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

TASMINA AHMED-SHEIKH, 75 Newlands Road, Newlands, Glasgow

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal in January 2020 by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Tasmina Ahmed-Sheikh, 75 Newlands Road, Newlands, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. No Secondary Complainer claimed to have been directly affected by the alleged professional misconduct.

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

4. On 2 April 2020, the Tribunal sisted the case on its own initiative under Rule 44 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 ("the Tribunal Rules") in view of Government advice regarding COVID-19 (coronavirus). That sist was recalled by Interlocutor of 22 May 2020.

5. Answers were lodged for the Respondent.

6. In terms of its Rules, the Tribunal set a virtual procedural hearing for 25 August 2020 and notice thereof was duly served on the parties.

7. At the virtual procedural hearing on 25 August 2020, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was not present but was represented by Duncan Hamilton, Advocate, instructed by Anne Kentish, Solicitor, Edinburgh. The Tribunal refused the Respondent's motion to sist the case for three months. The Tribunal allowed parties time to adjust the Complaint and Answers and fixed a virtual preliminary hearing for 1 December 2020. Notice thereof was duly served on the parties.

8. An adjusted Complaint and adjusted Answers were lodged with the Tribunal.

9. On 30 November 2020, the Chair, exercising the functions of the Tribunal under Rules 44 and 56 of the Tribunal Rules, on the joint motion of the parties, adjourned the virtual preliminary hearing set for 1 December 2020. A virtual preliminary hearing was set down for 17 March 2021. Notice thereof was duly served on the parties.

10. On 16 March 2021, the Chair, exercising the functions of the Tribunal under Rules 44 and 56 of the Tribunal Rules, on the joint motion of the parties, adjourned the virtual preliminary hearing set for 17 March 2021. A virtual preliminary hearing was set down for 11 May 2021. Notice thereof was duly served on the parties.

11. On 5 May 2021, the Chair, exercising the functions of the Tribunal under Rules 44 and 56 of the Tribunal Rules, on the unopposed motion of the Respondent, adjourned the virtual preliminary hearing set for 11 May 2021. A virtual preliminary hearing was set down for 24 June 2021. Notice thereof was duly served on the parties.

12. At the virtual preliminary hearing on 24 June 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was not present but was represented by Anne Kentish, Solicitor, Edinburgh. The Tribunal repelled the Respondent's preliminary plea to the competency based on time bar. It reserved the Respondent's preliminary pleas to the competency and relevancy of particular averments in the Complaint. In accordance with Rule 42 of the Tribunal Rules, the Tribunal produced an Interlocutor & Note recording its decisions. This was issued to parties. A virtual procedural hearing was set for 21 July 2021. A hearing in-person was set for 27 September 2021. Notice thereof was duly served on the parties.

13. On 20 July 2021, the Chair, exercising the functions of the Tribunal under Rules 44 and 56 of the Tribunal Rules 2008, on the unopposed motion of the Respondent, adjourned the virtual procedural hearing set for 21 July 2021. A virtual procedural hearing was set down for 3 August 2021. Notice thereof was duly served on the parties.

14. At the virtual procedural hearing on 3 August 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was not present but was represented by Anne Kentish, Solicitor, Edinburgh. The Tribunal continued the case to the hearing already fixed for 27 September 2021.

15. On 24 September 2021, parties lodged a Joint Minute of Admissions. The Chair, exercising the functions of the Tribunal under Rule 56 of the Tribunal Rules 2008, refused the opposed motion of the Respondent to adjourn the hearing fixed for 27 September 2021.

16. At the hearing in-person on 27 September 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Duncan Hamilton, Q.C., instructed by Anne Kentish, Solicitor, Edinburgh. Parties made submissions.

17. The Tribunal found the following facts established:-

17.1 The Respondent is a solicitor enrolled in the Registers of Scotland. Her date of birth is 5 October 1970 and she was enrolled on 3 September 1997. Between 17 October 2005 and 31 May 2006, she was an Associate in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow. Between 1 June 2006 and 31 October 2014, she was Partner in the said firm. Between 1 November 2014 and 8 May 2015 she was a Director in the incorporated practice of Hamilton Burns WS Limited. Between 1 October 2009 and 8 May 2015, she was the Designated Cashroom Partner, then Designated Cashroom Manager, of the said firm and said incorporated practice. Also between said dates, she was Anti-Money Laundering Partner then the Money Laundering Reporting Officer of the said firm, then said incorporated practice. Following her resignation from the said incorporated practice on 8 May 2015, she was elected as a member of the UK Parliament. The Respondent was aware, between 1 October 2009 and 8 May 2015, of the financial position of the firm in so far as that could be known from her role as Designated Cashroom Manager.

