

**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, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**VINCENT COBB, Flat 0/2, 63 Kirkland Street,
Glasgow**

Respondent

1. A Complaint dated 6 January 2017 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Vincent Cobb, Flat 0/2, 63 Kirkland Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
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 set down for a Procedural Hearing on 17 March 2017 and notice thereof was sent by recorded delivery post to the Respondent. This was returned by the Post Office marked as 'Not called for'. Accordingly, the Tribunal, in terms of Rules 44 and 56, adjourned the Procedural Hearing to 21 April 2017.
5. Notice of this hearing could not be effected, Sheriff Officers being unable to confirm the address for the Respondent. Accordingly, the Tribunal in terms of Rules 44 and 56

adjourned the Procedural Hearing to the 8th December 2017. Notice thereof was subsequently served upon the Respondent.

6. By email dated 6th December 2017, the agent for the Respondent contacted the Tribunal requesting an adjournment. The Complainers having no objection, the Tribunal adjourned the Procedural Hearing in terms of Rule 56 and appointed the Complaint to be heard on the 6th February 2018. Notice thereof was duly served on the Respondent.
7. At the Hearing on the 6th February 2018 the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and was represented by Ian Smart, Solicitor, Cumbernauld. The Fiscal lodged an Amended Complaint and asked that this be received. The Respondent consented to this motion and confirmed that the Respondent was now admitting the averments therein. The Tribunal allowed the Amended Complaint to be received and thereafter heard submissions from both parties.
8. The Tribunal found the following facts established:-
 - 8.1 The Respondent was enrolled as a solicitor on 6 September 2004. He has been a practitioner with several firms since the date of his enrolment, including JC Hughes & Co, Frank Irvine, Barton & Hendry, and DRB Solicitors. Latterly, he was employed as a solicitor by Rafferty, Wood & Co between 20 April 2015 and 5 November 2015.
 - 8.2 At the time of the events narrated in this complaint, he was employed by Neil Barnes Solicitor Ltd ("the Firm"), from 19 July 2012 to 30 November 2013. The Respondent was dismissed from his employment there with effect from 30 November 2013.
 - 8.3 The Council has made a complaint about the Respondent alleging professional misconduct in relation to six issues. Five of those relate to acts of dishonesty and/or misleading clients. The sixth issue relates to a failure to respond to correspondence from the Council.
 - 8.4 There was a prior and related complaint by the Respondent's former employer. However, this was withdrawn on 3 June 2015.

Issue 1

- 8.5 While employed by the Firm, the Respondent acted for client Mr A in relation to his application for a European Residence card. Mr A was in receipt of civil advice by way of representation (“Civil ABWOR”). Civil ABWOR was granted on 11 July 2013. Payments by the Scottish Legal Aid Board to the Firm in respect of this matter totalled £720 plus VAT.
- 8.6 In light of his income, Mr A was liable to pay a personal contribution of £105 to the Firm. By email dated 13 July 2013, the Respondent requested that Mr A transfer the said Civil ABWOR contribution directly to the Respondent’s own personal bank account, rather than the Firm’s account.
- 8.7 Mr A duly transferred £105 into the Respondent’s bank account. The Respondent did not subsequently account to the Firm in respect of that sum. The Respondent accepted by letter of 12 May 2015 that he received client funds which he failed to disclose to the Firm.

Issue 2

- 8.8 The Respondent also acted for Mr B in his period of employment by the Firm. Mr B had instructed the Firm in connection with a matrimonial issue. The work was undertaken on a private paying basis, as Mr B was not financially eligible for legal aid. On 22 February 2013, the sheriff issued an interlocutor confirming the agreement reached in relation to divorce and settlement.
- 8.9 On or around 1 and 25 February 2013, the Respondent received two separate payments of £450 and £800 from Mr B into his personal bank account. These payments related to unpaid fees due to the Firm.
- 8.10 The Firm’s file in relation to Mr B contained a receipt on headed notepaper of the Firm for £450 paid on 1 February 2013 and a letter to Mr B on Firm letterhead paper dated 25 February 2013 confirming receipt of £800 in respect of final fees. The Respondent failed to declare receipt of those sums and did not subsequently account for them to the Firm.
- 8.11 The Respondent has accepted by his letter to the Council of 12 May 2015, that he failed to declare cash sums. He could not advise the Council of the precise

amounts, but did not dispute the figures stated in the complaint by his former employer.

8.12 Also during his employment with the Firm, the Respondent acted for Mr C. Mr C was never formally recorded as a client of the Firm.

8.13 In or around June 2013, the Respondent received a cash sum of between £240 and £250 from Mr C. The Respondent failed to declare receipt of that sum and did not subsequently account for it to the Firm.

8.14 The Respondent accepted by his letter to the Council of 12 May 2015 that he received a cash payment from Mr C which was not declared to the Firm.

