

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

**F I N D I N G S**

**in the Conjoined Complaints**

**by**

**THE COUNCIL OF THE LAW SOCIETY of  
SCOTLAND, formerly at 26 Drumsheugh  
Gardens, Edinburgh and now at Atria One, 144  
Morrison Street, Edinburgh**

**Complainers**

**against**

**MICHAEL DRYDEN KERR, formerly of  
McClure and Partners, 199 St Vincent Street,  
Glasgow and MARTIN YOUNG KERR,  
formerly of McClure and Partners, 199 St  
Vincent Street, Glasgow**

**Respondents**

1. A Complaint dated 31 December 2015 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Michael Dryden Kerr, formerly of McClure and Partners, 199 St Vincent Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct. A further Complaint dated 31 December 2015 was lodged with the Scottish Solicitors' Discipline Tribunal by the Complainers averring that Martin Young Kerr, formerly of McClure and Partners, 199 St Vincent Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct. Apart from the identity of the Respondent both Complaints were in identical terms.
2. Neither Complaint had a Secondary Complainer.
3. The Tribunal caused copies of both Complaints as lodged to be served upon the Respondents. No Answers were lodged for either of the Respondents.

4. On 28 January 2016 the Fiscal for the Complainers in both cases lodged, by email, a Joint Motion on behalf of himself and the representative of both Respondents to conjoin both Complaints. This Motion was granted by the Chairman.
5. In terms of its Rules the Tribunal appointed both Complaints to be set down for a hearing on 11 March 2016 and notice thereof was duly served on both Respondents. The office of the Tribunal received a letter dated 9 March 2016 from the representative of both Respondents indicating that neither Respondent would be in attendance at the hearing. On 11 March 2016 the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. Neither Respondent was present and neither Respondent was represented. The Fiscal asked the Tribunal to adjourn the hearing to allow him to proceed in the absence of both Respondents by way of affidavit evidence in terms of Rule 14(5) of the 2008 Rules. The Tribunal granted this Motion and adjourned the case to a full hearing on 25 May 2016.
6. Formal notices of hearing were served upon both Respondents. On 24 May 2016 the Tribunal office received a telephone call from the representative of both Respondents confirming that no appearance would be made by either Respondent at the hearing the following day. On 25 May 2016 the Law Society were represented by their Fiscal Paul Marshall, Solicitor, Edinburgh. No appearance was made by either Respondent. The Tribunal heard evidence from the Clerk confirming that notices of hearing had been served upon the Respondents and that their representative had contacted the Tribunal office the previous day. A Motion for the hearing to continue in the absence of the Respondents in terms of Rule 14(4) of the 2008 Rules was granted. The Fiscal lodged affidavits for two witnesses. The Complainers had previously lodged the report produced by the Law Society's financial compliance department following an inspection of the firm. The Fiscal lodged copies of three letters from the legal representative of both Respondents.
7. Having heard detailed submissions from the Fiscal, referring to the affidavits and productions, the Tribunal made the following Findings in Fact:-
  - 7.1 Both Respondents were partners in the firm of McClure and Partners, 199 St Vincent Street, Glasgow ("the Firm") during the period of 5 October 1997 to 29 April 2013 both were also designated Cashroom partners or Cashroom managers

for the Firm. Both were suspended from practice on 2 May 2013 and neither currently hold a practising certificate.

- 7.2 From 22 to 24 October 2012 the Law Society's Financial Compliance Department ("the FCD") carried out an inspection of the Firm in accordance with The Law Society of Scotland Practice Rules 2011, Rule B6.18 which provides the process for the conduct of practice unit inspections and investigations. The FCD considered among other things whether or not the Firm was complying with the requirements of the Law Society's Accounts Rules. At the conclusion of its inspection the FCD prepared a report setting out its findings ("the Inspection Report"). The Inspection Report was lodged as a production for the Complainers.
- 7.3 The FCD was concerned that the Firm was in breach of the requirements of **Rule 6.3.1(a)** which requires the total client account balance to at all times be equal to or greater than the total client monies held. The FCD inspection reviewed the daybook records of the Firm which showed accounting entries for the Firm and client accounts.
- 7.4 The FCD noted that as at 30 April 2012 the client account surplus was £1,142.45. On 1 and 2 May 2012 the total sum of £52,576 was transferred from the client account to the firm account. The total fees rendered on 1 and 2 May 2012 amounted to £322.06. As at 2 May 2012 the total debit entries exceeded the previous daybook surplus. As a result the client account deficit as at 2 May 2012 was £51,111.49.
- 7.5 During the course of May 2012 a further £32,613 was transferred from the client account to the firm account. During the same period the sum of £26,517.03 was debited as fees. Accordingly the client account deficit increased during the course of May 2012. On 31 May 2015 the client account was credited with £54,300 from an account in the name of M&M Kerr. As a result of the funds transferred on 31 May 2012 the client account was returned to a surplus of £1,061.67 at the end of May 2012.
- 7.6 As at the end of May 2012 the daybook showed a client account surplus of £1,061.67. From 1 to 6 June the total sum of £73,698 was transferred from the

client account to the firm account. During that same period the fees debited from the client account totalled £1,811. As a result, as at 6 June 2012 the client account deficit was £70,825.33. During the course of June 2012 a further £25,210 was transferred out of the client account to the firm account. During the same period £35,540.29 was debited as fees. On 29 June 2012 the client account was credited with £59,000 from an account in the name of M&M Kerr. As a result of the funds transferred on 29 June 2012 the client account was returned to a surplus of £488.26 at the end of June 2012.