17.2 The Respondent has not held a practising certificate since 31 October 2015.

17.3 The incorporated practice, Hamilton Burns WS Limited, was incorporated on 29 July 2014. The First Directors appointed were the Respondent, Alan Niall Macpherson Mickel, William Lawson Criggie, and Garry Christopher Moss. Two further Directors, Lorraine Kelly and Andrew Knox, were appointed on 2 March 2015. The Respondent resigned as a Director on 8 May 2015. On 23 May 2017, the said incorporated practice entered administration and two members of FRP LLP were appointed as Joint Administrators. An estimated Statement of Affairs prepared by said Administrators dated 1 June 2017, showed a deficiency of £511,084.11.

17.4 On or around 25 April 2007, a client ledger card was opened by the said firm. The client was allocated an account number of 4307. The partner of the said firm allocated to the client and denoted on the said ledger card was Niall Mickel.

17.5 The said firm were instructed in respect of a reparation claim and sought the benefit of legal aid to represent the said client. Civil legal aid was granted to the said client under reference C8807291408. The nominated solicitor per that legal aid certificate was Kevin Murphy. On or around 17 December 2012, settlement terms were agreed whereby the said client was to receive a sum of £30,000 and the opponents agree to meet an award of judicial expenses. By letter dated 20 December 2012, the said firm wrote to the Scottish Legal Aid Board (SLAB) confirming the terms of settlement and that the said firm intended to claim payment of their fees and outlays in the amount of the judicial expenses recovered. Said letter contained the said firm's reference "NM/KM/PWS/SQ/C4307/1". The solicitors referenced in the correspondence with the firm are Kevin Murphy (KM) and Niall Mickel (NM). No correspondence bearing that reference was ever sent to, or seen by, the Respondent.

17.6 Payment of the said principal sum of £30,000 was received and made over to the said client on or around 18 January 2013. The said firm subsequently agreed with the opponents the judicial expenses in the sum of £48,400.01. The

opponents paid said judicial expenses in two amounts. Firstly, the sum of £30,000 on or about 27 August 2013 and secondly the sum of £16,400.01 on or around 20 February 2014.

17.7 Neither of the said sums of £30,000 nor £16,400.01 were remitted to SLAB. On or around 29 August 2013 fees were debited from the said client ledger in the amount of £22,813 plus VAT of £4,562.62. The said firm further utilised said sums to make payment of outlays. Following payment of said outlays a credit balance remained on the said ledger in the sum of £5,046.50. Said sum remained at credit on said ledger together with accrued interest until the said firm entered administration on 23 May 2017.

17.8 In terms of Section 17(2A) of the Legal Aid (Scotland) Act 1986, *"...any sum of money recovered under an award of or an agreement as to expense in favour of any party in any proceedings in respect of which he is or has been in receipt of civil legal aid shall be paid to the Board."* The said firm had elected to claim payment of their fees, VAT and outlays to the amount of the judicial expenses recovered, namely the sum of £48,400.01. The said sum however failed to make payment of the amount of said judicial expenses to SLAB. The purpose of said legislation is to ensure that the public purse recoups any costs incurred during the currency of a legal aid certificate. During the period when the said firm acted, SLAB paid out a total sum of £23,187.29 by way of reimbursements of outlays. As a result of the said firm failing to remit the said recovered judicial expenses, SLAB did not recoup said sums of £23,187.29.

17.9 By email dated 16 June 2014 [14:50] addressed to Niall Mickel, the firm's managing partner and the partner responsible for overseeing the case, cc'd to the Respondent, the firm's cashier noted that there was a credit balance on the client ledger of £5,046.50 and that her understanding was that £15,525.29 was due to SLAB. The Respondent was absent from work on that date and for some weeks thereafter. Her father had died three days prior to the sending of the email. The firm's cashier suggested that the file could be passed to one of the solicitors to "possibly" deal with the return of funds from expert witnesses and how much should be sent to SLAB in case there was something the cashier did not know and had not taken into account. By email reply dated 16 June 2014 [15:34], from

Niall Mickel to the firm's cashier, which email was not copied to the Respondent, Niall Mickel wrote "Can I suggest we run all of this past Mullens?" 'Mullens' referred to the firm of Mullens Law Accountants Ltd.

17.10 The Respondent had no involvement in (i) opening the client ledger card, (ii) allocating an account number (iii) the decision to claim payment of the firm's fees and outlays in the amount of the judicial expenses recovered; (iv) the decision to debit from the client ledger fees of £22,813.13 plus VAT of £4,562.62 or otherwise at any stage interacting with the client, SLAB or the nominated solicitor, Kevin Murphy.