Issues 3, 4 and 5

8.15 In or around June 2013, the Respondent was approached by Mr C for legal advice and assistance in relation to a simplified divorce procedure. Mr C thought that he had been taken on as a client of the firm. In fact, he had not been. The Respondent provided legal advice to Mr C, ostensibly under the auspices of the Firm, but without having assumed Mr C as a client of the Firm. As far as the Firm was concerned, it was not aware of Mr C and did not regard him as a client of the Firm.

8.16 The Respondent obtained a passport and other identification documents from Mr C. Mr C provided these in the understanding that they were required to establish him as a client of the Firm.. The Respondent then failed to return Mr C's identification documents to him timeously, even when they were requested by him.

8.17 The Respondent continued to take instructions from Mr C after his employment with the Firm had been terminated. His actions misled Mr C into thinking that he was represented by the Firm from June 2013 until a time in 2014.

8.18 In his letter to the Council of 12 May 2015, the Respondent accepted that he gave legal advice to Mr C between June 2013 and some time in 2014 without declaring him a client of the firm. He also accepted that Mr C's passport and a bank statement were obtained for the purposes of client identification. He accepted that those documents were not returned timeously to Mr C. He also accepted that he continued to take instructions from Mr C after his dismissal from the Firm.

However, he did not accept that he had used the Firm's headed notepaper to correspond with Mr C.

Issue 6

- 8.19 Issues 1-5 were formally intimated to the Respondent by letter dated 27 January 2016. The letter summarised the complaint issues 1-5 and explained that the Council had a statutory obligation to investigate. The Respondent was required to respond within 21 days, setting out his position in respect of the complaint; providing his business files in relation to the matter from which the complaint arose (or confirm their current location); and providing any additional relevant information. The Respondent was informed that if he failed to respond within 21 days, notices in terms of section 48 of the 2007 Act and section 15 of the 1980 Act would be issued to him. He was advised that the Council may also intimate a further conduct complaint in respect of any failure or delay on his part in responding. The Respondent failed to respond to this letter.
- 8.20 On 18 February 2016, the Complaints Investigator issued statutory notices under section 15(2)(i)(i) of the 1980 Act and section 48(2) of the 2007 Act to the Respondent in connection with issues 1-5.
- 8.21 The notice under section 15(2)(i)(i) ("the First Part of the Section 15 Notice") stated that the Council considered that the Respondent had failed to reply in such a way which would enable the Council to complete its investigation of the matter. It required the Respondent to send to the Complaints Investigator the response previously requested in the letter of 27 January 2016 within 21 days of 18 February 2016. It stated, "*You should also be aware that if you fail to respond to this Notice within the specified timescale, the complainer will be invited to submit to the SLCC a further conduct complaint in relation to your failure to respond to the Law Society, which failing the Society shall do so ex proprio motu. The Scottish Solicitors' Discipline Tribunal has previously upheld such complaints as professional misconduct.*"
- 8.22 Accompanying the First Part of the Section 15 Notice was a notice also dated 18 February 2016 requiring the Respondent to produce specified documents and/or an explanation of the matters to which issues 1-5 relate in accordance with section 48(2) of the 2007 Act. The notice required the Respondent to deliver a written

explanation of the matters to which issues 1-5 relate to the Complaints Investigator at the Council's offices within 21 days of the date of the notice. The notice advised the Respondent that, *"If you fail to respond to this Notice within the specified timescale, the Society:- Will invite the complainer to submit, which failing, will submit ex priorio motu a further conduct complaint to the Scottish Legal Complaints Commission in relation to your failure to provide the relevant documentation/explanation and/or your failure to respond to the Law Society."*

- 8.23 The notices were sent by recorded delivery post to the Respondent at his home address. Copies of the notices were enclosed with a letter dated 18 February, sent by normal post. The Respondent did not reply to either of the notices issued on 18 February 2016, or to the letter dated 18 February 2016. The notices were subsequently returned to the Council on 18 April 2016, marked "Not called for".
- 8.24 A further letter from the Complaints Investigator was sent to the Respondent's home address on 19 February 2016. The Complaints Investigator noted that the Respondent had not yet confirmed whether or not he wished to view the client files to assist him in answering the complaint. He was asked to confirm whether or not he wished to do so within 7 days. If no response was received, it would be assumed that he did not wish to view the files and the complaint would be progressed on that basis.
- 8.25 On 22 February, the letter of 27 January 2016 was returned to the Council marked "not known at this address".
- 8.26 By email of 22 February 2016, the Complaints Investigator emailed the Respondent stating that correspondence sent to his known home address had been returned marked "not known at this address". The Respondent was asked to confirm his new contact details to allow the correspondence to be re-issued to him. The Respondent replied by email on the same date, confirming his updated postal address and requesting that correspondence be sent to him by email.
- 8.27 On 23 February 2016, the Complaints Investigator emailed copies of all previous correspondence to the Respondent. He was given a further 21 days to provide a formal response to the complaint. Hard copies of the earlier correspondence were sent to the Respondent at his updated address by letter dated 24 February 2016. The Respondent failed to respond.

