

**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

**ANDREW JAMES MALONE, 49 Robb Place,
Castle Douglas**

Respondent

1. A Complaint dated 28 August 2024 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers") averring that Andrew James Malone, 49 Robb Place, Castle Douglas (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. Answers were lodged for the Respondent.
4. Following sundry procedure, the Tribunal set down a virtual Hearing for 21 November 2024.
5. At the virtual hearing on 21 November 2024, the Complainers were represented by their Fiscal, Gavin Whyte, Fiscal, Edinburgh. The Respondent was present and represented himself. A Joint Minute was lodged by the parties as a result of which no evidence required to be led. The Respondent had lodged answers and a written statement of his financial circumstances. Parties made submissions.

6. Having given careful consideration to the terms of the Complaint, Answers, Joint Minute and submissions by both parties, the Tribunal found the following facts established:-
- 6.1 The Respondent is Andrew James Malone, he was born on 05 September 1961. The Respondent was enrolled into the profession on 11 September 1985 and commenced employment with 'Hewats Solicitors, 63 King Street, Castle Douglas, DG7 1AG' hereafter known as the "the firm" on 31 March 1990. The Respondent left the firm on 17 March 2022 at which time he was the principal partner and client relations manager for the firm. He is not currently in possession of a practising certificate.
- 6.2 The secondary complainer instructed the Respondent in relation to her late mother's estate in September 2014 and more recently in relation to her late father's estate in May 2019. The secondary complainer complained to the Scottish Legal Complaint's Commission (hereinafter referred to as the SLCC) about the Respondent on 23 June 2022.
- 6.3 On 26 July 2022, the SLCC wrote to the secondary complainer confirming receipt of her complaint as per 23 June 2022 and that the complaint was going through the SLCC's eligibility process.
- 6.4 On 27 July 2022, an SLCC Case Investigator wrote to the Respondent to advise that a complaint had been received and requested that the Respondent provide the SLCC with information and the Respondent's original response to the secondary complainer within 14 days.
- 6.5 On 6 September 2022, the SLCC emailed the Respondent attaching a letter of the same date. The letter enclosed a copy of the summary of complaint which detailed the issues of complaint and requested information from the Respondent and his responses to the numbered issues of complaint. A deadline of 13 September 2022 was set for receipt of the information and responses by the SLCC.
- 6.6 On 7 September 2022, the Respondent emailed the SLCC to confirm receipt of the SLCC's email of the previous day and confirmed a response would follow.
- 6.7 On 18 October 2022, the SLCC emailed the Respondent. Attached to the email was a letter to the Respondent advising the Respondent of the current position. The letter advised

that as a result of previous failures to communicate the secondary complainer did not wish to take part in mediation, so matters were now proceeding to investigation of the four service issues of complaint. The letter advised that section 17 of the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act) entitled the SLCC to “examine documents and request explanations for the purpose of the investigation”. The letter requested that within 21 days the Respondent provide the relevant case files, a detailed response to the eligible issues of complaint and full details of any fees/VAT/outlays charged or to be charged.

- 6.8 The letter went on to narrate if the relevant information/responses were not received by 8 November 2022, then the SLCC may apply to the Court of Session for an order requiring the Respondent to provide the information and responses requested, the SLCC may determine the issues of complaint in the absence of materials received from the Respondent and may invite the secondary complainer to add a conduct issue against the Respondent for the failure to respond to the SLCC. The letter concluded by advising on how the information/responses should be conveyed to the SLCC including secure email.
- 6.9 On 10 November 2022, the SLCC emailed the Respondent. Attached to the email was a letter from an SLCC Case Investigations Manager. The content of the letter narrated that the Respondent had failed to respond to the SLCC’s correspondence of 18 October 2022. The letter advised that the information previously requested under section 17 of the 2007 Act should be provided to the SLCC by 17 November 2022 and a failure to obtemper the request may result in further action being taken against the Respondent without further notice. The further action included a conduct issue being raised for the failure to correspond with the SLCC, the commencement of legal action to recover the files and have the expenses of any such action awarded against the Respondent/ the firm, and the investigation of the complaint in the absence of the materials requested but where a negative inference against the Respondent could be drawn where there was insufficient evidence due to the Respondent’s failure to provide the firm’s files.
- 6.10 On 14 November 2022, an SLCC Case Investigations Manager emailed the Respondent attaching copies of the SLCC’s correspondence dated 18 October 2022. The Respondent replied by email on the same day at 1.20 pm confirming receipt of the email and enquired if he could be granted a further seven days to respond. The Respondent also advised he

was not in possession of the firm's files as they had been passed to another firm of solicitors to complete the executry following the cessation of the firm.

