

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

**QUINTON MUIR, D&J Dunlop, 2 Barns Street,
Ayr**

Respondent

1. A Complaint dated 18 June 2020 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Quinton Muir, D&J Dunlop, 2 Barns Street, Ayr (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 set the Complaint down for a procedural hearing to be heard on the virtual platform Zoom on 25 August 2020 and notice thereof was duly served upon the Respondent.
5. At the virtual procedural hearing on 25 August 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. Both parties invited the Tribunal to fix a full hearing. Having

heard submissions from both parties on the issue, the Tribunal set the Complaint for a hearing to take place on the virtual platform Zoom on 22 September 2020.

6. At the virtual hearing on 22 September 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. A Joint Minute of Admissions agreeing the averments of fact and duty had been lodged with the Tribunal. The Respondent invited the Tribunal to adjourn the hearing to allow him to obtain legal representation. The Fiscal confirmed that he had no objection to this motion and submitted that it was in the interests of justice to adjourn to allow the Respondent this opportunity. Accordingly, the Tribunal discharged the hearing and fixed a virtual procedural hearing for 9 November 2020.
7. Prior to the virtual hearing date, parties made contact with the Tribunal Office and indicated that the matter was now ready to be set down for a full hearing. Both parties invited the Tribunal to discharge the procedural hearing administratively and fix a full hearing. The Tribunal agreed to deal with the matter administratively in terms of Rule 56 of the Tribunal Rules 2008, discharged the procedural hearing and fixed a full hearing to take place on 26 January 2021, to take place on the virtual platform Zoom.
8. At the hearing on 26 January 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. Both parties indicated that, given that the Joint Minute agreed all of the averments of fact and duty, they would proceed on the basis of submissions only. The Tribunal proceeded to hear submissions on behalf of both parties.
9. Having given careful consideration to these submissions and the terms of the Joint Minute, the Tribunal found the following facts established:-
 - 9.1 The Respondent has a place of business at 2 Barns Street, Ayr. His date of birth is 8 May 1967. He was admitted to the roll of solicitors on the 18 December 1991. He was an employee of Jas Campbell & Co from the 31 January 1992 until the 28 February 1995. He was employed by West Anderson & Co between the 20 March 1995 and 30 June 1995. He was an employee with D & J Dunlop from the 19 July 1995 until 1 October 1998 when he became partner there, and he continues to practise from there.

- 9.2 The Respondent was consulted by the Secondary Complainer on the 11 April 2013. She sought advice on divorce from her husband from whom she had been separated since August 2010. The Respondent completed an advice and assistance application on her behalf. He wrote to her husband by letter of the 24 April 2013 seeking his co-operation in the divorce. Her husband instructed agents in Peterhead. There was a short exchange of correspondence. The Secondary Complainer instructed the Respondent to raise divorce proceedings as the negotiations were not bearing fruit. The Respondent applied for Legal Aid on her behalf to issue divorce proceedings in May 2013. Administrative difficulties meant that Legal Aid was not granted until 22 August 2013.
- 9.3 The Respondent drafted and then sought warrant for service of an Initial Writ from the Sheriff at Ayr by way of letter dated 18 October 2013. The warrant was granted on the 22 October 2013. The Respondent sought to serve the action by recorded delivery on the 25 October 2013. The service copy was returned to the Respondent marked "No Answer". The Respondent wrote to the husband's agents on the 30 October 2013 enquiring whether they had instructions to accept service. The agents replied indicating they were unable to accept service and advised of a potential alternative address. The Respondent enquired whether the Secondary Complainer could advise of a connection to this new address. She replied she was awaiting confirmation from the Child Support Agency [CSA].
- 9.4 The Respondent returned a voice mail message from the Secondary Complainer on the 29 November 2013, and left his own voicemail. He did not write to her advising service had not taken place, seek further information from her or attempt further service. On the 23 December 2013 SLAB wrote to the Respondent, he duly forwarded this letter to the Secondary Complainer, again without commenting upon the lack of service or requesting further information nor did he attempt further service. The Respondent did not contact the Secondary Complainer in the new year until a further letter from SLAB was received in February 2014, which he duly forwarded to her. He again did not mention a lack of service, seek further information from her or attempt further service. The Respondent took no further steps to serve the Divorce action nor did he contact the Secondary Complainer to advise her further of the lack of progress in the first half of 2014.

