

**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

**SVERRE NILS AAEN, formerly of Aaen Peach
Limited, 81 St Vincent Street, Glasgow and who
formerly resided at 8 Downfield Gardens,
Bothwell, Glasgow**

Respondent

1. A Complaint dated 29 July 2020 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Sverre Nils Aaen, formerly of Aaen Peach Limited, 81 St Vincent Street, Glasgow and who formerly resided at 8 Downfield Gardens, Bothwell, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent by his then agent accepting service. No Answers were lodged for the Respondent. The Respondent withdrew instructions from his agent but consented to him forwarding an email address for the Respondent to the Tribunal Office.
4. In terms of its Rules, the Tribunal set down the Complaint for a procedural hearing to be heard on the virtual platform Zoom on 24 September 2020. The Tribunal attempted to serve a notice of this procedural hearing on the Respondent by email. The email was unsuccessful.

5. At the virtual procedural hearing on 24 September 2020, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was not present. It was confirmed that the Complaint had been served by the Respondent's then solicitor accepting service. It was also confirmed that attempts by the Tribunal Office to email the notice of the hearing to the Respondent had been unsuccessful. Mr Stewart invited the Tribunal to fix a full hearing and made a motion to be allowed to lead evidence by way of affidavits. The Tribunal was satisfied that having regard to Rule 47 of the 2008 Rules and paragraph 10 of Schedule 4 of the 1980 Act, the Respondent had received notice of the Complaint. A full hearing was set down for 8 December 2020 at 10am to proceed by way of the Zoom platform. The Tribunal granted the Fiscal's motion that he be allowed to lead evidence by way of affidavits should the Respondent be absent at the full hearing.
6. The Tribunal instructed Sheriff Officers to serve notices of the above noted full hearing at the two addresses noted in the instance of the Complaint.
7. At the hearing on 8 December 2020, which proceeded on the virtual platform Zoom, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was absent and unrepresented. The Fiscal made a motion in terms of Rule 14 of the Tribunal Rules 2008 for the Complaint to be heard and determined in the absence of the Respondent. The Tribunal heard evidence from the Depute Clerk regarding the service of the notice of hearing. Having given careful consideration to the submissions and the background circumstances, the Tribunal determined that it was in the interests of justice and fairness that the matter proceed in the absence of the Respondent. The Tribunal proceeded to hear submissions on behalf of the Complainers.
8. Having given careful consideration to the submissions and the documentary productions before it, the Tribunal found the following facts established:-
 - 8.1 The Respondent is Sverre Nils Aaen. The Respondent was a partner of Aaen Peach Ltd. The Respondent no longer has a place of business at 81 St Vincent Street, Glasgow. He has not informed the Complainers of his new address.

Service of the Complaint was accepted on behalf of the Respondent by his then solicitor. The Respondent thereafter withdrew instructions and consented to the release of an email address. Said email address no longer operates. Sheriff Officers left notices of the hearing of 8 December 2020 at 81 St Vincent Street, Glasgow and 8 Downfield Gardens, Bothwell, Glasgow.

8.2 The Secondary Complainer sought an online quote for legal services from an intermediary website. The website obtained a quote from Aaen Peach Ltd [AP]. The quote was for £320 plus VAT and possible outlays of £365. This quote was not sent directly by AP to the Secondary Complainer. It was delivered through the website.

8.3 The Secondary Complainer accepted the quote. AP then wrote directly to the Secondary Complainer on the 3 July 2017 enclosing the firm's letter of engagement. The letter stated, inter alia,

"The above quoted fee and the services we provide for you is based upon certain assumptions about the work you will be instructing us on. We have outlined this below. We offer a tailored service to you based on your own unique individual requirements. Our fee quote is designed in such a way as to ensure that you only pay for services that you actually require, as opposed to a generally higher fee that is fixed, where we find some clients require less time spent on their file and others more. We think that this is a fairer way to charge our fee.

Please note that our instruction by you with regard to your above quote is strictly limited to the transfer of a legal title to you from the person(s) selling to you, including examination of title, search report interpretation, and preparation and issue of missives and formal documentation together with incidental advice on these matters from time to time. Our fee quote does not cover incurred outlays or any additional work that we may have to undertake on your behalf, for example where we require to undertake work on behalf of your mortgage lender, where the property has not been registered on the Land Register of Scotland, where further work is required to rectify a title issue, a survey query, notice or other issue arising from a search report. By instructing us, you agree to these terms.

