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

JOHN ROSS BOYLE, Boyles Solicitors, Boyle Chambers, 15 Albert Square, Dundee

Respondent

1. A Complaint dated 26 April 2022 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that John Ross Boyle, Boyles Solicitors, Boyle Chambers, 15 Albert Square, Dundee (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Gary Robertson, 1 Strathyre Place, Broughty Ferry, Dundee.

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 18 November 2022 and notice thereof was duly served on the Respondent.

5. At the hearing on 18 November 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Claire Mitchell, KC, instructed by Johnston Clark, Solicitor, Dundee.

6. Having given careful consideration to the terms of the Record, the Joint Minute, the productions, and the evidence of the Respondent, the Tribunal found the following facts established:-

6.1 The Respondent is John Ross Boyle of Boyles Solicitors, Boyle Chambers, 15 Albert Square, Dundee. He was born on the 19 August 1980. He was admitted as solicitor on the 10 March 2006. He was an employee of Boyles Solicitors between 20 March 2006 until 30 November 2011 when he commenced trading as John Boyle & Co. as a sole principal. His firm is John Boyle & Co. but it has traded as Boyles Solicitors since 1 November 2017.

6.2 On 24 January 2019, the Secondary Complainer instructed the Respondent regarding a claim against him for repayment of a sum he had previously been paid in respect of building work. The Respondent noted that the Secondary Complainer's invoices had been issued in the name of a limited company, GR Joinery Dundee Ltd at an address different to the Secondary Complainer's home. The Respondent advised that he would write to Harper McLeod who acted for the pursuer, advising that writing to the Secondary Complainer, in person, had been an error.

6.3 On 30 January 2019, the Respondent wrote to Harper McLeod on behalf of the Secondary Complainer to advise that it was the Secondary Complainer's company GR Joinery Dundee Ltd which their client had instructed to do the works. He also wrote to the Secondary Complainer referring to their meeting on 24 January 2019 and enclosing a copy of the letter he had sent to Harper McLeod. Separately, the Respondent sent the Secondary Complainer his Terms of Engagement.

6.4 On 6 March 2019, Harper McLeod responded in detail to the Respondent 's letter of 30 January 2019 disputing the Secondary Complainer's position and setting out their client's position. On 8 March 2019, the Respondent wrote to the Secondary Complainer enclosing this correspondence and requesting he arrange an appointment to discuss.

6.5 On 15 March 2019, the Secondary Complainer forwarded to the Respondent e-mail correspondence he had had with the pursuer. On 15 March 2019, the Respondent 's file records that the Secondary Complainer called to cancel his appointment.

6.6 On 22 March 2019, the Respondent wrote to Harper McLeod in relation to their recent correspondence and to dispute their client's claim.

6.7 On 26 March 2019, Harper McLeod e-mailed the Respondent referring to his letter dated 22 March 2019. They advised they were instructed to raise court proceedings. They had now received a warranted writ from the court and were arranging service on the Secondary Complainer and enclosed a copy for the Respondent's reference. They asked the Respondent to confirm if he was instructed in respect of the court action.

6.8 On 27 March 2019, the Respondent e-mailed Harper McLeod in reply to say that he had not heard from the Secondary Complainer yet but said that no doubt he would be in touch when he got the papers.

6.9 On 28 March 2019, Harper McLeod emailed to ask whether the Respondent had instructions to accept service of the writ. If they did not hear from the Respondent by 12pm next day or the recorded delivery writ was not signed for then, they would need to instruct Sheriff Officers. The Respondent replied to say that he had left a message for the Secondary Complainer to call him but had not heard anything.

6.10 On 2 April 2019, the Secondary Complainer e-mailed the Respondent for an update and asked if there had been any more correspondence.

6.11 On 3 April 2019, the Respondent replied to say that the pursuer was going to raise court proceedings to recover the money and that the Secondary Complainer should receive court papers soon whereupon he should contact the Respondent again.

6.12 On 5 April 2019, the Secondary Complainer spoke to the Respondent on the phone and told him that he had received an Initial Writ which he advised he would hand in to the Respondent's office.

6.13 On 11 April 2019, Harper McLeod e-mailed the Respondent to ask him if he had heard anything from the Secondary Complainer.

6.14 On 11 April 2019, the Respondent replied to Harper McLeod's e-mail. He advised the Secondary Complainer had received the Initial Writ and was going to arrange an appointment but had not done so yet.

6.15 On 6 May 2019, the Secondary Complainer e-mailed the Respondent to say that he had called his office over a week ago asking for a call back. He advised he had just received a letter dated 1 May 2019 from Registry Trust Limited advising that an undefended decree for £10,300 had been granted against him at Dundee Sheriff Court on 30 April 2019. He asked the Respondent how that was possible if the matter had not even been to court yet. He asked the Respondent to call him as a matter of urgency.

6.16 On 7 May 2019, the Secondary Complainer e-mailed the Respondent to ask again that he call him urgently. Within half an hour the Respondent e-mailed back to say that he had tried to call him but that the Secondary Complainer's phone wasn't working. He said he would contact the court to find out what had happened.

6.17 On 13 May 2019, the Secondary Complainer e-mailed the Respondent to ask what was happening. On 15 May 2019, the Secondary Complainer e-mailed the Respondent to ask that he please call him to let him know what was happening. The Respondent did not reply to either email.

6.18 On 17 May 2019, the Secondary Complainer e-mailed the Respondent to advise that he had had a Sheriff Officer at his door with a decree and that an inhibition had been put on his house. The Sheriff Officer had said that the Secondary Complainer had 14 days to pay or ask for a recall. The Secondary Complainer asked the Respondent to call him on Monday to discuss.

6.19 On 17 May 2019, the Respondent replied in haste from court from a mobile phone by e-mail to say that he was the duty solicitor that week so had been stuck in court and hadn't had a chance to call him. He then wrote:

"I've put a recall application in. Will let you know when I hear back from court"

6.20 On 18 May 2019, the Secondary Complainer e-mailed the Respondent to say that a £25 court fee had been taken from his bank account.

6.21 On 21 May 2019, the Secondary Complainer e-mailed the Respondent as follows:

"What's the outcome? Did you hear from the court? I'm getting anxious as he has had sheriff's officers at my personal address. He has put an inhibition on my house. How can this be?

"It's a limited company at another address that this was done by. Can you please update me tomorrow as a matter of urgency?

"I sent you his email correspondence stating that was not a contract. I'm feeling really nervous about the whole situation."

6.22 On 22 May 2019, the Respondent sent a text to the Secondary Complainer to arrange an appointment with him as a matter of urgency and to bring court correspondence with him.

6.23 On 30 May 2019, Harper McLeod e-mailed the Respondent asking if he was still instructed by the Secondary Complainer. The Respondent was advised the pursuer had obtained decree, served a charge for payment, an inhibition had been registered on his property and an arrestment had been served on his bank. The Respondent was asked if the Secondary Complainer had any proposals for settlement of the decree and expenses.

