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

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

MICHAEL THOMPSON, of Thompson Family Law, Suite 200, Central Chambers, 93 Hope Street, Glasgow

Respondent

1. A Complaint dated 8 December 2021 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Michael Thompson, of Thompson Family Law, Suite 200, Central Chambers, 93 Hope Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Mr A.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. Following a virtual procedural hearing on 23 March 2022, the Tribunal appointed the Complaint to be heard on 17 June 2022. Notice thereof was duly served on the Respondent.

5. At the hearing on 17 June 2022, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented himself.

6. Having given careful consideration to the terms of the Complaint, The Tribunal found the following facts established:-

6.1 On or about 20 July 2017, Mr A instructed the Respondent to pursue a claim for damages for personal injury. An action was raised in the early part of 2018. On 6 February 2018 the defenders' solicitors issued a Notice of Intention to Defend. They subsequently lodged a motion for summary decree of dismissal pursuant to Rule 17.2 of the Ordinary Cause Rules. At a hearing in Greenock Sheriff Court on 12 April 2018 the defenders' motion for summary decree of dismissal was granted. The last date for any appeal against that decision was 10 May 2018. On 13 April 2018 the Respondent wrote to his client advising that the action had been dismissed and further advising that he would not recommend appealing against the decision and that he would not accept instructions to do so. The Respondent advised his client that he was welcome to take a second opinion.

6.2 Just after noon on Thursday 26 April 2018 Mr Canning, Solicitor, emailed the Respondent directly to advise him that he held instructions from Mr A to appeal against the interlocutor of 12 April 2018. Mr Canning attached a signed mandate to his email. He indicated that he was seeking the co-operation of the Respondent for him to uplift the file rather than waiting for its forward transmission in view of the time limits involved.

6.3 Twice in the course of 27 April 2018 Mr Canning telephoned the Respondent's office in connection with the uplift of the file. The second call was made at 3.58 p.m. and Mr Canning was advised that his message had been passed to the Respondent who would respond.

6.4 On 30 April 2018 at 11.35 a.m. a colleague of Mr Canning emailed the Respondent with a copy of the email of 26 April and requested that someone contact her that day to advise when the file would be ready for collection. A contact telephone number was provided.

6.5 On 1 May 2018 Mr Canning wrote to the Respondent by letter marked "very urgent" and sent by first class post, email and fax referring to his email of 26 April

2018 and urgently requesting sight of the file in connection with the Appeal, the time limit for which would expire on 10 May 2018.

6.6 On 1 May 2018 at 11.46 a.m. the Respondent sent an email to Mr Canning. The email read *"see attached. The attachments constitute about 90% of the file..."*. The rest of the email referred to prejudice suffered by the defenders which could not be rectified. Among the attachments was a Judgment relating to previous analogous proceedings raised by Mr A in 2014. The email concluded "we will send the file by CD".

6.7 On 14 May 2018 Mr Canning emailed the Respondent. He reminded the Respondent that his urgent request for sight of all documentation remained outstanding and requested release of the remaining documents as these were urgently required now that the Appeal had been lodged. He stated that the defenders' solicitor had advised him that there had been no confirmation by the Respondent of his withdrawal from acting on behalf of Mr A. Mr Canning asked the Respondent to confirm his withdrawal to the defenders' agents as soon as possible.

6.8 On 30 May 2018 Mr Canning wrote to the Respondent by recorded delivery post referring to the email of 14 May 2018 and noting that he had not received a response for the remaining documentation. Mr Canning indicated that he required sight of all of the documentation and in particular a note of what happened at the opposed motion hearing when Mr A's case had been dismissed. The letter drew attention to the risk of prejudice to the Appeal in the event that the information was not made available. Mr Canning further advised that the defenders' solicitors had still not received confirmation of the Respondent's withdrawal.

6.9 On 31 July 2018, nothing having been received during the interim period, Mr Canning wrote to the Respondent by first class recorded delivery post drawing attention to the failure to provide the documentation and confirmation of withdrawal from acting. The letter further indicated that a complaint to the Scottish Legal Complaints Commission was in contemplation.