- 8.28 On 23 March 2016, the Complaints Investigator issued a further statutory notice under section 15(2)(i)(i) of the 1980 Act (“the Second Part of the Section 15 Notice”) to the Respondent at his updated home address. The Second Part of the Section 15 Notice was served on the Respondent by recorded delivery post at his home address. Another copy was also sent by normal post, together with a covering letter dated 23 March 2016. Copies of the notices and correspondence were also sent to the Respondent by email on 22 March 2016. The Respondent failed to respond. The Second Part of the Section 15 Notice and the letter of 23 March 2016 were returned to the Council marked “not known at this address” on 9 May 2016.
- 8.29 On 22 March 2016, the Complaints Investigator intimated issue 6 to the Scottish Legal Complaints Commission (“the SLCC”) by email as an additional issue to issues 1-5. The SLCC issue 6 as eligible and accepted it for investigation. The SLCC’s decision was intimated to the Council by letter dated 25 April 2016.
- 8.30 On 8 April 2016, the Complaints Investigator wrote to the Respondent to advise that an additional issue of complaint had been raised in relation to his failure to correspond with the Law Society, and that this had been submitted to the SLCC for consideration. A copy of the letter was also sent to the Respondent by email. The Respondent did not respond. On 9 May 2016, the letter was returned to the Council marked “not known at this address”.
- 8.31 By email of 12 May 2016, the Complaints Investigator emailed the Respondent to advise that recent correspondence sent to his updated address had been returned. The Respondent was asked to confirm his new contact details so that the correspondence could be re-issued to him. Copies of the Second Part of the Section 15 Notice and the letters of 23 March and 8 April 2016 were attached to the email. By email of 19 May 2016, the Respondent confirmed his updated address details.
- 8.32 The Complaints Investigator wrote to the Respondent at that address on 26 May 2016, enclosing hard copies of the Second Part of the Section 15 Notice and the letters of 23 March and 8 April 2016 and referring to her email of 12 May 2016. The Respondent was given a further 7 days to provide any comment he wished to make regarding the complaint.

- 8.33 On 3 June 2016, the Complaints Investigator wrote to the Respondent by post and by email to intimate notice of issue 6. The Respondent was required to respond within 21 days, setting out his position in respect of the complaint; providing his business files in relation to the matter from which the complaint arose (or confirm their current location); and providing any additional relevant information.
- 8.34 The Complaints Investigator has received no further correspondence from the Respondent in relation to the issues in the complaint. The only comments that the Respondent has made in relation to issues 1-5 was in his letter of 12 May 2015, relating to the earlier complaint by his employer. Since May and June 2015, the Respondent has not engaged with the investigation into the complaint by the Council.
9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct singly and *in cumulo* in respect of:
- 9.1(a) breach of the Accounts Rules by taking monies from clients for his own personal use and failing to properly record the sums received or pay them into proper client accounts;
 - 9.1(b) deliberate attempts to mislead clients and the Firm in relation to his dealings with client monies;
 - 9.2(a) failure to advise a client that he was not a client of the Firm;
 - 9.2(b) failure to advise a client that he was no longer employed by the Firm;
 - 9.2(c) taking into his possession and keeping client documents and failing to return them when requested;
 - 9.2(d) acting outside the cover of the Master Policy;
 - 9.3(a) failure to notify the Council of his change in address, leading to delays in him receiving correspondence or statutory notices sent by the Council to him on 27

January 2016, 18 February, 19 February 2016, 22 February 2016, 23 February 2016, 23 March 2016, 8 April 2016 and 13 May 2016;

9.3(b) failure to respond timeously, accurately or fully to correspondence sent by the Council to him on 26 May 2016 and 3 June 2016; and

9.3(c) failure to respond promptly and efficiently to correspondence or statutory notices received from the Council in respect of its regulatory function.

10. The Respondent requested further time to produce a medical report. This was not opposed by the Complainers. The Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 6 February 2018. The Tribunal having considered the Complaint dated 6 January 2017 at the instance of the Council of the Law Society of Scotland against Vincent Cobb, Flat 0/2, 63 Kirkland Street, Glasgow; Find the Respondent guilty of professional misconduct singly and *in cumulo* in respect of his 1(a) breach of the Accounts Rules by taking monies from clients for his own personal use and failing to properly record the sums received or pay them into proper clients' accounts (b) deliberate attempts to mislead clients in the firm in relation to his dealings with client monies; 2(a) failure to advise a client that he was not a client of the firm (b) failure to advise a client that he was no longer employed by the firm (c) taking into his possession and keeping client documents and failing the return them when requested (d) acting outside the cover of the master policy; 3(a) failure to notify the Council of his change of address, leading to delays in him receiving correspondence or statutory notices sent by the Council to him on 27 January 2016, 18 February 2016, 19 February 2016, 22 February 2016, 23 February 2016, 23 March 2016, 8 April 2016 and 13 May 2016 (b) failure to respond timeously, accurately or fully to correspondence sent by the Council to him on 26 May 2016 and 3 June 2016 and (c) failure to respond promptly and efficiently to correspondence or statutory notices received from the Council in respect of its regulatory function; Continue the hearing to 23 February 2018 at 2pm for further submissions.