17.11 The said firm advised SLAB by letter dated 20 December 2012 (with reference NM/KM/PWS/SQ/C4307/1) that they would be accepting payment of their fees and outlays by way of the judicial expenses recovered. Said sums were not remitted to SLAB. A period of two years passed without further contact by SLAB with the firm. By letter dated 5 February 2015, SLAB wrote to the said firm seeking an explanation. Said letter contained the reference "NM/KM/PWS/SW/C4307/1". The solicitors referenced in the correspondence with the firm are Kevin Murphy ('KM') and Niall Mickel ('NM'). No correspondence bearing that reference was ever sent to, or seen by, the Respondent. The nominated solicitor, KM, had left said firm on 31 October 2013. The said firm failed to respond to said letter. Further reminder letters were issued by SLAB containing the same reference on 10 March 2015 & 21 April 2015. No correspondence bearing that reference was sent to, or seen by, the Respondent. The Respondent's resignation from the firm (subsequent to her election on 7th May 2015 as a Member of the UK Parliament) came into effect on 8 May 2015.

17.12 Said firm entered administration on 23 May 2017, over two years after the Respondent had left the firm. The said sums lawfully due to SLAB were not remitted by that time. The credit balance on the said client ledger, together with accrued interest, amounting to £5,073.76 was remitted to SLAB on 30 October 2017 by the said firm's Administrators. The balance of the sums lawfully due to SLAB amounting to £18,113.53 were remitted to SLAB from the Complainer's Client Protection Fund on 14 December 2017, following upon an

application being made by SLAB to said fund. Consequently, there was no loss to the legal aid fund.

17.13 The Respondent was not the nominated solicitor in terms of the said client's legal aid certificate.

17.14 The Respondent as a Partner and as Designated Cashroom Partner or Manager was made aware in the email dated 16 June 2014 that sums were due to SLAB.

17.15 The said sums of judicial expenses retained by the firm were clients' money in terms of Rule B6.1.1 of the 2011 Rules. In failing to remit the sums to SLAB but instead to utilise the sums to debit fees from the said client's ledger resulted in improper fees being rendered, and consequently creating a deficit in the firm's client account and in breach of rules B6.3.1(a), B6.5.1(d), B6.7.1 and B6.11.1 of the 2011 Rules. That money was due to SLAB was first brought to the Respondent's attention in the email dated 16 June 2014.

18. Having considered the foregoing facts and submissions by both parties, the Tribunal found the Respondent guilty of Professional Misconduct in respect that she, as a Partner or Director or Designated Cashroom Partner or Designated Cashroom Manager, having been made aware that sums due to the Scottish Legal Aid Board by way of recovered judicial expenses had been improperly taken as fees,:-

18.1 Failed to take action, or instruct others to take action, to remit said judicial expenses to the Scottish Legal Aid Board in breach of Rules B6.2.3, B6.3.1, B6.4.1, B6.5.1(d), B6.7.1 and B6.11.1 of the Law Society of Scotland Practice Rules 2011;

18.2 Failed to cooperate and communicate effectively with the Scottish Legal Aid Board to resolve matters, in breach of Rules B6.2.3 and B6.12.1 of the Law Society of Scotland Practice Rules 2011;

18.3 Failed to correct matters, cooperate and communicate with the Scottish Legal Aid Board, and retained said sums lawfully due to the Scottish Legal Aid Board, in breach of Rule B6.12.1 of the Law Society of Scotland Practice Rules 2011.

19. Having heard further submissions from the parties, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh, 27 September 2021. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Tasmina Ahmed-Sheikh, 75 Newlands Road, Newlands, Glasgow; Find the Respondent guilty of professional misconduct in respect that she breached Rules B6.2.3, B6.3.1, B6.4.1, B6.5.1(d), B6.7.1, B6.11.1, and B6.12.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of two years any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit her to acting as a qualified assistant to such employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and any person referred to in Paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980 but need not identify any other person.
>
> **(signed)**
> **Ben Kemp**
> **Vice Chair**

20. 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

19 NOVEMBER 2021.

IN THE NAME OF THE TRIBUNAL

[redacted]

Ben Kemp

Vice Chair

NOTE

At the Hearing, the Tribunal had before it the Complaint as adjusted; Answers as adjusted; two Inventories of Productions for the Complainers; three Inventories of Productions for the Respondent; the Tribunal's Interlocutor & Note of 24 June 2021; a signed Joint Minute of Admissions; and the Notes of Argument and Lists of Authorities from both parties submitted in advance of the preliminary hearing on 24 June 2021. Parties confirmed they did not intend to lead any evidence. Counsel for the Respondent indicated he would address the preliminary point about dishonesty taken in the Answers during his submissions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal referred the Tribunal to the Joint Minute and the admitted breaches of the rules. Breaches of Rules B1.2 and B6.12 were not the subject of the Joint Minute and would be separately addressed by the Fiscal. The alleged breaches of Rule B6.13 were no longer insisted upon by the Complainers.

