be given to the presentation to the court of a Petition in terms of which Mr C sought to prove the tenor of the Will of his late father. In order to obtain information to facilitate such an application items of correspondence were sent by Wink & Mackenzie to the Respondent which were ignored. In particular they wrote on 10 February 2015, 19 February 2015, 11 March 2015, 25 March 2015, 18 May 2015 and 3 June 2015. Messrs Wink &



Mackenzie instructed as court agents the Edinburgh firm Urquharts to act in this matter believing initially that it required a Petition to be presented to the Court of Session. The Court rules had changed and a Petition before the Sheriff Court was competent. However, Urquharts also wrote on a number of occasions to the Respondent requesting information to facilitate the Petition being presented and these items of correspondence were ignored. Letters were sent on 14 August 2015, 1 September 2015, 23 September 2015, 1 October 2015 and 9 November 2015.

8.4 A Mandate was prepared and executed by Mr C authorising release of any paperwork or information concerning the affairs of his late father. There is dubiety regarding the validity and legal effect of the Mandate given the absence of a Will. However, the Mandate was presented along with correspondence to the Respondent which again was ignored. In particular correspondence was sent in connection with the Mandate on 1 September 2015, 23 September 2015, 1 October 2015 and 9 November 2015. The complaint was intimated to the Respondent on 22 February 2017. No reply was received. On 2 March 2017 a further request was intimated to him. No response was received. A Formal Notice in terms of Section 15 of the 1980 Act was served on 22 March 2017. This prompted a response by telephone call from the Respondent.

8.5 The Respondent over a period of time received correspondence from a number of agents in connection with the affairs of their client. The correspondence intimated to the Respondent sought information to be utilised in support of an application to the court. The Respondent should have communicated effectively in reply to these enquiries. Instead the Respondent ignored the enquiries.

9. After considering the submissions made by both parties, the Tribunal did not consider that the Respondent's conduct represented a serious and reprehensible departure from the standards of competent and reputable solicitors. The test for Professional Misconduct was not met. However, the Tribunal considered that the Respondent's actions may amount to unsatisfactory professional conduct and accordingly remitted the matter under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland.

10. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 September 2018. The Tribunal having considered the Complaint dated 25 January 2018 at the instance of the Council of the Law Society of Scotland against Andrew Forman Donaldson & Henderson Solicitors, 75/77 High Street, Nairn; Find the Respondent not guilty of professional misconduct; Remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

**(signed)**

**Eric Lumsden**  
**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 *5 OCTOBER 2018*.

**IN THE NAME OF THE TRIBUNAL**



**Eric Lumsden  
Vice Chairman**

**NOTE**

At the hearing on 10 September 2018, the Tribunal had before it the Complaint, three Affidavits lodged by the Complainers, a List of Authorities for the Complainers, amended submissions for the Respondent, an Inventory of Productions for the Respondent, a List of Authorities for the Respondent and two letters from the Respondent's agents. It was clear from the Respondent's agent's correspondence with the Tribunal Office that the Respondent had received notice of the hearing and wished the matter to be dealt with in his absence. The Tribunal considered that it was fair and appropriate to do so in terms of Rule 14(4) of the Tribunal Rules 2008. The Fiscal indicated that he intended in the Respondent's absence to rely upon the three Affidavits he had lodged and proceeded to make submissions. No evidence was led.

**SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal described the procedural history of the case. At an earlier stage, the Tribunal had raised a question regarding the Respondent's capacity. However, the Fiscal had received confirmation from the Respondent's agents that they were content to receive instructions from him. The Respondent wished his agents to make written submissions on his behalf to the Tribunal. The Fiscal referred to Rule 14(5) of the Tribunal Rules 2008 and invited the Tribunal to take account of the documents lodged and to proceed and act upon evidence given by affidavit. He noted that the affidavits were uncontroversial and that the matter for the Tribunal was whether the facts laid out in the Complaint which were substantially admitted in the Respondent's submissions, constituted professional misconduct.

The Fiscal noted that the Respondent is 76 years old and was admitted as a solicitor in 1968. He has been in practice for 50 years. He is a partner in his firm. The Fiscal described the circumstances of the Respondent's conduct as set out in the findings in fact above. The Fiscal noted that an action to prove the tenor of a will can now be raised in the sheriff court. It was not necessary to do this in the Court of Session or to instruct Edinburgh agents, although this was still competent. The effect on the client had been to delay matters and increase costs. The Respondent had allowed his integrity to be called into question. He was therefore guilty of professional misconduct. The Fiscal noted that in his amended submissions, the Respondent made repeated concessions that there were failings in his conduct.

