

**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  
(Complainers)**

**on behalf of**

**NICOLA HOCKING, 67 Lindores  
Drive, West Mains, East Kilbride  
(Secondary Complainer)**

**against**

**JAMES GERARD BROPHY,  
Solicitor, Brophy & Company,  
Suite 2, Gemini House, 2 Lints  
Riggs, Falkirk  
(Respondent)**

1. A Complaint dated 13 September 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, James Gerard Brophy, Solicitor, Brophy & Company, Suite 2, Gemini House, 2 Lints Riggs, Falkirk (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Secondary Complainer is Ms Nicola Hocking, 67 Lindores Drive, West Mains, East Kilbride (hereinafter referred to as "the 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 6 December 2013 and notice thereof was duly served on the Respondent.
5. The hearing took place on 6 December 2013. The Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was present and represented by Mr William Macreath, Solicitor, Glasgow. The Secondary Complainer was not present but was represented by Mr Iain Nicol, Solicitor, Livingston.
6. Mr Macreath advised that the Respondent pled guilty to the averments of fact, averments of duty and averments of professional misconduct in the Complaint. No evidence required to be led.
7. After having heard submissions from Ms Johnston and Mr Macreath in respect of the Complaint, the Tribunal found the following facts established
  - 7.1 The Respondent was born on 28 May 1962. He was enrolled as a Solicitor on 13 November 1986. He was employed by and was then a partner in the firm of Gibson Kennedy, Solicitors, Benview, Wellside Place, Falkirk until 30 June 1996. He became a Partner in the firm of Brophy & Company, Falkirk on 1 July 1996.
  - 7.2 The Secondary Complainer submitted a Complaint Form to the Scottish Legal Complaints Commission on 4 September 2012. The SLCC considered the Complaint a hybrid matter and, in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 6, remitted the conduct Complaint to the Complainers to investigate.

7.3 By letter dated 7 February 2013 the Complainers wrote to the Respondent intimating their obligation under the 2007 Act Section 47(1) to investigate complaints relating to the conduct of enrolled Solicitors. The letter advised that the complaint was based on consideration of the two issues raised in her complaint to the SLCC by the Secondary Complainer, namely that:

“1. Mr Brophy failed to contact or update me on my case for a period of over three years between June 2009 and August 2012 despite numerous telephone calls. Mr Brophy finally responded on 21 and 31 August 2012 after I wrote a letter of complaint.

2. Mr Brophy failed to address my complaint about why he had not contacted me.”

7.4 The Respondent was instructed by the Secondary Complainer in relation to a medical negligence claim on or about 29 January 2009. She had undergone a course of chiropractic treatment and in April 2007 she appeared to have suffered injury as a result of this. The Respondent was alert to the triennium being around April 2010, and advised his client her claim would be time barred within three years of the date on which the injury occurred. He stated that he would require her instructions to raise an action no later than 28 February 2010 otherwise he would not have sufficient time to complete the required paperwork. The Secondary Complainer was admitted to Advice and Assistance on 30<sup>th</sup> January 2009. An increase in authorised expenditure was granted on or about 11 February 2009 in the amount of £1,600 to enable the Respondent to obtain an expert medical report.

7.5 The Respondent managed the case smoothly for the first six months. There was regular contact with the Secondary Complainer during this period. On 2 June 2009 he wrote

advising her that he had sent the administration fee for release of her medical records. The medical records were received from Southern General Hospital in October 2009. No further action was taken and the Respondent did not contact his client or do any work on the file between October 2009 and 22 August 2012. The Respondent wrote to the Secondary Complainer on 22 August 2012 in response to her letter of 13 August 2012 and advised that she had poor prospects of success in relation to any potential claim for damages following her treatment from the chiropractor. The triennium had already passed.

- 7.6 On 28 February 2013 in response to the complaint dated the Respondent advised that the client file had been mislaid and that he could not be sure when that had occurred. He stated that the firm moved office in March 2011 and that the file had been incorrectly placed in a box of files earmarked for storage containing completed files before the office move. He confirmed that he retrieved the file in 2012. He accepted that the Secondary Complainer had contacted him on a number of occasions but stated that he was unable to respond because he could not find the client file.
- 7.7 The Complainers compiled an Investigation Report dated 13 May 2013, a copy of which was intimated to the Respondent.
- 7.8 The Complainers provided a Supplementary Report dated 3 June 2013 to the Respondent and intimated that the Complaint would be considered by the Professional Conduct Committee on 11 July 2013.
- 7.9 On 11 July 2013 the Complainers' Professional Conduct Committee considered the matter and determined that in respect of issue 1. the Respondent's conduct appeared to amount to a serious and reprehensible departure from the standard of

conduct to be expected of a competent and reputable Solicitor, that it appeared to be capable of being proved beyond reasonable doubt and could thus amount to professional misconduct. It further determined that the Respondent should be prosecuted before the Scottish Solicitors Discipline Tribunal.

