

**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, 26
Drumsheugh Gardens, Edinburgh**

against

**NORMAN DOUGLAS PATON
CATHCART of Campbell
Cathcart, 3 Lynedoch Place,
Glasgow**

1. A Complaint dated 7 February 2012 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Norman Douglas Paton Cathcart of Campbell Cathcart, 3 Lynedoch Place, Glasgow (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.
2. The Secondary Complainer is Mr Duncan Donald McGruther of Mazars, 90 St Vincent Street, Glasgow (hereinafter referred to as the "Secondary Complainer") who claims to have been directly affected by the professional misconduct and seeks compensation for the loss, inconvenience and stress arising from it.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged for the Respondent.

4. In terms of its Rules the Tribunal appointed the Complaint to be heard on 23 January 2013 and notice thereof was duly served on the Respondent. The Secondary Complainer was also notified of the date by the fiscal acting on behalf of the Law Society.
5. When the Complaint called on 23 January 2013 the Complainers were represented by their Fiscal, Elaine Motion Solicitor Advocate, Edinburgh. The Respondent was present and represented by Johnathan Brown, Advocate Glasgow. The Secondary Complainer was not present.
6. Counsel for the Respondent indicated that he had a preliminary plea to make and he submitted that the Tribunal did not have power to hear the case on this date due to the fact that an improperly constituted Tribunal had previously issued a decision in the case. After hearing submissions from both parties on this matter the Tribunal determined that it did have power to hear the case and directed that the case proceed before it.
7. The Respondent pled guilty to the averments of fact, averments of duty and averments of professional misconduct in the Complaint as slightly amended.
8. In respect of these admissions no evidence was led and the Tribunal found the following facts established:
 - 8.1 The Respondent is a solicitor enrolled in the Registers of Solicitors in Scotland. He was enrolled as a solicitor on 30 January 1976 and has been a Principal in private practice since 1 January 1977. He has been a Partner in Campbell Cathcart, solicitors, since 6 April 1994 and as from 10 May 1999 has been the designated cashroom partner and as from 13 November 2006 the designated Anti Money Laundering Partner for that firm.

Liquidation of Company 1

- 8.2 The Respondent acted on behalf of Company 1 (“the Company”).
- 8.3 On 31 March 2009 the Secondary Complainer was appointed Provisional Liquidator of the Company by a Sheriff at Glasgow Sheriff Court.
- 8.4 By letter 5 June 2009 the Secondary Complainer advised the Respondent of his appointment as Liquidator and requested copies of all documentation which the Respondent and his firm held in relation to the Company from its inception in 2002 until its liquidation. At the same time, a request was made for a copy of the firm’s client account for the period and a note of any funds held on behalf of the company by the Respondent and his firm or details of any company or person doing so. No response was received. By letter of 15th June 2009, the Secondary Complainer sent a reminder to the Respondent.
- 8.5 By letter of 18 June 2009, under reference NDC/SD the Respondent replied indicating that the Secondary Complainer’s request would involve time and expense. Assurances were sought by the Respondent that the Respondent’s firm’s costs in complying with the Secondary Complainer’s request would be met.
- 8.6 By e-mail of 22 June 2009, the Secondary Complainer contacted the Respondent requesting a quote in respect of the cost of providing the information previously requested. No response was received. By e-mail of 24 June 2009, The Secondary Complainer issued a reminder to the Respondent.
- 8.7 By email of 6 July 2009 the Respondent set out the various costs with a request for confirmation that the Secondary Complainer would meet those costs.

- 8.8 By e-mail of 6 July 2009 the Secondary Complainer responded with confirmation that he would be happy to meet the administrative costs incurred by the Respondent's firm. In addition, he stated that he would be happy to take direct delivery of the files if that would be more convenient for the Respondent.
- 8.9 By e-mail of 16 July 2009, the Respondent advised The Secondary Complainer that the exercise would be completed that day as the requested information had taken the firm's cashier some time to collate and that it would be forwarded to the Secondary Complainer after the "holiday weekend".
- 8.10 By letter of 28 August 2009, the Respondent was written to, advising that the information had yet to be received and unless it was received within the next 7 days, instructions had been given to raise the necessary proceedings in terms of Section 234(2) of the Insolvency Act 1986. By letter of 3 November 2009 a copy of the Sheriff Court Interlocutor dated 1 October 2009 and certified copy Note were sent by the Secondary Complainer's agent, Alistair Dean Law Practice Ltd, ("ADLP") to the Respondent's firm by recorded delivery post. By letter 16 November 2009 a copy of the Sheriff Court Interlocutor dated 12 November 2009 was sent by the Secondary Complainer's agent, Alistair Dean Law Practice Gowan, ("ADLP") to the Respondent's firm by recorded delivery post. That Interlocutor ordained the Respondent's firm to deliver all books, papers and/or records to The Secondary Complainer within 14 days of intimation of the said Interlocutor.
- 8.11 On 4 December 2009, the Respondent provided copies of ten relevant ledgers to the Secondary Complainer by e-mail. A further e-mail followed the same day with six further ledgers.
- 8.12 On 4 December 2009 the Secondary Complainer responded to the