You must read the accompanying Terms and Conditions carefully as we have provided details of our charges for some of the more commonly encountered areas that we receive additional instructions on from our clients.

We may have to pay outlays on your behalf, depending on the requirements of your transaction. Outlays are not included in your fee quote as these are costs attributable to your transaction that do not form part of the fee we charge. By instructing us, you authorise us to make these payments on your behalf as we deem necessary and you agree to reimburse us for these costs. Our firm does not offer services relating to the provision of search reports, the submission of registration forms to Registers of Scotland or submission of tax forms to Revenue Scotland. In the event that this work is required during the course of your transaction then this work will be referred to a provider of services of our choice and the costs of this will be reflected as an outlay on your statement of account. These costs are not included in our fee quote. To assist our clients, we do not tend to ask for payment for these costs during the transaction but would rather clear any charges/outlays on the date of entry from your settlement funds or funds that we ask you to forward to us.”

- 8.4 On 3 July 2017, AP submitted an offer to purchase the property. Subsequently, AP received a copy of the title which was first registered on 10 March 2003 and updated to 4 September 2014. On 12 July 2017 AP sent a letter enclosing a copy of the title to the Secondary Complainer. This letter advised that the process of registration would take a considerable amount of time.
- 8.5 AP received the Secondary Complainer’s mortgage offer and instructions to act for the lender dated 25 July 2017. On 27 July 2017, AP wrote to the Secondary Complainer enclosing the standard security for signature. The instructions by the lender, Bank Of Scotland-Halifax required the solicitor to adhere to the Council of Mortgage Lenders (CML) instructions. These instructions narrated inter alia:
- a. **Para 5.5.1** title to the property must be good and marketable, and free of any burdens, restrictions, servitudes, charges or encumbrances which, at

the time of settlement, might reasonably be expected to materially adversely affect the value of the property or its future marketability (but excluding any matters covered by indemnity insurance) and which may be accepted by us for mortgage purposes. [...] You must also take reasonable steps to ensure that, on settlement, the property will be vested in the borrower.

- b. **Para 10.4** You are only authorised to release the loan when you hold sufficient funds to complete the purchase of the property and pay all land and buildings transaction tax and registration fees to perfect the security forthwith as a first charge or, if you do not have them, you accept responsibility to pay them yourself. You must hold the loan on trust for us until settlement. [...] You must ensure that all land and buildings transaction tax returns are timeously completed and submitted to allow registration of the security to take place forthwith.
- c. **Para 14.1.1** You must forthwith after settlement register our standard security in the Land Register of Scotland, taking the necessary steps if applicable, to complete a voluntary first registration in the Land Register if title to the property is held in the Register of Sasines. Before making your application for registration you must place on your file certified copies of the disposition or other conveyance in favour of the borrower, our standard security and any discharge from a previous heritable creditor.

8.6 On 8 August 2017 AP sent the Secondary Complainer a draft purchase Statement of Account which narrated the following charges:-

	Fees	
1	Transfer of legal title,	£384
2	Chaps fee	£54
3	Acting for mortgage lender	£252
4	Post and incidents	£60
	Total fee	£750
	Payments to others (Outlays)	
7	Lender transfer fee	£35
	Registration costs	
9	Disposition	£240

10	Standard security	£60
11	Advance notice	£10
12	Application for 1 st registration	£108
13	Completion and submission of registration - Disposition	£108
14	Completion and submission of registration - Standard security	£54
15	LBTT return (required by Law)	£108
16	Client ID verification	£9

- 8.7 Missives were concluded on the 11 August 2017, including a clause requiring the seller to incur the costs of registering advance notices. The transaction settled on the 15 August 2017.
- 8.8 AP wrote on the 18 August 2017 to the Registers of Scotland enclosing the disposition, standard security and LBTT certificate. The firm wrote "*We will pay £300 by Direct Debit*". The LBTT return was completed and submitted by MM, an employee of AP. The sum of £300 was paid from AP's client account with the following entry "Cheque Aaen Peach Client Account: Registration ROS". Receipts for £240 & £60 (in respect of the disposition and standard security respectively) were issued by Registers of Scotland to AP.
- 8.9 The fee quote provided by Aaen Peach Ltd was £320 + VAT + outlays a total of £749.
- 8.10 To obtain a real property right the disposition transferring ownership of a property requires to be registered. To comply with the obligations to the Bank of Scotland, in terms of the instructions, AP required to ensure the title and standard security were registered. To comply with the same instructions AP required to ensure the LBTT form was lodged and any dues paid at the time of registration.
9. Having considered the foregoing circumstances, the Tribunal found the Respondent not guilty of Professional Misconduct but considered the Respondent may be guilty of unsatisfactory professional conduct.