8. The Secondary Complainer suffered loss, inconvenience and distress as a direct result of the Respondent's failures.
9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in that between 2 June 2009 and 22 August 2012 he failed to act in the best interests of a client who had instructed him in relation to a potential medical negligence claim, failed to communicate effectively or at all with that client regarding her claim and repeatedly failed to return her calls during which period the negligence claim became time barred.
10. Having noted a previous Finding of misconduct against the Respondent and having heard the Solicitor for the Respondent in mitigation and a submission from Mr Nicol in respect of the Secondary Complainer's request for compensation, the Tribunal pronounced Interlocutors in the following terms:-

Edinburgh 6 December 2013. The Tribunal having considered the Complaint dated 13 September 2013 at the instance of the Council of the Law Society of Scotland against James Gerard Brophy, Solicitor, Brophy & Company, Suite 2, Gemini House, 2 Lints Riggs, Falkirk; Find the Respondent guilty of Professional Misconduct in respect of his failure between 2 June 2009 and 22 August 2012 to act in the best interests of a client who had instructed him in relation to a potential medical negligence claim, his failure to communicate effectively or at all with that client regarding her claim and his repeated failure to return her calls during which period the negligence claim became time barred; Censure the Respondent; Fine him in the sum of £5,000 to be

forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

**(signed)**

**Douglas McKinnon**  
**Vice Chairman**

Edinburgh 6 December 2013. The Tribunal having considered the Complaint dated 13 September 2013 at the instance of the Council of the Law Society of Scotland against James Gerard Brophy, Solicitor, Brophy & Company, Suite 2, Gemini House, 2 Lints Riggs, Falkirk and having considered the Secondary Complainer's claim for compensation, Ordain the Respondent to make payment to the Secondary Complainer, Nicola Hocking, 67 Lindores Drive, West Mains, East Kilbride in the sum of £2,000 in respect of her losses resulting from the misconduct and that within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum from the due date until paid.

**(signed)**

**Douglas McKinnon**  
**Vice Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Douglas McKinnon**

**Vice Chairman**

**NOTE**

The Respondent pled guilty to all aspects of the Complaint. No evidence was accordingly required. Ms Johnston lodged a previous Finding of misconduct against the Respondent from 2011.

**SUBMISSIONS FOR THE COMPLAINERS**

Ms Johnston advised that the Respondent was consulted by the Secondary Complainer in January 2009 and referred the Tribunal to Production number 3 of the Inventory of Productions for the Complainers, a file note dated 29 January 2009. Ms Johnston stated that this was a reasonably comprehensive note which indicated that the Respondent had a good grasp of the situation and what was required. Ms Johnston drew the Tribunal's attention to the final paragraph of that file note where the Respondent stated that he advised his client of the time bar issue and also the issue regarding Advice and Assistance. Ms Johnston advised that the Respondent then completed and sent out the correct documentation promptly and successfully applied for Advice and Assistance funding on behalf of his client. The Respondent then obtained an increase in authorised expenditure to enable him to instruct an expert medical report.

Ms Johnston referred the Tribunal to the terms of Article 4.4 of the Complaint and stated that the Respondent then managed the case smoothly for the first six months. Ms Johnston advised that it was clear from the telephone note at page 17 of the said Inventory that the Respondent was aware of what he required to do to progress this matter.

Ms Johnston then referred the Tribunal to page 18 of the said Inventory, a letter sent to the client on 2 June 2009 explaining that he was awaiting her medical records. Ms Johnston then referred to page 19 of the said Inventory, a letter to the Respondent enclosing the medical records from the Southern General Hospital.

Ms Johnston stated that after that there was no further communication or action in the file until the Secondary Complainer started trying to find out what had happened. Ms



Johnston referred the Tribunal to page 7 of the said Inventory which contains a summary of the Secondary Complainer's complaint. Ms Johnston explained that with her complaint the Secondary Complainer had enclosed her letter to the Respondent dated 5 September 2012. Ms Johnston stated that the letter of 5 September 2012 which is found at page 9 of the said Inventory outlined how the Secondary Complainer had been taken aback by the Respondent's letter of 31 August 2012 in which he indicated that her claim had no merit. Ms Johnston stated that the triennium had passed by the date that this letter was written by the Respondent.