6.24 On 31 May 2019, the Secondary Complainer e-mailed the Respondent to ask if there had been any correspondence yet. The Respondent did not reply.

6.25 On 4 June 2019, the Secondary Complainer e-mailed the Respondent:

"Hi John, is there any news?
I'm getting really anxious as not heard anything from you. Sorry to skull burn you".

6.26 On 4 June 2019, the Respondent's file records that his secretary sent a text to the Secondary Complainer to arrange an appointment to see him as soon as possible.

6.27 On 12 June 2019, Harper McLeod e-mailed the Respondent chasing a response to their e-mail of 30 May 2019. The Respondent did not contact the Secondary Complainer to seek instructions.

6.28 On 8 July 2019, the Secondary Complainer e-mailed the respondent to say,

"John. Please call me ASAP. URGENT"

6.29 On 8 July 2019, the Secondary Complainer spoke to the firm's staff member DGR by phone and advised that Sheriff Officers had called at his house serving papers on him. DGR noted that the Secondary Complainer thought that this had been dealt with. DGR noted that he/she advised the Secondary Complainer that he had not provided instructions in relation to the court action and so it had not been defended. DGR noted that they would need to see papers before advising further and noted that the Secondary Complainer would hand them in that day.

6.30 On 15 July 2019, the Secondary Complainer e-mailed the Respondent to ask him to please call him urgently.

6.31 On 17 July 2019, the Secondary Complainer spoke to the Respondent by phone regarding a sequestration hearing. The Respondent noted that this was calling in Dundee Sheriff Court the next day. The Respondent noted that he advised the Secondary Complainer that decree had been granted against him as the action had been undefended and that the pursuer was now enforcing decree by sequestrating him. The Respondent recorded that the Secondary Complainer owned his own house and could afford to pay £400-£500 a month towards the debt.

6.32 On 17 July 2019, the Secondary Complainer e-mailed the respondent:

"John, please emphasise on [S's] condition. Disability if required. His autism is high level and I can't have him being forced out of his home. I will settle at £500 a month".

6.33 On 18 July 2019, the Respondent recorded that he attended at the Sequestration Hearing. The Respondent noted that the case was continued for six weeks for settlement.

6.34 On 18 July 2019, the Respondent e-mailed the Secondary Complainer:

"Tried to call there but your phone is switched off. No problems today-sequestration was not granted, and the case was continued 6 weeks for resolution."

6.35 On 19 July 2019, the Respondent's file records that he sent a text to the Secondary Complainer to advise that the case had been continued to 29 August 2019 and to ask that he telephone the office to arrange an appointment with the Respondent.

6.36 On 8 August 2019, the Secondary Complainer e-mailed the Respondent to ask when they could meet up to discuss. The Respondent did not reply.

6.37 On 23 August 2019, the Respondent 's file records that there was a telephone message to the Secondary Complainer to arrange an appointment.

6.38 On 27 August 2019, the Respondent recorded "Instructions to close file. No instructions from client."

6.39 On 29 August 2019, in his absence, the Secondary Complainer was declared bankrupt and had his estate sequestrated by the Sheriff at Dundee Sheriff Court.

6.40 On 1 September 2019, the Secondary Complainer e-mailed the Respondent to acknowledge that although he was really busy to please let him know if he'd got his e-mails. The respondent confirmed by e-mail the next day that he had.

6.41 On 5 September 2019, the Secondary Complainer e-mailed the Respondent on the subject of "court" and to ask if there was any update and if it had been that week. The Respondent did not reply.

6.42 On 11 September 2019, the Secondary Complainer e-mailed the Respondent to ask if there was any news. The Respondent did not reply.

6.43 On 20 September 2019, Wylie & Bisset wrote by letter to the Secondary Complainer to advise him that on 29 August 2019, the Sheriff at Dundee had declared him bankrupt and sequestrated his estate. The relevant date for the commencement of the Secondary Complainer's sequestration was 27 June 2019. The court had appointed the Accountant in Bankruptcy to be his Trustee and the Accountant had appointed Wylie & Bisset to administer his sequestration. The Secondary Complainer was provided with a form to provide a true and accurate statement of his assets and liabilities within 7 days failing which was a criminal offence for which he could be prosecuted and fined or imprisoned.

6.44 On 23 September 2019, the Secondary Complainer e-mailed the Respondent asking him to call him that day and advising him that he had received Wylie & Bisset's letter declaring him bankrupt. He concluded by saying he needed to talk to the Respondent.

6.45 On 24 September 2019, the Secondary Complainer e-mailed the Respondent to ask that he call him urgently and forwarded him an historical e-mail exchange between himself and the pursuer. The Secondary Complainer asked the Respondent how he could resolve the situation and get the bankruptcy overturned.

6.46 On 24 September 2019, the Respondent e-mailed the Secondary Complainer to advise him that he was duty solicitor that week and so out of the office a lot and was finding it difficult to return calls. He then wrote:

"*They were granted decree for the original debt and have now applied for and been granted bankruptcy to enforce that debt. I have contacted the solicitors see if they would accept £400 a month towards the debt.*

"I expect to hear back from them by end of this week. I'll let you know as soon as I hear but can you contact me Friday just to see where we are regardless."

6.47 On 24 September 2019, the Secondary Complainer replied to ask how this could have happened and to ask the Respondent to please call him as he just needed to talk about the consequences regarding his house. The Respondent did not call.

6.48 On 30 September 2019, Wylie & Bisset wrote by letter to the Secondary Complainer noting that the Secondary Complainer had failed to respond. They asked him to now make an appointment for a telephone interview and to complete the previously requested statement of assets and liabilities. He was reminded that it was an offence not to cooperate with his Trustee.

6.49 On 1 October 2019, the Secondary Complainer e-mailed the respondent to ask him to confirm the status of events for his wife.

6.50 On 1 October 2019, the Respondent e-mailed the Secondary Complainer to say:

"As per our phone call yesterday a court order has been granted ordering you to pay him the money. We will seek to have this court order recalled and overturned. That would mean you were not due him the money and there would be no debt."

6.51 The Respondent did not take action to recall the court order. The order was not recalled.

6.52 On 3 October 2019, the Secondary Complainer e-mailed the Respondent about Wylie & Bisset's letter and saying that he thought the Respondent had written to them. He asked for a call back. The Respondent did not call back.

6.53 On 8 October 2019, the Secondary Complainer e-mailed the Respondent asking him to call him.

6.54 On 9 October 2019, the Respondent's file records that he spoke on the phone to the Secondary Complainer, they discussed the letter form Wylie & Bisset and that the Secondary Complainer would need to arrange an appointment to discuss matters further. The Respondent also said that he would write to the Accountant in Bankruptcy in the meantime.

6.55 On 10 October 2019, the Respondent wrote to Wylie & Bisset regarding their letter to the Secondary Complainer dated 20 September 2019 and asking them for an extension of the time limit for a response from him so that he could take instructions.