- 9.5 Legal Aid was terminated on the 7 July 2014. The Respondent did not communicate this decision to the Secondary Complainer. The Secondary Complainer called the Respondent on the 8 September 2014 and advised she did not know where her husband was. The Respondent discussed instructing tracing agents/Sheriff Officers and intimation on the walls of court. He advised he would report shortly. The Respondent did not take any action. He did not report shortly thereafter. The Secondary Complainer next called on the 23 December 2014. The Respondent called back and left a message but took no action.
- 9.6 The next note of action on the Respondent's file is an incoming call from the Secondary Complainer dated 6 February 2017, shortly followed by an email from the Secondary Complainer complaining of a lack of a response and/or action. In the email the Secondary Complainer indicated she had spoken to the Respondent on numerous occasions since 2014 during which the Respondent promised progress. The Respondent's file shows no record of these contacts and he did not take any action in furtherance of the divorce action.
- 9.7 Following the telephone call the Respondent prepared a minute of amendment, affidavits and a minute for decree which he forwarded to the Secondary Complainer on the 17 February 2017. The Respondent instructed Sheriff Officers to serve the original unamended Initial Writ on the 27 February 2017. He instructed them to serve the action at an address in Ellon, the source of that address is not recorded on the Respondent's file. The initial writ was served on the 1 March 2017. The husband did not enter appearance in the divorce action.
- 9.8 The Respondent intimated a minute of amendment in the divorce action to the husband and forwarded the same to Ayr Sheriff Court on the 4 April 2017. He advised the Secondary Complainer of this action. The Respondent received an interlocutor allowing the amendment dated 18 April 2017. The interlocutor was authenticated by Sheriff Leslie. The Respondent forwarded this to the Secondary Complainer on the 25 April 2017 advising he would finalise the affidavits and Minute for Decree. The Secondary Complainer did not hear from the Respondent and called him on the 30 May 2017 for an update. He advised once again he would finalise the

affidavits as they required updating. The Affidavits were sworn on the 20 June 2017.

9.9 The Respondent submitted affidavits and a minute for decree to Ayr Sheriff Court under cover of letter dated 6 July 2017. The Secondary Complainer called the Respondent on the 30 August and he advised he had not heard from the court. He advised he would check with the court. The Respondent spoke with the Secondary Complainer on the 6 September 2017 advising he had no word from the court. The Sheriff Clerk at Ayr has a letter dated 7 July 2017 addressed to the Respondent advising that the Sheriff was of the view the minute for decree was incompetent as the instance had fallen. A warrant (authority of the court to serve a court action) falls (becomes ineffective) if not served upon the defender within a year and a day of the granting of the warrant. The instance fell in this case on the 23 October 2014.

9.10 The Secondary Complainer's partner called the Respondent on her behalf on the 17 October 2017 advising he had spoken to the Court which advised the case had been dismissed. The Respondent called the court and was advised the case had been dismissed but the court had not intimated this to him. The Respondent wrote to the Secondary Complainer by email advising of the outcome and advised he would prepare a fresh Initial Writ forthwith. The Secondary Complainer withdrew her instruction on the 18 October 2017 and instructed fresh agents the same day.

10. Having given careful consideration to the foregoing facts and the submissions of both parties, the Tribunal found the Respondent guilty of Professional Misconduct as follows:-

A. *Singly* in respect that:-

- (i) In delaying and acting upon the Secondary Complainer's instruction to raise and proceed with a divorce action within the period October 2013 to October 2017, the Respondent failed in his obligation to proceed with the instruction within a reasonable time; and
- (ii) In failing to communicate with the Secondary Complainer in the period January 2015 to February 2017, the Respondent failed to communicate effectively with her;

- B. *In cumulo* with the above and with each other:-
- (i) In failing to instruct Sheriff Officers/tracing agents to attempt to trace the husband in 2014 and thereafter the Respondent failed to act in the best interests of the Secondary Complainer;
 - (ii) In failing to advise the Secondary Complainer the instance had fallen in October 2014 and he could not serve the action, the Respondent failed to act in her best interests; and
 - (iii) In failing to serve the divorce action by exhibition on the walls of court and allowing the instance to fall, the Respondent failed to act in the best interests of the Secondary Complainer.