Ms Johnston advised that when the matter was brought to the Respondent's attention by the Law Society he responded clearly on 28 February 2013 indicating that the file had been lost. Ms Johnston referred the Tribunal to that letter at pages 24 and 25 of the said Inventory. In relation to the issue of compensation, Ms Johnston indicated that the SLCC had awarded compensation for the service issue of £800 and that was paid by the Respondent.

Ms Johnston advised that Mr Nicol is now representing the Secondary Complainer and was in attendance at the Tribunal. Ms Johnston referred the Tribunal to the letter dated 21 November 2013 written by Mr Nicol regarding the issue of compensation. Ms Johnston indicated that Mr Nicol was available to address the Tribunal regarding the matter of compensation and stated that she understood from Mr Macreath that there was a measure of agreement in relation to that matter.

In relation to the Respondent's previous appearance before the Tribunal, Ms Johnston stated that she wished to draw to the Tribunal's attention that those Findings related to issues prior to 2009 when the Respondent had properly instructed the firm of Lindsays to raise court actions and thereafter failed to communicate properly with that firm.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr Macreath stated that the details of the misconduct are contained in Article 6.2 of the Complaint in that the Respondent failed to act in the best interests of his client and failed to communicate effectively or at all with her in relation to a medical negligence

claim and repeatedly failed to return her calls during which period the negligence claim became time barred.

Mr Macreath stated that the file discloses that the Secondary Complainer consulted with the Respondent by telephone in January 2009. He referred the Tribunal to the detailed telephone note contained at page 12 of the said Inventory. Mr Macreath stated that the Respondent confirms that many cases received by him were referred to him by other solicitors or by certain call centres in England & Wales as he was recognised as an expert in medical negligence cases. Mr Macreath stated that the Respondent provided sound advice and disclosed information regarding the time bar. The Respondent followed this up by sending a detailed letter which is found at page 15 of the said Inventory to his client in clear terms regarding Advice and Assistance and explaining pre-action outlays and the triennium. He indicated that the triennium expired on a date in March 2010 and he indicated a date by which he would need to raise the action on her behalf. Mr Macreath stated that there were thereafter further discussions over the telephone with the client as she lived in East Kilbride. A mandate was obtained and then the correspondence ended at June 2009 and was only renewed when the Secondary Complainer pressed the Respondent by telephone and letter asking what was happening.

Mr Macreath stated that he asked the Respondent what system he operated and confirmed that the Respondent does operate a proper system. Mr Macreath advised that the Respondent does not deal with criminal work, conveyancing or chamber work and concentrates solely on civil litigation and has made a name for himself in this field and frequently instructs Edinburgh agents such as Balfour & Manson to pursue cases in the Court of Session. Mr Macreath stated that the Respondent is successful in this business and has recently settled two Court of Session cases. Mr Macreath stated that the Respondent does not have an electronic system. He did have a triennium register but unfortunately this case was not contained within it.

Mr Macreath stated that he asked the Respondent why he did not pick up on the file as the client kept phoning and advised that the Respondent had indicated that the file was mislaid. Mr Macreath advised that the Respondent is not sure exactly when the file was mislaid but it was before he moved offices in March 2011. Mr Macreath stated

that the file was eventually recovered in August 2012 by which time the claim was time barred.

Mr Macreath assured the Tribunal that the Respondent keeps a list of cases, a lot of which are child welfare cases which have to be appropriately managed. Mr Macreath explained that the Respondent took him through his system.

Mr Macreath stated that the Respondent has been in practice for 27 years on his own account and has been a sole practitioner for the last 17 years.

Mr Macreath submitted that when one looks at the file it was initially dealt with appropriately and professionally and the Respondent got proper sanction from the Scottish Legal Aid Board for reports. He stated that the Respondent accepts that the Secondary Complainer's losses are in the region of £2,000 and that should be paid by him. Mr Macreath advised that the Respondent client had already paid compensation of £800 to the Secondary Complainer regarding the service complaint.

Mr Macreath submitted that when writing the letter of 31 August 2012 the Respondent had clearly examined the client's medical records prior to issuing the letter. However the Respondent accepts that as set out in Article 6.2 he failed to act in the best interests of his client by failing to alert her to the fact that the time bar had been missed.

In relation to the previous Findings, Mr Macreath indicated that he had acted on behalf of the Respondent in relation to that matter. Mr Macreath submitted in that case there was no failure to communicate with clients but a failure to communicate with Lindsays, his Edinburgh agents in keeping them advised. Mr Macreath advised that in that matter all cases were resolved and stated that it is accepted that there was a reprehensible failure but no member of the public suffered as a result and no monies were outstanding. Mr Macreath submitted that for those reasons the previous Findings can be distinguished. He advised that the Respondent is contrite and accepts that his failures meet the Sharp Test as there was a communication failure for over three years.