6.56 On 15 October 2019, the Respondent's file records that he wrote to the Secondary Complainer to make an appointment to see colleagues William Boyle and DGR.

6.57 On 22 October 2019, the file records the Respondent texting the Secondary Complainer to contact the office ASAP.

6.58 On 23 October 2019, the Secondary Complainer e-mailed the Respondent asking him to call him. The Respondent did not return the call.

6.59 On 4 November 2019, the Secondary Complainer e-mailed the Respondent asking him to call him. The Respondent did not return the call.

6.60 On 12 November 2019, the Secondary Complainer e-mailed the Respondent as follows:

"I don't know what is going on or why you or your dad is not contacting me. I've left messages from last Tuesday. I've spoken to Wylie Bisset myself and they say they have had no correspondence from Boyle's. After the meeting with your dad, he explained Boyle's had done wrong. (fucked up) was his words. He then went on to say he would fix it. I've had to call and leave numerous messages, but no one is returning them. I can't let this go on as my house is at risk. My family is torn apart. I need a call today or I'm left with no choice but to do as your dad instructed me to do. Go to the law society and get another solicitor to sue Boyle's. This is not what I want but I'm in limbo.

"You said your insurance company had been contacted and agreed to pay out? I'm not falling out or looking to start any lawsuits but why are you not calling me?"

6.61 On 28 November 2019, the Secondary Complainer advised the SLCC that he had received no response back to his e-mail of 12 November 2019.

7. Having considered the foregoing circumstances, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal considered Section 53ZA of the Solicitors (Scotland) Act 1980 and declined to remit the Complaint to the Council of the Law Society of Scotland.

8. Having heard further submissions on expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh, 18 November 2022. The Tribunal having considered the Complaint dated 26 April 2022 as amended at the instance of the Council of the Law Society of Scotland against John Ross Boyle, Boyles Solicitors, Boyle Chambers, 15 Albert Square, Dundee; Finds the Respondent not guilty of professional misconduct; Finds 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; Certify the cause as appropriate for Junior Counsel; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent, his father and the Secondary Complainer, but need not identify any other person.
>
> **(signed)**
> **Kenneth Paterson**
> **Vice Chair**

9. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 23 JANUARY 2025.

IN THE NAME OF THE TRIBUNAL

Kenneth Paterson

Vice Chair

NOTE

At the Hearing on 18 November 2022, the Tribunal had before it a Record, a Joint Minute, one Inventory of Productions for the Complainers, three Inventories of Productions for the Respondent, two Lists of the Authorities for the Complainers, two Lists of Authorities for the Respondent, a note of the Respondent's preliminary plea, a List of Witnesses for the Respondent, and the Respondent's affidavit.

Parties indicated at the outset of the hearing that they were content for the preliminary plea to be dealt with as part of submissions after evidence had been led. The only witness was the Respondent, and he would adopt his affidavit as his evidence-in-chief. The Tribunal received the Respondent's third Inventory of Productions even although it had been lodged late.

EVIDENCE FOR THE RESPONDENT

Witness One: The Respondent

The Respondent gave evidence on oath. He adopted his affidavit as his evidence in chief. The terms of his affidavit were as follows:

"1. I am John Ross Boyle, Boyles Solicitors, Boyles Chambers, 15 Albert Square, Dundee, DD1 1DJ. I was born on 19th August 1980. I was admitted as Solicitor on 10 March 2006. I was employed by Boyles Solicitors until 30th November 2011 when I started trading as John Boyle and Company as sole principal. The firm of John Boyle & Company has traded as Boyles Solicitors since the 1st November 2017 when the former firm of Boyles ceased trading.

2. I was instructed by Gary Robertson on the 24th January 2019 in relation to correspondence he had received seeking repayment of a sum of money that Mr. Robertson had been paid to carry our building work. Mr. Robertson had been written to as an individual and he advised me that the invoices were issued in the name of a Limited Company GR Joinery Dundee Limited which also had a different address to Mr. Robertson's home address. On the basis of these instructions I wrote to Harper McLeod, Solicitors acting for the Pursuer advising that the company GR Joinery Dundee Limited had carried out the work. Mr. Robertson was provided with a copy of this letter. The letter to Harper McLeod was sent on 30th January 2019.

3. On the 6th March 2019 Harper McLeod replied by letter disputing the position that it was GR Joinery Dundee Limited which had been instructed to carry out the work. Their position was that Mr.

Robertson had been instructed as an individual. Mr. Robertson was sent a letter dated 8th March 2019 enclosing this letter and asking him to arrange an appointment.

4. On 15th March 2019 Mr. Robertson forwarded emails to me which were direct correspondence between him and the Pursuer. Mr. Robertson had been due to attend for an appointment on that day but called to cancel the appointment.

5. On the 22nd March 2019 I wrote to Harper McLeod in relation to their letter of 6th March 2019 and disputed their client's claim. Mr. Robertson had not discussed Harper McLeod's letter of 6th March 2019 directly with me as he cancelled his appointment. The response to Harper McLeod was based on previous discussions with Mr. Robertson.

6. On the 26th March 2019 Harper McLeod emailed me in response to the letter of 6th March 2019. The email advised that they were instructed to raise Court proceedings and had received a warranted writ from the Court. I was asked to confirm if I was instructed in respect of the Court action. I responded by email on 27th March 2019 advising we had not heard from Mr. Robertson.

7. On the 28th March 2019 Harper McLeod emailed to ask if I have instructions to accept service of the writ. I had previously left a voicemail message for Mr. Robertson to call me, but he had not returned my call. I replied to Harper McLeod stating this.

8. On the 2nd April 2019 Mr. Robertson emailed asking for an update. I replied on 3rd April 2018 stating that the Pursuer was going to raise Court proceedings to recover the money and that Court papers were going to be served on him. I advised Mr. Robertson to contact us when he received the Court papers.

9. On the 5th April 2019 Mr. Robertson telephoned me to say that he received an Initial Writ and said that he would hand this into the office. Mr. Robertson did not hand this into the office. I was not surprised by this because based on the correspondence from Harper McLeod, and the email correspondence between Mr. Robertson and the Pursuer, it was clear that the Pursuer had contracted directly with Mr. Robertson as an individual to carry out the building work, not with the limited company. In addition, I had been instructed by Mr. Robertson in relation to a previous case where Lloyds Bank were pursuing him for recovery of money, and he had taken no steps to defend that action. Decree was passed against Mr. Robertson in that case.

10. On the 11th April 2019, Harper McLeod emailed me to ask if I had heard anything from Mr. Robertson. I responded to say that I had heard from Mr. Robertson and that he had received the

Initial writ but had not arranged an appointment yet. Again, I was not surprised that Mr. Robertson had not been in touch given the specific circumstances of the case and previous dealings with him.