(signed)

Nicholas Whyte
Chairman

11. At the continued hearing on 23 February 2018, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was present and was represented by Ian Smart, Solicitor, Cumbernauld. A medical report and a number of testimonials were lodged for the Respondent. The Tribunal heard submissions from both parties.
12. Having given careful consideration to all of the documents lodged and the submissions from both parties, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 23 February 2018. The Tribunal having considered the Complaint dated 6 January 2017 at the instance of the Council of the Law Society of Scotland against Vincent Cobb, Flat 0/2, 63 Kirkland Street, Glasgow and having previously determined that the said Vincent Cobb was guilty of professional misconduct; Order that the name of the Respondent be Struck Off the Roll of Solicitors in Scotland; Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order shall take effect on the date on which the written Findings are intimated to 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 but should not identify any other individual.

(signed)

Nicholas Whyte
Chairman

NOTE

At the hearing on 6 February 2018, the Fiscal for the Complainers lodged an amended Complaint and asked the Tribunal to substitute the original Complaint with the amended one. The Respondent consented to this motion. Both parties confirmed that the Respondent was admitting the averments of fact, duty and professional misconduct contained within the amended Complaint.

The Respondent raised with the Tribunal that it might prove necessary to seek an adjournment of proceedings to allow the Respondent to obtain a medical report. It was confirmed that the report would not be relevant to the question of professional misconduct, as this was admitted. It would however be significant when the Tribunal came to consider disposal. The Tribunal indicated to the parties that it would hear submissions with regard to the question of professional misconduct and that the issue of the medical report could be revisited thereafter.

SUBMISSIONS FOR THE COMPLAINERS

Mr Marshall lodged written submissions with the Tribunal and took the Tribunal through these which were as follows:-

“1 Introduction

The complaint alleging professional misconduct against the respondent was originally lodged with the Tribunal in January 2017. Following a period of difficulty in reaching Mr Cobb, his representative Mr Smart made contact at the start of December 2017 to advise that he was instructed. Since that time a plea has been agreed to an amended form of the complaint. Therefore my motion is to allow the amended complaint dated 23 January 2018 to be substituted for the original complaint.

2 Submission on professional misconduct

I am asking the Tribunal to find the *Sharp* test satisfied and find the solicitor guilty of professional misconduct.

This case demonstrates some very basic ethical failures by the solicitor at a time when he was employed by the firm of Neil Barnes. There are three separate types of misconduct:-

1. Taking client money for himself, when it should have gone to his firm.

2. Representing a client without carrying out the client take on process so that the client was not in fact a client of the solicitor's firm, and then continuing to represent that client after being dismissed from the firm, not telling the client that he had been dismissed.
3. Failing to respond to the Law Society complaints investigation process.

The respondent admits all of the **facts** averred by the Law Society in the complaint. Therefore you can find the facts contained in the complaint admitted in their entirety. The respondent also admits the **duties** set out in the complaint and admits that as a result of his breach of these duties that he is guilty of professional misconduct. That said, parties recognise that the question of professional misconduct is a decision for the Tribunal.

The complaint consists of 6 issues as they were referred to the Sub-committee. I will deal with the issues in 3 groups as they are grouped in the complaint. For each group I will in this submission:-

- (a) Summarise the factual position;
- (b) Consider the relevant duties, and submit that these were breached.

Once I have reviewed the facts and duties for each group of issues I will:-

- (c) Conclude by submitting why a breach of these duties in the circumstances amounts to professional misconduct.

3 Review of facts and duties

Group 1: Issues 1 and 2

Issue 1 factual summary

Client was granted funding for Civil Advice by Way of Representation (ABWOR) by the Scottish Legal Aid Board. The client was required to part fund the advice and required to make a contribution of £105 to his costs. That contribution should have gone to the solicitor's firm's account – the firm of Neil Barnes. Instead the solicitor provided his client with his personal bank account details and so took the money. He didn't disclose this to his firm. The solicitor subsequently admitted his conduct after a Law Society investigation had begun, but I am advised by Neil Barnes that the money has not been paid back to the firm.

Issue 2 factual summary

Consists of a further two matters where the solicitor took money from clients when this should have gone to his firm. In both cases the clients were paying privately for advice.

In the first case, the solicitor took two payments into his own personal bank account - £450 and £800 – in settlement of fees due to the firm of Neil Barnes. The solicitor issued receipts for these payments to the client on firm headed notepaper but took the money himself.

In the second case, the solicitor took a cash payment of either £240 or £250 from a client in settlement of fees.

In both cases he didn't tell his firm what he had done. The solicitor subsequently admitted his conduct after the Law Society investigation had begun, but again no money has been paid to the firm.

Therefore across Issues 1 and 2 we can see that on a total of four occasions the solicitor has taken client money which should have gone to his firm.