Respondent's e-mails indicating that the information provided "does not even scratch the surface of the transactions in which you have been involved on the liquidated company's behalf, nor does it contain other than the minimum of detail on certain plot transactions". The Secondary Complainer required all information previously requested to be delivered to his office by the following Monday (7 December), failing which his agent would enrol a motion ordaining the Respondent to appear in Court to explain his failure to comply with the terms of the Court Interlocutor of 12 November 2009. That e-mail concluded by stating "I am extremely disappointed that you still fail to recognise that as former solicitors for the company, you owe me as Liquidator, a duty to provide this information as a matter of course".

8.13 On 7 December 2009, the Respondent delivered sixteen files to the Secondary Complainer's office by courier. The covering letter enclosing these indicated that the Respondent would check his firm's external storage facilities and advise if further files were held there.

8.14 By letter 8 December 2009 ADLP intimated, by recorded delivery, a motion to the Respondent to ordain his appearance at the Bar of the court to explain his failure to obtemper the Interlocutor of 12 November 2009.

8.15 By letter of 9 December 2009, the Secondary Complainer's agents wrote to the Respondent's firm, the letter bearing the Respondent's reference, seeking clarification that the Respondent considered he had delivered all the information required to comply with the terms of the Court Interlocutor of 12 November 2009. Said letter specifically indicated that the Respondent had failed to disclose whether or not his firm held funds on behalf of the company and sought clarification on this point. The letter

also indicated that instructions had been provided by the Secondary Complainer to proceed to lodge an amended motion against the Respondent for failure to comply fully with the terms of the Interlocutor. Said letter attached a list of transactions which appeared to consist of twenty six matters. Fifteen of the transactions listed appeared to correspond with the files provided by the respondent on 7 December 2009 in terms of paragraph 8.13 above. No response was received to the letter of 9 December 2009. The motion was intimated to the Respondent by recorded delivery letter of 16 December 2009.

- 8.16 The Respondent's failure to provide the required information requested by the Secondary Complainer impeded the Secondary Complainer from determining the validity of claims and potential recovery of assets. By letter 22 January 2010 the Secondary Complainer advised the Respondent of a Complaint he had intimated to the SLCC.
- 8.17 On 10 February 2010, Sheriff Officers intimated the Note and Motion to the Respondent's firm which had been lodged with Glasgow Sheriff Court compelling the Respondent's appearance at the Bar of the Court. Said motion was opposed by the Respondent.
- 8.18 By letter of 26 February 2010 a further Interlocutor dated 17 February 2010 from Glasgow Sheriff Court was intimated to the Respondent compelling the Respondent's attendance to appear and explain his failure to comply with the terms of the Interlocutor of 12 November 2009. The Court appearance was set for 8 March 2010.
- 8.19 By letter of 3 March 2010, the Secondary Complainer's agents wrote to the Respondent setting out information on which the Secondary Complainer considered to be outstanding. Said letter

refers to the solicitor's letter of 7 December 2009, bearing references from DARW002/2 to DARW0002/31 which indicated that a further fifteen files existed for which no information had been provided.

8.20 By letter of 4 March 2010, the Respondent wrote to the Secondary Complainer setting out a list of transactions where the Respondent had been instructed on behalf of the Company. Various explanations were provided, including:-

- DARW2/0003 – Development – The solicitor advised that the file had been amalgamated with a file which had already been delivered to The Secondary Complainer. A copy of the ledger was enclosed.
- DARW2/0005 – The solicitor had been unable to locate his file in storage, however no transaction was dealt with on the file and a copy of the ledger was enclosed.
- DARW2/0010 – Joint Venture – The matter did not proceed and the file was destroyed. A copy of the ledger was enclosed, showing no entries.
- DARW2/0011 – Sale Property 1– the solicitor had been unable to locate this file however a copy of the ledger was delivered to The Secondary Complainer under cover of the solicitor's e-mails of 4 December 2009.
- DARW/0015 – Dispute Company 2 – the dispute did not proceed to litigation and the file was destroyed, a copy of the ledger was enclosed showing no entries.
- DARW2/0019 – Joint Venture – site at Property 2 – the venture did not proceed. A copy of the ledger was enclosed.