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

By Video Conference, 26 January 2021. The Tribunal having considered the Complaint dated 18 June 2020 at the instance of the Council of the Law Society of Scotland against Quinton Muir, D&J Dunlop, 2 Barns Street, Ayr; Find the Respondent guilty of professional misconduct *singly* in respect that (i) in delaying and acting upon the Secondary Complainer's instruction to raise and proceed with a divorce action within the period October 2013 to October 2017, the Respondent failed in his obligation to proceed with the instruction within a reasonable time; (ii) in failing to communicate with the Secondary Complainer in the period January 2015 to February 2017, the Respondent failed to communicate effectively with her; *in cumulo* in respect that (i) in failing to instruct Sheriff Officers/tracing agents to attempt to trace the husband in 2014 and thereafter the Respondent failed to act in the best interests of the Secondary Complainer; (ii) in failing to advise the Secondary Complainer the instance had fallen in October 2014 and he could not serve the action, the Respondent failed to act in her best interests; and (iii) in failing to serve the divorce action by exhibition on the walls of court and allowing the instance to fall, the Respondent failed to act in the best interests of the Secondary Complainer; Censure the Respondent; Fine him in the sum of £10,000 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; 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)

Ben Kemp

Vice Chair



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12. 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



Ben Kemp

Vice Chair

NOTE

A Joint Minute between the parties agreeing the averments of fact and duty had been signed and lodged with the Tribunal in advance of the previous full hearing set down for 22 September 2020. Both parties confirmed to the Tribunal on 26 January 2021 that there were no preliminary matters to be dealt with prior to the hearing and that both parties would proceed on the basis of submissions only given the extensive nature of the Joint Minute. The Tribunal invited both parties to clarify whether or not the Respondent accepted that the Secondary Complainer had spoken to him on numerous occasions between 2014 and the date of her email of 6 February 2017 and whether or not the Sheriff Clerk's letter of 17 July 2017 was actually received by the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

Mr Stewart took the Tribunal through the averments of fact. In the course of these submissions, he emphasised that for the first six months of 2014 the Respondent took no steps to either serve the initial writ or offer any advice to the Secondary Complainer. He submitted that the key date for the divorce action was 23 October 2014 when the instance of the initial writ fell due to lack of service during the period of one year and one day.

The Respondent admitted receiving an email from the Secondary Complainer in February 2017 which stated that the Secondary Complainer had spoken to the Respondent on numerous occasions since 2014. The Respondent's admissions include that his file shows no record of these contacts and that he did not take any action in furtherance of the divorce action. He submitted that this was an acceptance by the Respondent that contact was made during the time and that no action was taken. Averments 3.5 and 3.6 demonstrated that two years had passed during which the Respondent accepted that he had contact from the Secondary Complainer which was not recorded on the file and that he had not taken any action.

The email of February 2017 spurred the Respondent into action. He instructed service of the initial writ which was not competent given that the instance had fallen. Unfortunately, the error by the Sheriff Court in allowing the Respondent's Minute of Amendment encouraged the Respondent to think that the court accepted that the case was still live.

Averments 3.9 and 3.10 demonstrate that the Secondary Complainer continued to have to press the Respondent for action.

With regard to the letter dated 17 July 2017 held by the Sheriff Clerk at Ayr, Mr Stewart submitted that he could not say whether the letter was received by Mr Muir and no action taken or whether the letter was not received by him.

Mr Stewart directed the Tribunal's attention to the averments of duty set out within the Complaint. He conceded that not every breach of a rule necessarily amounted to misconduct but explained that the rules assisted the Tribunal in assessing the Respondent's conduct in this case. The rules referred to within the Complaint were Rule B1.4.1 (acting in the best interests of the client), Rule B1.9.1 (communicating effectively with the client), and Rule B1.10 (carrying out instructions adequately, competently and within a reasonable time) of the Law Society of Scotland Practice Rules 2011.

Mr Stewart referred the Tribunal to MacPhail – Sheriff Court Practice, 3rd Edition paragraphs 6.10 and 7.07 which explained that the instance of an initial writ would fall if the writ was not served within one year and one day. He submitted that any reasonably competent court practitioner would have this in the forefront of his or her mind.

Mr Stewart then directed the Tribunal's attention to the averments of misconduct within the Complaint.