10. Having heard submissions from the Complainers in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference 8 December 2020. The Tribunal having considered the Complaint dated 29 July 2020 at the instance of the Council of the Law Society of Scotland against Sverre Nils Aaen, formerly of Aaen Peach Limited, 81 St Vincent Street, Glasgow and who formerly resided at 8 Downfield Gardens, Bothwell, Glasgow; Finds the Respondent not guilty of professional misconduct; Remits the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Finds no expenses due to or by either party; and Directs that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Beverley Atkinson

Vice Chair

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 *25 FEBRUARY 2021*

IN THE NAME OF THE TRIBUNAL



Beverley Atkinson

Vice Chair

NOTE

At the Hearing on 8 December 2020, the Tribunal had before it the Complaint and three Inventories of Productions for the Complainers.

The Respondent did not attend. The Fiscal for the Complainers invited the Tribunal in terms of Rule 14 of the 2008 Tribunal Rules to proceed to hear and determine the Complaint in the absence of the Respondent. He submitted that the Tribunal had served a Notice of Hearing in accordance with Rule 11(2) of the 2008 Rules. Section 8 of the Solicitors (Scotland) Act 1980 obliges the Respondent to advise the regulator of his new address. The Complainers' records show no such intimation having been made. It was his position that service on the last known address for the Respondent was sufficient. He referred the Tribunal to the case of The Law Society of Scotland-v-Daniel Anthony McGinn [2018] 1856.

The Tribunal heard evidence from the Depute Clerk confirming that the Complaint had been served by the Respondent's then agent accepting service. The Tribunal Office instructed Sheriff Officers to serve notices of this hearing at the two addresses given in the Complaint. The Tribunal Office received a letter from the Sheriff Officers dated 8 October 2020 confirming that the two notices had been deposited at both addresses. The one bearing the office address had been placed under a door at that address. Sheriff Officers had attended at the previous home address and had spoken to an occupant who confirmed she was a tenant. The notice deposited at the office address had been returned to the Tribunal Office. The other notice had not been returned. Emails the Tribunal Office had attempted to send to the Respondent had been bounced as undeliverable.

The Tribunal gave careful consideration to the evidence and submissions before it. It was satisfied both in terms of its Rules and Section 64 of the Solicitors (Scotland) Act 1980 that the Respondent had been given proper notice of the hearing. Thereafter, the Tribunal required to consider whether it was fair to proceed to hear and determine the Complaint in the absence of the Respondent. In that regard, the Tribunal bore in mind the case of R-v-Jones [2002] UKHL 5 and the need to exercise its discretion in this matter "*with great caution and close regard to the overall fairness of the proceedings.*" Obviously, there could be a disadvantage to the Respondent by the Tribunal hearing the case without hearing his account of events. However, the Respondent is aware of the outstanding Complaint before the Tribunal. The email address he provided is no longer operational. He has made no contact with the Tribunal since withdrawing instructions from his solicitor. It was unlikely that any adjournment of

proceedings would be able to secure any involvement by the Respondent. It is in the public interest that regulatory proceedings take place within a reasonable time. The fair, economical, expeditious and efficient disposal of allegations against solicitors was an important consideration. The Complaint contained a serious allegation of dishonesty. The Tribunal balanced the interests of the Respondent and the public interest. The Respondent had failed to keep either the Complainers or the Tribunal advised of a contact address. Failing to hear the case was not in the interests of the public or the Secondary Complainer. The Tribunal was satisfied that a fair hearing was possible and that it would consider the question of professional misconduct regardless of whether the Respondent was present. In these circumstances, the Tribunal considered that the balance lay in favour of proceeding in the Respondent's absence and it granted the Fiscal's motion to proceed.

