

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

FINDINGS

in Complaint

by

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh**

against

**MARTHA ANNE RAFFERTY,
Solicitor, J. R. Rahman, First
Floor, 40 Carlton Place, Glasgow**

1. A Complaint dated 13 July 2015 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Martha Anne Rafferty, Solicitor, J. R. Rahman, First Floor, 40 Carlton Place, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional.
2. There was no Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.
4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 27 August 2015 and notice thereof was duly served on the Respondent.
5. The hearing took place on 27 August 2015. The Complainers were represented by their Fiscal Jim Reid, solicitor, Glasgow. The Respondent was present and represented herself. A Joint Minute was

lodged admitting the averments of fact and averments of duty in the Complaint. The Complainers lodged an Inventory of Productions and a List of Authorities. The Respondent lodged a medical report and various references. The Tribunal agreed to adjourn until 2pm for the Respondent's advocate to be present to represent her.

6. The Respondent then advised that her advocate would not be able to represent her and confirmed that she wished to proceed and represent herself. She confirmed that she did not wish an adjournment.

7. The Joint Minute admitted all the averments of fact in the Complaint. The Respondent however advised that there was a mistake with regard to the section of the Road Traffic Act in connection with one of the convictions. There was a joint motion to amend the terms of the Complaint due to the confusion with regard to exactly which section applied. This was allowed and the Tribunal found the following facts established:-

7.1 In 2012 the Respondent was convicted under Section 5(1)(A) of the Road Traffic Act 1988 of driving or attempting to drive a motor vehicle on a road (or other public place) with alcohol concentration above the prescribed limit, or alternatively under Section 7(6) of the Road Traffic Act 1988 of failing to provide 2 specimens of breath. The Respondent was subsequently disqualified from driving for 18 months and fined £500.

On 2nd February 2012, the Complainers' Client Care Sub Committee (now known as the Complaints Sub Committee) considered the conviction. They subsequently decided not to raise a conduct complaint with the Scottish Legal Complaints Commission (SLCC) as it was the Respondent's first conviction and there were no other relevant circumstances which would make the offence more serious. The Sub

Committee had however indicated that should there be a repeat of the circumstances, then a complaint might be raised.

- 7.2 On 4th August 2014 the Respondent was convicted of failing to provide two specimens of breath in contravention of Section 7(6) of the Road Traffic Act 1988. The Respondent pled guilty to the charge, was fined £530 and disqualified from driving for three years.
- 7.3 On 21st October 2014 the Crown Office wrote to the Complainers advising them of the conviction. The Complainers' Complaints Sub Committee considered the matter on 6 November 2014 and decided that the matter was sufficiently serious to warrant a formal investigation as a conduct complaint. On 20th November 2014 the Complainers submitted a Complaint Form to the SLCC. The SLCC considered the Complaint and, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6, remitted the Complaint to the Complainers to investigate.
- 7.4 The Complainers instructed a Complaints Investigator whose report was provided to the Respondent's representative by the Complainers in a letter dated 25 March 2015 together with intimation that the Complaint would be considered by a Professional Conduct Sub Committee. The Complaints Investigator also completed a Supplementary report which was provided to the Respondent by the Complainers in a letter dated 12 May 2015.
- 7.5 The complaint was considered by the Complainers' Professional Conduct Sub Committee on 28th May 2015.

The Sub Committee determined that the Respondent's conduct in respect her conviction on 4 August 2014 for failing to

provide two specimens of breath in contravention of the Road Traffic Act 1988, Section 7; this being a course of conduct in conjunction with her conviction in 2012 of a drink driving offence; appeared to amount to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor; that the conduct appeared to be capable of being proved beyond reasonable doubt and could therefore amount to professional misconduct.

The Sub Committee further determined that a Fiscal should be appointed to prosecute in terms of the Solicitors (Scotland) Act 1980 Section 51.

By email dated 11th June 2015 the Complainers sent the Respondent a copy of the Professional Conduct Sub Committee's Determination.

8. The Tribunal heard submissions from both parties in connection with whether or not the Respondent's conduct amounted to professional misconduct. After carefully considering the submissions and all the documents lodged, the Tribunal found the Respondent guilty of professional misconduct *in cumulo* in respect of:

- 8.1 Her conviction of a charge under Section 7(6) of the Road Traffic Act 1988, together with the earlier conviction under Section 5(1)A or alternatively Section 7(6) of the same Act.

9. Having heard submissions in mitigation and submissions with regard to publicity and expenses, Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 27 August 2015. The Tribunal having considered the Complaint dated 13 July 2015 at the instance of the Council of the Law Society of Scotland against Martha Anne Rafferty, Solicitor, J. R.