6.10 On 20 August 2018 Mr Canning received a telephone call from the Respondent's office which he recorded in the following terms:-

"Lisa from Thomsons Family Law calling to discuss subject access request.

Lisa advising that that she had sent it to [Mr Canning's firm] twice, the first time after the initial request in April/May and the second time following the request in August.

Lisa advising on both occasions the documents have been refused by the Glasgow office and returned. Mr Canning asking if she has information regarding who refused this, but she advised this is the only information she has.

Mr Canning asking she send it once more addressing it for the attention of Mr Canning. Mr Canning advising if there is any other issues he will arrange to collect from this office himself. Lisa agreeing and Mr Canning thanking."

6.11 Later on 20 August 2018 Mr Canning received a letter (dated 3rd August 2018) from the Respondent which read as follows:-

"We refer to the above matter and enclose herewith our previous file in disc form. For the avoidance of any doubt we do not hold paper files"

This letter also enclosed a copy of a letter dated 29 May 2018 written by the Respondent in the same terms.

6.12 On 27 February 2019 Mr C wrote to the Respondent. *Inter alia* he said that of the twelve attachments to the email sent on 1 May 2018 there were no note of instructions received from the client, no notes regarding the hearing at Greenock Sheriff Court on 12 April 2018 when summary decree was granted, no information as to who had appeared on behalf of the pursuer or the reasons put forward for opposing the motion for summary decree. Also missing were copies of the client's statement, witness statements, supporting medical evidence or any response to the defenders' agents request to prorogate the jurisdiction of all Scotland personal injury court and advising that they had instructed counsel. The

letter stated that there was no internal process in which Mr Canning's firm declined correspondence addressed to the firm and while evidence of the Respondent's attempts to send the files to Mr Canning had been requested none was provided. The letter noted that within the CD there were over 750 pages of documentation relating to the action for damages raised in 2014. There was no information specific to the 2018 action.

6.13 On 12 April 2019 Mr Canning submitted on behalf of Mr A, a complaint against the Respondent to the Scottish Legal Complaints Commission.

6.14 The email and attachments sent by the Respondent to Mr Canning on 1 May 2018 (said to constitute about 90% of the file) did not relate to the decision of 12 April 2018 other than a copy of the letter sent to Mr A confirming the defenders' motion for dismissal having been granted and an explanation of the outcome.

7. 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.

8. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 16 June 2022. The Tribunal having considered the Complaint dated 8 December 2021 at the instance of the Council of the Law Society of Scotland against Michael Thompson, of Thompson Family Law, Suite 200, Central Chambers, 93 Hope Street, 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 any 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)

Colin Bell

Chair

9. 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 July 2022 .

IN THE NAME OF THE TRIBUNAL

[redacted]

Colin Bell

Chair

NOTE

At the Hearing on 16 June 2022, the Tribunal had before it the Record, a Joint Minute, two Inventories of Productions for the Respondent, a List of Witnesses for the Complainers, and a List of Witnesses for the Respondent. Three witnesses gave evidence.

This case concerned two firms: Thompson Family Law and Thompsons Solicitors. These are distinct firms.

EVIDENCE FOR THE COMPLAINERS

Witness One: Daniel Canning

Mr Canning gave evidence having affirmed to tell the truth. He is a solicitor admitted to the roll in April 2022. He currently works for Jones Whyte Solicitors. In April 2018 he was working for Thompsons Solicitors in their personal injury team. He was contacted by the Secondary Complainer who wanted to pursue a personal injury claim relating to historic abuse. Thompson Family Law had previously represented him in 2014 and 2018. His cases had been dismissed. The Secondary Complainer wanted Thompsons Solicitors to handle the appeal following the 2018 decision. The appeal had to be lodged by 10 May 2018.

The witness sent a mandate to Thompson Family Law on 26 April 2018. He received certain information on 1 May 2018 in an email which was said to attach 90% of the file. He was not sure exactly what was included in that email. However, he could say that it was vague and did not assist in making decisions regarding the appeal. The witness remembered speaking to a woman at Thompson Family Law. He explained to her that he had not received the file he asked for in April. After that, he received a disc which was scanned to the file. The disc contained 800 pages which consisted mainly of email chains and screenshots which related to correspondence with the Edinburgh agents in relation to the Secondary Complainer's 2014 case. There was no substantive information contained within.