- 6.11 On 14 November 2022, the SLCC emailed the Respondent confirming that an extension until 21 November 2022 had been granted for the Respondent to reply to the issues of complaint.
- 6.12 On 22 November 2022, the Respondent emailed the SLCC to apologise for not responding and requested a further seven to ten days for responses to be submitted. The SLCC responded via email the same day to advise an extension had been granted for the submission of responses and the deadline was 2 December 2022. The Respondent responded again on the same day thanking the SLCC for the extension.
- 6.13 On 6 December 2022, the Respondent emailed the SLCC apologising for not fully replying. The Respondent cited health difficulties and difficulty obtaining the firm's client files as a reason for not responding fully. The Respondent enquired if he could have additional time to respond.
- 6.14 On 7 December 2022, an SLCC Case Investigation Manager emailed the Respondent. The content of the email advised that the SLCC were sympathetic to the Respondent's position, but they could not await a response indefinitely. A deadline of 6 January 2023 was offered and a preliminary deadline of 14 December 2022, was offered in respect that the Respondent confirm he would be able to adhere to the extension deadline.
- 6.15 On 15 December 2022, the Respondent emailed the SLCC apologising for the delay in responding and indicated he would obtain some help on an "informal basis" to address matters.
- 6.16 On 12 January 2023, an SLCC Case Investigations Manager emailed the secondary complainer. Attached to the email was a letter the content of which advised that the Respondent had failed to provide materials and a response to the complaint despite numerous attempts to obtain such matters from the Respondent. The letter enquired if the secondary complainer wished to raise an additional issue of complaint for the Respondent's failure to co-operate with the SLCC.

- 6.17 On 14 January, the secondary complainer emailed the SLCC to indicate that she wished to proceed with an additional issue of complaint against the Respondent for his failure to co-operate.
- 6.18 On 16 January 2023, the secondary complainer emailed the SLCC to advise of the location of the client files pertaining to the executry. The SLCC emailed the firm holding the files on 20 January 2023, and the new agents responded the same day via email indicating the requisite files would be copied and forwarded to the SLCC.
- 6.19 On 8 February 2023, an SLCC Case Investigator emailed the Respondent attaching a letter. The content of the letter advised the Case Investigator would be addressing the issues of complaint relating to service and upon completion of that investigation the papers would be passed to the Law Society for investigation of the conduct complaint.
- 6.20 On 29 March 2023, the SLCC wrote to the Law Society confirming that the SLCC's service investigation was now complete and that the Law Society was free to progress the issue of complaint pertaining to the Respondent's conduct.
- 6.21 On 30 March 2023, a Reporter from the Law Society of Scotland emailed the Respondent in furtherance of a conduct complaint remitted by the SLCC to the Law Society. The email to the Respondent included intimation papers in the form of the procedural papers received from the SLCC and a formal intimation letter narrating the investigative process and the manner of progression. The formal intimation letter narrated that the Law Society would require to compile a written report detailing the Respondent's actions and where recommendations would be made to the Professional Conduct Sub Committee who would in turn determine matters. The letter advised the Respondent of his professional obligation to respond to the Law Society and invited the Respondent to reply to the issue of complaint within 21 days of 30 March 2023.
- 6.22 On 31 March 2023, the Respondent emailed the Law Society to confirm receipt of the intimation papers and associated documentation.
- 6.23 On 24 April 2023, the Reporter referred to previously, emailed the Respondent to indicate that the period for responses had expired and no response had been received from the Respondent. The Reporter offered the Respondent a further 7 days to comply and

reminded the Respondent of his professional obligation to co-operate with the Law Society. The Reporter's email concluded by advising the Respondent that if he failed to provide a response then statutory notices may be issued without further notice, and this may have implications for the Respondent's practising certificate and may also result in the secondary complainer raising a further issue of complaint.