In relation to paragraphs 5.2 and 5.3, he submitted that the Respondent should have brought to the Secondary Complainer's attention that he did not have the address for the husband and that he had not served the initial writ. He should have sought instructions from the Secondary Complainer.

Paragraph 5.4 states that the Respondent failed to communicate effectively with the Secondary Complainer in failing to communicate with her for the period December 2014 to February 2017. He submitted that it was incumbent upon a solicitor to seek instructions.

Paragraph 5.5 averred that the Respondent failed to act in the best interests of the Secondary Complainer by failing to instruct Sheriff Officers to attempt to trace her husband. At some point in 2014, it was incumbent upon the Respondent to take action to progress the litigation. By failing to do so he had failed to act in the best interests of his client.

Paragraphs 5.5 and 5.6, he submitted, merged together. Paragraph 5.6 was the averment that the Respondent had failed to act in the Secondary Complainer's best interests by failing to advise that the instance of the initial writ had fallen in October 2014.

Paragraphs 5.7 and 5.8 were further instances of the Respondent failing to act in the best interests of the Secondary Complainer as a result of his failure to identify that the instance of the initial writ fell in October 2014 due to lack of service.

Averment 5.9 related to the delay on the part of the Respondent to proceed with the divorce action within a reasonable time.

Mr Stewart directed the Tribunal's attention to the case of Sharp-v-The Law Society of Scotland [1984] SC 129 in relation to the test to be applied in relation to professional misconduct. He submitted that the delay in this case together with the Respondent's failure to act in the best interests of his client and failure to communicate effectively with her amounted to a serious and reprehensible departure from the conduct to be expected of a competent and reputable solicitor. He submitted that a competent and reputable solicitor would have known that the instance of the initial writ had fallen and would have sought instructions from the Secondary Complainer to allow him to proceed.

The Fiscal referred the Tribunal to the case of The Law Society of Scotland-v-Andrew Lawrie [10 September 2018] SSDT which he submitted was a case which dealt with delay. In that case he stated that the period of delay was just over one year. In the present Complaint, the delay was substantially more than one year. He argued that the Tribunal required to take into account not only the delay but the failure of the Respondent to act in the best interests of his client, the failure to communicate effectively with his client and the lack of competency of the Respondent. In particular, he submitted the Tribunal should note that the Respondent continued to try to use the original court action even though it had fallen which he said demonstrated that the Respondent had not shown the appropriate level of skill.

In response to a question from the Tribunal, the Fiscal confirmed that he was relying on a breach of Rule B1.10 on the basis of delay and lack of competence. He argued that a competent solicitor would have taken steps to serve the initial writ timeously in order to preserve the cause. In this case, there was legal aid to cover the costs of instructing Sheriff Officers. He argued that the delay of two years with no instructions or progress demonstrated a lack of competence on the part of the Respondent. He submitted that a competent solicitor would have taken steps to obtain instructions and progress matters.

In response to a further question from the Tribunal, the Fiscal argued that the Respondent's conduct met the serious and reprehensible part of the Sharp Test in a number of respects. There was a series of instances where the Respondent failed to demonstrate competency. The Respondent had allowed the instance of the initial writ to fall. The overall delay in pursuing his client's claim and his failure to

achieve his client's goal included breaches of Rules 1.4, 1.9 and 1.10. For two years and two months, the Respondent did nothing. When he was spurred into action, he jumped into the old case where the instance had fallen. From the end of December 2013, the Respondent had failed to seek further instructions from the Secondary Complainer regarding an address for her husband. Mr Stewart argued that it was the responsibility of a solicitor to best serve his client. In order to do that the solicitor required to keep in mind what his client sought to achieve which in this case was divorce. If the Respondent was unable to trace the husband in this case, he could have taken steps to display the initial writ on the walls of court. Divorce could have been achieved here at least three years earlier. He submitted that this alone (a three-year delay) amounted to serious and reprehensible conduct.

SUBMISSIONS FOR THE RESPONDENT

The Respondent confirmed that this had been a fairly straightforward divorce which had involved children under 16 but had not included any financial dispute.