- 7.7 As at the end of June 2012 the daybook showed a client account surplus in the sum of £488.26. On 2 and 3 July amounts totalling £81,288 were transferred from the client account to the firm account. During the same period the sum of £890.40 was debited as fees. As at 3 July 2012 the total debit entries on the client account exceeded the previous surplus. As a result of the funds transferred on 3 July 2012 the client account deficit as at that date was £79,909.34.
- 7.8 During the course of July 2012 a further £24,694 was transferred from the client account to the firm account. During that period a further £27,692.82 was debited as fees. On 31 July 2012 the Bank of Scotland client account was credited with £69,800 from an account in the name of M&M Kerr. As a result of the funds transferred on 31 July 2012 the client account was returned to a surplus of £677.32 at the end of July 2012.
- 7.9 As at the end of July 2012 the daybook showed a client account surplus in the sum of £677.32. On 1 August amounts totalling £91,844 were transferred from the client account to the firm account. During that period no fees were debited from the client account. As at 1 August 2012 the total debit entries on the client account exceeded the previous daybook surplus. As a result the client account deficit as at 1 August 2012 was £91,166.68.
- 7.10 During the course of August 2012 a further £18,510 was transferred from the client account to the firm account. During that period a further £18,703.33 was debited as fees. On 31 August 2012 the client account was credited with £118,876.51 following the sale of a property. As a result the daybook showed that the client account was returned to a surplus of £26,857.28 at the end of August 2012.

7.11 The FCD raised its concerns with the Firm's client account running in deficit in the Inspection Report. The Firm responded to the Law Society's concerns with the running of a deficit on 15 December 2012 stating:-

*“A daybook was done for the whole month and sums were deposited to ensure there was a surplus. We accept that we should have informed the Law Society of the position and were wrong not to do so. We thought we could sort it out far quicker than we did but it took longer than anticipated to raise the finance. As is evident from our records the position was rectified at the end of August. It should also be noted that we had financial backing from family members and while no funds were introduced by them during this period the members were satisfied that no clients' money was at risk and thus the Guarantee fund would never be called upon. It should also be noted that no client lost any money during this period. Daybooks and surpluses have been provided to you by e-mail and as stated above the daybooks have been produced since 1 September and we have been in surplus since that date.”*

7.12 With reference to the paragraphs 2.3 to 2.11, the FCD concluded that the Firm's client account had been in a deficit position over a long period of time. It found that the position appeared to be temporarily rectified at each month end. It found that a deficit position was created shortly after the month end. The FCD concluded that this demonstrated an awareness of a breach of **Rule B6.4.1**.

7.13 The Firm responded on 15 December 2012 stating:-

*“As we have already stated we were aware of the position and thought that we could rectify it quickly. This did not happen as it took longer than anticipated to raise funds. We were wrong not to inform the Law Society immediately but thought we could sort it out far quicker than we did. We eventually rectified matters at the end of August”.*

7.14 Separately, the FCD found that the Firm had not maintained up to date accounting records as required by **Rule B6.7.1**. The FCD found that during the months of July, August and September 2012 account entries were posted approximately 14 days in arrears. The posting of account entries for July 2012 were commenced on 14

August 2012. The posting of account entries for August 2012 commenced on 11 September 2012. The posting of account entries for September 2012 commenced on 13 September 2012. The FCD noted that “With the records of the firm being kept in arrears it is therefore unclear how the Cashroom Managers could ascertain the up to date position of the practice unit”.

7.15 The Firm responded on 15 December 2012 stating:-

*“Daybooks are prepared every day since the beginning of September and therefore our records are being kept up to date...All bank accounts are being reconciled every month and all transactions through the bank statements will be posted to the practice unit’s records in future”.*

7.16 Separately, the FCD found that the Capital and Drawings balances shown on the trial balances did not reflect the true position of the Firm’s finances as required by **Rule B6.7.4**. The FCD noted that the Firm’s records must be balanced monthly and on the last day of the accounting period. It noted that this included the preparation of a monthly trial balance. The Firm had recorded information in its trial balances which related to personal affairs of both Respondents.