11. As Mr Robertson has not provided instructions in relation to defending the Court action, I had assumed he was content to simply let decree pass in favour of the Pursuer. Mr. Robertson contacted the office on the 7th May 2019 to say that decree had been granted against him and requesting a call back. A further email was sent on 7th May 2019 requesting a call. I contacted Mr. Robertson, but his phone was not connecting. I emailed Mr. Robertson to explain this. On the 17th May 2019 Mr Robertson emailed to say that Sheriff Officers had attended at his door with the decree in relation to the action. I replied to the email today that I was the duty Solicitor that week and had not had a chance to call him. I did state in my email "I've put the recall application in, and I will let you know when I hear back from Court." This email was sent from my mobile phone. I was very busy that day as the duty Solicitor and the email was sent in between numerous Court appearances. The email was sent in haste, and I did not mean to say, "I've put a recall application in." I meant to say to Mr. Robertson "I'll have to put a recall application in." My mobile telephone has predictive text, and it may have corrected this. Being in a hurry I failed to proofread the email or ensure its contents were accurate. I had no intention to deceive or mislead Mr, Robertson. I have obviously not been paying sufficient attention as I refer to a recall in the email when the correct procedure would have been a reponing note. In Mr. Robertson's case I am of the view that I would not have been able to submit a reponing note as I would require to state a defence to the Court action, given substantial evidence that the contract was between the Pursuer and Mr. Robertson as an individual and not the limited company, I did not see that Mr. Robertson had a defence to the action.

12. I however, realised my error and that I required to speak to Mr. Robertson in relation to this matter and sent him a text message on the 22nd May 2019 asking him to arrange an urgent appointment and to bring all Court correspondence with him. Mr Robertson did not arrange an appointment.

13. A further text message was sent to Mr. Robertson on the 4th June 2019 asking him to arrange an appointment. Again, Mr. Robertson failed to arrange an appointment.

14. On the 12th June 2019 Harper McLeod sent an email. I did not contact Mr. Robertson to seek instructions as he had not responded to previous requests to arrange an appointment. By that time, the time for lodging a reponing note had passed.

15. Mr. Robertson contacted the office on 8th July 2019 and spoke to a Solicitor [DR]. [DR] advised Mr. Robertson that the action had not been defended as he had failed to provide instructions in relation to the Court action.

16. On the 17th July 2019 I spoke with Mr Robertson by telephone in relation to a sequestration hearing at Dundee Sheriff Court on 18th July 2019. I advised Mr. Robertson that the Pursuer was enforcing decree by sequestrating him as the action had not been defended. Mr. Robertson was aware that decree had passed against him and gave instructions to try and prevent the sequestration by offering a payment of £400-£500 per month towards the debt. Mr Robertson had previous experience at Court actions and was aware of the consequences of sequestration. Mr. Robertson had previously not defended a Court action where decree had been taken against him. In this case Mr. Robertson's concern was losing his house and he hoped that the Pursuers would accept payment by way of monthly instalments to prevent that.

17. I attended the sequestration hearing on 18th July 2019 and advised the Pursuer's local agents of the offer for settlement. This was refused and the matter was continued for 6 weeks for settlement. I tried to contact Mr. Robertson the same date, but his phone was switched off. I had advised him that sequestration had not been granted and the case had been continued for resolution. Mr. Robertson did not reply to this email. On the 19th July 2019 I sent Mr. Robertson a text message confirming the date that the sequestration hearing had been continued to, 29th August 2019 and asking he arrange an appointment.

18. Mr. Robertson emailed me on the 8th August 2019 asking to meet up to discuss the case. I forwarded the email to my secretary to arrange an appointment. There is nothing within the file to indicate what was done in relation to arranging the appointment but Mr. Robertson did not attend for an appointment. On the 23rd August 2019 Mr. Robertson was telephoned and a voicemail message left asking him to arrange an appointment. Mr Robertson did not arrange an appointment and because of no further instructions from him the file was closed. I did not attend at the sequestration hearing on the 29th August 2019. Given previous dealings with Mr. Robertson and his failure to attend for appointments I did not think the lack of instructions was unusual.

19. Shortly after the sequestration hearing, Mr. Robertson attended the office and spoke to William Boyle, Solicitor. The meeting is not recorded in the file so I cannot confirm the date of this meeting. As there is no file note I cannot provide details of the exact discussions between William Boyle and Mr. Robertson but I am aware from a conversation I had with Mr. Boyle around that time that Mr. Robertson complained that the sequestration had not been defended. Mr. Robertson was advised in relation to instructing another firm of Solicitor to seek redress and in relation to lodging a complaint with the SLCC. Mr. Robertson continued to email me, and I did not respond to these emails given the advice which he had been given.

20. Mr. Robertson continued to email me looking to resolve matters and, on that basis, I advised him by email on 1st October 2019 that I would seek to have the Court order recalled. At that stage, the file was passed to William Boyle to deal with. William Boyle at that stage was working primarily from home and I recall [DR] taking the file from the office to Mr Boyle's home address.

21. Mr. Robertson then subsequently contacted me in relation to letters received from Wylie and Bissett and on the 9th October 2019 I spoke to Mr Robertson about these letters. He was advised he would need to arrange an appointment but that I would write to the Accountant in Bankruptcy meantime. On the 10th October 2019 I wrote to Wylie and Bissett asking for an extension of the time limit for a response so as we could take instructions. On the 15th October 2019 Mr. Robertson was written to asking him to make an appointment to see William Boyle. On the 22nd October 2019, a text message was sent to Mr. Robertson to arrange an appointment as soon as possible. The purpose of these appointments was to speak to Mr Robertson in order to take instructions in relation to the recall of the decree.

22. I had understood that William Boyle was dealing with Mr. Robertson's case. He had spoken to Mr. Robertson and had the file. Mr. Robertson emailed me on the 23rd October and 4th November 2019 requesting a call. On the basis William Boyle was now dealing with matters I did not call him back but passed the emails on to administrative staff to make William Boyle aware Mr. Robertson had called. I failed to ensure that William Boyle was dealing with the matter. With the benefit of hindsight, the emails from Mr. Robertson should have indicated to me that the matter was not being dealt with. I should have made enquiries at that point but I did not. I was not aware that William Boyle had not contacted Mr. Robertson or taken action in relation to the recall of sequestration.

23. Mr. Robertson subsequently complained to the SLCC and was awarded compensation."

In cross-examination, the Respondent confirmed that his affidavit was accurate, and he did not wish to clarify anything. The admissions in the Answers had been properly made on his instructions.

The Respondent said he took instructions from the Secondary Complainer. He had previously acted for him in relation to other matters. His instructions in the past and on this occasion were not clear or unequivocal. The Secondary Complainer had been pursued for money before. He had some knowledge of court proceedings and the potential consequences. Legal terms might have to be explained to him.