Rahman, First Floor, 40 Carlton Place, Glasgow; Find the Respondent guilty of professional misconduct *in cumulo* in respect of her being convicted twice in relation to drink driving offences in terms of the Road Traffic Act 1988; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Dorothy Boyd
Vice Chairman

10. 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

IN THE NAME OF THE TRIBUNAL

Dorothy Boyd
Vice Chairman

NOTE

The Respondent did not lodge Answers to the Complaint but a Joint Minute was lodged with the Tribunal agreeing the averments of fact and averments of duty in the Complaint. The Complainers lodged an Inventory of Productions and also a List of Authorities. The Respondent lodged a GP medical report and 6 References. The Respondent advised that her Counsel, Gordon Jackson, was not able to attend the Tribunal until 2pm and asked that the case be put off until then to allow her to be represented. In the circumstances the Tribunal agreed to this. The Respondent however then advised that her Counsel would not be available in the afternoon and asked the Tribunal to proceed with the case. The Respondent advised that she did not wish an adjournment and wished to have the case dealt with today and represent herself.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid submitted that the facts as set out in the Complaint were sufficiently serious and reprehensible so as to meet the Sharp test. He indicated that the two convictions as set out in the Complaint related to Road Traffic convictions in connection with the drink driving legislation. Mr Reid pointed out that drinking and driving had consequences which could be a danger to other road users and pedestrians and that the legislation was in place to deal with the control of this. In this case the Respondent had breached the procedures. Mr Reid submitted and these two convictions together were sufficient to amount to professional misconduct. He referred the Tribunal to his List of Authorities and to Paterson and Ritchie, Law & Conduct for Solicitors, 2nd Edition, at page 21, which referred to the case of Howard, an English case where the Disciplinary Tribunal had found that the Respondent was guilty of professional misconduct when he had been convicted of driving a vehicle after consuming excess alcohol while acting in the course of his profession. Mr Reid also referred the Tribunal to the Tribunal Findings in 2003 against Neil McPherson, who had been found guilty of professional misconduct in respect of 4 convictions for driving a motor vehicle whilst drunk and had been Censured and Fined £500. The Tribunal had made it clear in that case that one of the essential qualities of a solicitor is integrity, which extends to the personal as well as the professional conduct of a solicitor. Mr

Reid also submitted that the Respondent had breached Rule B1.2 of the Practice Rules in relation to her personal integrity. He however submitted that it was not necessary to find a breach of Rule B1.2 for a finding of misconduct, it was just another indication of the importance of integrity. Mr Reid also referred the Tribunal to disciplinary findings of the Bar Standards Board in England in the case of Paul Brant where a barrister had been found guilty of a criminal offence of being in possession of a controlled drug class A and been cautioned. The disciplinary body had found that his conduct was discreditable to a barrister and he was reprimanded. Mr Reid pointed out that this was only one event.

Mr Reid further referred the Tribunal to previous Tribunal Findings in 2006 against Michael Alan Grant McNiven, where the Respondent had been found guilty of professional misconduct in cumulo in respect of his conviction for drunk driving and also for driving while disqualified and when not covered by any policy of insurance. Mr Reid particularly referred the Tribunal to page 8 of the Tribunal Findings in this case where the Tribunal found that the Respondent's conduct and the inevitable publicity that followed was damaging to the reputation of the profession. Mr Reid stated that the conduct was likely to bring the profession into disrepute whether or not any actual publicity occurred. In response to a question from the Tribunal, Mr Reid stated that a solicitor has a duty not to breach the law and if they did it reflected on their personal integrity. He confirmed that he was not alleging any fraudulent or deceitful conduct or any dishonesty but referred to the trustworthiness of the Respondent. Mr Reid stated that he did not know whether or not the conviction arose during the Respondent carrying out any professional duties. He indicated that he considered that this would be more a matter for mitigation than whether or not it amounted to professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

The Respondent submitted that she actually had been convicted of 2 different failures to provide specimens and that both the convictions were in terms of Section 7(6) of the Road Traffic Act 1988. She indicated that she knew she had been drinking on both occasions. She advised that she had admitted herself into the Priory in May 2014 and had submitted herself to random breath tests there but had difficulty providing

these because she was very flustered when doing the tests. She advised that she had pled guilty at the earliest opportunity because she knew she had been drinking. The Respondent further advised that she now had her illness under control and was doing criminal agency work and had a heavy court diary. The Respondent advised that at the time of the offences her personal life was in turmoil and she had not dealt with matters as she should and that explained the 2 convictions. She confirmed that she was no longer in that situation.