7.17 In connection with the trial balance of 28 September 2012 the FCD noted that the following ledgers related to personal affairs of the Respondent and Martin Kerr:-

- (1) Ledger 8004, Company 1 where the account was in debit in the sum of £87,359.
- (2) Ledger 8074, Company 2 where the account was in debit in the sum of £3,315.37.
- (3) Ledger 8085, Company 3 where the account was in debit in the sum of £2,718.40.
- (4) Ledger 8086, Company 4 where the account was in debit in the sum of £4,361.39.

7.18 In its Inspection Report the FCD stated “*Please clarify the position confirming why personal expenditure is recorded through the records of the firm, therefore distorting the true position.*” The Firm responded on 15 December 2012 stating:-

*“Personal expenditure should not have been recorded through the records of this firm. The position has been rectified and will not happen again.”*

7.19 Both Respondents attended an interview with the Law Society on 20 December 2012. Their representative advised the Law Society that the Firm was being wound up. On 2 May 2013 the Guarantee Fund Sub Committee considered the Respondents conduct. It was noted that the Firm had been wound up on 29 April 2013. The Guarantee Fund Sub Committee determined to withdraw both Respondents’ Practising Certificate on 2 May 2013 in accordance with section 40 of the Solicitors (Scotland) Act 1980.

7.20 On 28 January 2014 the Respondents’ representative submitted a letter to the Law Society accepting on the Respondents’ behalf that there had been a failure to comply with the Accounts Rules.

8. Having considered the foregoing circumstances, and the documents before it the Tribunal found both Respondents guilty of Professional Misconduct as a consequence, in cumulo, of both Respondents’ failure to comply with Rules B6.3.1(a), B6.4.1, B6.7.1, B6.7.4 and B6.13 of the Law Society of Scotland Practice Rules 2011.
9. The Fiscal moved the Tribunal to make an award of expenses against both Respondents’ and indicated that the usual order for publicity would be appropriate in this case.
10. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 25 May 2016. The Tribunal having considered the Complaints dated 31 December 2015 at the instance of the Council of the Law Society of Scotland against Michael Dryden Kerr and Martin Young Kerr, both formerly of McClure and Partners, 199 St Vincent Street, Glasgow; Find both Respondents guilty of professional misconduct in cumulo in respect of their failure to comply with Rules B6.3.1(a), B6.4.1, B6.7.1, B6.7.4 and B6.13 of the law Society of Scotland Practice Rules 2011; Suspend both Respondents from practice for a period of 5 years; Find both Respondents jointly and severally 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 both Respondents.

**(signed)**

**Alan McDonald**

**Vice Chairman**



11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondents by recorded delivery service on

**IN THE NAME OF THE TRIBUNAL**

**Alan McDonald**  
**Vice Chairman**

**NOTE**

Neither Respondent lodged Answers to the Complaints and neither made any appearance at either of the hearings. A Solicitor for both Respondents had written to the Tribunal office and telephoned the office confirming that no appearance was going to be made.

At the hearing on 25 May 2016 for the sake of completeness the Tribunal heard evidence from the Clerk confirming that formal notices of the hearing date had been served upon both Respondents and that a telephone call had been received from the solicitor for both Respondents the day before the hearing confirming no appearance was to be made. A Motion allowing the Complainers to proceed by way of affidavit evidence had already been granted. The Fiscal proceeded to lodge two affidavits, one for the witness Veronica Walker who was the individual who conducted the investigations upon the Firm from 22 to 24 October and the author of the inspection report, and the other was of Ian Messer who is the director of financial compliance of the Law Society of Scotland. The Complainers had previously lodged the full inspection report. The inspection report and the two affidavits confirmed the deficits on the client account for the months of May, June, July, and August 2012 as set out above. They also set out the responses given by the Firm to these deficits. Both affidavits and the inspection report set out the late posting of entries for the months of July, August and September 2012 together with the Firm's response. The affidavits and report also referred to the Firm recording personal affairs for both Respondents within its trial balances.

**SUBMISSIONS FOR THE COMPLAINERS**

The Fiscal for the Complainers lodged written submissions, which he went through in detail with the Tribunal. The written submissions were as follows:-

**Introduction**

These complaints against Michael Kerr and Martin Kerr arise out of the same facts and circumstances. The Kerrs are brothers. These complaints concern the same Law Society financial compliance inspection of the firm in which the two brothers were the only two partners. The complaint concerns a series of breaches of the 2011 rendition of the Accounts Rules. The relevant breaches are:-

1. Running the client account in deficit – in breach of Rule B6.3.1(a)
2. Failure to remedy a breach of Rule 6 promptly – in breach of Rule B6.4.1

3. Failure to keep up to date accounts – in breach of Rule B6.7.1
4. Producing inaccurate trial balances – in breach of Rule B6.7.4
5. Failure to comply with the cashroom manager duty to supervise staff and systems to implement the Account rules – in breach of Rule B6.13.1.