The Tribunal confirmed to the Fiscal that the Tribunal Office had received by email a copy of the record card for the Respondent. The Fiscal was asked if he intended to lodge this as a late production. He explained that he did not intend to rely on the record card in evidence and was not intending to lodge it as a production. He acknowledged that on that basis the record card would not be before the Tribunal.

The Fiscal confirmed that he was not intending to lead any parole evidence and that he was relying upon the two Affidavits and documentary productions lodged. The Tribunal invited submissions with particular regard to the Respondent's responsibility and culpability.

EVIDENCE FOR THE COMPLAINERS

1. Affidavit of Lynne Kilpatrick

This witness confirmed that she has been employed by the Law Society of Scotland since 2012. Her Affidavit went on to say:

"...2. Generally my role in the conduct complaint against Mr Aaen was to intimate, investigate and thereafter prepare the conduct complaint file to facilitate the writing of the report which would then be submitted to the Respondent and Secondary Complainer and thereafter the Professional Conduct Sub Committee.

3. In that role I received the file opened by Aaen Peach Solicitors on behalf of the secondary complainer.

4. Another part of my role is to identify the solicitor's details from the Society's records. I confirm that the information contained in paragraph 3.1 of the Complaint has been partly obtained from records held by the Society's Registrar of Mr Aaen's professional involvement with the Society. I understand the Society has lodged evidence in respect of the Respondent's present whereabouts.

5. The Respondent was represented by [Mr A] solicitor in the investigation, report and committee stages of conduct complaint.

6. I have had sight of the Second list of documents to be lodged on behalf of the Council of the Law Society of Scotland. I confirm that productions contained therein at Nos 1-9 were found within the papers received by the Law Society. From Aaen Peach. The papers were either forwarded to the Society by The Scottish Legal Complaints Commission having been provided to them by Aaen Peach or by the Respondent's [solicitor].

7. [The solicitor] on behalf of the Respondent accepted all of these documents (Nos 1-9 of the Second list of documents) were prepared by Aaen Peach. Accordingly the Respondent through his agent has accepted the documents were prepared by and issued by his firm in the service it provided to the secondary complainer.

8. In correspondence I received from [the solicitor] it was accepted that Mr Aaen was partner of Aaen Peach, there was no submission by [the solicitor] that the another solicitor was responsible for the supervision of the employees who worked upon the Secondary Complainer's file. It was therefore tacitly accepted on behalf of Mr Aaen that he was professionally responsible for the terms and conditions and all correspondence passing between the firm and the secondary complainer.

9. I would add that I did not draught the report which was submitted to Professional Conduct Sub Committee but facilitated all correspondence and documentation for the report writer."

2. Affidavit of Michael Greenfield

This witness confirmed that he had been employed by the Law Society of Scotland since 2004 and the Affidavit went on to say:-

"...I completed the report into the Secondary Complainer's conduct complaint made against the Respondent which was considered by the Professional Conduct Sub Committee.

2. When completing the report, I had full access to the Society's full records. Within those records I found the documents lodged on behalf of the Society in the second list of documents numbers 1 – 9.

3. [Mr A] solicitor on behalf of the Respondent accepted these documents originated from Aaen Peach and they (with the exception of No. 1) had been sent to the secondary complainer by the Respondent's firm.

4. It was accepted by the Respondent (through his agent) that he had supervision responsibilities in respect of the firm's terms and conditions and all correspondence sent to the Secondary Complainer.

5. The website quote (No 1 of the Second List of documents for the Council) was exhibited to the Society by the Secondary Complainer. It appears this was the quote he received from the intermediary website which led to the firm receiving instructions from the Secondary Complainer. The Respondent did not refute this. I saw correspondence from the secondary complainer confirming this is the quote he received from the website.

6. I would add a little background at this stage and say that the initial instructions to Aaen Peach were from [the Secondary Complainer] and his partner, however, when the offer of loan was received by Aaen Peach it was in respect of [the Secondary Complainer] only. At that point the conveyancing documentation and instruction was restricted to [the Secondary Complainer] only. This position was accepted by both Secondary Complainer and on behalf of the Respondent by his agent.