The Secondary Complainer in the present case was being pursued for money. He provided invoices in the name of his company. The Respondent did not remember the dates of those invoices. He did not think the company was struck off at that stage. The Respondent challenged the claim on behalf of the

Respondent. Harper MacLeod acted for the pursuer. The Respondent forwarded their email with attachments to the Secondary Complainer. The Respondent advised the Secondary Complainer that the evidence showed he had corresponded as an individual. He said he would have told the Secondary Complainer that his case was not particularly strong. The Secondary Complainer knew that. The Secondary Complainer's instruction had been to write to Harper MacLeod indicating that it was the limited company which ought to be pursued. However, in the Respondent's view, this was "flying a kite". The Secondary Complainer was not entirely convinced by that position, and neither was the Respondent. It started as a stateable defence but the email correspondence between the Secondary Complainer and the pursuer which was provided by Harper MacLeod showed that it was not viable. The Respondent was unable to take the Secondary Complainer's instructions on this because he would not speak to the Respondent about it. The Respondent was aware that he wished to maintain the defence. He was advised to make an appointment, hand in the paperwork, and the firm would lodge a Notice of Intention to Defend. The Secondary Complainer knew what he had to do when the Initial Writ was lodged. He had previous experience of this procedure.

The Respondent said he did not withdraw from acting for the Secondary Complainer but he was not directly instructed regarding the Initial Writ because the Secondary Complainer did not come in to the office. The Secondary Complainer knew what he had to do. With reference to paragraph 9 of his affidavit, the Respondent noted that he had assumed that the Secondary Complainer intended to let decree pass. The Respondent asked him to come in and he did not.

With reference to paragraph 11 of his affidavit, the Respondent noted that he was contacted by the Secondary Complainer and advised that decree had passed. There was an absence of instruction from the Secondary Complainer. The Respondent did not have the writ. The only had the emails between himself and Harper MacLeod. The Respondent did not accept service on behalf of the Secondary Complainer.

The Respondent agreed that the Secondary Complainer asked the Respondent twice to respond to him and the Respondent did not do that. The Respondent referred to his email of 7 May 2019 where he said he had tried to call the Secondary Complainer, but his phone was not connected. The Respondent confirmed that he did not speak to the Secondary Complainer on 6 or 7 May 2019.

The next contact the Respondent had with the Secondary Complainer was on 17 May 2019. The Respondent had been duty solicitor that week. He is the only criminal law solicitor in his firm. It is a busy practice. For a week at a time, he is on duty from Friday midnight to the following Friday midnight.

He deals with calls from the police, attendance at the police station out of hours, custody appearances and pleading diets for clients and accused persons who don't have representation. On that Friday the Respondent was busy. He received an email from the Secondary Complainers about Sheriff Officers. The Fiscal asked the Respondent why he responded. The Respondent said he should not have done it. He regretted the email. He wished he had not sent it. The message could have waited until Monday. He agreed that he had said in that email, "I've put the recall application in." He wishes he had not sent the email. He did not mean to say what he said. His phone has an autocorrect function. He does not know why the email said what it did. He did not mean he had put the recall in because he had not put it in. He meant to say that he would have to put the recall in and would let the Secondary Complainer know when he heard back. He understood why the Secondary Complainer would have thought something had been done. However, this was not his intention. The sentiment was that the Respondent would put it in and let the Secondary Complainer know the outcome.

The Fiscal noted that the first suggestion that there might have been an autocorrect error came in the Respondent's affidavit. The Respondent said he did not know if his phone had autocorrected what he had typed. However, regardless, he did not mean to say that. The only explanation is that the phone altered what he had typed. He did not put forward that explanation to the SLCC. He said he thinks about this complaint every single day. He thinks that autocorrect is the only explanation. However, he cannot say for certain that is what happened. All he can say is he did not mean what is said in the email. He did not make the autocorrect explanation to the Law Society. He just made a two-line response to the regulator because he wanted the matter concluded. It was plaguing him. He knew he had done wrong and had made a mistake. That mistake had grave consequences for the Secondary Complainer. He just wanted to pay him and deal with the situation.

The Fiscal asked the Respondent when he realised his error. The Respondent said he assumed it was on 22 May 2019 when he finished being duty solicitor for the week. The Fiscal asked why the Respondent did not explain his error to the Secondary Complainer. The Respondent said he would have done so at the appointment. He had to insist on appointments with the Secondary Complainer. Past experience had shown that he was a hard man to pin down. The Respondent wanted him to come into the office. The Respondent highlighted that the Secondary Complainer was familiar with the procedure. He might not know what a reponing note was, but he would understand that there was a procedure for recalling a decree.

The Fiscal noted that at paragraph 14 of his affidavit, the Respondent had said it was too late to lodge a reponing note. The Fiscal disagreed. The Respondent said regardless of the correct legal position, he

had not ever seen the decree. The Secondary Complainer had not come in with papers. The Fiscal noted that despite not being provided with papers or having had a meeting with the Secondary Complainer, the Respondent still took calls and continued to act from May to July 2019. The Respondent agreed that he had not withdrawn from acting but said he did not have instructions.

The Fiscal noted that the Secondary Complainer called again on 17 July 2019. The Respondent said he was successful in helping the Secondary Complainer that day. He offered a monthly payment on his behalf. The case was continued to 29 August 2019. However, the Respondent closed the file on 27 August 2019 because he had not engaged. The Respondent did not tell the Secondary Complainer he was going to close the file and that he was not going to attend the hearing. The Secondary Complainer was sequestrated on 29 August 2022. The Secondary Complainer continued to contact the Respondent but he did not reply. By then the Respondent said he was treating the issue as a complaint.

The Respondent agreed that he had written to the Secondary Complainer on 1 October 2019 saying that a court order had been granted ordering him to pay money but that the Respondent would seek to have this court order recalled and overturned. He told him that this would mean that the Secondary Complainer was not due money and there would be no debt. The Respondent said he did intend to do all of this. He passed it to someone else to deal with it. However, he agreed that he was the senior partner at his firm and it was his responsibility.

There was no re-examination and no questions from the Tribunal.

SUBMISSIONS FOR THE COMPLAINERS – PROFESSIONAL MISCONDUCT

The Fiscal said that the Law Society accepted that the Respondent had dealt with the Secondary Complainer before this incident. There had been a long professional relationship. The Respondent knew that the Secondary Complainer was difficult to nail down and get him into the office. He was therefore on notice that this was likely to be a problem. The Secondary Complainer was someone who fleeted in and out of the solicitor client relationship. However, those kinds of client still need the same standard of conduct as "gold standard" clients. These individuals need clear unequivocal communication.

The Fiscal reminded the Tribunal of Sharp v Council of the Law Society of Scotland 1984 SLT 313, and the test for professional misconduct. He submitted that the Respondent had breached Rule B1.2. He highlighted the test for dishonesty contained within Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 and referred the Tribunal to passages within that case. In his submission, the test for

dishonesty was contained in that case, and was not, as he expected the Respondent to suggest, whether there was no available explanation other than dishonesty.