- 6.24 On 9 May 2023, having received no response from the Respondent, statutory notices under section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 and Section 48(1)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007 were issued to the Respondent by the Reporter both by recorded delivery post and secure email.
- 6.25 On 9 May 2023, the Reporter emailed the secondary complainer attaching a letter which advised of recent developments including the issuing of statutory notices. The letter also advised that the secondary complainer may be invited to consider whether or not she wished to raise a further issue of complaint for the Respondent's failure to engage with Law Society of Scotland. The letter concluded by advising that the Reporter would contact the secondary complainer upon expiry of the period of notice contained within the statutory notices.
- 6.26 On 10 May 2023, the Respondent acknowledged receipt of the secure email and indicated he would address matters. The Respondent concluded his email by offering his apologies and indicating he had "been away".
- 6.27 On 2 June 2023, the Reporter emailed the Respondent to indicate despite the Respondent's assertion he would address matters no response had been received. A further opportunity to address matters by 5pm on 5 June 2023 was offered and if no response was forthcoming the second part of the section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 notice would be served upon the Respondent.
- 6.28 Following no response from the Respondent the second part of the section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 notice was served upon the Respondent by recorded delivery post on 8 June 2023. A copy of the notice was also sent to the Respondent by secure email on 9 June 2023.

- 6.29 On 16 June 2023, the SLCC by email to the secondary complainer confirmed receipt of the secondary complainer's complaint form with an additional issue of complaint in respect of the Respondents failure to engage with the Law Society of Scotland.
- 6.30 On 30 June 2023, the Reporter via email, intimated the additional issue of complaint upon the Respondent. A further 21 days was offered to the Respondent to provide a response, but no response has been received.
- 6.31 On 30 June 2023 (3.04 pm), the secondary complainer was advised by email that the additional issue of complaint had been intimated to the Respondent and after the expiry of the period of notice (21 days) both the issues of complaint would be considered by the Law Society of Scotland.
7. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of professional misconduct singly and *in cumulo* in respect that:-
- 7.1 The Respondent failed to deal with the SLCC in an open, timely and co-operative manner, so as to enable the Commission to properly exercise and fulfil its functions, in that he failed to timeously provide the SLCC with documents and/or information requested by them in correspondence of 18 October 2022, 10 November 2022, 14 November 2022, 22 November 2022 and 7 December 2022 which was required for the purposes of the investigation of a complaint against the former firm of Hewat's Solicitors. The SLCC requested that the information be provided by 8 November 2022, 17 November 2022, 21 November 2022, 2 December 2022 and again by 6 January 2023, and this was not complied with. This was in contravention of Rule B1.17 of the Law Society of Scotland Practice Rules 2011.
- 7.2 The Respondent failed to engage with the Law Society of Scotland in an open, timely and co-operative manner, so as to enable the Council to properly exercise and fulfill its regulatory functions. Mr Malone failed to timeously provide a response to the Law Society of Scotland in respect of a conduct complaint, intimated upon him on 30 March 2023 and failed to provide a response despite reminders on 24 April 2023 and 2 June 2023 and the service of statutory notices under section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 and Section 48(1)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007 on 9 May

2023. This was in contravention of Rule B1.16 of the Law Society of Scotland Practice Rules 2011.

8. Having heard the Respondent in mitigation and considered the written information previously lodged by him, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 21 November 2024. The Tribunal having considered the Complaint dated 28 August 2024 at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against Andrew James Malone, 49 Robb Place, Castle Douglas; Find the Respondent guilty of professional misconduct singly and *in cumulo* in respect of his breach of Rules B1.16 and Rule B1.17 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Direct 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; Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation, if so advised.

(signed)

Catherine Hart

Vice 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 22 JANUARY 2025 .