The Fiscal noted (as was agreed in the joint minute) that the firm's file was never made available to either party. The Complainers had to work from other sources, such as the client's ledger card (Production 1 in the Second Inventory of Productions for the Complainers).

With reference to the Joint Minute and various Productions, the Fiscal explained that the firm had elected to receive judicial expenses in a case. However, it took fees and did not remit any money to the Scottish Legal Aid Board ("SLAB"). SLAB sent various letters to the firm. None of these letters bore the Respondent's reference and it was a matter of agreement that she did not have sight of them at the relevant time. A copy of an email from the firm's cashier dated 16 June 2014 was provided to SLAB during its investigation (Production 3 in the Second Inventory of Productions for the Complainers). The email was addressed to the managing partner. The Respondent was copied into the email. The Fiscal indicated he would return to this email later in his submissions.

The Respondent resigned from Hamilton Burns in 2015 when she was elected to Parliament. The firm went into administration on 23 May 2017. The matter in question remained unresolved. The administrators for Hamilton Burns paid £5,073.76 to SLAB. The shortfall of £18,113.53 was the subject of a successful application to the Complainers' Client Protection Sub Committee. There was therefore no loss to the public. However, the profession has suffered a loss through its contributions to the Client Protection Fund. For an application to be successful, the Sub Committee must be satisfied the loss was

caused by an element of dishonesty. The application was against the firm and not the Respondent as an individual. It was considered two and a half years after she left Hamilton Burns. SLAB's loss was incurred between December 2012 and August 2013. During this period, the Respondent was a partner or director of Hamilton Burns and the Designated Cashroom Manager. When she left the firm, the matter was unresolved and her successor also did nothing.

Turning back to the cashier's email of 16 June 2014, the Fiscal noted it indicated to the recipients that the money at credit on the account had to be sent to SLAB, but there was also a larger amount owed. There was a spreadsheet attached to the email. In the Fiscal's submission, the email and attachment should have "set major alarm bells ringing" for the Respondent. The only reply to that email was sent by the managing partner who suggested that the file was referred to law accountants (Production 4 in the Second Inventory of Productions for the Complainers). That email was not copied to the Respondent. It cannot be established that she ever received it.

The Complainers' position was that the Respondent did nothing in response to the cashier's email. No evidence has arisen during the entire process to suggest the Respondent did anything. She was not the solicitor involved in the case. She had no dealings with the case or the file. However, the cashier's email raised an issue and something should have been done about it. There is nothing to suggest the Respondent did anything, even after her return to work.

The Fiscal referred the Tribunal to the relevant rules and guidance. He noted that Designated Cashroom Managers are responsible for compliance. "Prompt" action must be taken to rectify breaches. Proper accounts must be kept. The practice unit must ensure compliance during holidays or illness. The responsibility for the operation of the cashroom lies with the Cashroom Manager, in this case the Respondent. He referred the Tribunal to The Law Society of Scotland-v-Philip Hogg [2016].

The Fiscal noted that the Respondent admitted in paragraph 1 of the Joint Minute that she knew about the firm's finances. The Complainers do not know the exact extent of that knowledge. However, as Designated Cashroom Manager, the Complainers are entitled to infer she should have full knowledge of the financial position of the firm. Law Society inspections revealed cashflow problems from 2012 onwards. Several cases have come before the Tribunal as a result of cashflow issues at Hamilton Burns.

The Fiscal referred the Tribunal to the accounts certificates signed by the Respondent. He did not suggest these were indicative of misconduct but rather showed that the Respondent apparently signed them "blissfully unaware of the situation".

The Fiscal referred the Tribunal to the terms of Rule B1.2 and B6.12. The Complainers allege that both rules were breached by the Respondent. However, it is a matter for the Tribunal whether or not the breaches occurred, and the Respondent's level of culpability. The Fiscal referred the Tribunal to Fyfe-v-The Council of the Law Society of Scotland [2017] CSIH 6. In that case, the Tribunal found a solicitor guilty of professional misconduct as he knew something was amiss regarding the way the cashroom operated. In this case, the Respondent was the Cashroom Manager. She was made aware of a significant problem. She had some knowledge of the firm's finances. She did nothing for 11 months. The profession had to cover SLAB's loss. If she had addressed the problem in 2014, there would have been no prosecution.