The Fiscal questioned the Respondent's credibility and reliability. He had first raised the autocorrect issue three days before the hearing. In addition, autocorrect might explain the first sentence but not the second. The second sentence suggests he has done something and expects to hear from court. The autocorrect explanation was not given in the Answers. It was not given to the SLCC or the Law Society. It came at a very late stage, three years later. The Fiscal therefore asked the Tribunal to reject the suggestion that the email was sent in error. The Tribunal should look at the matter objectively. The Respondent did not submit a reponing note. There was no attempt to correct the error even although he noticed it was wrong. He instead asked the client to come in for an appointment knowing how difficult it was to get him through the door. He did not tell the Secondary Complainer there was anything to correct. There was no other evidence, for example a file note, to support the Respondent's position. His unequivocal words should be taken at face value in the absence of correction.

The Fiscal referred to Wingate & Evans v SRA; SRA v Malins [2018] EWCA Civ 366. He submitted that the Respondent's email was dishonest. If the Tribunal was not convinced regarding dishonesty, it should consider whether it was deceitful. He also referred the Tribunal to Paterson and Ritchie's "Law, Practice and Conduct for Solicitors" which talks about reckless misleading. In the Fiscal's submission the Ivey test was met and the email was dishonest. He said it was quite clear at a bare minimum this was a reckless statement. However, if the Tribunal was not persuaded, it could find that the Respondent's conduct lacked integrity. The Respondent said he had taken action when he had not. He did not lodge the reponing note. He was aware of the difficulties communicating with the Secondary Complainer. He also said he would recall the sequestration. He did not do it and did not write to say he would do it.

The Fiscal said it was abundantly clear that the Respondent had failed to act in the Secondary Complainer's best interests. The Respondent's repeated failures in not rectifying decree passing against the Secondary Complainer, meant that he lost the opportunity to recall the sequestration. The Respondent's actions brought the profession into disrepute.

The Fiscal noted that the Respondent suggested in his answers that his failures should be characterised as inadequate professional services. The Fiscal submitted it was too late to do that now. The opportunity to challenge the categorisation as a conduct Complaint arose by way of appeal to the Court of Session under Section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007. The Respondent had been sanctioned by the SLCC. However, the SLCC has no power to deal with conduct issues and the Tribunal

has no power to make a finding of inadequate professional service. The Tribunal said he would address the Tribunal again once Ms Mitchell had made her submissions in relation to the preliminary plea.

SUBMISSIONS FOR THE RESPONDENT – PRELIMINARY PLEA

Ms Mitchell indicated that the preliminary issue related to paragraph 5.4 of the Complaint. She said there had been a conflation of the rule breaches averred at an earlier stage, and the common law. She said this was not competent or appropriate. There was no issue with the common law position being pled as an alternative. However, it would not be appropriate to find someone guilty of all three matters. The regulatory system acknowledges the existence of the common law. It does not replace it, but supplements it. Where a regulatory scheme is in place, then unless it is specified in the scheme, it is not competent or appropriate for a statutory scheme to be added to in this way. She said the Complainers were seeking a conviction on two charges, one at common law and one statutory, both based on the same *species facti*. She referred the Tribunal to Cantoni-v-France (Application No 17862/91). Although she did not say there had been a breach of Article 7, the Cantoni case was authority for the proposition that rules and regulations ought to be clear. She said a person should not be found guilty of both murder and assault.

SUBMISSIONS FOR THE COMPLAINERS – PRELIMINARY PLEA

The Fiscal submitted that the Respondent's preliminary plea could not be correct. The Sharp case said that breach of a rule may be misconduct. The Tribunal must look wider than the rule. The reference to bringing the profession into disrepute was not an aggravation. It was a proper averment which the Tribunal should consider when taking into account all the circumstances of the case. Sometimes, the Tribunal will say that many rule breaches constitute professional misconduct even if individually, they would not have met the test.

The Fiscal referred to Sandeman-v-Law Society [2011] CSIH 24, particularly paragraphs 14 and 15. In that case, the Respondent faced allegations relating to a conflict of interest. Paragraph 3 of the Code of Conduct applied. Although the Respondent had acted without ulterior motive, the Tribunal concluded that his conduct was of a kind which could bring the profession into disrepute and as such constituted professional misconduct.

The Fiscal noted that Article 7 relates to criminal proceedings and Cantoni involved a criminal prosecution. The Tribunal was bound by Sandeman. It can make findings that a rule was breached and that the conduct also brought the profession into disrepute. It is not pleaded as an aggravation.

SUBMISSIONS FOR THE RESPONDENT – PROFESSIONAL MISCONDUCT

Ms Mitchell invited the Tribunal to find the Respondent not guilty of the breaches of Rule B1.2 and B1.4 and professional misconduct. She asked the Tribunal to dismiss the Complaint with expenses. The Tribunal knew the outcome of the SLCC case. The Respondent cooperated with the SLCC and promptly paid the sum sought. The Tribunal has had the benefit of the Record, the Respondent's affidavit and his evidence.

In Ms Mitchell's submission, the issues were two-fold. Firstly, the Respondent said that he had lodged a recall when he had not done so. Secondly, he said he would recall the sequestration and did not. The original Complaint before this Tribunal involved a failure to communicate. When objection was taken to this as a hybrid issue, the Complaint was amended to become one of lack of integrity and bringing the profession into disrepute.

Dealing with the matter of integrity first, Ms Mitchell said that there was no basis on the evidence that the Respondent's personal integrity was in question. The Respondent gave evidence in a credible and reliable manner. It was clear he recognised the seriousness of the matter. It had preoccupied him for a long time. The Tribunal should have regard to the Tribunal's demeanour when giving evidence. He knows he has done something wrong. He has admitted the facts and explained to the best of abilities how the error took place. The Respondent's position has not changed in saying this was an error. It was always accepted it was an error. In racking his brains, he says that the only answer he can think of is autocorrect. He did not offer this as a definitive explanation. It would not have been correct to express that to the SLCC as a fact. He said the email was sent in error. There was no evidence to contradict that position.

In Ms Mitchell's submission, the Tribunal should have regard to the content of the email but also the context of what was said and done. The Respondent is a busy court practitioner. He was dealing with the matter while also acting as duty solicitor. This is a 24/7 requirement. The Tribunal can see how this could have happened. He had simply no reason to lie to the Secondary Complainer. The Tribunal will deal with cases where Respondents lie to clients to cover up things they have not done. In this case, there was no reason for him to have said this. The reponing issue is a red herring. The Secondary

Complainer did not think something had been done, he wanted the Respondent to do something. There was no motive to deceive.

When the Respondent realised his error he wrote as a matter of urgency to the Secondary Complainer asking him to attend at the office in order to properly carry out the work which could still have been done in time. However, the Secondary Complainer did not keep in good contact with the Respondent. It is fair to say he was someone who would not always contact his solicitor when requested. If he had attended, the Respondent could have communicated his error and timeously carried out the work. Communication is a two-way street. The Tribunal cannot place on solicitors a duty which goes further than that.