7. On the 3rd July 2017 the firm sent out the letter of engagement and terms of business to the Secondary Complainer and also submitted an offer to purchaser the relevant property on behalf of [the Secondary Complainer] Nos 3 and 2 respectively of the Second List of documents for the Council. The terms and conditions were provided by Respondent via his agent who advised despite the date they were the terms and conditions sent to the Secondary Complainer. I saw no evidence that the firm had engaged in discussion with the Secondary Complainer to assess the extent of services he required prior to sending out the correspondence.

8. The Secondary Complainer's mortgage offer dated 25th of July 2017 was received by the firm, the Respondent's firm were instructed to act on behalf of the lender. That offer maintained the Council of Mortgage Lenders instructions applied to the offer of loan and the clauses narrated at paragraphs 3.11.1 through to 3.11.3 in the complaint therefore formed part of the instructions to the Respondent's firm.

9. Missives for the purchase of the property were concluded on the 11th of August 2017. The missives contained a clause that the seller required to incur the cost of the registering of the advance notices.

10. The firm received and forwarded to the Secondary Complainer by letter of 12 July 2017 a copy of the title which was first registered on 10 March 2003, and updated to 4 September 2014. In this letter the firm advised they would charge the costs contained in Condition 14 of the terms and conditions – the letter is no 4 of the Council's second List of Documents.

11. The Secondary Complainer expressed anger on receipt of the statement of account from Aaen Peach dated 8 August 2017 No 6 of the Council's second List of Documents. The covering letter sets out the charges due and requiring further payment to settle the transaction. The Secondary Complainer attended at the Respondent's office and met with colleagues of the Respondent who maintained that to settle the transaction the funds would have to be paid. The firm did not concede prior to settlement that any of the demanded payments were not due. The firm maintained the charges were due under the terms and conditions. The Secondary Complainer felt cheated but was not in any position to change solicitor so close to settlement. He felt held over a barrel and to ensure no further losses were incurred in terms of the missives provided the funding.

12. In completing the transaction, the firm submitted Land & Building Transaction Tax Form. That form was completed by [MM]. I noted in my reported that [MM] was an employee of Aaen Peach. In commenting upon the Respondent [the solicitor] on behalf of the Respondent did not challenge that [MM] was an employee of Aaen Peach.

13. Further with regard to the ledger the Respondent advised after clarification was sought that the outlays incurred on 15 August 2017 for £422 and 6 September 2017 for £10 were paid by the firm to a company called [HB Ltd]. [HB Ltd] has a registered office at 81 St Vincent Sreet, Glasgow (ie. It shares, or at any rate shared, an address with the firm), and has since 2008 had only two directors, a Ms [JM] and a Ms [FA].”

SUBMISSIONS FOR THE COMPLAINERS

Mr Stewart took the Tribunal through the two affidavits and documentary productions comparing them with the averments of fact. He invited the Tribunal to hold that the facts averred within the Complaint had been established. He acknowledged that the two affidavits substantially contained hearsay evidence and referred the Tribunal to Section 2 of the Civil Evidence (Scotland) Act 1988, submitting that hearsay evidence is admissible in Tribunal proceedings.

Mr Stewart submitted that the quote and letter of engagement of 3 July 2017 were misleading. He argued that “transfer of a legal title” would mean to a member of the public transfer of a good title i.e. transfer of a real right to the property. That would include registration of title. Whilst in some exceptional conveyancing transactions it might be possible that a purchaser would not want to register title, the Fiscal submitted that he could not imagine a standard domestic conveyancing transaction where a solicitor might advise a client not to register his title. To register title, a completed LBTT application is necessary. If the purchase is dependent upon funding from a lender, then a standard security will be necessary. The standard security will require to be registered and will depend on the title being registered. Although he conceded that the lender would have a separate solicitor/client relationship, he submitted that a solicitor acting for a purchaser should be aware at an early stage, certainly before issuing a letter of engagement, where the funding for a purchase was coming from. In response to a question from the Tribunal, he did not accept that a letter of engagement represented an opening of communications between the solicitor and client. He was unable to confirm whether or not the offer to purchase in this case had been conditional upon funding.

Mr Stewart was unable to say whether or not it had been the firm’s intention, at the time the letter of engagement was issued, to instruct third parties to register the deeds and submit the LBTT. He conceded that it could be acceptable to outsource such work but submitted that that required the creation of a separate contractual relationship between the solicitor and the third party carrying out the other work. In this case, there was no evidence of such a relationship being established, although he conceded that payments to a third party company had been made. He submitted that the evidence suggested that the work in relation to the deeds and the LBTT had in fact been carried out by AP but was then charged as outlays.