The Fiscal suggested that dishonesty was a "jury question" for the Tribunal. The Tribunal asked the Fiscal to address the definition of dishonesty in Ivey-v-Genting Casinos (UK) Limited T/A Crockfords [2017] UKSC 67, and the question of lack of integrity. The Fiscal submitted that having been made aware of the problem but ignoring it for 11 months could amount to a lack of integrity. This question frequently arises before the Tribunal because of the wording of Rule B1.2. The Fiscal said he had to aver breach of the rule but it was for the Tribunal to say where on the scale the conduct fell. He referred the Tribunal to the case law discussed in Fyfe-v-The Council of the Law Society of Scotland. In that case, the Court supported the Tribunal's assessment of the conduct based on the Respondent's knowledge and culpability. He suggested that the Tribunal could look at the circumstances of this case and take into account the benefit to the firm of retaining the money. Only the Tribunal can say whether that was dishonest, reckless, intentionally misleading, or none of those. The Fiscal would not say into which category the Respondent fell. That was not the agreed position with the Respondent, and it was not the Fiscal's usual approach to these matters.

The Chair noted that the agreed facts could be consistent with the Respondent having no subjective awareness and simply not applying her mind to the issue for 11 months. The Fiscal said that could demonstrate a lack of integrity because the Respondent was Cashroom Manager. The client account is sacrosanct. Cashroom Managers must act appropriately. They cannot take a "relaxed view" for 11 months.

SUBMISSIONS FOR THE RESPONDENT

Counsel for the Respondent moved the Tribunal to find that the admitted breaches of the rules, did not, in context, meet the test for professional misconduct. He also said that the averments regarding honesty,

integrity and fraud were irrelevant and scandalous and ought to be dismissed. However, even if the Tribunal allowed those averments to stand, the Complainers had failed to prove these charges beyond reasonable doubt.

Mr Hamilton noted that the Respondent's first and only involvement in the case was being copied into a cashroom email to the managing partner raising an issue that fees had been taken from money which should have been returned to SLAB. With reference to that email (Production 3 in the Second Inventory of Productions for the Complainers), he noted the cashier's suggestion that the file be passed to the relevant solicitor. There was no direct evidence the Respondent was ever aware of the email. At the time it was sent, she was absent from work due to a bereavement. The email was answered by another partner. It had been "an almighty struggle" to recover the managing partner's response. Any action taken by anyone else is unknown because the file has been lost. No explanation has been forthcoming regarding its loss. Speculation is not evidence, and the onus is on the Fiscal to prove the Complainers' case. There are vast gaps in the evidence. SLAB did not start to attempt to recover the money for two years. He did not say the lack of urgency excused the breach, but it did place it in context. The Respondent did not see the SLAB correspondence. The Respondent left the firm in 2015, two years before it went into administration.

Collectively, six rules were breached but in Mr Hamilton's submission, this did not amount to professional misconduct. One significant error by another led to other consequences in a "cascade effect". As Cashroom Manager, the Respondent was responsible for the consequences which flowed from the initial error. The Tribunal must however consider her individual culpability. The Respondent did not take the fees in question. The ledger wrongly showed a surplus. This was not at the Respondent's hand, but she accepted it was a breach of the rules. There appeared to be an absence of proactive activity by the Respondent after the email. However, the difficulty is the absence of evidence or the file. The context of the Respondent's absence from work was a family bereavement.

Mr Hamilton referred to Sharp-v-The Council of the Law Society of Scotland 1984 SLT 313 and the conjunctive test the Tribunal applies. In order to find professional misconduct, the conduct must represent a serious and reprehensible departure from the standards of competent and reputable solicitors. The Tribunal must assess the degree of culpability of the Respondent. Not every rule breach amounts to misconduct. The Tribunal did not know the whole circumstances of this case.

Mr Hamilton submitted that the Fiscal's approach to dishonesty was incorrect. The Complainers said they were not trying to infer personal dishonesty and yet there were averments and pleadings which did

just that. He said that the Fiscal appeared at one stage to be "floating the idea" of dishonesty to see if the Tribunal was happy to take it somewhere. This is inappropriate. By the end of the Fiscal's submission, there was an insistence that because the rule was in those terms, this amounted to dishonesty.

Mr Hamilton said there was no factual evidence that the Respondent personally had ever acted in a way that breached Rules B1.2 or B6.12.1. There is nothing in the adjusted Complaint regarding dishonesty, beyond the finding of the Client Protection Sub Committee. This is a wholly inadequate factual basis upon which to make the allegation. It was therefore a scandalous averment. To maintain that position was also scandalous. Absent a proper factual basis, it was at best, inappropriate. A warning was given in the Answers. No Tribunal should accept dishonesty without a factual basis, otherwise baseless innuendo and smear will result.