The Respondent's conduct is eloquent of someone who has made an error and seeks to put it right. This client was someone who could not be relied upon. The Respondent does not require to go above and beyond for an individual like this. A solicitor is not his client's keeper. If he asks him to attend at the office, one would hope a client would do just that if parties are in a solicitor client relationship. These people do not have better entitlement than other clients.

Ms Mitchell referred the Tribunal to the two-line email in question. It read, "I've put a recall application in. Will let you know when I hear back from court." The Law Society accept that autocorrect could have resulted in the formation of the first sentence. This is therefore a simple error. The Tribunal can see how that could happen. The Fiscal asks the Tribunal to look at the second sentence in interpreting the likelihood of the truthfulness of sentence one. Ms Mitchell submitted that the second statement could equally be interpreted both ways. It is entirely neutral and is reminiscent of the Derek Bentley case where the sentence in question was, "Let him have it".

Ms Mitchell said it would not have been proper to lodge a reponing note when the client's defence was so clearly in question following the information provided by Harper Macleod. There being no instructions, a recall could not be lodged. The Respondent had to see the Secondary Complainer.

With reference to Rule B1.2, Ms Mitchell said that if the Tribunal accepted the Respondent made an error in his first communication, that explanation negates a finding of dishonesty or lack of integrity. The Respondent has provided a satisfactory explanation. It excludes the absence of integrity. If the Tribunal is satisfied the first email was written under pressure and that the Respondent lacked instructions to take the second matter further, then breach of Rule B1.2 cannot be made out. Ms Mitchell said that the Respondent accepted in relation to the second matter that he had instructions. He accepts

that an inadequate professional service was provided. However, it is not a matter in breach of Rule B1.2. if the Tribunal believes the respondent, the case must fall.

Ms Mitchell encouraged the Tribunal to look at the Ivey case. The Tribunal should take into account the Respondent's actual belief regarding the facts. The Tribunal heard direct evidence from him about his intentions. There were two hurdles to overcome: the Respondent's actual state of knowledge or belief as to the facts, and whether he was dishonest. She commended the Respondent's evidence as credible and reliable. There was no motive to deceive. It should also be examined in its context. He told the Secondary Complainer to make an appointment and bring the paperwork. This points away from dishonesty. The first thing he needed to do was consider the documents and take instructions so he could then act. The communication on Wednesday clearly showed the Respondent needed further communication with the Secondary Complainer.

Ms Mitchell highlighted the Wingate case. She noted that integrity was described as a "nebulous" concept. The six examples of lack of integrity given are very different to the Respondent's behaviour. The circumstances of this case do not call into question the Respondent's integrity.

Ms Mitchell referred the Tribunal to Paterson and Ritchie's *"Law, Practice and Conduct for Solicitors"* at paragraph 1.24 onwards. It is noted there that where a client is knowingly and deliberately deceived by a solicitor, this will almost certainly amount to misconduct. However, this is not the situation here.

Ms Mitchell described the circumstances in Law Society-v-Nelson (2003). In that case the Tribunal found the Respondent not guilty even although the Respondent had admitted professional misconduct. The Respondent accepted she had misled the Law Society by saying that she had done something. In Ms Mitchell's submission, the Respondent in the present case was in a much more favourable situation than Ms Nelson. The Tribunal should not focus on the misleading but rather on the intention of the Respondent.

Ms Mitchell referred to Rule B1.4. She said the Respondent accepted that he failed to act in the Secondary Complainer's best interests. However, she said this was a service issue and did not meet the conjunctive test of being both serious and reprehensible. She said that the circumstances did not meet the very high test. The conduct must invoke the most severe criticism. The Respondent accepts that he made an error. However, the Respondent should not be responsible for the Secondary Complainer's actions which were beyond the Respondent's control. According to Ms Mitchell, it could not be said that the sequestration and loss of the Secondary Complainer's house were down to the actions of the

Respondent or his errors. The Respondent can only be responsible for the circumstances flowing directly from the misconduct.

Ms Mitchell noted that some of the Secondary Complainer's complaints had been dealt with by the SLCC as service issues. The Tribunal must be careful only to address the issues which were before it. She also invited the Tribunal to compare the conduct and service issues in the case. In her submission, the issues before the Tribunal were not more serious than the service issues upheld.

Lastly, Ms Mitchell noted the applicable standard of proof. To find the Respondent guilty, the Tribunal would have to be satisfied beyond reasonable doubt. This is a high standard. She invited the Tribunal to find the Respondent not guilty of professional misconduct.

ADDITIONAL SUBMISSIONS FOR THE COMPLAINERS

The Fiscal said that the Nelson case proceeded as a matter of agreement. The Tribunal was not taken to all relevant authorities. The case was also decided before the Ivey case. The Tribunal should therefore pay it little regard. Although the Complaint contained a reference to the Secondary Complainer's claim for compensation, this was not a matter to be determined at this hearing. The Tribunal must deal with the issues before it. References to the SLCC decision ought to be disregarded.

DECISION

The Complaint alleged that the Respondent advised the Secondary Complainer by email on 17 May 2019 that he had lodged a recall of decree with court when he had not done so. He also advised the Secondary Complainer by email on 1 October 2019 that he would seek to have a court order recalled. He did not take this action. The Complaint also alleged that the Respondent failed to take steps to protect the Secondary Complainer's position, which failing, to advise him of the importance of protecting his position. In a separate paragraph, the Complainers alleged that the Respondent's actions in failing to adequately protect the Secondary Complainer's position, which led to the sequestration of his estate, brought the profession into disrepute.

The Respondent said that the allegation about bringing the profession into disrepute should not be a separate "charge". The Tribunal were content that this was not a separate additional charge and was a relevant issue when considering the whole issue of professional misconduct (Law Society-v-Sandeman). Breaches of rules may be misconduct but consideration of what is misconduct requires an assessment of

the whole circumstances and the degree of culpability to be attached to the individual Respondent (Sharp-v-Law Society 1984 SLT 313). Examination of whether the conduct has brought or is likely to bring the profession into disrepute is part of that overall assessment. Therefore, the Tribunal repelled the preliminary plea for the Respondent relating to this paragraph of the Complaint.

The Tribunal carefully considered all the evidence in the case. It found the Respondent to be a credible and reliable witness. It believed that he was trying to tell the truth. He made appropriate concessions. He accepted that he had made mistakes and that these had consequences for the Secondary Complainer. On the basis of the Complaint, Answers and the admissions made by the Respondent, the Tribunal was satisfied beyond reasonable doubt that the Respondent had acted in the manner set out in the findings in fact above.

The question for the Tribunal was whether on the basis of those facts, the Respondent was guilty of professional misconduct. According to the definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313,

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

The Tribunal considered the first averment of misconduct. It found that the Respondent advised the Secondary Complainer by email on 17 May 2019 that he had lodged a recall of decree with court when he had not done so. The Respondent also advised the Secondary Complainer by email on 1 October 2019 that he would seek to have a court order recalled. He did not do that. The Complainers alleged this was a breach of Rule B1.2. That Rule provides that a solicitor must be trustworthy and act honestly at all times so that their personal integrity is beyond question. In particular, solicitors must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.