The Fiscal noted that the Respondent referred to the Council of the Law Society of Scotland-v-Lewis. The Fiscal maintained that Lewis could be distinguished from the present case. The issues were fact sensitive. In Lewis, the solicitor was under no obligation to assist. He offered to "help out" and then failed to do so. In the present case the Respondent had previously acted for the deceased. He had an



obligation to reply to correspondence and comply with the Practice Rules. He demanded a fee for his assistance. He was not offering to “help out”. The Fiscal also referred to the Council of the Law Society of Scotland-v-Tracey Campbell-Hynd [2014]. This more recent case involved a failure to deal with mandates and correspondence. In that case, the solicitor failed to respond on six occasions to correspondence. The Fiscal submitted that in the present case, there was a failure to respond to 15 letters and so the circumstances of this case amounted to professional misconduct. It was a well-known principle that solicitors have a duty to respond to fellow solicitors.

In response to questions from the Tribunal, the Fiscal reiterated that the Complainers made no criticism of the Respondent for failing to comply with the “mandate”. He had included it in the Complaint for completeness and show that the “temperature” of the relations between the solicitors was rising and yet still the Respondent failed to respond to correspondence.

The Fiscal also clarified that he was not seeking a conviction with regard to any failure to respond to the Law Society. The Complainers’ case was based on a failure to respond to fellow solicitors. It was unacceptable to fail to correspond with them even if it was to say that he would not or could not assist. The letter dated 24 November 2015 could have, and should have, been set much earlier.

## **SUBMISSIONS FOR THE RESPONDENT**

The Respondent’s agent provided written submissions for the Tribunal’s consideration. The Tribunal had regard to the material lodged on the Respondent’s behalf in accordance with Rule 14(5) of the Tribunal Procedure Rules 2008.

The Respondent emphasised his regret and apologised to those who had encountered difficulties as a result of his actions. The Respondent admitted the facts of the Complaint with the exception of the suggestion that he had failed to reply to letters from the Complainers.

The Respondent’s submissions provided background to the admitted facts. With hindsight the Respondent felt that he could have done more to respond to correspondence from the Secondary Complainer’s agents and in particular he ought to have responded in writing. However, he claimed that he did make efforts to give the agents the information they required. He wrote to them and telephoned them on a number of occasions. He referred to file notes he had lodged in support of his claim that he had telephoned the Secondary Complainer’s agents. The Respondent accepted that Urquharts wrote to him several times. He accepted that he should have communicated to Urquharts that he was dealing



with the principal agents. However, Wink and Mackenzie continued to correspond with the Respondent. Any failures or omissions were not deliberate or premeditated. The Respondent's submissions also alluded to the Respondent's health difficulties which had been recently diagnosed but were likely to have had an effect on him during the conduct which was the subject of complaint.

It was accepted that the Respondent's conduct could have been better. However, it was denied that his communication was "ineffective" or that he had failed to act with other regulated persons in a matter inconsistent with persons having mutual trust and confidence in each other. Even if he had breached the practice rules, the Respondent's agent suggested that the Tribunal could not be satisfied beyond reasonable doubt that the Respondent's actions were so serious and reprehensible that they amounted to professional misconduct. Reference was made to the Lewis case where this Tribunal held that a solicitor who had merely agreed to help another firm of solicitors, rather than engage in the performance of an obligation owed to them, was not guilty of professional misconduct when he had delayed in correspondence.

The Respondent had practised for 50 years but had recently retired. He posed no ongoing risk to the public or the profession. He had never been before the Tribunal previously. He had never been the subject of any disciplinary action. The proceedings weighed heavily with the Respondent. It was a matter of great regret that he found himself before this Tribunal.

## **DECISION**

The Tribunal noted that the Complainers did not invite the Tribunal to make any finding with regard to implementation of mandates or correspondence with the Complainers. The averments of professional misconduct before the Tribunal were solely about effective communication with other solicitors and acting with regulated persons in a manner consistent with people having mutual trust and confidence in each other.