In any case, the Tribunal had no basis to accept the submissions beyond reasonable doubt. The height of the evidence is that the Client Protection Fund paid out. It is wrong to suggest that the collective responsibility of the firm is an evidential basis for personal fraud. Mr Hamilton referred to the Section 42ZA Appeal by Alan Mickel [2020]. SLAB constructed a case against the firm, but the Client Protection Sub Committee made no detailed examination of the firm or the Respondent. She did not have any opportunity to contribute to any discussion on dishonesty or contest that position. To base an allegation of dishonesty upon this was "a stretch".

Mr Hamilton submitted that there should be clear and sufficient evidence of dishonesty before it can be responsibly advanced. There needs to be sufficient factual basis in primary fact to support the charge. It was not enough for the Fiscal to say "this might be a thing – over to you." Mr Hamilton referred the Tribunal to paragraph 9.12 of MacPhail's *"Sheriff Court Practice"* (Authority 12 for the Respondent) and the case law referred to there.

According to Mr Hamilton, there was no evidence of dishonesty, rather than inadvertence, error, or the Respondent just not being very good at her job. A basis for the elusive missing factual averments might be in the missing file. However, the Complainers cannot proceed without evidence. Therefore, the Tribunal should delete all references to Rules B1.2 and B6.12. Evidence of dishonesty is almost entirely absent. Where evidence does exist, it points away from dishonesty.

Mr Hamilton invited the Tribunal to make a clear statement for the benefit of the Law Society, Respondents and the wider public interest that averments and submissions on fraud or dishonesty require clear and sufficient evidence.

The Chair invited Mr Hamilton to address the Tribunal on recklessness. Mr Hamilton submitted that recklessness relates to conduct beyond that which is averred. Rules B1.2 and B6.12 have an additional facet which relate to motive or "moral turpitude". There is no evidence of dishonesty, recklessness or misleading behaviour.

ADDITIONAL SUBMISSIONS FOR THE COMPLAINERS

The Fiscal said that the starting point was the issues referred to the Law Society by the Scottish Legal Complaints Commission ("SLCC"). The rules used the terms "dishonesty". If the allegation is that the rule is breached, the Complainers are stuck with it. The question for the Tribunal was whether part of the rule can be established. In his submission, the circumstances were similar to those in Fyfe-v-The Council of the Law Society of Scotland.

ADDITIONAL SUBMISSIONS FOR THE RESPONDENT

Mr Hamilton said Fyfe-v-The Council of the Law Society of Scotland was not controversial. However, in that case facts existed upon which the Tribunal drew inferences. The facts as known and admitted by the Respondent in that case justified such findings. He noted that paragraph 3.3 of the adjusted Complaint was not admitted by the Joint Minute. The Respondent accepted the email of 16 June 2014 was received, in the absence of evidence to the contrary. However, there is a difference between that and knowledge, awareness or deliberate avoidance of the rules.

DECISION

As invited by the parties, the Tribunal made findings in fact based on the agreed facts in the Joint Minute. The Tribunal was therefore satisfied beyond reasonable doubt that the Respondent had acted in the manner set out in this decision at paragraph 17. In short, it was established that the Respondent was a Partner and then Director of Hamilton Burns. Between 1 October 2009 and 8 May 2015, she was the Designated Cashroom Partner/Manager of the firm. She was made aware by a cashier's email of 16 June 2014 that sums due to SLAB as recovered judicial expenses had been improperly taken to fees. She failed to take action to remit the judicial expenses to SLAB. She failed to cooperate and communicate with SLAB to resolve matters. She failed to correct matters. Money was therefore retained by the firm which was lawfully due to SLAB. This money was clients' money (Rule B.6.1.1). In failing to remit the sums to SLAB and taking money to fees, a deficit was created on the client account.

The Accounts Rules apply to all managers of practice units. In addition, no regulated person within a practice shall cause or knowingly permit it not to comply with Rule B6 (Rule B6.2.3). The client account must never be in deficit (Rule B6.3.1). Breaches should be remedied promptly, and money improperly withheld or withdrawn, should be replaced (Rule B6.4.1). Proper fees can be taken if recorded and rendered (Rule B6.5.1(d)). Proper accounting records must be kept (Rule B6.7.1). Money held by the practice should be returned as soon as there is no reason to retain it (Rule B6.11.1). The Respondent admitted that she breached these rules.

According to 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."