The Tribunal had regard to the test for dishonesty described in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. According to that case, the Tribunal should first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. When that is established the question

whether his conduct was honest or dishonest is determined by applying the objective standards of ordinary decent people.

The Tribunal also considered whether the conduct demonstrated a lack of integrity. In Wingate & Evans v SRA; SRA v Malins [2018] EWCA Civ 366 it was said that integrity is a broader concept than dishonesty. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of one's own profession and involves more than mere honesty.

With regard to the email of 17 May 2019, the Tribunal accepted the Respondent's explanation that he did not intend to mislead or deceive the Secondary Complainer. He replied in haste from court by mobile phone to an email. He ought not to have done so. He did not proofread his email. The Respondent believes that the autocorrect function on his mobile telephone altered his intended words, "I'll have to put a recall application in" to read "I've put a recall application in." Whether the email was altered by autocorrect, or the Respondent was simply distracted at the time of typing, the Tribunal was satisfied that the Respondent's actions did not demonstrate dishonesty or a lack of integrity. There was no advantage to him telling the Secondary Complainer that a recall had been lodged. He repeatedly attempted, without success, to have the Secondary Complainer attend his office to explain the situation. However, the Secondary Complainer failed to engage with the Respondent. With hindsight, it would have been better if the Respondent, on realising his error, had taken steps to immediately communicate this to the Secondary Complainer. However, the Tribunal accepted the Respondent's evidence that he intended to make the explanation at their next meeting. Although the autocorrect explanation had only been made shortly before the hearing, the Respondent had been consistent in saying that a mistake had been made and that he had not intended to mislead the Secondary Complainer. The Fiscal suggested that the second sentence of the email ("Will let you know when I hear back from court") gave colour to the first sentence and made the Respondent's autocorrect suggestion less likely. The Tribunal was of the view that the second sentence was entirely neutral and could equally have followed "I've put a recall application in" or "I'll have to put a recall application in".

With regard to the email of 1 October 2019, the Tribunal accepted the Respondent's explanation that he intended to have the court order recalled and overturned at the time he wrote the email. No issues of dishonesty or lack of integrity therefore arose. The Respondent was prevented from trying to recall the court order by the actions of the Secondary Complainer who repeatedly failed to make and attend for

appointments and failed to provide basic information with regard to a defence or even to give his solicitor a copy of the initial writ.

Therefore, when applying the tests in Ivey and Wingate, the Tribunal was satisfied that the Respondent had not acted in a dishonest way or allowed his integrity to be called into question. There was therefore no breach of Rule B1.2. The Complainers had not made out dishonesty or lack of integrity. The Respondent gave a plausible explanation regarding the error. It was not proved that the email of 17 May 2019 was anything more than a mistake made innocently and inadvertently. It was consistent with the context provided which was a busy practitioner at court undertaking duty solicitor responsibilities and at the same time firing off a quick email which was not properly checked before sending. The Respondent had intended to take the action he had set out in his email of 1 October 2019.

The Tribunal considered the second averment of misconduct. It found that the Respondent failed to take steps to protect the Secondary Complainer's position and had failed to advise him of the importance of protecting his position. It was said that this was in breach of Rule B1.4. That rule provides that solicitors must act in the best interests of their clients subject to preserving their independence and complying with the law, the practice rules and the principles of good professional conduct. Solicitors must not permit their own interests or those of the legal profession in general to influence their advice or actings on behalf of clients. Solicitors must at all times do, and be seen to do, their best for their client and must be fearless in defending the client's interests, regardless of the consequences.

The Tribunal considered that the Respondent had breached Rule B1.4. However, in the context of the whole circumstances of the case, there was not a large degree of culpability to be attached to the Respondent. The client in this case was a longstanding one. He was familiar with the process. He had previously allowed decree to pass against him. The Respondent had repeatedly tried to get the Secondary Complainer to engage but the client had not done so. A solicitor client relationship requires both sides to participate. Clients must give instructions to their solicitors. The consequences for the Secondary Complainer arose largely as a result of his failure to engage with the Respondent. If he had provided instructions to the Respondent, things may have turned out differently for him. The Tribunal was satisfied that the public would not consider that the Respondent had brought the profession into disrepute in these circumstances. The Respondent ought to have checked that the case was being progressed by colleagues. He did ask for the Secondary Complainer's messages to be passed on to these colleagues. The Secondary Complainer was given appropriate information about taking alternative legal advice and was told how to make a complaint to the SLCC. It would have been better if the Respondent had not taken the Secondary Complainer's case on again in September 2019. However, that was done at the

Secondary Complainer's insistence and the Tribunal could see that the Respondent felt obliged to assist a longstanding client in the circumstances.

Considering all the circumstances in context, the Tribunal was not satisfied that the Respondent's behaviour constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. Therefore, the Respondent was not guilty of professional misconduct.

Having decided that the Respondent was not guilty of professional misconduct, the Tribunal was obliged to consider if he might be guilty of unsatisfactory professional conduct. It noted that unsatisfactory professional conduct is defined as professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor. Given the explanation of the Respondent which was accepted, the Tribunal considered that the circumstances did not impinge on the reputation of the Respondent. Carelessness, incompetence, or inadequate professional service alone is insufficient to satisfy the test. Therefore, the Tribunal declined to remit the complaint to the Council of the Law Society of Scotland under Section 53ZA of the Solicitors (Scotland) Act 1980.

SUBMISSIONS ON PUBLICITY AND EXPENSES

The Fiscal noted that expenses usually follow success. However, the reason for departing from that proposition might be that the Respondent only first mentioned the autocorrect issue three days before the hearing. Had that been before the SLCC or the Law Society, matters might have taken a different course. The Fiscal referred to Baxendale-Walker-v-Law Society [2007] EWCA Civ 233 and CMA-v-Flynn Pharma Ltd and Another [2022] UKSC 14. He suggested that any award to the Respondent should be no more than 50%. The Fiscal was in the Tribunal's hands regarding publicity.

Ms Mitchell stressed that throughout the whole case, the Respondent had always accepted that an error had been made. A year of wondering had made him think of autocorrect. However, this was not a different explanation. Expenses should follow success and should not be reduced. Ms Mitchell moved for sanction for counsel. She noted that different submissions had to be made regarding the authorities and the analysis of the Law Society's 2011 rules.

The Fiscal suggested that the facts were not so difficult that counsel was appropriate.

DECISION ON PUBLICITY AND EXPENSES

Following submissions on expenses and publicity, the Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal granted sanction for counsel at junior rates only. The matter was not so complex that instruction of senior counsel had been necessary or reasonable other than at the Respondent's own expense.

The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent, his father and the Secondary Complainer. However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.

Kenneth Paterson

Vice Chair