#### Proceeding in the absence of the respondents

The respondents have communicated via their solicitor that they do not intend to take part in these proceedings. No answers have been lodged by the respondents. At the last calling of this case on 11 March I made a motion to allow the matter to proceed in the absence of the respondents, and for the matter to proceed by way of affidavit evidence. That motion was granted. The solicitor instructed on behalf of the respondents is aware that the matter will proceed in their absence and that affidavit evidence will be relied upon.

Rule 14(4) of the 2008 Rules sets out the position on **proceeding in absence** when a respondent fails to attend. It provides:-

*'If any person fails to appear or to be represented at the hearing, the Tribunal may, after being satisfied that notice of the hearing has been duly posted or intimated to that person in accordance with rule 11(2) or, as the case may be, rule 5(b)(v), proceed to hear and determine the complaint in the absence of that person.'*

Rule 14(5) of the 2008 Rules provides that where a respondent fails to appear or be represented the Tribunal may **proceed by way of affidavit evidence** and with regard to documents lodged with the Clerk. It provides:-

*'In any case where the respondent fails to appear or to be represented at the hearing and the Tribunal decides to proceed to hear and determine the complaint in the absence of that respondent under paragraph (4), the Tribunal -*

*(a) shall take into account all the documents lodged with the Clerk, whether by the principal or secondary complainer or by the respondent; and*

*(b) may, either as to the whole complaint or as to some or all of the facts alleged in the statements contained in the complaint, proceed and act upon evidence given by affidavit but this is without prejudice to its power to take evidence orally.'*

In connection with (a) I have lodged the Law Society's inspection report which relates to the inspection dated 22-24 October 2012 and identifies the breaches of the Accounts Rules that I will refer to. I would ask you to take account of that report in determining the complaint.

In connection with (b) I have produced an affidavit from Veronica Walker, the Law Society inspector who managed the inspection of the respondents' firm. I have also produced an affidavit from Ian Messer, the Law Society's Director of Financial Compliance. Mr Messer had overall responsibility for the supervision of the inspection. I would move the Tribunal to admit the affidavit evidence of both witnesses.

### **Submission that the respondents are guilty of misconduct**

I rely on the evidence produced to the Tribunal today – that is inspection report lodged, and the affidavit evidence of Veronica Walker and Ian Messer – to support the submission that the respondents are guilty of misconduct.

In support of that submission I will:-

1. Summarise the facts to be found;
2. Summarise the relevant duties owed by the respondents as set out in the complaint; and
3. Submit why a breach of these duties amounts to professional misconduct.

### **1 Factual findings**

The facts noted in this section are contained in the affidavits of Veronica Walker and Ian Messer. The specific financial compliance findings made in connection with the firm's accounts which are referred to by Ms Walker and Mr Messer are contained in the Law Society inspection report which has been lodged as a production.

Accordingly in my submission you can find the following facts as proved:-

- 1.1 From 22 to 24 October 2012 the Law Society's Financial Compliance Department ("the FCD") carried out an inspection of the firm of McClure and Partners, 199 St Vincent Street, Glasgow, G2 5QD ("the Firm") in accordance with The Law Society of Scotland Practice Rules 2011, in particular Rule B6.18, which provides the process for the conduct of practice unit inspections and investigations.

- 1.2 The Law Society's records confirm that during the period 5 October 1997 to 29 April 2013 the partners in the Firm were Martin Kerr and Michael Kerr.
- 1.3 The Law Society's records also confirm that during that period Martin Kerr and Michael Kerr were the designated Cashroom partners or Cashroom managers for the Firm.
- 1.4 Martin Kerr and Michael Kerr were both suspended from practice on 2 May 2013. They do not currently hold Practising Certificates.
- 1.5 During its inspection of the Firm the FCD considered among other things whether or not the Firm was complying with the requirements of the Law Society's Accounts Rules.
- 1.6 At the conclusion of its inspection the FCD prepared a report setting out its findings ("the Inspection Report", which has been lodged as a production).

Facts relevant to client account deficit in breach of Rule 6.3.1(a)

- 1.7 The FCD was concerned that the Firm was in breach of the requirements of **Rule 6.3.1(a)** which requires the total client account balance to at all times be equal to or greater than the total client monies held. The FCD inspection reviewed the daybook records of the Firm which showed accounting entries for the Firm and client accounts.
- 1.8 On review of the Firm's records the FCD noted a series of occasions where the firm's client account was in deficit in breach of Rule 6.3.1(a). It noted the following occasions when the client account was in deficit:-
- 1.9 The FCD noted that as at 30 April 2012 the client account surplus was £1,142.45. On 1 and 2 May 2012 the total sum of £52,576 was transferred from the client account to the firm account. The total fees rendered on 1 and 2 May 2012 amounted to £322.06. As at 2 May 2012 the total debit entries exceeded the previous daybook surplus. As a result the client account deficit as at 2 May 2012 was £51,111.49.
- 1.10 During the course of May 2012 a further £32,613 was transferred from the client account to the firm account. During the same period the sum of £26,517.03 was debited as fees. Accordingly the client account deficit increased during the course of May 2012. On 31 May 2012 the client account was credited with £54,300 from an account in the name of M&M Kerr. As a result of the funds transferred on 31 May 2012 the client account was returned to a surplus of £1,061.67 at the end of May 2012.
- 1.11 As at the end of May 2012 the daybook showed a client account surplus of £1,061.67. From 1 to 6 June the total sum of £73,698 was transferred from the client account to the firm account. During that same period the fees debited from the client account totalled £1,811.