By way of clarification, Mr Stewart compared the quote and letter of engagement in this case to the oft criticised practices of car hire companies. He submitted that the additional services referred to were not in truth “optional extras” but were inherent and necessary steps of the transaction.

Additionally, he stated that the statement of account included an outlay for first registration where in fact the title had already been registered in the Land Register.

Mr Stewart referred the Tribunal to the averments of misconduct within the Complaint. The first of these was at paragraph 5.2. He moved to amend that averment by deleting the word “supervising” so that it now read that the Respondent was a partner responsible for his firm’s services provided to the Secondary Complainer including the quote and the firm’s terms of business. Referring the Tribunal to Paterson & Ritchie “Law, Practice and Conduct for Solicitors” paragraph 1.1, he submitted that all partners in a firm are responsible for work carried out in the name of a firm.

In response to a question from the Tribunal, Mr Stewart confirmed that the Respondent was not a sole partner. He accepted that none of the documents produced bore the Respondent’s reference. He confirmed that he had no evidence of whether or not there had been a supervising partner in this transaction. He was unable to say whether the Respondent was the line manager of anyone involved in the transaction. He referred the Tribunal to the two affidavits.

He explained that averments 5.3 to 5.6 set out that the registration of the disposition, the standard security, and the building transfer tax return were all inherent and necessary steps in regard to the transfer of a real right in the property. The Respondent had failed to provide a transparent statement of charges. He referred the Tribunal to Paterson & Ritchie, paragraph 4.03.1 which set out the requirements of a letter of engagement. Whilst he had not averred that the letter of engagement in this case was a breach of the Practice Rules relating to letters of engagement, he referred to these requirements to give an idea of what should be expected to be contained in a letter of engagement.

The Tribunal asked the Fiscal to clarify if he was suggesting that there were elements of double charging involved here and reminded the Fiscal that he had no specific averment directed to that within the Complaint. The Fiscal clarified that the mischief struck at here was the lack of clarity of the fee quote and letter of engagement, a contention which was clearly supported by the questions being asked by the Tribunal.

Mr Stewart submitted that the quote had not been given in good faith as the firm knew perfectly well that these “extra” fees would in fact be incurred. He submitted that this was an artificial separation of these steps to provide a lower quote and mislead the Secondary Complainer. He submitted that this was a deliberate course of conduct by the firm to mislead the Secondary Complainer for which the Respondent was responsible. He referred the Tribunal to Paterson & Ritchie at paragraph 1.24; and Smith & Barton “Procedures and Decisions of the Scottish Solicitors Discipline Tribunal”, paragraph 7.04. He submitted that if the Tribunal was not with him that the misleading conduct was deceitful and dishonest then he invited the Tribunal to hold that it amounted to a lack of integrity. He referred the Tribunal to Treverton-Jones “Disciplinary and Regulatory Proceedings” at paragraph 2.55 and the case of SRA-v-Wingate [2018] 1WLR paragraph 100. He submitted that the conduct within averments 5.3 to 5.6 amounted to a lack of integrity.

Mr Stewart turned to averment 5.7 and stated that the evidence before the Tribunal was sufficient to establish that the work done in relation to the submission of the disposition, standard security and LBTT return was all done by AP and yet the firm had clearly charged this as an outlay.

The Tribunal asked Mr Stewart if he accepted that the Tribunal required to be satisfied that the Respondent had personal knowledge of these outlays being included in the account. The Fiscal responded that the question of the Respondent’s knowledge was a subjective one. He submitted that the question was whether or not it could be seen that the Respondent knew that this was the way the firm carried out business. He submitted that the Respondent had accepted that he knew this was how the firm charged fees. He argued that the Respondent had accepted that he knew that only his firm could intromit with the client account, that the statement of account had been issued, that he was aware of and accepted responsibility for the letters issued and that he knew it was the practice of the firm to submit the LBTT to the Register. The solicitor for the Respondent had accepted these things on behalf of the Respondent. Mr Stewart submitted that this was evidence that amounted to dishonest acts on the part of the Respondent.