- DARW2/0030 (20)– Purchase Property 3 - this transaction did not proceed and the file was destroyed. A copy of the ledger was enclosed.
- DARW2/0023 – Property 4 – A copy of the ledger was enclosed showing no entries.
- DARW2/0025 – Purchase, Property 5, The transaction did not proceed and the file was destroyed. A copy of the ledger was enclosed showing no entries.
- DARW2/0026 – Company 3 – The dispute did not proceed to litigation and the file was destroyed. A copy of the ledger was enclosed showing no entries.
- DARW2/0027 – Company 4 – the file had been located in storage and would be delivered to The Secondary Complainer the following day. A copy of the ledger was enclosed.
- DARW2/0016 – Purchase Property 6– the file had been located and was enclosed, together with a copy of the ledger.
- DARW2/0032 – Company 5 – the file had been located and was enclosed. However the transaction did not proceed and a copy of the ledger card was enclosed showing no entries.

8.21 By letter 5 March 2010 the Respondent produced to the Secondary Complainer the file DARW2/0027 detailed in the preceding article and a further file reference BRID0002/1.

8.22 The Respondent attended Court on 8 March 2010. On that date, the Secondary Complainer's agent, MacRobert's, provided the Respondent with a request for, *inter alia*, electronic records and

instances where the Respondent had confirmed that the relevant files had been destroyed. The Hearing was continued for two weeks.

8.23 By letter of 15 March 2010, the Respondent advised the Secondary Complainer, inter alia, that his firm did not maintain electronic files but had enclosed copy ledger cards previously.

8.24 By letter of 18 March 2010, the Secondary Complainer advised the Respondent that he still considered various matters had not been addressed including delivery of a file with reference DARW/2/005 which the Respondent had in his possession at the Court Hearing on 8 March 2010. The Secondary Complainer also noted that there were twelve DARW files which had not been delivered. It re-enforced that the Respondent had been asked to provide a full accounting for all sums which had passed through the Respondent's firm for the period of the Respondent's firm's dealings with the Company. The Secondary Complainer indicated that he held the Respondent personally responsible for the costs that had been incurred in recreating the Company's records and that the Respondent would be liable if his delays resulted in diminishing the value of the assets of the Company being made available to the creditors. The Secondary Complainer also stated "you are aware, I am sure, that Section 234 of the Insolvency Act 1986 does not limit my recovery of documents to those which you have deemed to allocate a Company 1 reference. You are not a solicitor responding to a client request but a party under the terms of the Insolvency Act withholding documentation to which I have a legal entitlement. You are also under instruction from the Court".

8.25 The Secondary Complainer's Court action against the Respondent called in Court on 29 March 2010 and this was continued until 29 April 2010. A report was provided to the

Secondary Complainer dated 30th March 2010. That included confirmation that the Respondent clarified that DARW2/005 related to a general file for dealing with correspondence regarding the Company from its Liquidation in June 2009 onwards.

8.26 By email 31 March and 6 April both 2010 the Secondary Complainer offered to meet with the Respondent on various dates. No response was forthcoming.

8.27 By letters 14 April 2010 the Secondary Complainer wrote to the Respondent and separately to the Respondent's partner, Mr A, given the lack of a response to his emails of 31 March and 6 April both 2010.

8.28 On 15 April 2010, the Respondent's agent contacted the Secondary Complainer's agent in order to attempt to progress matters.

8.29 On 21 April 2010, the Secondary Complainer's agent, MacRoberts, provided a further note to the Respondent's agent, detailing the matters which were considered to be outstanding. Nine different points were raised in that letter, including a request for various accounting for sums held on the company's behalf.

8.30 On 6 May 2010 a meeting took place between the Secondary Complainer, the Respondent and their respective agents to discuss outstanding matters.

8.31 By e-mail dated 6 May 2010 the Secondary Complainer's agent, MacRoberts, set out action to be taken and the steps the Respondent was to take to deal with such outstanding matters.

8.32 By letter of 25 May 2010, the Secondary Complainer's agent,

Macroberts, advised the Respondent's agent that an expenses award would be sought when the matter next called in Court; that without the assistance of the Respondent, the Secondary Complainer had established that £8,000 was held in a joint deposit by the purchaser's agent on behalf of the purchaser and the company in a transaction where the solicitor had been unable to provide the file (DARW2/0011). It also indicated that the Secondary Complainer had incurred work costing in the region of £40,000 recreating records requested from the Respondent.

8.33 On 7 June 2010, the matter again called in Glasgow Sheriff Court. The Respondent was found liable in the expenses of the Secondary Complainer's action.