As a result, as at 6 June 2012 the client account deficit was £70,825.33. During the course of June 2012 a further £25,210 was transferred out of the client account to the firm account. During the same period £35,540.29 was debited as fees. On 29 June 2012 the client account was credited with £59,000 from an account in the name of M&M Kerr. As a result of the funds transferred on 29 June 2012 the client account was returned to a surplus of £488.26 at the end of June 2012.

- 1.12 As at the end of June 2012 the daybook showed a client account surplus in the sum of £488.26. On 2 and 3 July amounts totalling £81,288 were transferred from the client account to the firm account. During the same period the sum of £890.40 was debited as fees. As at 3 July 2012 the total debit entries on the client account exceeded the previous surplus. As a result of the funds transferred on 3 July 2012 the client account deficit as at that date was £79,909.34.
- 1.13 During the course of July 2012 a further £24,694 was transferred from the client account to the firm account. During that period a further £27,692.82 was debited as fees. On 31 July 2012 the Bank of Scotland client account was credited with £69,800 from an account in the name of M&M Kerr. As a result of the funds transferred on 31 July 2012 the client account was returned to a surplus of £677.32 at the end of July 2012.
- 1.14 As at the end of July 2012 the daybook showed a client account surplus in the sum of £677.32. On 1 August amounts totalling £91,844 were transferred from the client account to the firm account. During that period no fees were debited from the client account. As at 1 August 2012 the total debit entries on the client account exceeded the previous daybook surplus. As a result the client account deficit as at 1 August 2012 was £91,166.68.
- 1.15 During the course of August 2012 a further £18,510 was transferred from the client account to the firm account. During that period a further £18,703.33 was debited as fees. On 31 August 2012 the client account was credited with £118,876.51 following the sale of a property. As a result the daybook showed that the client account was returned to a surplus of £26,857.28 at the end of August 2012.
- 1.16 The FCD raised its concerns with the Firm's client account running in deficit in the Inspection Report. The Firm responded to the Law Society's concerns with the running of a deficit on 15 December 2012 stating:-
- "A daybook was done for the whole month and sums were deposited to ensure there was a surplus. We accept that we should have informed the Law Society of the position and were wrong not to do so. We thought we could sort it out far quicker than we did but it took longer*

*than anticipated to raise the finance. As is evident from our records the position was rectified at the end of August. It should also be noted that we had financial backing from family members and while no funds were introduced by them during this period the members were satisfied that no clients' money was at risk and thus the Guarantee fund would never be called upon. It should also be noted that no client lost any money during this period. Daybooks and surpluses have been provided to you by e-mail and as stated above the daybooks have been produced since 1 September and we have been in surplus since that date."*

- 1.17 The FCD considered the evidence of client account deficits outlined at paragraphs 1.8-1.15 and concluded that the Firm's client account had been in a deficit position over a long period of time. It found that the position appeared to be temporarily rectified at each month end. It found that a deficit position was created shortly after the month end. The FCD concluded that this demonstrated an awareness by the partners of the firm of a breach of the **Rule B6.3.1** which required them to keep the client account in surplus at all times.
- 1.18 The Firm responded on 15 December 2012 stating:-  
*"As we have already stated we were aware of the position and thought that we could rectify it quickly. This did not happen as it took longer than anticipated to raise funds. We were wrong not to inform the Law Society immediately but thought we could sort it out far quicker than we did. We eventually rectified matters at the end of August"*.

Facts relevant to failure to keep up to date accounts in breach of Rule B6.7.1

- 1.19 Separately, the FCD found that the Firm had not maintained up to date accounting records as required by **Rule B6.7.1**. The FCD found that during the months of July, August and September 2012 account entries were posted approximately 14 days in arrears. The posting of account entries for July 2012 were commenced on 14 August 2012. The posting of account entries for August 2012 commenced on 11 September 2012. The posting of account entries for September 2012 commenced on 13 September 2012. The FCD noted that "With the records of the firm being kept in arrears it is therefore unclear how the Cashroom Managers could ascertain the up to date position of the practice unit".
- 1.20 The Firm responded on 15 December 2012 stating:-  
*"Daybooks are prepared every day since the beginning of September and therefore our records are being kept up to date...All bank accounts are being reconciled every month and all transactions through the bank statements will be posted to the practice unit's records in future"*.