It was a matter of agreement that the witness had not received items 2-17 set out in the Joint Minute from the Respondent. However, the witness recovered copies of some of the documents from other sources. An appeal was marked and then abandoned. If the witness had been able to receive items 2-17 then the Secondary Complainer might have been able to make an informed decision about an appeal. If all the information had been available, perhaps the appeal would not have been lodged at all. This would have made a difference from a client-handling point of view. The Secondary Complainer was

very anxious. He was damaged as a result of his childhood experiences. He was very disappointed his case had been dismissed. It was important to manage his expectations. He needed a lot of support. The witness tried not to give the Secondary Complainer false hope, but it is inevitable that while a solicitor is still acting, the client has certain expectations.

During cross examination, the witness confirmed that he was a trainee solicitor during the relevant period. A partner had control of the case but the witness was the case handler. At that time, Thompsons Solicitors had around 10-20 partners and 20-30 solicitors. There were about 150 staff in the Glasgow office. Mail was received into a mailroom. The witness accepted that a disc was sent to him and scanned to the file. The date of the letter said to attach the disc was 29 May 2018. He did not know at the time that there were any regular problems with mail at Thompson's Family Law Solicitors and Thompsons Solicitors. However, he understood why there would be a mix-up. He would not be in a position to contradict any evidence about these problems.

The witness was referred to an email from him to the Respondent dated 26 April 2018 (Production 24 in the Respondent's Second Inventory of Productions). This email had a mandate attached. The witness accepted that he received the email of 1 May 2018 from the Respondent. The email explained why the Respondent thought the prejudice suffered by the defenders could not be rectified and highlighted the judgment which was also attached to the email. The Respondent suggested that all queries were answered by reference to that Court of Session judgment which referred to the 2014 case. The witness said that the information provided did not help him understand why the case had been reraised. Without that evidence, he could not analyse the appeal prospects.

The Respondent asked the witness several times if he had understood the judgment. The Fiscal objected to the questions saying that the issue was the implementation of a mandate, not the solicitor's understanding of the judgment. He objected to the Respondent's tone as well as the question which he said served no real purpose. The witness left the room while the parties addressed the Tribunal.

The Respondent explained that his line of questioning was relevant to the question of prejudice (Law Society-v-J 1991 SLT 662) and the ability of the law firm to advise the Secondary Complainer. The matter was raised in examination-in-chief and it would not be fair to disallow cross-examination on the same topic. The Tribunal must look at all the circumstances. The case law demonstrates that prejudice is not irrelevant. Although Paterson and Ritchie in "Law, Practice and Conduct for Solicitors" say the decision is "surprising", the Inner House expressly rejected the position they put forward. Professional

misconduct is a question of circumstances and prejudice is not irrelevant to that. He asked the Tribunal to hear all the evidence before making a decision.

The Fiscal said that Law Society-v-J had been described by Paterson and Ritchie in "Law Practice and Conduct for Solicitors" as a "surprising ruling" in the light of the Sharp test. In any case it was clearly distinguishable from present circumstances. Law Society-v-J was about breach of a rule which modified the common law position. He said that the issue of whether the information was useful or not was a matter for the Tribunal after hearing submissions. It was irrelevant for the Respondent to cross-examine the witness on his understanding of the previous decision. He invited the Tribunal to sustain the objection.

After retiring to consider the issue, the Tribunal repelled the objection and allowed the Respondent to continue questioning the Secondary Complainer. The issue of prejudice had been introduced by the Fiscal in examination-in-chief and it was fair that the Respondent was allowed to explore that in cross-examination. Law Society-v-J was authority for the fact that prejudice was not irrelevant in the context of the whole circumstances of the case. Prejudice might also be relevant in mitigation, in the event that the Tribunal made a finding that there had been professional misconduct.