**Law Society of Scotland – failure to respond re Company 1 –
The Secondary Complainer**

8.34 The Factual background in relation to Company 1 and the Secondary Complainer and the Respondent is detailed above.

8.35 By letter of 8 July 2010 the Complainers intimated the conduct complaint to the Respondent. That included a request for a response within 21 days, not only setting out the Respondent's position in respect of the complaint but also providing business files relative to the matter from which the complaint arose.

8.36 By letter of 29 July 2010 the Respondent *inter alia* requested further time to respond.

8.37 By letter of 3 August 2010, the Complainers extended the response time to 10th August 2010. No response was received.

- 8.38 By letter of 25 August 2010 the Complainers insisted on a formal response from the Respondent, with any relevant files “within the next 7 days”. No response was received.
- 8.39 By letter of 14 September 2010, the Complainers served a notice under Section 15(2)(i)(i) of the Solicitors’ Scotland (Act) 1980. No response was received.
- 8.40 By letter of 16 November 2010 a further Notice was served in terms of Section 15(2)(i)(i) of the Act and intimated a complaint of a failure to respond to the Respondent.
- 8.41 By letter of 13 January 2011 the Complainers wrote to the Respondent’s partner, Mr A, and the files were provided on 4 February 2011.

Law Society of Scotland – Financial Compliance Team - Failure to Respond

- 8.42 On 3 November 2009 the Complainer’s financial compliance team attended to inspect the books of the Respondent’s firm, Campbell Cathcart in terms of the Solicitor’s (Scotland) Accounts etc, Rules 2001.
- 8.43 At all material times, the Respondent was the designated Cash Room Partner of Campbell Cathcart.
- 8.44 On 2 December 2009 the Complainer’s financial compliance department (“FCD”) sent two letters to the Respondent seeking clarification of various matters raised during the inspection. One of those letters requested a response within 14 days and raised queries relating to the actings of both the Respondent and separately his partner, Mr A.

- 8.45 By telephone on 18 December 2009 Mr A advised the FCD that he would respond specifically to points raised in the letter of 2 December 2009 which related to his actions and that the Respondent would respond in relation to any queries in relation to the Respondent's clients. Mr A then corresponded on a regular basis with the FCD between 18 December 2009 and 1 April 2011.
- 8.46 By letter of 21 December 2009 Mr A advised the FCD, *inter alia*, "I am personally locating and considering other files referred to in your report, and expect very shortly to enable [the Respondent], the Cash Room Partner to reply to you as comprehensively as possible".
- 8.47 By letter of 11 March 2010 Mr A advised the FCD, *inter alia*, that he had been "pressing" [the Respondent] to reply to your letter.... I trust you will receive his reply very soon, as he has promised me on two or three occasions he would give a reply to your letter "priority" ".
- 8.48 In a further letter of 12 March 2010 Mr A indicated, *inter alia*, "I repeat that I have again reminded [the Respondent] as Cash Room Partner of his obligations to reply to your earlier omnibus letter".
- 8.49 On 17 March 2010, over three months after the letters of 2 December 2009, the Respondent provided his initial responses to the Complainers.
- 8.50 By letter of 30 March 2010, the FCD wrote to the Respondent, in response to letters received from the Respondent and Mr A, seeking further information and a response within fourteen days. While Mr A responded, the Respondent did not.

- 8.51 By letter of 30 April 2010, the Complainers wrote to the Respondent repeating the outstanding points and requesting a response within seven days, failing which the matter would be placed before the Guarantee Fund Committee to consider whether the Respondent's conduct ought to be the subject of formal complaint. No response was received.
- 8.52 By letter of 14 May 2010, the Complainers wrote to Mr A acknowledging information provided by him but indicating that as no substantive response had been received in respect of the outstanding items from the Respondent, the matter was being referred to the Guarantee Fund Committee. Said letter was copied to the Respondent.
- 8.53 By further letters of 21 and 23 July 2010, Mr A advised the Complainers that he was trying to deal with matters; that he had impressed upon the Respondent the importance of complying with the deadline and that the Respondent had already acknowledged that he had set such correspondence aside for a substantial period of time.
- 8.54 It was not until 29 July 2010, over seven months after the initial correspondence flowing from the inspection, that a response was received from the Respondent dealing with outstanding matters. That letter indicated that it had been prepared with the input of Mr A and the Respondent.
- 8.55 By letter of 3 August 2010 the Complainers confirmed to the Respondent that all outstanding matters had been dealt with but the Guarantee Fund Committee would still meet to consider if further action was required against the Respondent.