The Respondent submitted that her conduct had not brought the profession into disrepute. She emphasised that she was not dishonest and had been a solicitor since 1983 and had had no professional complaints against her. She was also a Legal Aid practitioner and there had been no complaints from the Legal Aid Board. She referred the Tribunal to the report from her GP and confirmed that neither of the offences had occurred when she was working and there was no one else in the car apart from herself. She indicated that she accepted that she had been a danger to others and she had been relieved that there had not been any more serious consequences. She emphasised that she was very remorseful. She confirmed to the Tribunal that she had now recovered from her illness and that her GP was happy with her progress and would provide an updated report if required. She explained that she had set up her own business and that she was passionate about her job. She referred the Tribunal to the references lodged from other professionals and a Sheriff. She submitted that her case could be distinguished from the cases referred to by the Fiscal. In the case of Howard, he was acting professionally. In the case of Docherty, dishonesty was involved. In the case of MacPherson, there had been publicity with regard to the convictions. The Respondent submitted that her conduct might be more in the way of inadequate professional standards rather than professional misconduct. She pointed out that if publicity was given to the Tribunal Findings, this might bring the Law Society into disrepute.

In response to a question from the Tribunal, the Respondent confirmed that she regularly saw her doctor and her psychiatrist and was on the necessary medication. She confirmed that her illness had never affected her work with clients. She accepted, in response to another question from the Tribunal, that the public would not be

impressed by what had happened but pointed out that it did not affect her ability to do her job.

Mr Reid advised that in a letter he had received from the police, the conviction was stated to relate to Section 5(1)A of the Road Traffic Act 1988. The Tribunal advised that it was necessary for parties to agree what the actual factual circumstances of the convictions were.

After an adjournment parties advised that they had not been able to obtain any confirmation with regard to the exact nature of the offences. Given that both offences related to drink driving, the Tribunal did not consider that it would make much difference, whether it was a conviction under Section 5(1)A or Section 7(6) of the Road Traffic Act. The Tribunal however required to make findings in fact and asked the parties to consider whether or not they wished to amend the Complaint. Parties advised that they were agreed that the Complaint should be amended to read that the offence was either Section 5(1)A or Section 7(6).

DECISION

The Tribunal found this to be quite a difficult case and considered its decision very carefully. The Tribunal has made it clear on a number of previous occasions that a solicitor's conduct in his or her personal life can amount to professional misconduct. In this case the Respondent had been convicted twice in relation to drink driving offences. The Tribunal accept that the Respondent's conduct took place in her private life rather than her professional life but her conduct may have put other road users and members of the public at risk. On two occasions the Respondent got behind the wheel of a car when she should not have been driving. She also failed to cooperate with the authorities in relation to providing breath tests, which was something, in terms of the law, she was required to do. The Tribunal considered that the public would regard these offences, committed by a solicitor, as a matter of serious concern. In her submissions, the Respondent acknowledged that she should not have been driving and that she had been drinking at the time of the offences. In these circumstances her behaviour was a danger to the public and the Tribunal considered that it was behaviour that would not be tolerated by the public. The Tribunal considered that her

conduct had to be considered as conduct not becoming of a solicitor and was conduct which would be likely to bring the profession into disrepute.

The Tribunal noted the Respondent's submissions to the effect that there was no publicity at the time of her convictions. The Tribunal however did not find the fact that there was not actual publicity to be particularly relevant. The Tribunal considered that the Respondent's behaviour in this case was sufficiently serious and reprehensible as to adversely affect the reputation of the legal profession. In the whole circumstances the Tribunal considered that the two convictions, in cumulo were serious and reprehensible enough to meet the Sharp test.

The Tribunal however was not persuaded that the Respondent's conduct amounted to a breach of Rule B1.2 of the Practice Rules 2011, in that the Tribunal did not consider that the Respondent's conduct was dishonest, fraudulent or deceitful.

The Tribunal then heard submissions on expenses and publicity and in mitigation. The Respondent indicated that she had nothing to add in mitigation but asked that the Tribunal not make a finding of expenses due to her modest income and the fact that she had already paid court fines. She asked that publicity not be given to the decision as it would bring the Law Society into disrepute. Mr Reid asked for an award of expenses in the usual manner and submitted that the Tribunal had no discretion with regard to publicity in this case.

PENALTY

Although the Tribunal made a Finding of professional misconduct, the Tribunal considered that this was at the lower end of the scale. The Tribunal took into account the Respondent's illness, the fact that she had been in practice for 32 years with no professional complaints against her, the fact that she was taking steps to remedy her underlying problem, that she had shown insight and remorse and had cooperated with the Law Society and the Tribunal. The Tribunal considered that a Censure was sufficient penalty in this case. The Tribunal has very limited discretion with regard to publicity in terms of Schedule 4 to the Solicitors' (Scotland) Act 1980 and can only refrain from giving publicity if it would be likely to damage the interests of persons

other than the solicitor, his or her partners or his or her family. In this case the Tribunal cannot find that there would be damage to any individuals other than the Respondent, her partners or her family. It is important that Tribunal decisions are given publicity so that members of the profession can learn from the mistakes of others.

In connection with expenses, although the Tribunal has sympathy for the Respondent's position, the usual practise is to award expenses where a finding of professional misconduct is made. The Tribunal did not consider that there was anything exceptional in this case which would justify departure from this practise.

Dorothy Boyd
Vice Chairman