The witness returned to the hearing room and cross-examination continued. The witness confirmed that, overall, he did not find the information contained in the email of 1 May 2018 helpful. He discussed the case with the qualified solicitor involved in the case. He remembered the Respondent's letter to the Secondary Complainer. He thought that the Secondary Complainer might have brought that to their first meeting. The witness agreed that the Secondary Complainer was aware that his case might not be successful. The Respondent referred the witness to his letter to the Secondary Complainer dated 13 April 2018 (Production 19 in the Respondent's first inventory of productions). The witness agreed that it was clear and that he had seen that letter before he lodged the appeal.

The Respondent asked the witness about mandates. The witness said that larger firms will comply within a couple of weeks. In his experience other firms provide information within 30 days.

The witness said he was aware of the 2014 Court of Session judgment attached to the Respondent's email of 1 May 2018. He knew the judge had said a fair trial was not possible. He had read and understood the Respondent's email of 1 May 2018. However, matters were still unclear. There had been a recent change in the legislation. The timescale was very short. The reasons for re-raising the case were not obvious to the witness against the background of the Court of Session decision. He

assumed that additional evidence not available in 2015 had come to light. He wished to know the reasons for re-raising the case.

The witness confirmed that an appeal was lodged although he was not responsible for that. The appeal was abandoned June-August 2018. The Respondent suggested that the appeal was marked so there was no prejudice to the Secondary Complainer. The witness agreed that "procedurally" that was correct.

The witness said the 800 pages provided on 1 May 2018 were mostly email trails. There was no medical evidence, no records relating to admission or discharge to the home, and no witness statements. The witness had no understanding of why proceedings had been raised in the first place.

In re-examination, the witness indicated that in August he received 800 pages of information. However, he thought there must be more information. His firm lodged the appeal assuming that more information would come in later but that the firm's advice might change dependent on that information. It is not possible to say whether the appeal would have been marked, had the witness had all the information.

In answer to questions from the Tribunal, the witness explained that the mandate was a "data protection" mandate seeking all and any information in relation to the Secondary Complainer. It did not specify the 2018 case. It was an all-encompassing mandate. Between April/May and August 2018 various people chased the papers. The matter was urgent and needed to be kept on track.

EVIDENCE FOR THE RESPONDENT

Witness One: The Respondent

The Respondent gave evidence on oath. He explained that a mandate was sent to him on 26 April 2018. He responded on 1 May 2018 believing he had sent 90% of the file. He thought he had helpfully included documents from the 2018 action. He had also provided the 2014 action and pointed Mr Canning to the issue which the Respondent had been unable to get around. Mr Canning did not reply saying the information was "a lot of rubbish". Had he done so, the Respondent would have checked it again. He understood the mandate to cover all papers and that is why 800 pages of material was then sent by disc. He did not accept it was not the file. He agreed it was incomplete. If Mr Canning had reverted to him, the Respondent would have checked and sent all material. The disc was returned. This was unusual. Sometimes law firms will copy the discs and send them back. However, it became apparent that the file sent on 29 May 2018 had not made its way to the solicitors at Thompsons. This happens all too often

due to the similarity in the firms' names. However, at the time, the Respondent believed he had sent everything which was required.

Many months later, the Respondent received a complaint saying the full mandate had not been implemented. The Respondent said he was "bullish". He thought he had sent 90% of the file. However, eventually, the Law Society investigation revealed that the full file was not contained on the disc. The Respondent accepts he did not fully implement the mandate.

Addressing the question of prejudice, the Respondent explained he thought he had sent Mr Canning the 2018 papers and a comprehensive explanation of the 2014 case. There were insurmountable problems. The Respondent said he raised a second action because he felt very sorry for the Secondary Complainer. He did not doubt he was the victim of abuse. The first case was the decision of a single judge which was not binding on a Sheriff. The Secondary Complainer wanted to exhaust every possibility. The law had changed to relax the triennium but the issue of prejudice to the defenders had not changed.

The Respondent said he was guilty of an administrative error. Had anyone emailed him to say the mandate had not been implemented he would have responded right away. He had every sympathy with the Secondary Complainer. The Respondent did not accept that the 800 pages were nonsense or irrelevant.