Duties relevant to issues 1 and 2

The solicitor has taken for himself client monies which were due to the firm. The relevant professional duties are the fundamental duties to act honestly (Rule 1.2) and in your client's interests rather than your own (Rule 1.4.2), and separately the duty set down in the accounts rules that a solicitor should not be dishonest, reckless or misleading in relation to the financial affairs of his practice or his client (Rule 6.12.1). Clearly the solicitor has breached these duties in this case.

Group 2 – Issues 3-5Issues 3-5 factual summary

Issues 3-5 all relate to the same client. This is the part of the complaint which was amended by agreement. The complaint originally included a failure to issue a letter of engagement but that is not being insisted on by the Law Society.

The essence of this part of the complaint is that the solicitor gave a client to believe that he had been taken on as a client of the firm of Neil Barnes, when in fact that never happened. In this case the solicitor took his client's passport and a bank statement, on the face of it to satisfy the "know your

client” requirements. He never did arrange the client’s take on with the firm who knew nothing of the client. The solicitor was subsequently dismissed from the firm. He carried on acting for his client and did not tell him he had been dismissed from the firm. He delayed in returning his client’s identification documents when these were requested.

Duties relevant to Issues 3-5

The solicitor (1) failed to advise his client that he had not been taken on by the firm, even though the client had provided his personal identification documents and the solicitor was acting for him; and (2) failed to advise his client after he had been dismissed by the firm, and continued to represent him. These were fundamental failures to comply with the professional duty to communicate with clients (Rule 1.9.1).

Separately in carrying on representing his client while not employed by a firm the solicitor took his client outside the protection of the Master Policy operated by the Law Society. The Master Policy provides last resort professional indemnity insurance for solicitors and so protects clients. As a result of the solicitor’s actions in this matter his client was deprived of that protection.

Group 3 – Issue 6

Issue 6 factual summary

The final issue is the failure of the solicitor to respond and cooperate with the Law Society which followed on from the conduct referred to above. There are two elements to this failure. One is a failure to keep the Law Society updated on his current address which meant that in the period January-April 2016 various correspondence and statutory notices were sent to an out of date address. The second element is that even when correspondence successfully made its way to the solicitor either by e-mail or at his new address in the period May-June 2016 he delayed in responding or failed to respond to the Law Society.

Duties relevant to Issue 6

The solicitor failed to keep the Law Society informed of any change of address and separately failed to comply with the duty to communicate effectively with the Law Society once the Society did reach him (Rule 1.9.1). As a result the Law Society’s complaint investigation was hampered.

4 Breach of duties amounts to professional misconduct

Taking the various failures identified across the 6 issues it is submitted that the respondent is guilty of professional misconduct.

The test for professional misconduct is as set out in the decision of *Sharp v The Council of the Law Society of Scotland* 1984 SC 129 at 134:-

“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.”

The question of whether a breach of the duties identified in this case is misconduct is a matter for the Tribunal. To assist you with that decision I offer the following submissions:-

Group 1 – Issues 1 and 2

On four separate occasions the solicitor took client money for himself when it should have gone to his firm. It is submitted that such conduct on its own is so serious and reprehensible as to amount to professional misconduct. It is a most basic example of an abuse of the trust placed in solicitors by clients. His employer Neil Barnes reported the matter to the police and to the Law Society.

Paterson and Ritchie note at para 9.02 of *Law, Practice and Conduct for Solicitors* (second edition) that:-

“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.”

The Tribunal has noted on many occasions it is imperative that solicitors comply with the Accounts Rules for the public to have confidence in the profession. As the Tribunal noted in *Michael and Martin Kerr*, 25 May 2016, at page 22:-

"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."

It is submitted that the taking of client monies when these should have been sent to his firm represents a fundamental breach of trust, harms public confidence in the profession and is a clear example of professional misconduct.

Group 2 – Issues 3-5

In this case we have two blatant examples of a failure to communicate with a client in (a) allowing a client to believe that he had been taken on by the solicitor's firm when that was not the case and (b) failing to advise the client that the solicitor was no longer employed with his firm. These failures to provide basic but important information exposed the client to risk, given the solicitor removed himself and his client from the protection of the Law Society's Professional Indemnity Insurance Master Policy. Smith & Barton at paragraph 7.03 consider the duty of keeping clients informed when carrying out their business. In a case where a solicitor was found guilty of professional misconduct the Tribunal stated:-

"...it is of cardinal importance that a solicitor should at all times keep his client fully informed regarding his progress in dealing with his client's business...." (case 751/89)

In this case the solicitor clearly failed to keep his client informed on key facts about the client's status as a client of the firm, and then the solicitor's position when he was no longer employed by the firm. In connection with placing his client outside the protection of the Master Policy, Paterson and Ritchie at Para 1.21 on Acting without a Practising Certificate or Insurance note:

"Understandably, the Discipline Tribunal has been concerned by the likelihood that the solicitor would be unable to meet any claim for loss. Thus in the Gillespie case (1994 JLSS 224) the Discipline Tribunal commented:

"It is a solicitor's duty that there are sufficient funds available to finance a practice and the only acceptable alternative is for the solicitor immediately to withdraw from practice. In continuing to practise without indemnity insurance, the respondent exposed herself to possible claims from clients

which she would have been unable to meet from her own resources. This could have had very serious consequences."