When service of the initial writ had initially failed, he had asked the Secondary Complainer if she could provide an address for her husband. This appeared to him to be "doable" as the Secondary Complainer was also engaged in a case with her husband with the Child Support Agency. He noted that there was some criticism of him in averment 3.4 where it stated he had not written to the Secondary Complainer in November 2013 explaining that service had not taken place. He argued that there would have been no expectation on the part of the Secondary Complainer that service could have taken place as she was to provide the Respondent with an address for her husband. He accepted that sundry correspondence had taken place between him and the Secondary Complainer which made no reference to lack of service of the writ. He submitted that there would have been no reasonable understanding that the writ could have been served because the Secondary Complainer was still seeking the address. With regard to correspondence from the Legal Aid Board, it was his experience that such correspondence was also sent direct to the client by the Legal Aid Board.

The Complaint referred to the Secondary Complainer calling the Respondent on 8 September 2014 and advising him that she did not know where her husband was. This, he argued, demonstrated that she was still endeavouring up until then to get her husband's address. Reference had been made to intimation of the divorce action on the walls of court. For that to take place, a solicitor requires detailed averments regarding attempts to trace a defender which were a necessary precursor to proceeding by intimation on the walls of court. None of that had happened so the Respondent was not able to proceed in that manner.

The Respondent was unable to explain why he failed to notice that the instance fell in 2014. He accepted that the authorities were well-known. He explained that this had simply escaped him. He did not have a system at the time to identify such dates but had employed one now.

He submitted that he was encouraged to go down the road of attempting to rejuvenate the existing process by the Sheriff Court in Ayr. He did not accept that he had failed to take action between December 2014 and February 2017. The Secondary Complainer had contacted him on 23 December 2014. Whilst he had called back on that date, his office thereafter was closed for the festive period. He accepted that his delay in taking any action commenced in January 2015. He emphasised that it was not the responsibility of the Secondary Complainer to make progress during this time but that the responsibility remained with him throughout.

With regard to the Secondary Complainer's email of 17 February 2017, the Respondent did not recall there having been any contact from the Secondary Complainer during the period referred to. However, on receipt of her email a process of proposed remedial action was attempted. It was still not in his mind that the old writ had fallen. When he had instructed Sheriff Officers to serve the writ, they had not raised the issue. He stated that he did, however, accept that it was his responsibility and that he should have known. The Minute of Amendment referred to was to amend the address for the defender. The Sheriff had allowed this Minute of Amendment. The Respondent had continued to attempt to progress the old action. He was not aware that the instance had fallen. He was not aware of the Sheriff Court letter dated 7 July 2017. He did not become aware of the situation until he sent his court messenger to Ayr Sheriff Court, following contact from the Secondary Complainer's partner in October 2017. The court indicated that the action had only recently been dismissed and that this had not been intimated yet to the Respondent.

The Respondent accepted he could be criticised for delay from January 2015 until early February 2017. Beyond that period, he submitted this was a private divorce action. The remedy was not lost to the client. She was able to instruct new agents and successfully obtained the remedy she desired.

The Respondent accepted that the averments of duty were well noted. He submitted that not all breaches of rules are sufficient to establish misconduct. He submitted that the standard of proof for the Tribunal was one of beyond reasonable doubt.

The Respondent turned to the averments of misconduct in the Complaint. He conceded that there was no suggestion on his part that this was "good lawyering" or that any problem lay with the client. He

accepted that there was a period of delay but argued that this should be taken within the relevant context. After the delay, action was subsequently taken to resolve matters which was unfortunately incompetent, and it took some time for that to come to light. He invited the Tribunal to have regard to the Sheriff allowing the Minute of Amendment which had encouraged him then to proceed with Affidavits and minuting for decree. He argued that this demonstrated that this was not done in a cavalier fashion ignoring the client's interests. He submitted that this was a hamfisted attempt to get things back on track. With regard to paragraphs 5.2 and 5.3, the Respondent argued that the telephone call of the Secondary Complainer in September 2014 regarding an address for her husband disclosed that she was still trying to provide him with the necessary information to allow him to serve the initial writ. He argued that this disclosed that she must have known that the writ had not been served until that point.

With regard to 5.4, he accepted that there was undoubtedly no communication from the period January 2015 until February 2017. He accepted that the onus was upon him and not the client. He explained that he had no notes of any detailed requests from her during that time but he accepted that there was some interaction between him and her during that period of time as he was representing her partner in another matter and on occasions when he contacted the partner for instructions the Secondary Complainer would be in the background.