In cross-examination, the Respondent said he could not remember putting together the material in response the mandate. He could not recall any suggestion that Mr Canning wanted to uplift the file from the office. However, he would not have agreed to this as it would have taken too long. 90% of the file was sent within 3-4 days. The Respondent said he was a court lawyer. He was virtually never in the office. He knew about the mandate within a couple of days. He understood the appeal issue was urgent. Although Mr Canning's colleague was said to have emailed again on 30 April 2018, the Respondent was not concerned. He had never known a mandate to be implemented in three days. He accepted that letters and emails were sent to him about the file. However, there was no challenge about the content of the email of 1 May 2018.

The Fiscal suggested that the Respondent was on notice that there was an issue. The Respondent said he was in court virtually every day and seeing clients. He received the recorded delivery letter of 30 May 2018 but by then he thought he had sent the full file and the letters had crossed in the post. He thought he had sent everything. He received another letter dated 31 July 2018 by recorded delivery post. He began to panic he had not sent everything. He sent the disc again on 2 August 2018. The Respondent

spoke to Lisa Rae and she said the disc had been returned a couple of times. He knew that a 3-4 month delay was unacceptable. However, he thought the disc had been sent on 29 May 2018. He thought it contained everything but actually it was incomplete. The missing items were agreed by joint minute.

The Fiscal suggested that given Mr Canning's communication, the Respondent ought to have checked what had been sent. The Respondent said that with the benefit of hindsight, had Mr Canning said that what had been sent was wrong, he would have checked. If he had been asked for additional information, he would have provided it. The Fiscal suggested that the Respondent had decided that the Secondary Complainer's case was hopeless and therefore gave the correspondence low priority. The Respondent said this was not fair when he gave 90% of the file within four days and what he thought was the full file within 5-6 weeks.

The Fiscal suggested that Mr Canning was entitled to have the information to make his own decision rather than relying on the Respondent's opinion. The Respondent said it was not his opinion, but that of a judge of the Court of Session. However, he fully accepted it was not ideal that Mr Canning did not have all the information. The Fiscal suggested that Mr Canning must have thought there must be new material. The Respondent said it did not follow that there must be "a new nugget".

The Fiscal asked if the Respondent's position was that despite the number of contacts from Mr Canning, the onus was on him to tell the Respondent about the deficiencies in implementing the mandate. The Respondent said the answer to that question had to be yes. If he sent something completely inaccurate and wrong, it was reasonable for the solicitor to say this was not what was sought. The Respondent said he did not want to be evasive. He knows he made a mistake. However, it would not be unreasonable for Mr Canning to say the email did not make any sense. The Respondent accepted he could have been more diligent. His mistake was in trying to do it himself. The mandates process has now changed.

In answer to a question from the Tribunal, the Respondent explained that the items listed at para 2(a)-(o) of the joint minute were never sent in implement of the mandate.

Witness Two: Lisa Rae

The witness affirmed. She is a legal secretary at Thompson Family Law. She has worked as a legal secretary for fifteen years. She swore an affidavit on 25 March 2021. It was contained at Production 1 of the first inventory of productions for the Respondent. She adopted it as her evidence-in-chief.

In cross examination, the witness explained that there were regular mistakes with the delivery of mail to Thompson Family Law and Thompsons Solicitors. If Thompson Family Law received mail for the other firm, they would sometimes take it back to the DX Exchange. Sometimes they would phone Thompsons. Sometimes they would collect it or ask her to send it back in the DX. It would happen to them too and she would ask them to pop it back in the DX.