*However, the Discipline Tribunal has indicated that **lack of insurance cover is still misconduct even if there is a reduced risk of loss to the client.** Thus in Currie (1997 JLSS 422) it was held that it is not an excuse to a charge of practising as a solicitor without professional indemnity insurance that the solicitor confines his practice to criminal proceedings, employs no staff and does not hold client's funds."*

It is submitted that in failing to communicate key facts and developments to his client, and in continuing to act when his client had no protection under the Master Policy, the solicitor was guilty of professional misconduct.

Group 3 – Issue 6

The subsequent failure to communicate with the Law Society is another clear instance of professional misconduct. The most serious element of this failure relates to the period after the Law Society had managed to make contact with the solicitor. When they did reach him he did not engage.

In finding solicitors guilty of professional misconduct for delay or failure to respond to the Law Society the Tribunal has repeatedly made clear that the Society has statutory duties to promote the interests of the profession and to protect the interests of the public in relation to the profession. The Law Society carries out investigations in pursuance of these duties. The Tribunal has repeatedly found that solicitors who fail to respond to the Law Society or delay in doing so hamper the Society in the performance of its duties and damage the reputation of the profession.

It is submitted that the failure to cooperate with the Law Society was professional misconduct.

Conclusion: finding

For the reasons that I have given in this submission, I would ask you to find that the respondent is guilty of professional misconduct in accordance with the averments contained in paragraph 5 of the complaint."

At the conclusion of his submissions, the Tribunal asked the Fiscal to clarify if it was his submission that the Respondent's conduct amounted to dishonesty. The Fiscal confirmed that was his position and referred the Tribunal to issues 1 and 2 which he submitted amounted to the Respondent taking funds

which were not his into his own pocket. In support of this submission, he referred the Tribunal to the averments of duty set out within paragraphs 4.1 and 4.6 of the Complaint. These averments set out the duty to be trustworthy and act honestly at all times and averred that the Respondent's actions were not an error or mistake.

The Tribunal sought clarification from the Fiscal with regard to his submissions in relation to finding the misconduct either singly or *in cumulo*. The Fiscal explained that he invited the Tribunal to find the Respondent guilty of misconduct separately in relation to group 1, 2 and 3 but *in cumulo* in relation to the matters within each issue.

SUBMISSIONS FOR THE RESPONDENT

Mr Smart confirmed that the Respondent took no issue with the factual matters and he had no submissions to suggest that the conduct did not amount to professional misconduct. He conceded that the Respondent's actions amounted to dishonesty.

DECISION ON PROFESSIONAL MISCONDUCT

The Respondent had admitted all of the averments of fact, duty and misconduct as set out within the amended Complaint. Nonetheless, the Tribunal required to consider whether the admitted conduct met the test as set out within the Sharp case.

The Fiscal had invited the Tribunal to consider the conduct broken into three groups. He had submitted that each group of conduct amounted to professional conduct.

The first group to which he referred involved the Respondent taking client money for himself, when it should have gone to his firm in contravention of Rules 1.2, 1.4.2 and 6.12.1 of the Law Society of Scotland Practice Rules 2011.

The Respondent accepted that this conduct amounted to dishonesty. The duty of honesty and integrity is a fundamental and overriding principle of professional conduct. Membership of the legal profession is a privilege. The public must have trust in the profession. To fail in the duty of honesty is a clear and obvious basis for a finding of professional misconduct.

In these circumstances, the Tribunal had no hesitation in concluding that professional misconduct was established by the conduct set out in group 1.

The second grouping of misconduct described by the Fiscal related to the Respondent failing to advise Mr C that Mr C was not a client of the Firm, failing to advise Mr C that the Respondent was no longer employed by the Firm, failing to return documents to Mr C when requested and acting outside the cover of the master policy. The Fiscal had submitted that this conduct amounted to the Respondent failing to communicate essential facts to his client and continuing to act for the client with no insurance cover. The significance of acting only within the cover of indemnity insurance is the protection of the public. In this regard the Tribunal was satisfied that the actions of the Respondent were a clear departure from the standards to be expected of a competent and reputable solicitor to a degree that would be considered serious and reprehensible. Accordingly, the Tribunal was satisfied that this group of conduct amounted to professional misconduct.

The third grouping of conduct described by the Fiscal involved the Respondent failing to cooperate with the Law Society acting as the profession's regulatory body. The Tribunal has repeatedly emphasised the necessity for members of the profession to cooperate with the Law Society in the investigation of complaints. If the Law Society is to be able to work effectively as the regulator of the profession, then members of the profession must cooperate with it. This is essential for the protection of the public and maintaining public confidence in the profession. Accordingly, the Tribunal was satisfied that the conduct described in group 3 amounted to professional misconduct.