IN THE NAME OF THE TRIBUNAL

Catherine Hart
Catherine Hart / Jan 14, 2025 19:07 GMT

Catherine Hart

Vice Chair

NOTE

At the Virtual Hearing on 21 November 2024, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented himself.

The Tribunal had before it the Complaint and Answers. Parties had lodged a Joint Minute prior to the Hearing which agreed all of the averments of fact, duty and misconduct. In addition, the Respondent had lodged answers and a Statement of Financial Circumstances for consideration by the Tribunal. Parties made submissions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that there were two averments of professional misconduct in relation to the Respondent's conduct in dealing with the executry of the Secondary Complainer's late mother and father. However, the work carried out by the Respondent in relation to the executry was not part of the Complaint.

The Fiscal continued by stating that the first and second averments at paragraphs 6.2 and 6.3 of the Complaint show that a pattern had developed in that the Respondent did not engage or co-operate with either the SLCC or the Complainers in terms of Rules B1.16 and B1.17 of the Law Society of Scotland Practice Rules 2011 respectively. As detailed in the Complaint, various deadlines and extensions to those were set by the SLCC and the Complainers but were not complied with by the Respondent. The Respondent accepted this in the Joint Minute which has been lodged.

The Fiscal stated that reference is also made within the Complaint to Rule B1.2. Although there is no allegation of dishonesty in relation to the Respondent, his integrity is brought into question by acknowledging receipt of the correspondence from the SLCC and stating that he would respond but repeatedly failing to do so.

The Fiscal acknowledged that it was for the Tribunal to assess whether the conduct of the Respondent met the test contained in Sharp v Law Society of Scotland 1948 SLT 313, namely whether the Respondent's behaviour was a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Fiscal submitted that the behaviour of the Respondent had hampered both the SLCC and the Complainer in the exercise of their respective statutory duties. In the past, the Tribunal has considered such behaviour to amount to professional misconduct and the Fiscal referred to the case of Law Society of Scotland v John Fraser Tait. The Fiscal explained that the facts of that case were in short compass, but the Tribunal concluded that it was not acceptable for solicitors to ignore the SLCC and that the public interest is affected as those who wish to escalate issues with the profession cannot progress with their complaint. He went on to submit that, by extension, this should apply to a regulator in contravention of Rule B1.16.

The Fiscal pointed out that, since service of this Complaint, the Respondent has been quick to respond to him and has dealt with matters promptly. The Fiscal has not encountered any difficulties in dealing with the Respondent in relation to these proceedings.

SUBMISSIONS FOR THE RESPONDENT

The Chair invited the Respondent to make submissions thereafter. The Respondent confirmed that, as stated in his Answers and agreed in the Joint Minute, he accepted the facts and evidence before the Tribunal. He went on to say that he had no intention of acting in a way that amounted to professional misconduct and accepted that he should have responded to various requests from the SLCC and the Complainer. The Respondent said that he has explained some of the background to events in his Answers although that is not offered as an excuse. The Respondent said that the behaviour which resulted in these proceedings is not something he would have done in normal circumstances in his practice. He has never had an issue like this in practice before and accepted he should have dealt with matters and sought help earlier. However, the complaint arose during a difficult time for his business when, as a sole practitioner, he was trying to wind the practice down after the challenges of trying to run the business during the pandemic. The Respondent commented that there is nothing else to add and reiterated that he accepts the facts.

In relation to the question of personal integrity, the Respondent considers himself to be a person of great integrity. He does, however, accept that he did not conduct himself well in relation to the matters before the Tribunal. The Respondent stated that he had no intent to mislead or cause problems, he simply could not face up to things at the time.

The Respondent added that he has had no previous issues with integrity and considers that people would trust him to keep his word or carry out actions as stated. The Respondent pointed out that he is part of a

small legal community in a rural area and, therefore, acting with integrity is of great importance and the way he has always acted in his career. He described the events in these proceedings as a 'one off lapse' caused by particular circumstances and stated that he is 'ashamed and embarrassed' by events.

DECISION

On the basis of the admitted facts and submissions from both parties, the Tribunal was satisfied that the Respondent acted in the manner detailed in the averments of fact set out in the Complaint at paragraphs 6.2 and 6.3. The Tribunal therefore found the above facts to be established.