The witness said that the letter of 29 May 2018 was probably sent by DX. She did not put the material together. She just put the disc and letter together and took it to the DX. The letter came back to her firm. She was not concerned. Sometimes discs would be copied and returned. It would not be unusual for a returned disc to arrive without a letter. In this case the Thompson Family Law letter was still attached. She did not know why the covering letter would also have been returned. The disc was returned at least twice. She phoned and spoke to someone at Thompsons Solicitors called Daniel. He said to send the disc again and if it bounced back, he would come to collect it. It looked like the same disc. She made no enquiries regarding the content of the disc.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the facts of the case were agreed in the joint minute. He commended Mr Canning's evidence to the Tribunal. The Respondent had sought to minimise his responsibility but had accepted the situation in the office was chaos and there was a lack of a proper system for dealing with mandates. He suggested Lisa Rae's evidence should be treated with some care. In addition to the facts agreed in the joint minute, the Fiscal asked the Tribunal to find that there was prejudice occasioned by the Respondent's failure to implement the mandate. He referred the Tribunal to various cases where the Tribunal had found that failure to implement a mandate constituted professional misconduct. He noted that a finding of misconduct was dependent on the facts. The degree of culpability may be affected by the urgency of the situation and the degree to which this was under his control. Even if the case was a lost cause, this was nothing to the point. The Respondent accepted that as of 1 May 2018, he was aware of the mandate and its urgency. If there was not a good reason for failing to obtemper it, a finding of misconduct should follow.

The Fiscal noted that the Law Society Reporter to the Professional Conduct Sub Committee had not considered the delay to be undue, even allowing for the appeal deadline. However, the Committee itself had disagreed and said that failure to provide the file means the whole file. A mandate is not obtempered by partial compliance. The Respondent could have provided the whole file on 1 May 2018. He was aware the request was urgent. He possessed the relevant information. He could without difficulty have

dealt with the matter on the day. There was thereafter a failure to give the matter priority. It was only when the Law Society investigation was complete that he realised his failure.

In the event that the Tribunal was not persuaded on the question of misconduct, the Fiscal invited it to consider remitting the complaint to the Complainers under section 53ZB of the Solicitors (Scotland) Act 1980.

SUBMISSIONS FOR THE RESPONDENT

The Respondent invited the Tribunal to find him not guilty. He referred the Tribunal to Paterson and Ritchie's "Law Practice and Conduct for Solicitors" as well as the test for misconduct contained within Sharp-v-Law Society of Scotland 1984 SLT 313. He submitted that lack of prejudice to the client was a relevant factor. The Tribunal had to look at the whole circumstances in the round, and that included prejudice.

The Respondent said he did not want to abrogate responsibility for his actions. He had reflected on the situation and was contrite. The complaint had been outstanding for a long time. He urged the Tribunal to consider all the circumstances. The Complainers suggested that failure to implement a mandate within two weeks can amount to professional misconduct. There is no case or standard to this effect. Appeals are marked and amended as the case proceeds. It was not impossible to mark an appeal on the basis of the information provided. The Respondent had tried to help Mr Canning and the Secondary Complainer. He accepted that what he sent was not the entire file. However, it was sent in good faith, three to four weeks after the request. He did not know why Mr Canning did not tell him that the information was incomplete. It would be normal for solicitors to correspond about such a problem.

The Respondent said that implementing the mandate within six weeks does not fall within any category of case law. He said the Fiscal's cases could be distinguished because he made a concerted effort to provide 90% of the file within one week.

The Respondent said that the question for the Tribunal was whether there was a duty on the Respondent as a solicitor transferring the file to know that those receiving it have read and checked the file. He said that the answer to that must be no. He said that in all humility. He was responsible for the error. However, he could not be faulted for assuming the solicitor had read the file and would tell him if anything was missing. He believed that the mandate had been implemented in full. He was not told it

was incomplete until August. The issue of the file bouncing between the solicitors exacerbated the problem. The circumstances were unfortunate.

The firm was chaotic towards the end of the partnership but this did not affect the mandate. It was dealt with in four days and then six weeks. However, the firm's systems have changed since this time.

The Respondent invited the Tribunal to reject Mr Canning's evidence as incredible and unreliable. The Respondent accepted Mr Canning would have had questions but he ought to have reverted to him in May.

Although the error was down to him, the Respondent believed there was a degree of bad luck and adverse circumstances.