In answer to a question from the Tribunal, the Fiscal accepted that he could not say if another partner in the firm had direct supervision responsibility in relation to this transaction. He argued that any doubt in the Tribunal’s mind could be overcome by considering the two affidavits together. He did not accept that there was any conflict between the wording of paragraph 8 of the affidavit of Lynne Kilpatrick and paragraph 4 of the affidavit of Michael Greenfield. At no stage had the Respondent suggested that someone else was supervising the transaction and there was no positive evidence to suggest that there

was. The lack of any positive evidence that anyone else was responsible for the supervision of the transaction was, in Mr Stewart's submission, sufficient to overcome any doubt that the Tribunal should have in relation to the Respondent's responsibility.

The Fiscal referred the Tribunal to the definition of professional misconduct set out within Sharp v Council of the Law Society of Scotland 1984 SLT 313. He submitted that the averments of misconduct contained in paragraphs 5.3 to 5.6 amounted to breaches of Rule B1.4.1 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2011 in that the Respondent had failed to act in the best interests of his client. These averments also amounted to a breach of Rule B1.9.1 of the same Practice Rules in that the Respondent had failed to communicate effectively with his client. He submitted that together these amounted to reprehensible conduct. The averment of misconduct at paragraph 5.7 amounted to dishonesty and in itself amounted to serious and reprehensible conduct. The Respondent had not served the public appropriately and thereby put the reputation of the profession at risk.

DECISION

The first step for the Tribunal was to determine which facts had been established by the evidence before it.

In professional misconduct proceedings, the standard of proof is that of beyond reasonable doubt. The onus of proof rests on the Complainers. The failure of the Respondent to participate in proceedings does not lessen that onus in any way.

The only evidence placed before the Tribunal were the two Affidavits and documentary productions. The Affidavits were in the main reliant upon hearsay evidence. The Tribunal accepted the Fiscal's submission that hearsay is admissible in Tribunal proceedings. However, admissibility and sufficiency are separate issues. The Tribunal continued to have a duty to assess the weight it should give to the hearsay evidence within the Affidavits. The Tribunal considered carefully all of the averments of fact in the Complaint to assess if they had been proved by the contents of the Affidavits and productions.

Averment 3.1 in the Complaint set out the professional history of the Respondent. The Fiscal indicated in his submissions that he relied upon the Affidavit of Lynne Kilpatrick to establish what was averred there. In her Affidavit, Ms Kilpatrick states "*I confirm that the information contained in paragraph 3.1 of the Complaint has been partly obtained from records held*". She does not say that the averments within paragraph 3.1 are true and accurate. She does not say which parts of paragraph 3.1 were

ascertained from records. The Tribunal considered the other evidence before it and concluded that it could only find established the facts now noted in paragraph 8.1.

The Tribunal was not satisfied beyond reasonable doubt that the terms and conditions of business produced as document number 3 on the Second List of Documents for the Complainers were the terms and conditions sent to the Secondary Complainer. The lodged copy bears the date 24 July 2019. The copy that was sent to the Secondary Complainer was sent on 3 July 2017. This issue is referred to in the Affidavit of Michael Greenfield who indicates that document 3 was provided via the then solicitor for the Respondent who advised they were the ones sent to the Secondary Complainer despite the date noted upon them. The Tribunal is aware that terms and conditions of business are documents that are constantly subject to review. The best evidence in this instance would have been the correspondence from the Respondent's former solicitor which would have provided the Tribunal with more information to allow a better assessment of the weight to be given to this evidence.

With regard to averment 3.10 in the original Complaint, reference is made to a letter to the Secondary Complainer dated 12 July 2017 which was produced as document 4 on Second List of Documents for the Complainers. The production lodged with the Tribunal was incomplete and only contained the first and last pages.

In averment 3.11 of the Complaint, reference is made to a letter dated 27 July 2017 which was produced as document 5. The letter before the Tribunal did not contain the words quoted within averment 3.11.

With regard to averment 3.12 in the Complaint, no certificate of title was lodged and no reference was made to this in either of the Affidavits.