With regard to 5.5, he accepted that as a matter of fact he had not instructed Sheriff Officers to trace the husband. He had hoped that an address could be furnished by the Secondary Complainer. This was also of relevance to averment 5.7 regarding intimation on the walls of court. In order to do that, he would have had to have taken other steps to trace the husband which he had not done.

With regard to averment 5.6, he accepted that he should have been aware that the instance had fallen in October 2014. Regrettably, Sheriff Officers had not raised the issue with him and nor had the Sheriff in Ayr until late in the day. He accepted that the root of the fault lay with him, but these matters were relevant to the question of reprehensibility of his action in persevering with an incompetent action. When the Secondary Complainer contacted him in February 2018 to indicate that she was unhappy with the lack of progress, she was nonetheless happy for him to proceed. Having received that communication, he took steps to progress matters. Unfortunately, these steps included the Minute of Amendment and Affidavits referred to in averment 5.8. He could not minute for decree without submitting the welfare affidavits.

With regard to averment 5.9, he invited the Tribunal to accept that the appropriate period of delay was January 2015 to February 2017.

The Respondent argued that a failure to comply with rules may amount to professional misconduct but this was only permissive and not inevitable. He submitted that this required proof beyond reasonable doubt. He invited the Tribunal to hold that communication had taken place with his client. There had been no attempt on his part to mislead the Secondary Complainer. A process of rectification had been undertaken. The client's remedy was not lost. He emphasised that it was to the Secondary Complainer's credit that there was no allegation that she was disadvantaged in such a way that raised a claim for compensation.

The Respondent submitted that the Secondary Complainer's divorce action had "bumbled along". It had lost steam. The amount of business being dealt with by the Respondent at that time meant that the Secondary Complainer's action had suffered. The Respondent explained that he now had a case management system to prevent that. Whilst he readily accepted that the onus was on a solicitor to be in touch with his client, he asked the Tribunal to take into account that there had been sporadic contact here and that what had happened is that the Respondent had lost focus.

The Respondent submitted that the Sharp Test referred to serious and reprehensible conduct taking into consideration the whole circumstances of the case. He argued that the circumstances here might amount to negligence. He conceded that the evidence here amounted to "bad or inefficient" lawyering but argued it was not such as can be categorised as professional misconduct. He accepted that the conduct was such that something required to be done to mark it and he conceded that his conduct had amounted to unsatisfactory professional conduct. He referred to two cases he said had been published by the Law Society as guidance to the profession. The first was a case from June 2014 which he submitted involved a full two-year delay where the solicitor withdrew from acting only 10 days before the expiry of the triennium resulting in prejudice to the client which was held to amount to unsatisfactory professional conduct. The second from July 2017 was a case involving a delay of 16 months with other aggravating factors which was held to be unsatisfactory professional conduct. He argued that in his own case there were no other aggravating factors. The client's remedy was not lost. The Respondent had attempted remedial action. He invited the Tribunal to look at the interaction of all of the features of his case and to determine that the conduct did not amount to professional misconduct but was unsatisfactory professional conduct.

In answer to a question from a member of the Tribunal, the Respondent explained that his firm was a high street partnership where he was the court partner. His work consisted of 60% crime and the other 40% was a range of civil court work mainly residence, contact and divorce issues. On reflection, he was

aware of the year and a day rule but had not picked up on it in this case. Since this matter, he has introduced systems within the office to highlight the issue.

DECISION

The parties in this case had entered into a Joint Minute agreeing all of the averments of fact. The Tribunal accordingly found the relevant facts to be established, as admitted. It required to assess whether or not the admitted facts were sufficient to find the averments of misconduct set out within the Complaint. Both parties had made reference to the case of Sharp v Council of the Law Society of Scotland 1984 SLT 313, which sets out the test for professional misconduct as follows:-

“There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made.”

In broad terms, it appeared that the Respondent accepted that his conduct had fallen below the conduct to be expected of a competent and reputable solicitor but that the conduct did not meet the serious and reprehensible part of the test. The question was in any event one for the Tribunal.

In considering the averments of misconduct, the Tribunal concluded that the main overriding averment of misconduct was 5.9 which stated:-

“In delaying and acting upon the Secondary Complainer’s instruction to raise and proceed with a divorce action in the period October 2013 to October 2017 the Respondent failed in his obligation to proceed with instruction within a reasonable time.”