DECISION

There were two allegations of misconduct in this Complaint. The first allegation of misconduct was that the Respondent had unduly delayed in providing a file to another solicitor. The last date for lodging an appeal was 10 May 2018. The file was requested on an urgent basis on 26 April 2018, 27 April 2018, 30 April 2018 and 1 May 2018. The Respondent did not respond or provide any of the file until 1 May 2018. The second allegation of misconduct was that the Respondent had failed or unduly delayed in providing the client's new solicitor with portions of the file. These portions included notes of instruction, notes of the hearings on 12 April 2018, copies of the client's statements, witness statements, supporting medical evidence and the Respondent's response to the defenders' letter dated 12 April 2018. These were not included within the file sent on 1 May 2018 and were not received despite further requests from the new solicitor on 14 May 2018, 30 May 2018 and 31 July 2018.

By joint minute, all of the averments of fact and duty in the Complaint were admitted. It was agreed that fifteen items were not forwarded in terms of the mandate. These were listed in the joint minute and included various forms and letters relevant to the Secondary Complainer's 2018 action. The Tribunal proceeded on the basis of the admitted facts. It also had regard to the evidence of the witnesses. It considered that all three witnesses had tried their best to give evidence, despite the inevitable difficulties due to the passage of time which had elapsed since 2018. The Tribunal had no concerns about the credibility and reliability of the witnesses.

The Tribunal considered whether the Respondent's conduct met the test set out in Sharp v Council of the Law Society of Scotland 1984 SLT 313. According to that definition,

"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."

Solicitors must act in the best interests of their clients (Rule B1.4.1). This means responding promptly and fully to mandates in accordance with the Law Society's guidance on mandates attached to Rule B3.

There were shortcomings in the way the mandate was handled. The Respondent admitted these. He did not attach the whole file to his email of 1 May 2018. The disc which was later provided was also incomplete and appears to have "bounced" between the two firms without the Respondent being aware of the problem. However, when considering the whole circumstances and the Respondent's degree of culpability, the Tribunal did not consider that the conduct constituted a serious and reprehensible departure from the standards of competent and reputable solicitors.

In relation to the first averment of misconduct, the Respondent provided what he said was 90% of the file by email on 1 May 2018 which was 5 days (and three working days) after the mandate was received. The Tribunal considered that failure to provide the complete file within that period was not professional misconduct, even in circumstances where the Respondent knew that time was of the essence due to the time limit for appeals.

In relation to the second averment of misconduct, the Tribunal accepted that the Respondent believed that he had sent the complete file to Mr Canning by disc attached to a covering letter which was dated 29 May 2018. That file was incomplete due to the Respondent's own administrative error. However, he was not aware of that at the time. This was not a case where a solicitor failed to take any steps to implement a mandate or retained material to cover that solicitor's own wrongdoing. The Tribunal considered that the attempt to comply with the mandate in just over a month was reasonable. The file was not necessary to lodge the appeal, and indeed, it was lodged without the missing material, although later abandoned. While not irrelevant to misconduct, the Tribunal did not consider the issue of prejudice

particularly pertinent in the circumstances of this case. The Tribunal considered that failure to provide the complete file within that period was not professional misconduct.

While failure to obtemper a mandate will often constitute professional misconduct, the Respondent's conduct in the case did not constitute a serious and reprehensible departure from the standards of competent and reputable solicitors. However, the Tribunal considered that the Respondent may be guilty of unsatisfactory professional conduct, which is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional service. He could have done more to oversee that the implementation of the mandate was successful and apply his mind to the reasons why his firm was receiving repeated emails from the new solicitors. Accordingly, the Tribunal found the Respondent not guilty of professional misconduct and remitted the case to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980. The Secondary Complainer's claim for compensation will be dealt with by the Professional Conduct Sub Committee when the case is remitted to them.

Following submissions on expenses and publicity, the Tribunal made no award of expenses due to or by either party. The Respondent had been successful but, as he accepted, there had been deficiencies in his conduct which will now be reviewed by the Complainers' Professional Conduct Sub Committee. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent and the witnesses who gave evidence. However, there was no requirement to identify the Secondary Complainer or any other person as publication of their personal data may damage or be likely to damage their interests.

Colin Bell

Chair