The Tribunal was satisfied that the admitted conduct was in clear breach of both rules B1.16 and B1.17 of the Practice Rules 2011.

The Fiscal submitted that the conduct was also a breach of Rule B1.2. However, there was no reference to Rule B1.2 in the averments of professional misconduct and given the information before it and, in particular, the Respondent's explanation of the situation in his business at the time, the Tribunal was not satisfied that this was established.

Although the Respondent admitted professional misconduct, it remained for the Tribunal to consider whether the admitted conduct met the test as set out within Sharp v The Law Society of Scotland 1984 SLT 313 which states:-

"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."

This Tribunal has emphasised on numerous occasions that failure to respond to, and engage with, the SLCC and the Complainers, acting as the profession's regulator, hampers both bodies in the performance of their statutory duties and brings the profession into disrepute. Here the Respondent failed to cooperate

with both bodies over a period of several months. Accordingly, the Tribunal found the Respondent guilty of professional misconduct both singly and *in cumulo* in relation to his breach of Rules B1.16 and B1.17.

SUBMISSIONS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal indicated that there were no previous findings of professional misconduct in respect of the Respondent.

The Respondent referred to his Answers which explain some of the background to the difficulties he had encountered. He mentioned his mental state at the time which, he said, he had taken some time to recognise and stated that this resulted in the closure of the firm. He stated that the relevant files which were originally requested had been passed to another firm and were not in his possession at the time. He went on to say that he was struggling to deal with various matters at the time and was not acting logically. The files were substantial and he was not facing up to the complaint. This was not offered as an excuse; the Respondent stated that he was simply 'putting it off'. The Respondent said that he has never been before the Tribunal previously nor had any findings of professional misconduct against him.

In terms of integrity, the Respondent reiterated his earlier comments that he is considered to be a man of integrity in the community and would always strive to do what he has said he will do. He accepts that the matters in this complaint are a major lapse from that but submitted that they were a lapse and not indicative of his overall character or behaviour.

The Respondent confirmed that he has not practised a solicitor since the firm closed and has no intention of practising again or working for a regulated business in any capacity. His name is no longer on the Roll of Solicitors. In light of those factors, the risk of recurrence is nil. If any issues occur in the future as a result of residuary matters, the Respondent undertakes to deal with them fully and promptly, whether or not he remains subject to any regulatory or disciplinary processes.

In terms of his financial circumstances, the Respondent referred to his written statement. His former business premises are currently subject to an outstanding change of use application with the local authority and this means that the sale is uncertain. The Respondent is not currently employed.

Regarding publicity, the Respondent stated he appreciated that publicity is mandatory in most cases. He submitted that the impact on him in a small community is likely to be significant and of interest to the local press. However, he does not anticipate any impact on other person(s). The Respondent has recently

become a trustee of a Local Development Forum and had been invited to become a member of the HR and finance sub-committee but has deferred on that invitation pending the outcome of these proceedings.

In relation to an award of expenses, the Respondent described his financial position as 'precarious' and he may need time to pay. His understanding of the legislative provision is that there is an accounting process to be followed with an award of expenses.

The Fiscal moved for expenses on the basis that these usually follow conviction and publicity as standard. He stated that there is no requirement to name the Secondary Complainer.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal gave careful consideration to all of the information before it. It noted that the Respondent had practised as a solicitor for 36 years and had no previous disciplinary matters on his record. The Fiscal had confirmed that the Respondent had cooperated with him in the course of these proceedings. The Respondent had entered into an extensive Joint Minute and had expressed remorse and regret for his conduct. There was little chance of any repeat of this type of conduct. In all of these circumstances the Tribunal was satisfied that the appropriate sanction was one of censure.

Following submissions on expenses and publicity, the Tribunal decided that the appropriate award of expenses was one in favour of the Complainers. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondent. 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. The Tribunal allowed the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation, if so advised.

Catherine Hart
Catherine Hart (Jan 14, 2025 10:02 GMT)

Catherine Hart
Vice Chair