The Respondent had invited the Tribunal to hold that the dates within this averment should be restricted. The Tribunal did not accept that that was the appropriate approach to this averment of misconduct. A solicitor is expected to carry out instructions adequately and competently within a reasonable time. The relevant time is from instruction to the termination of engagement. In that event, the Tribunal asked itself whether it was reasonable that in a four-year period the Respondent had failed effectively to commence

a divorce action. In considering this question, the Tribunal took the view that the other averments of misconduct were all steps within this broad encompassing averment. Due to periods of inaction on the part of the Respondent, a failure to seek instructions and a failure to properly identify that the instance of this writ had fallen, the Respondent had failed to raise and proceed with a divorce action for a period of four years. The Tribunal determined that this period of time, taking into account all of the contributory factors, amounted to a departure from the standard to be expected of a competent and reputable solicitor that could only be classed as serious and reprehensible. The Tribunal determined that paragraph 5.9 was established and that this *in itself* amounted to professional misconduct.

Paragraph 5.4 states that:-

“In failing to communicate with the Secondary Complainer in the period December 2014 to February 2017 the Respondent failed to communicate effectively with her.”

The Tribunal agreed with the Respondent that the appropriate start date for the purposes of this averment should be January 2015. Nonetheless, this amounted to a period of in excess of two years of complete inaction by the Respondent. Taking that into context with the other background circumstances, the Tribunal concluded that this averment also amounted in itself to professional misconduct.

With regard to the other averments of misconduct, the Tribunal concluded that paragraphs 5.5, 5.6, 5.7 and 5.8 were all supported by the facts but were more appropriately considered as part and parcel of paragraph 5.9 and the appropriate finding was one of misconduct *in cumulo*.

With regard to paragraphs 5.2 and 5.3, the Tribunal had some sympathy with the Respondent's submissions relating to the confirmation of an address for the Secondary Complainer's husband. Accordingly, the Tribunal found that they had not been established by the facts.

The Tribunal invited both parties to make submissions with regard to disposal.

SUBMISSIONS FOR THE COMPLAINER WITH REGARD TO DISPOSAL

The Fiscal lodged with the Tribunal a copy of the Respondent's record card. This disclosed two findings of unsatisfactory professional conduct and a finding of misconduct before the Tribunal on 28 September 2018.

The Fiscal clarified that the finding of unsatisfactory professional conduct from August 2018 resulted in a censure. This had involved a case where litigation had been raised in the Sheriff Court and there was an issue of whether or not it had been remitted to the Court of Session. The Sub Committee had taken the view that the ongoing correspondence in the case had created an impression that the court case had been transferred to the Court of Session when it had not been and that this matter was not clarified appropriately with the client.

The second case of unsatisfactory professional conduct was in April 2020 and this resulted in a censure, fine of £1,250 and compensation of £1,250. This case involved delay in obtempering a mandate.

With regard to the finding of the Tribunal dated 28 September 2018, the Fiscal invited the Tribunal to consider paragraphs 7.1 to 7.5 of the Tribunal Findings.

SUBMISSIONS FOR THE RESPONDENT WITH REGARD TO DISPOSAL

The Respondent emphasised that he wanted to make a full and unreserved apology to the Secondary Complainer. He said he was genuinely sorry for any distress he had caused.

The Respondent is 53, married with a child still at school. He has significant outlays and his only employment is with the firm. This is his 30th year in practice. He has two partners, one 70 the other 66. The older partner has intimated a desire to retire. The firm employs eight staff. It is a busy practice.

He invited the Tribunal to hold that the delay and failure to communicate in this case occurred in a very case specific way. He invited the Tribunal to accept that the delay was 24 months and not the whole period indicated in the body of the Complaint. He accepted that he was not proud of what had occurred but asked the Tribunal to accept that there were no aggravating factors. He had not attempted to mislead his client in any respect. No remedy was lost. He thanked the Secondary Complainer for her openness in not seeking compensation.

He accepted that there was no excuse for the delay that had occurred. The best explanation that he could provide was that he had been swamped by the volume of business at the time. He accepted that the Secondary Complainer's case should have been driven on by his own hand. The case had lost impetus and his client had been patient. He had cooperated fully with the mandate, the Fiscal and the Tribunal. He submitted that his attempt to undertake a remedy in the course of the action was a genuine attempt mistakenly encouraged by the failure of Sheriff Officers and Ayr Sheriff Court to identify the problem.