Facts relevant to inaccurate trial balances in breach of Rule B6.7.4

- 1.21 Separately, the FCD found that the Capital and Drawings balances shown on the trial balances did not reflect the true position of the Firm's finances as required by **Rule B6.7.4**. The FCD noted that the Firm's records must be balanced monthly and on the last day of the accounting period. It noted that this included the preparation of a monthly trial balance. The Firm had recorded information in its trial balances which related to personal affairs of Michael Kerr and Martin Kerr.
- 1.22 In connection with the trial balance of 28 September 2012 the FCD noted that the following ledgers related to personal affairs of Michael Kerr and Martin Kerr:-
- a) Ledger 8004, Company 1 where the account was in debit in the sum of £87,359.
  - b) Ledger 8074, Company 2 where the account was in debit in the sum of £3,315.37.
  - c) Ledger 8085, Company 3 where the account was in debit in the sum of £2,718.40.
  - d) Ledger 8086, Company 4 where the account was in debit in the sum of £4,361.39.
- 1.23 In its Inspection Report the FCD stated "Please clarify the position confirming why personal expenditure is recorded through the records of the firm, therefore distorting the true position." The Firm responded on 15 December 2012 stating:-
- "Personal expenditure should not have been recorded through the records of this firm. The position has been rectified and will not happen again."*
- 1.24 Michael Kerr and Martin Kerr attended an interview with the Law Society on 20 December 2012. Their representative advised the Law Society that the Firm was being wound up. On 2 May 2013 the Guarantee Fund Sub Committee considered the conduct of Michael Kerr and Martin Kerr. It was noted that the Firm had been wound up on 29 April 2013. The Guarantee Fund Sub Committee determined to withdraw both solicitors Practising Certificates on 2 May 2013 in accordance with section 40 of the Solicitors (Scotland) Act 1980.
- 1.25 On 28 January 2014 the representative of Michael Kerr and Martin Kerr submitted a letter to the Law Society accepting on their behalf that there had been a failure to comply with the Accounts Rules.

## **2 Summary of duties owed by the respondents**

At paragraph 3 of the complaint I set out the duties which I submit the respondents have failed to comply with. The duties owed are compliance with the Accounts Rules which are contained at Rule B6 of the Law Society of Scotland Practice Rules 2011. Partners in a law firm have joint and several liability for compliance with the Accounts Rules. In addition, firms must designate cashroom partners



(now cashroom managers), to satisfy the additional, specific duty to supervise the operation of their cashroom. The respondents were the designated cashroom managers for the Firm in this matter.

Therefore the relevant duties owed by the respondents in the current matter were:-

Duty to keep client accounts in credit – breach of rule B6.3.1(a)

2.1 Rule B6.3.1(a) *Clients' money to be paid into client account or holding ledger* provides:-

*"...every practice unit shall (a) ensure that at all times the sum at the credit of the client account, or where there are more such accounts than one, the total of the sums at the credit of those accounts, shall not be less than the total of the clients' money held by the practice unit."*

2.2 The respondents were the two designated cashroom managers for the Firm in the period May 2012 to August 2012. On several occasions during that period the respondents failed to ensure compliance with Rule B6.3.1(a) by ensuring that the Firm held sufficient funds in the client account to meet all sums due to all the clients of the firm at any one time. On these occasions the sum at credit of the client account was less than the total client monies held by the firm (referred to above).

Duty to remedy breaches of account rules promptly – breach of rule B6.4.1

2.3 Separately, Rule B6.4.1 *Duty to rectify breaches*, provides:-

*"A practice unit shall remedy any breach of rule 6 promptly upon discovery and shall, without limitation, replace any money improperly withheld or withdrawn from a client account."*

2.4 During the period May 2012 to August 2012 the respondents failed to ensure compliance with Rule B6.4.1. The respondents failed to promptly remedy the shortfalls in the client account. The respondents failed to promptly replace all money which had been improperly withdrawn from the client account.

Duty to keep up to date accounts at all time – breach of Rule B6.7.1

2.5 Separately, Rule B6.7.1 makes provision in relation to the accounts required to be kept in books of practice unit. It provides:-

*"A practice unit shall at all times keep properly written up such accounting records as are necessary (a) to show all its dealings with (i) clients' money"*.

- 2.6 During the period July 2012 to September 2012 the respondents failed to ensure compliance with Rule B6.7.1. The respondents failed to ensure that at all times the accounting records were properly written up so as to show dealings with clients' money.
- 2.7 In the months of July, August and September 2012 account entries were posted approximately 14 days in arrears.

Duty to keep accounts showing the true financial position of the firm – breach of Rule B.6.7.4

- 2.8 Separately, Rule B6.7.4 also makes provision in relation to the *Accounts required to be kept in books of practice unit*. It provides:-  
*“Every practice unit shall (a) at all times keep properly written up such accounting records as are necessary to show the true financial position of the practice unit”.*
- 2.9 During September 2012 the respondents failed to ensure compliance with Rule B6.7.4. The respondents failed to ensure that at all times accounting records were kept so as to show the true financial position of the firm. The trial balance produced by the respondents on 28 September 2012 included personal expenditure which had nothing to do with the business of the firm. As a result the true financial position of the firm was distorted.