While not every breach of a rule will constitute misconduct, the Tribunal was satisfied that the Respondent's conduct regarding the admitted rules breaches was a serious and reprehensible departure from the standards of competent and reputable solicitors. The Respondent was Designated Cashroom Manager of the firm. This is an important and highly responsible position which should not be undertaken lightly. It is essential that Designated Cashroom Managers ensure compliance with the Accounts Rules. In holding funds for clients, a solicitor is in a privileged position of trust. The public must have confidence that the profession will comply with the Accounts Rules and that solicitors can be trusted. Failure to comply with the Accounts Rules demeans the trust the public places in the profession. Designated Cashroom Managers have a particularly important role in protecting the public. They must protect client money and keep the client account sacrosanct. The admitted breaches demonstrated that the Respondent had failed in her duties as the Designated Cashroom Manager. Professional misconduct was therefore made out in relation to the admitted breaches of the rules.

The Complainers also averred, but the Respondent did not admit, breaches of Rules B1.2 and B6.12. According to Rule B1.2, a solicitor must be trustworthy and act honestly at all times so that their integrity

is beyond question. According to Rule B6.12, a solicitor shall not act, or omit to act, in a manner which is dishonest, reckless or intentionally misleading in respect of (a) the writing up of accounting records in respect of clients' money or his practice; (b) balancing his books; or (c) the financial affairs of his clients or of his practice. These rules include an additional mental element of honesty, integrity, recklessness or intentional misleading which was not required in relation to the admitted rules breaches. The Respondent contended that there was insufficient factual basis for the Complainers to aver or for the Tribunal to find dishonesty, lack of integrity, recklessness or intentional misleading. It was said on the Respondent's behalf that the Tribunal should not consider these rules at all as there was not a clear and sufficient basis for averring a breach of these rules. The Fiscal noted that honesty and integrity were part of the complaint remitted to the Law Society by the SLCC (Production 29 of the First Inventory of Productions for the Respondent) and that he was obliged to aver the whole rule, which in the case of Rule B1.2, included honesty and integrity.

This Tribunal has repeatedly advised that where dishonesty is alleged, it should be clearly set out in the Complaint so that the Respondent knows the case he or she must meet (Singleton-v-The Law Society [2005] EWHC 2915 Admin). This is a matter of fair notice to the Respondent. However, in this case, the Respondent claimed that although dishonesty had been averred, this had been done without a clear and sufficient factual basis. The Fiscal claimed that on the basis of Fyfe-v-The Council of the Law Society of Scotland it was open to the Tribunal to make findings regarding the Respondent's mental state. The Tribunal considered this was only possible in Fyfe due to the established facts from which an inference of deceit arose. If dishonesty or lack of integrity is pleaded, there should be a sufficient factual basis for doing so. In this case, the factual basis on which to ground an allegation of dishonesty or lack of integrity could only be the determination of the Client Protection Sub Committee and the evidence they accepted as establishing dishonesty. It was admitted in paragraph 1 of the Joint Minute that the Respondent was "aware between 1 October 2009 and 8 May 2015, of the financial position of the firm insofar as that could be known from her role as Designated Cashroom Manager". However, no evidence was led or facts admitted regarding the financial position of the firm other than that Hamilton Burns entered administration on 23 May 2017 with a deficiency of £511,084.11.

The principles of honesty and integrity are fundamental to the profession. Members of the profession are in a very privileged position and members of the public must be able to trust that a solicitor will carry out his or her duties and obligations in an honest and trustworthy manner. The importance of this principle and the seriousness of the breach of that principle has repeatedly been emphasised in several cases before this Tribunal. It is essential that the specific basis for allegations of dishonesty or lack of integrity are clearly set out.

The Tribunal had regard to the test for dishonesty described in Ivev v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. According to that case, the Tribunal should first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. When that is established the question whether his or her conduct was honest or dishonest is determined by applying the objective standards of ordinary decent people.

Lack of integrity is defined in Wingate & Evans v SRA; SRA v Malins [2018] EWCA Civ 366. According to that case, integrity is a broader concept than dishonesty. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of one's own profession and involves more than mere honesty. Examples of lack of integrity were noted to include a sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules; recklessly allowing a court to be misled; subordinating the interests of the clients to the solicitors' own financial interests; making improper payments out of the client account; allowing the firm to become involved in conveyancing transactions which bear the hallmarks mortgage fraud; and making false representations on behalf of the client.