Mr Macreath stated at the time the Respondent mislaid the file he was being referred large numbers of medical negligence cases by a big firm and could be referred as many as four or five of these cases at a time. Mr Macreath stated that these referrals have stopped and the Respondent is now working on a volume of work that he can properly manage.

Mr Macreath submitted that there was no benefit to the Respondent from this case as he was not able to ask for any fees. Mr Macreath stated that the Respondent wishes to make restitution and will deal with the claim through his professional indemnity insurers so there should be no loss to the Secondary Complainer.

In relation to the Respondent's personal circumstances, Mr Macreath advised that the Respondent is married and has no family. The Respondent's mother died in November 2013 and he has had to deal with that as well as this matter. Mr Macreath asked the Tribunal to take into account that the Respondent has dealt with this Complaint as quickly as possible and has accepted his failures, agreed compensation and has systems in place to protect the public. Mr Macreath asked the Tribunal to consider dealing with this matter by way of a fine.

In response to a question from the Tribunal as to whether the letter indicating that the claim had no merit could have been written at any time, Mr Macreath responded in the affirmative stating that it should have been written earlier so the Secondary Complainer could have got a second opinion.

In response to a question from the Tribunal as to why the Respondent did not mention the time bar and the option for his client to obtain a second opinion in his letter of 31 August 2012, Mr Macreath advised that the Respondent had advised him that he was not trying to conceal his risk but was concentrating on explaining to the Secondary Complainer why in his view her claim had no merit. The Respondent had indicated that there were insuperable problems regarding causation and probably also regarding liability and that in his view the claim would not succeed. However the Respondent accepted it would have been better to tell the Secondary Complainer that she could seek a second opinion.

In response to a further question from the Tribunal as to why the Respondent did not respond to telephone calls from the Secondary Complainer, Mr Macreath indicated that this was because the file was lost. Mr Macreath indicated that he explained to the Respondent that it is possible to reconstruct a file. However the Respondent said that he was very busy and always intended to deal with the matter and then did not until the next call. Mr Macreath submitted that this failure should be balanced along with all the cases which the Respondent did progress properly.

Mr Macreath stated that he has given the Respondent advice regarding implementing a streamlined system for passing on information with the use of template letters.

In response to a question from the Tribunal as to where the file was eventually found, Mr Macreath stated that it was eventually found where it should not have been, it had been boxed with papers regarding the practice rather than client papers.

#### **SUBMISSION ON BEHALF OF THE SECONDARY COMPLAINER**

Mr Nicol stated that he was grateful to Mr Macreath for his candour and his concession that compensation of £2,000 was due. He stated that his client was no longer eligible for Advice and Assistance. He stated that he had obtained a quotation from an expert witness who has confirmed that the costs of the required report will be £1,600 plus VAT making that a round figure of £2,000.

#### **DECISION**

The Tribunal had regard to the definition of professional misconduct as outlined in the case of Sharp-v-The Council of the Law Society of Scotland [1984] SC 129. The Tribunal noted that the Respondent had admitted failing to act in the best interests of his client and failing to communicate effectively or at all with her in relation to her medical negligence claim and repeatedly failing to return her calls during which period the negligence claim became time barred. The Tribunal noted that these failures subsisted for a period of just over three years. The Tribunal was of the view that the Respondent's failures as outlined above would be viewed by competent and

reputable solicitors as serious and reprehensible and therefore were sufficient to meet the Sharp Test.

In considering sanction, the Tribunal noted that the Respondent had accepted that he was guilty of professional misconduct from the commencement of these proceedings and accepted that compensation of £2,000 was due to be paid to the Secondary Complainer in relation to her losses. This meant that there was no need for evidence to be led. The Tribunal noted that the Respondent had shown insight into his failures and accepts that he has put systems in place to protect the public in future. In view of these factors, the Tribunal considered that there was no ongoing risk to the public and that there was therefore no requirement for supervision.

However, the Tribunal noted the previous Findings in relation to the Respondent and the fact that they disclosed a previous failure to communicate, albeit not with a client but with other solicitors. The Tribunal was concerned that this matter disclosed a further communication failure resulting in loss to a client. The Tribunal therefore considered that it was important to emphasise the seriousness with which it viewed the Respondent's conduct. Accordingly in all these circumstances, the Tribunal was of the view that a substantial fine was appropriate and the Tribunal decided to Censure the Respondent and fine him £5,000.

The Tribunal noted that there was agreement in relation to the amount of compensation and so awarded compensation of £2,000 in favour of the Secondary Complainer. The Tribunal made the usual order for expenses, to include the expenses of the Secondary Complainer in this matter and in addition the usual order for publicity.

**Vice Chairman**