The Tribunal considered the evidence before it in support of these averments of misconduct. From the evidence contained in the affidavits lodged by the Complainers it found that Wink and Mackenzie wrote to the Respondent eight times between November 2014 and November 2015 (24 November 2014, 10 February 2015, 19 February 2015, 11 March 2015, 25 March 2015, 18 May 2015, 3 June 2015 and 9 November 2015). Urquhart's wrote to the Respondent five times between August and October 2015 (14 August 2015, 1 September 2015, 23 September 2015, 1 October 2015 and 12 October 2015).

The Respondent did not reply to every letter. However, he did write to Wink and McKenzie on 1 December 2014 explaining that the original will was left in the possession of Mr C's father and enclosing the codicil. The codicil had a handwritten note attached which read, "Original will dated 10<sup>th</sup> March 1990 in possession of [deceased]". This note was also enclosed with the letter of 1 December 2014.

The Respondent lodged a file note which recorded in detailed terms a telephone call between himself and Mr Marinello of Wink and Mackenzie on 16 February 2018. According to that note the Respondent made it very clear that the Secondary Complainer's father had retained the will and had not left it at the Respondent's office for safekeeping. Mr Marinello asked the Respondent to send him a letter setting out that information. The Respondent agreed to do so if the Secondary Complainer agreed to meet his expenses.

Another file note was lodged recording a telephone call between the Respondent and an assistant at Wink and Mackenzie on 25 September 2015. The Respondent explained that he had found a copy of the will. The assistant asked the Respondent to send them a copy of the file. However, the Respondent intimated that he wished to speak to Mr Marinello first. He informed the assistant that he had received letters from Urquharts but wished to deal directly with the principal agent.

Another file note records that the Respondent left a telephone message for Mr Marinello on 20 October 2015 asking him to call and noting that the Respondent had telephoned Wink and Mackenzie on several occasions but had been unable to speak to Mr Marinello. The Respondent again noted that he would send the file to the principal agent and that they had agreed to meet his expenses.

The Respondent also lodged his letter of 24 November 2014. This letter explained the background to the case and enclosed a certified copy of the will.

The Tribunal considered whether the admitted conduct met the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313. This case stated that there are certain standards of conduct to be expected of competent and reputable solicitors and a departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, in every case it is 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 made.



The Tribunal noted the terms of the Lewis decision which were specific to its facts. While there were some superficial similarities, in the present case the Tribunal was satisfied that the Respondent undertook to perform a service and so distinguished Lewis on its facts.

The Tribunal considered that the Respondent's conduct, while not exemplary, did not constitute a serious and reprehensible departure from the standards of competent and reputable solicitors. He had communicated with Wink and Mackenzie on at least five occasions throughout the year. There was a period of seven months where he did not communicate. It was during this period that it would appear that the Respondent found the copy will. It was reasonable for him to deal with the principal agents given the conversations that had taken place between Mr Marinello and the Respondent. The Respondent should have informed Urquharts that was what he intended to do although it is clear from the correspondence that at least latterly, Urquharts knew that the Respondent continued to deal with Wink and Mackenzie. The correspondence from Urquharts followed upon their mandate and the Complainers accepted that there was doubt about the validity of that mandate. The Tribunal was of the view that the Respondent's failures did not prejudice Mr C. An action to prove the tenor of the will could have been raised without the letter the Respondent ultimately provided. Nothing the Respondent did or omitted to do prevented the Secondary Complainer from raising the action. However, best practice would have been to provide the letter and copy will much sooner. Solicitors should respond promptly and appropriately to enquiries from other firms.

The Tribunal considered that the case was on the boundary between professional misconduct and unsatisfactory professional conduct. It had regard to the guidance on unsatisfactory professional conduct provided in Hood-v-The Law Society of Scotland [2017] CSIH 21. In that case Lord Drummond Young said:

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

The Tribunal was of the view that the conduct libelled fell short of the standards expected of competent and reputable solicitors. Although it was not serious and reprehensible, it had been unacceptable and may amount to unsatisfactory professional conduct. The Tribunal accordingly remitted the complaint



under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland for consideration.

The Fiscal made no motion for expenses and asked for usual order with regard to publicity. The Tribunal ordered that no expenses should be have due to or by either party. The present case lay close to the threshold between professional misconduct and unsatisfactory professional conduct. There was no criticism to be made of the Complainers who had properly brought the case before the Tribunal. Both parties had been partially successful. The decision will be given publicity in the usual way. However, other than those persons referred to in paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, no third-party need be identified in the findings as publication of their personal data may be detrimental to their interests.



**Eric Lumsden**  
**Vice Chairman**