The Tribunal considered that there was insufficient evidence upon which to base a finding of dishonesty or lack of integrity (Rule B1.2). The admitted agreed facts were the only basis upon which the Tribunal could make its decision. The Client Protection Sub Committee paid out on the basis of dishonesty. However, this finding alone was not sufficient for the Tribunal to find dishonesty in respect of the Respondent. The Client Protection Fund is a discretionary fund. The finding of dishonesty related to the firm. The Respondent had no input into that decision. Overall, the evidence was not sufficient to satisfy the Tribunal beyond reasonable doubt on the matter of dishonesty or lack of integrity. Insufficient evidence was admitted or agreed regarding the financial position of the firm so that a nefarious motive could be inferred for the retention of these sums. The agreed and admitted facts were also consistent with someone failing to understand, or to apply their mind to, the importance of the situation. No breach of Rule B1.2 was therefore established.

The Tribunal carefully considered the terms of Rule B6.12.1 which referred to acting or omitting to act in a way that was dishonest, reckless or intentionally misleading regarding accounts or financial affairs of clients. It was admitted that the Respondent was made aware in the cashier's email of 16 June 2014 that sums were due to SLAB (paragraph 15 of the Joint Minute). Even without this email the Respondent as Designated Cashroom Manager should have been aware of the operation of the cashroom. She was

responsible for it. She should have been keeping track of the client account and ledgers, supervising her staff, and creating procedures by which her staff could report problems and issues to her for resolution. Instead, the Respondent did not do anything about this problem for 11 months. While no positive finding of dishonesty or lack of integrity could be made on the basis of the agreed facts, the Tribunal considered that by omitting to act while Cashroom Manager, the Respondent's conduct was reckless and therefore breached Rule B6.12.1. Action was necessary, either to replace the money or report the situation to the Law Society. This omission was a serious and reprehensible departure from the standards of competent and reputable solicitors and accordingly also constituted professional misconduct.

SUBMISSIONS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal moved for the entire expenses of the process including the reserved award following the preliminary hearing on 24 June 2021. He suggested the Tribunal made the usual order for publicity. He drew the Tribunal's attention to its previous finding of professional misconduct against the Respondent from 15 January 2019, which was also based on Accounts Rules breaches in addition to other matters. In that case, the Respondent was censured and fined £3,000.

Mr Hamilton said the Respondent regretted the circumstances which brought her before the Tribunal. She was a solicitor for many years and cherished her career. She was no longer practising and had not held a practising certificate since October 2015. She had no intention of returning to the profession. Mr Hamilton outlined the Respondent's career and personal circumstances. He provided two character references for the Respondent from Kenny MacAskill MP and David Davis MP.

The Respondent understood the breach was a serious matter. She appreciated the Tribunal had to maintain public confidence in the profession. She acknowledged the importance of the duties of Designated Cashroom Manager. Mr Hamilton referred to the "cascade effect" and the Respondent's individual culpability which he said was due to oversight. Mr Hamilton submitted the Respondent's culpability was at the lower end of the scale. Dishonesty and lack of integrity had not been established. The breach of B6.12 was at the lower end of that scale.

Mr Hamilton said he would leave expenses in the hands of the Tribunal. He had nothing to say about publicity. The Respondent was familiar with the usual scale the Tribunal utilised for expenses.

DECISION ON SANCTION, EXPENSES AND PUBLICITY

The previous finding of professional misconduct which related to Accounts Rules breaches from the same period as these findings was an aggravating factor. The fact that the Respondent had recently suffered a bereavement at the relevant time was mitigatory. The references from politicians who were not aware of the details of the alleged misconduct provided some personal mitigation but were of limited assistance in this case which involved breach of a solicitor's professional obligations.

The Tribunal was concerned that the Respondent had failed in her duties as Designated Cashroom Manager on two different occasions. It considered she might be a danger to the public should she return to the profession with a full practising certificate (which would allow her to operate as a manager and Designated Cashroom Manager). The Respondent's practice regarding the Accounts Rules required review, retraining and supervision. However, if she was to work under supervision, the public would not be at risk. The conduct fell in the middle of the scale of misconduct. A censure and restriction for an aggregate period of two years would be sufficient for the Respondent to renew her practice under supervision, should she decide to do so. This would protect the public and uphold the reputation of the profession. The Tribunal considered whether additionally to impose a fine, but concluded that this would be disproportionate and unnecessary. Suspension or strike off would be excessive in the circumstances of the case.

The appropriate award of expenses was one in favour of the Complainers. The Tribunal had found no breach of honesty or integrity but overall, the Complainers had been successful. This Tribunal generally awards expenses on the basis of success.

Publicity will be given to this decision and the interlocutor and note of 24 June 2021. It should include the name of the Respondent. The names of the Respondent's partners cannot be anonymised (Paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980). However, there was no requirement to identify any other person as publication of their personal data may damage or be likely to damage their interests.

[redacted]

Ben Kemp

Vice Chair