The Tribunal intimated its decision to the parties and invited further submissions. The Fiscal indicated that he would not be opposed to an adjournment of the hearing for the Respondent to obtain the appropriate medical report on the basis that the process could be advanced within a sensible period of time. The Respondent invited the Tribunal to adjourn the hearing for a period of two weeks for the medical report to be obtained. Additionally, the Respondent gave an undertaking to the Tribunal that in the meantime he would not work as a solicitor. The Tribunal continued the hearing to 23 February 2018.

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At the continued hearing on 23 February 2018 the Respondent lodged a medical report together with a number of testimonials for the Respondent.

SUBMISSIONS FOR THE RESPONDENT

Mr Smart indicated that it was appropriate to begin with the history of the Respondent's career. The Respondent had left school without higher qualifications. He secured a position as an office junior in a legal practice in Glasgow which had specialised in immigration and asylum. That firm encouraged him to gain higher qualifications. The Respondent had continued to work full time whilst pursuing further education. He had applied to Strathclyde University under a special scheme then in place which allowed for the possibility of those who did not have the appropriate higher qualifications to attend the University to study law. The Respondent had sat and passed the appropriate exam and thereafter successfully completed his degree at the University. During that whole time the Respondent had continued to work on a full-time basis for a Glasgow firm with an immigration practice. The Respondent completed his traineeship with the firm of JC Hughes before moving on to work for Frank Irvine, a firm which had a particular interest in immigration. Thereafter the Respondent wanted to broaden his experience and took on the position of assistant with the firm of Barton & Hendry. In that firm he had a position of significant responsibility with a broad and varied workload. The Respondent remained with Barton & Hendry until 2010 when he then worked with a number of different firms for short periods of time.

By the stage he was working for the firm of Neil Barnes Solicitor Limited, the Respondent was feeling low in mood and this is reflected within the doctor's letter. Mr Smart submitted that it was only with the benefit of hindsight that the Respondent could see how low his mood had been. The diagnosis within the GP's letter was conducted on a retrospective basis. Following his dismissal by Neil Barnes in 2013 the Respondent gained employment in another field. In the Spring of 2015, the Respondent was approached by Rafferty, Wood and Co. and invited to take up employment with that firm. He remained employed by Rafferty, Wood and Co. until November 2015. Since that time, the Respondent had worked only on the basis of agency. He had declared to the Law Society that he would only act on an agency basis which allowed him to shelter under the professional indemnity insurance of those who instructed him. The Respondent had worked only in the area of criminal defence since November 2015.

Mr Smart drew the Tribunal's attention to the testimonials lodged on behalf of the Respondent. He submitted that these were testimonials provided by practitioners who were all of good standing with the Law Society and considered leading members of the Glasgow Criminal Bar. All of the testimonials indicated a willingness to continue to instruct the Respondent in the full knowledge of the details of the matters before the Tribunal.

Mr Smart drew the Tribunal's attention, particularly to group 2 of the conduct described by the Fiscal. He submitted that this in particular demonstrated how low the Respondent's mood must have been at the time of his actions. In this case the Respondent had been approached in licensed premises by an individual who sought advice about a simplified divorce. Cash had changed hands and the Respondent had taken instructions. If the Respondent had simply progressed the simplified divorce procedure then the prospect of this coming to light was negligible.

With regard to his failure to cooperate with the Law Society, Mr Smart explained that this was caused again by his low mood. The Respondent knew that what he had done was improper and could not offer any explanation as to why it had happened. The Respondent had at one stage written a comprehensive letter in which he admitted the matters. However, he had subsequently disengaged from the procedure again, in the knowledge that the matters were potentially very serious. Finally, the Respondent had engaged in the proceedings and had instructed Mr Smart. From their first meeting at the beginning of December, the Respondent's instructions to Mr Smart had been to resolve matters with the Fiscal.

Mr Smart conceded that the admission of dishonesty was a matter of utmost seriousness. Nonetheless, he invited the Tribunal to have particular regard to one of the testimonials where the author had confirmed an offer to the Respondent to employ him on an ongoing basis, in the full knowledge of the Complaint before the Tribunal.

He submitted that the seriousness of the matter could be sufficiently marked and the public protected by the imposition of a restriction on the Respondent's practising certificate, restricting him to working as an employee. He submitted that the Society would ensure that any employer was aware of the history of matters.

Mr Smart submitted that the Respondent had made significant efforts to become a member of the profession and it was disappointing to consider that this could be tossed away over two or three acts of madness. He invited the Tribunal to accept that the circumstances outlined by him might tilt the balance in favour of allowing the Respondent to continue to practise under significant restriction.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal drew the Tribunal's attention to the fact that the Respondent had only seen his GP on 20 March 2014. The conduct complained of, apart from that involving the Law Society, had occurred in

February to July 2013. The GP's letter made reference to the loss of the Respondent's job in November 2013 as the precipitating factor causing his mood to change.