Duty as cashroom managers to supervise staff and systems to implement rule 6 – breach of Rule B6.13.1

- 2.10 In addition to the Accounts Rules referred to above, Rule B6.13.1 places additional responsibilities on partners in a law firm who take on the role of Cashroom Manager. It provides:-  
*“Within one month of the coming into force of rule 6 or of its commencing practice on its own account every practice unit shall designate one or more of its managers as Cashroom Manager. A Cashroom Manager will be responsible for the supervision of the staff and systems employed by the practice unit to implement the provisions of rule 6 and for securing compliance with the provisions of rule 6...”*
- 2.11 During the period May 2012 to September 2012 the respondents as the Firm's cashroom managers failed to ensure compliance with Rule B6.13.1. The respondents failed to secure compliance with the provisions of Rule 6 as can be seen in the failures to comply referred to above.

As a result of the failures to comply with these duties it is submitted that the respondents are guilty of professional misconduct.

### **3 Submission as to why these failures amount to misconduct**

I would submit that these failures satisfy the Sharp test:-

*“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 made.”*

...and accordingly amount to misconduct.

Each case will turn on its own facts and circumstances but I submit that the following observations from previous decisions of the Discipline Tribunal will assist this Tribunal to find that the multiple breaches of the Accounts Rules in this case amount to professional misconduct for both respondents. In *Smith and Barton: Procedures and Decisions of the Scottish Solicitors Discipline Tribunal* the authors cite the following comments from the Tribunal:-

*‘[If] solicitors are to continue to enjoy public trust in regard to their financial affairs, they must have careful regard to all the requirements and obligations incumbent on them as contained in the Accounts Rules (Case 665/86).’*

The authors in *Smith and Barton* note that failure to keep properly written up books and accounts to show dealings with clients’ money has been found to constitute professional misconduct. [Case 844/93]

They also cite the following comments from the Tribunal:-

*'In holding funds for clients, a solicitor is in a privileged position of trust. In order fully to protect clients at all times, a solicitor must comply with the detailed provisions of the [Accounts Rules], which not only ensure that all monies belonging to clients are distinguished from the solicitor's own funds, but also require the solicitor to set down and maintain detailed records so that the solicitor and the Law Society can immediately satisfy themselves that the solicitor is always in a position to account for all funds held for clients'. (Case 710/87)*

In the current matter the respondents failed to meet those basic requirements.

More specifically, in this current matter there was a pattern of substantial funds being transferred into the client account at the month end to demonstrate a surplus and then funds being transferred out again immediately afterwards. *Smith and Barton* refer to a matter which appears comparable on the facts and note:-

*'The Tribunal took a particularly serious view where the Respondent's firm pursued a course of deliberate deception whereby substantial funds were transferred into the client account in order to achieve a temporary surplus at the end of each month and withdrawn immediately thereafter. Apart from the brief period each month, the client account was in effect funding the Respondent's firm to a significant extent and they said this was wholly improper and a flagrant breach of the Accounts Rules'. (Case 759/89)*

In the current matter the FCD did not consider that there was deception or dishonesty but were concerned with the pattern of behaviour. They considered that the conduct demonstrated an awareness by the respondents that the Accounts Rules were being breached. In my submission it is fair to say that in the current matter the course of conduct was wholly improper and a flagrant breach of the Accounts Rules.

The authors of *Paterson and Ritchie: Law, Practice & Conduct for Solicitors* make a similar point on the privilege and responsibility that comes from holding client funds:-

*'Solicitors often either forget or fail to appreciate that they have a special privilege in being allowed to handle clients' money, sometimes in very large amounts. The price to be paid for this is proper regulation, meaning not just a set of rules to be followed, but also active monitoring by the regulatory*

*body of compliance with those rules coupled with real sanctions for significant breaches of them and compensation to the victims of such breaches.’ (para 9.02)*

In *Lyons and Drummond* (19 November 2008) the Tribunal noted:-

*“The Accounts Rules are in place in order to protect the public. Solicitors who fail to comply with the provisions of the Accounts Rules undermine public confidence in the profession.”*

The Tribunal has repeatedly confirmed that it is imperative if the public is to have confidence in the legal profession for solicitors to comply with the Accounts Rules. The Tribunal has repeatedly made findings of professional misconduct where there have been multiple failures to comply with the Accounts Rules. (McSherry 21 January 2016; Sommerville 9 March 2015).

In my submission the privilege of holding client funds carries important responsibilities with it. The Accounts Rules seek to protect client funds and protect the public’s confidence in the profession. In the current matter we can see fundamental and significant breaches of the Accounts Rules. The client account was repeatedly in deficit as a result of a pattern of behaviour which carried on over a number of months. As a result of that course of conduct, and the other accountancy practices which concerned the FCD, there was a period of time in which the client funds were not properly protected. Law firms which operate in this way undermine public confidence in the profession.