In averment 3.14 of the Complaint, it was said "*AP did not instruct any other entity to submit the deeds*". The Tribunal was not satisfied beyond reasonable doubt that that had been established. Michael Greenfield in his Affidavit refers to payments to a third-party company. There was little information before the Tribunal regarding the identity of this company. Only one page of the client ledger card had been lodged as a production and this did not contain the payments referred to by the witness Greenfield. It was unclear from the two Affidavits exactly what documents they had seen. Ms Kilpatrick makes reference to seeing the firm's file but then refers to documents having been provided either by the SLCC or through the Respondent's agent.

With regard to averment 3.15, reference is made to "*the bill charged*" by AP. The Complainers had not lodged a copy invoice with the Tribunal and there was no reference to this within the two Affidavits.

In averment 3.16, it was stated that the Respondent was an experienced domestic conveyancer. There was no evidence led before the Tribunal in relation to the Respondent's experience or area of work.

The Tribunal was not satisfied that averment 3.17 had been established.

Having determined which facts had been established, the next step for the Tribunal was to consider whether the conduct established amounted to professional misconduct.

The definition of professional misconduct contained in Sharp v Council of the Law Society of Scotland 1984 SLT 313:-

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

In particular, this test requires the Tribunal to consider "*the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made*". To do that the Tribunal required to be satisfied beyond reasonable doubt of the Respondent's involvement, knowledge or responsibility for what took place here.

Mr Stewart had referred to Paterson & Ritchie at paragraph 1.17 as support for the proposition that all partners are responsible for matters done in the name of the firm. The paragraph referred to in Paterson & Ritchie discusses the supervision of junior staff. It states:-

“The PPC has reaffirmed the duty of the partners in the firm to supervise the conduct of non-solicitor employees. The partners are responsible for matters done in the name of the firm, whoever actually carries them out. In particular, the partner responsible for the specific department should ensure that all staff in that department have adequate training in any relevant professional practice rules and guidance, and that there is adequate supervision of staff in carrying out work. If there is no partner directly responsible, the duty of supervision will rest with all partners of the firm.”

As already stated above, there was no evidence before the Tribunal relating to the structure of this firm, the number of partners, the type of work the firm or indeed the Respondent undertook or who it was who prepared the quote and issued the letter of engagement. Mr Stewart relied upon the contents of the Affidavits in relation to the responsibility of the Respondent for this transaction. The Tribunal was greatly troubled by this issue. In Ms Kilpatrick’s Affidavit it appeared that she had concluded that the Respondent had *“tacitly accepted”* professional responsibility because the solicitor then representing him in correspondence sent to the witness had not submitted that another solicitor was responsible for the supervision of the employees involved in the transaction.


In the Affidavit for Mr Greenfield, it was stated that the Respondent had accepted through his agent *“that he had supervision responsibilities”*. Mr Greenfield does not state how this information came to him but presumably it was from the same correspondence as referred to by Ms Kilpatrick. In both instances the best evidence would have been the correspondence containing the statements relied upon. It is impossible to say whether or not consideration of the contents of the actual correspondence would have provided more clarity. The Tribunal carefully considered all of other evidence before it to determine whether it could find assistance there. None of the Productions contained references or signatures identifying the Respondent in particular. Mr Stewart himself amended his averments of professional misconduct to remove a reference to the Respondent being the “supervising” partner.

The most serious allegation against the Respondent is that he acted dishonestly. The case of Ivey-v-Genting Casinos (UK) Limited trading as Crocfords [2017] UKSC 67 sets out the test for dishonesty. This requires the Tribunal as a first step to *“ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts.”* Given all of the reservations with regard to the evidence before it, the Tribunal was unable to make any finding of fact relating to whether the Respondent knew or ought to have known anything about this transaction.

In all of these circumstances, the Tribunal found the Respondent not guilty of professional misconduct. The Tribunal recognised that the standard of proof in relation to allegations of unsatisfactory professional conduct is that of the balance of probabilities. In these circumstances, the Tribunal considered that the Respondent may be guilty of unsatisfactory professional conduct and remitted the case to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal invited further submissions in relation to expenses and publicity. Mr Stewart had no submissions in relation to publicity and invited the Tribunal to find no expenses due to or by either party.

The Tribunal concluded that in all the circumstances it was appropriate to make no award of expenses. It ordered that publicity should be given to the decision and that publicity should include the name of the Respondent. The Tribunal considered that the decision did not require publication of the identity of any other individual other than the witnesses.



Beverley Atkinson
Vice Chair