The Respondent had made no financial benefit here. He received no fees for any of the work done.

He invited the Tribunal to accept that there were no issues of competence here. There was nothing inherently problematic in his work. He had been the subject of a number of peer reviews in civil and criminal work since this time and had passed these reviews with flying colours. He invited the Tribunal to hold that this was a “case-specific” episode. He explained that no issues with his work had arisen since October 2017. He had learnt from his difficulties and had adapted office processes to make sure problems did not occur again. He had introduced a system where an alert is given if a case lies dormant for more than three months. The firm had appointed a number of paralegals to undertake regular file reviews. All of the steps taken by him and the firm mitigated and militated against reoccurrence. He hoped that the Tribunal would accept that as a result he presented no risk to the public. His conduct was not premeditated. He was not aware at the time of his error.

He invited the Tribunal to distinguish this case from the other findings against him. The finding of August 2018 was in relation to a complex case involving Counsel. An action had been raised in Aberdeen Sheriff Court with averments that the law of Yemen applied. He emphasised that this was a matter of regret for him. He argued that the finding of misconduct before the Tribunal in the other case was of a different character to the present one. The second finding of unsatisfactory professional conduct in 2020 related to a delay in obtempering a mandate which was not in the circumstances time critical. At the time he had spent a period in hospital unwell for which he had provided medical vouching.

He explained that he was the only court partner within his firm. He had no issue with drink, drug or gambling dependence. There was no mental health background. He submitted there was no collateral danger to allowing him to continue to practise. He stated that what happened in the present case was of an isolated nature. This was one of many cases he dealt with. This was not endemic or systematic behaviour. He invited the Tribunal to hold that he did not present a risk to the public. At the time his practice was overloaded. Since then, various procedures have been introduced to adapt his practices to being proactive rather than being reactive.

He accepted that his case merited more than a censure but invited the Tribunal to hold that a fine was the appropriate disposal. He referred the Tribunal to its indicative sanctions guidance and invited the Tribunal to hold that there was no need for supervision, that he presented no risk to the public, and that the conduct was at the lower to middle end of the scale. He invited the Tribunal to hold that a censure and fine of a level reflecting the seriousness of the damage to the reputation of the profession was

sufficient to demonstrate the Tribunal's discontent. He conceded that publicity would follow in the usual manner. He conceded that an award of expenses against him was appropriate.

He invited the tribunal to hold that the other SSDT case against him was much different in character to the present one. In answer to a question from the Tribunal, he clarified that in the other case he was found guilty of professional misconduct, censured and fined £7,500. He invited the Tribunal to consider this case on its own facts and circumstances and deal with the matter by way of censure and fine.

The Fiscal clarified that he was moving for expenses and that he had no comment to make with regard to publicity.

DECISION ON DISPOSAL

The Tribunal gave very careful consideration to the submissions made by both parties. In the circumstances it was prepared to accept the Respondent's submission that there was no requirement for supervision here. The Respondent appeared to have insight into his conduct. He indicated, and was not contradicted, that he had no other outstanding matters. He has been peer reviewed on several occasions and no issues raised. Following the matter before the Tribunal, his firm had employed additional staff and introduced file management systems to prevent any recurrence.

The Tribunal concluded that the seriousness of the conduct contained within the Complaint did not in itself merit suspension. However, the Tribunal was in agreement with the Respondent that a censure in this case would not be sufficient. The Tribunal did not accept that this was an isolated incident. Although the other cases referred to were not necessarily on all fours with the present case, they involved similar issues. This was the fourth conduct issue for the Respondent and as a result has serious potential consequences for the reputation of the profession. The failure to make progress in the Secondary Complainer's case was extensive and included a period in excess of two years where no action of any kind was taken by the Respondent.

Having regard to the whole circumstances, the Tribunal concluded that the appropriate disposal was one of censure and a fine of £10,000.

The Respondent had conceded that an award of expenses against him was appropriate. Given the personal and private nature of the matters involved within the Complaint for the Secondary Complainer,

the Tribunal considered it appropriate that publicity should include the name of the Respondent but need not identify any other individual.



Ben Kemp
Vice Chair