The respondents are not present or represented today.

I have produced letters from the agent for the respondents dated 28 January 2014, 2 February 2016 and 9 March 2016. In their absence I would note that although these failings were significant, in particular the repeated shortfall in the client account, it may be said on behalf of the respondents that these failures all took place over a period of five months (May-September 2012). The Law Society identified their concerns following an October 2012 inspection. Unlike other instances of breaches of the Accounts Rules the solicitors did not go on to repeat their failures. Instead they wound up the Firm in April 2013 before having their practising certificates removed by the Law Society in May 2013. This case reinforces the importance of the Law Society’s inspection framework protecting the public and the reputation of the profession.

Both respondents were experienced solicitors. Michael Kerr was enrolled as a solicitor in 1981 and was a partner in the Firm or its predecessor practice from 1982 until 2013. Martin Kerr was enrolled as a solicitor in 1984 and was a partner in the Firm or its predecessor practice from 1990 until 2013. It is unfortunate that the respondent solicitors have not taken the opportunity to attend or be represented today. They had the opportunity to engage with the Tribunal and in so doing to provide reassurance to the Tribunal and the public about this matter.

**Conclusion: finding**

For the reasons that I have given in part 3 of this submission above, I would ask you to find that the respondents are guilty of professional misconduct in accordance with paragraph 4.1 of the two conjoined complaints which in each case state:-

“The Council avers that the respondent has been guilty of acts or omissions which, singularly or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 (as amended) Section 53.

In particular, the Council avers that as a consequence of the Respondent’s failure to comply with Rules B6.3.1(a), B6.4.1, B6.7.1, B6.7.4 and B6.13 the Respondent is guilty of professional misconduct.”

**DECISION**

The two affidavits and inspection report were extensive in their terms. The Tribunal were satisfied beyond reasonable doubt that the above facts were proved.

The Tribunal had been invited to find the Respondents guilty of professional misconduct either singularly or in cumulo in relation to the breaches of the Accounts Rules.

The Accounts Rules are in place in order to provide protection to the public. Solicitors are in a privileged position of holding monies belonging to others. It is well accepted that the Tribunal will treat breaches of the Accounts Rules as a serious matter. The question here was whether the breaches proved here individually amounted to professional misconduct. The test to be satisfied is that the conduct proved represents a departure from the standards to be expected of a competent and reputable solicitor that would be regarded as serious and reprehensible.

In relation to the breaches of rules B6.3.1(a) and B6.4.2, which run together, the evidence before the Tribunal reflected a deliberate course of conduct by the two Respondents. Over a period of 4 months money was removed from the client account putting it into deficit in the course of the month and then shortly before the month end, money was transferred back into the client account to put it back into surplus. This represented deliberate breaches of the Accounts Rules, executed in such a way that suggested full knowledge on the part of the Respondents. This part of the Complaint in itself, in the view of the Tribunal, amounted to professional misconduct.

The other matters were clearly breaches of the Accounts Rules but in themselves did not necessarily amount to professional misconduct. The Tribunal required to look at the conduct as a whole. Accordingly the Tribunal found both Respondents guilty of professional misconduct in cumulo.

The Tribunal found this a difficult case in relation to its approach to the appropriate disposal. The case was presented to the Tribunal on the basis that there was no dishonesty or deception on the part of the Respondents yet the conduct described was clearly deliberate, calculated and carried out in full knowledge of the Accounts Rules. If there had been evidence before the Tribunal of dishonesty on the part of the Respondents then the Tribunal would, without hesitation, have struck both names from the Roll of Solicitors in Scotland. However, the case was presented to the Tribunal on the specific basis that there was not dishonesty of the part of the Respondents.

The matter was further complicated by the absence of the Respondents. The course of conduct was relatively short although that may have been due to the timing of the Financial Compliance Department inspection. The deliberate breach of Rule B6.3.1(a) (running the client account in deficit) is clearly a very serious matter. The Tribunal were advised that no client had in fact incurred any loss. It was difficult for the Tribunal to gauge any degree of remorse or insight given the absence of the Respondents. However, the Tribunal did have before it letters of explanation from the solicitor for both Respondents which indicated that the firm had been wound up in such a way that no party incurred any loss. This could be said to be an indication of some remorse or insight.

There was however no getting away from the serious nature of what was very clearly deliberate and calculated behaviour. In these circumstances the Tribunal unanimously concluded that the appropriate disposal was one of suspension of both Respondents from practice. Such a step was necessary to underline the importance of the protection of the public and to maintain public trust in the profession. The Tribunal concluded that the appropriate period for suspension was one of 5 years.

The Fiscal moved for expenses. There being no information before the Tribunal otherwise, that motion was granted. The Fiscal indicated to the Tribunal that there was no reason to depart from the usual order with regard to publicity.

**Alan McDonald**  
**Vice Chairman**