He submitted that he did not see in the doctor's letter any clear contention that the Respondent had been suffering from ill-health at the time of the actual conduct. He appreciated that the report itself was written some four years after events but emphasised that the report did not say that any medical condition was actually suffered by the Respondent.

The Fiscal submitted that the Tribunal should approach the matter as a question of disposal rather than one of penalty. He submitted that it was not the Tribunal's role to punish the Respondent but rather that it should have regard to protecting public confidence in the profession.

The Tribunal enquired of Mr Smart as to whether repayment had been made to the Firm. Mr Smart explained that when the Firm had seen the Respondent's letter explaining his circumstances it had withdrawn the Complaint. The Law Society had taken the matter forward *ex proprio motu*. The Firm had dealt with Mr C's simplified divorce, so that Mr C did not have to pay twice.

Mr Marshall advised the Tribunal that he had spoken to the Firm which who had confirmed there had been no repayment. The Firm had expressed disappointment that it had had no contact from the Respondent.

In summary, the Respondent accepted that repayment had not been requested but neither had it been offered.

The Fiscal made a motion for expenses which was not opposed by the Respondent. The Fiscal submitted that publicity was appropriate with the names of third parties redacted.

DECISION ON DISPOSAL

The Tribunal accepted that the appropriate approach was not one of imposing a penalty upon an individual but rather one of taking steps to protect the public and the reputation of the profession.

Of main concern to the Tribunal was the dishonest conduct on the part of the Respondent. As conceded by Mr Smart, this had to be regarded by the Tribunal as of the utmost seriousness. The court in the case of McMahon-v-The SSdT in referring to the duty of honesty stated:-

“If the public is to give the profession its respect and trust, it must be assured that when solicitors fail in these duties, they will be suitably dealt with by the profession’s disciplinary system.”

The Respondent had lodged a number of extremely favourable testimonials. These testimonials however in the main referred to the Respondent’s standard of work. The Complaint before the Tribunal made no criticism of the standard of work of the Respondent.

The Respondent had lodged a letter from his GP which recounted the history of the GP’s contact with the Respondent from 20 March 2014 until the 24 April 2015. The report referred to the loss of the Respondent’s job as seeming to be a precipitating factor in the deterioration of his mood. The following contact between the Respondent and the GP could only be described as sporadic. The latter stopped short of suggesting that there was a connection between the Respondent’s mental health and the conduct contained in the Complaint. In his letter to the Council of the Law Society the Respondent had referred to drinking to excess and a gambling problem. There was little or no reference to these matters within the GP’s letter. In particular, the GP’s letter did not indicate that any treatment had been provided to the Respondent which had alleviated any mental health condition which had been the cause of the Respondent’s conduct.

Foremost in the Tribunal’s mind was the protection of the public and the maintenance of public confidence in the profession. The Respondent’s agent had suggested that a restriction on his practising certificate restricting him to acting as an employee would be sufficient to reflect these issues. The difficulty in this case is that the type of conduct before the Tribunal has nothing to do with the ability or training of the Respondent. A restriction on the Respondent’s practising certificate for instance would not address the kind of behaviour engaged in relation to Mr C. In that case, the Respondent had taken instructions from an individual, the Tribunal was told, in licensed premises, outwith his employment by the Firm and outwith the scope of indemnity insurance.

The Tribunal was also concerned that the Respondent’s failure to cooperate with his regulatory body had occurred after the Respondent’s contact with his GP. The Respondent’s failure to cooperate with his regulatory body suggested to the Tribunal that his attitude and conduct had not changed since any treatment.

The element of dishonesty was not the only serious aspect of this case. The Respondent’s failure to cooperate with the Law Society was also considered to be a serious matter.

The starting point for the conduct of the Respondent was him acting in a dishonest fashion with client money for his own personal gain. His lack of cooperation with the Law Society could well be taken as a sign of lack of insight into the seriousness of his conduct. The element of dishonesty taken together with the lack of cooperation with the profession's regulatory body in dealing with a Complaint relating to the dishonesty is extremely damaging to the reputation of the profession and will inevitably undermine public confidence.

Having regard to all of the above factors, the Tribunal unanimously concluded that the only disposal that would accurately reflect the seriousness of the conduct before the Tribunal in a way which would protect the public and maintain confidence in the profession was to order that the Respondent's name be struck from the Roll of Solicitors in Scotland. The Tribunal also considered it appropriate to direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order should be effective from the date of intimation of these written Findings.

The Tribunal considered it appropriate that an award of expenses be made in favour of the Complainers. With regard to publicity, the public interest did not require the identity of third parties to be included in the Findings and so the Tribunal concluded that the appropriate order was one that publicity should only name the Respondent.

Mr Smart confirmed to the Tribunal that the address for the Respondent remained that on the amended Complaint.



Nicholas Whyte

Chairman