8.56 By letter of 2 March 2011 a conduct complaint was intimated to the Respondent. That letter requested a response within 21 days. No response was received.

8.57 By letter of 5 April 2011 a Notice was sent to the Respondent in terms of Section 15(2)(i)(i) of the Solicitor's (Scotland) Act 1980. No response was received.

8.58 By letter of 30 June 2011 a further Notice under Section 15(2)(i)(i) of the Solicitors (Scotland) Act 1980 was intimated to the Respondent along with a further complaint of failing to respond to the Complainers.

8.59 Neither of the Notices were returned as undelivered.

9. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in respect of:

9.1 His failure to communicate effectively and appropriately with the Secondary Complainer, Mr McGruther, the Liquidator of the Respondent's client, Company 1.

9.2 His failure and/or unreasonable delay in responding to the Law Society in the investigation of the complaint by the Secondary Complainer.

9.3 His failure and/or unreasonable delay in responding to the Financial Compliance Department of the Law Society

10. The Tribunal noted the terms of the letter dated 9 January 2012 from the Secondary Complainer detailing the losses incurred by him as liquidator. The Tribunal noted that the Respondent accepted that the letter indicated that the Secondary Complainer had incurred costs in the region of

£40,000 recreating records requested from the Respondent. The Tribunal further noted that Mr Brown accepted on behalf of the Respondent that there would be a causal link between the Respondent's failures and some increased costs for the liquidator and that it was open to the Tribunal to make a compensation award.

11. Having heard Counsel for the Respondent in mitigation and having noted two previous findings of professional misconduct against the Respondent, the Tribunal pronounced Interlocutors in the following terms:-

Edinburgh 23 January 2013. The Tribunal having considered the Complaint dated 7 February 2012 at the instance of the Council of the Law Society of Scotland against Norman Douglas Paton Cathcart of Campbell Cathcart, 3 Lynedoch Place, Glasgow; Find the Respondent guilty of Professional Misconduct in respect of his failure to communicate effectively and appropriately with the Secondary Complainer, the liquidator of his client, Company 1, his failure and/or unreasonable delay in responding to the Law Society in the investigation of the Complaint made by the Secondary Complainer and his failure and/or unreasonable delay in responding to the Financial Compliance Department of the Law Society; Suspend the Respondent from practice for a period of 3 years and Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this suspension shall take effect on the date on which the written Findings are intimated to the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; excluding the expenses of the abortive hearing on 24 May 2012 and with an abatement of 25% of the expenses of the hearing on 23 January 2013;

and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Alistair Cockburn

Chairman

Edinburgh 23 January 2013. The Tribunal having considered the Complaint dated 7 February 2012 at the instance of the Council of the Law Society of Scotland against Norman Douglas Paton Cathcart of Campbell Cathcart, 3 Lynedoch Place, Glasgow; Ordain the Respondent to make payment to the Secondary Complainer, Mr Duncan Donald McGruther of Mazars, 90 St Vincent Street, Glasgow as liquidator of Company 1 in the sum of £5000 in respect of loss and inconvenience arising from the misconduct and that within 28 days of the date on which this Interlocutor becomes final with interest thereon at the rate of 8% per annum from the due date until paid.

(signed)

Alistair Cockburn

Chairman

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

There had been a hearing in respect of the Complaint on 24 May 2012 where the Respondent pled guilty to professional misconduct and Findings were issued by the Tribunal. After the Findings had been issued but before the Findings became final, it came to light that due to an administrative oversight, the Chairman presiding at the hearing on 24 May 2012 had not been a member of the Tribunal at the time, his appointment having expired and having not at that time been renewed. To cure this defect it was suggested that the matter be re-heard before the same Tribunal so that the previous Findings could be validated. The Respondent however did not agree to this course of action and accordingly the matter was set down before a completely different Tribunal on this date.

Mr Brown, Counsel for the Respondent, lodged a preliminary motion a matter of days before the hearing challenging the competency of the Tribunal to deal with the matter. The Tribunal accordingly firstly heard submissions on this motion.

SUBMISSIONS FOR THE RESPONDENT IN RESPECT OF THE TRIBUNAL'S POWERS TO DEAL WITH THE CASE

Mr Brown submitted that the purported decision of the Tribunal issued on 24 May 2012 could not take effect and that the Tribunal did not have power to correct the defect in this previously issued Interlocutor. Mr Brown clarified that it was not contended that this would result in the Respondent not having to face the charges of professional misconduct but the Tribunal had no power to set aside a previous decision and it was only the Court of Session in terms of Section 54(1F) of the Solicitors (Scotland) Act 1980 that had power to do this. The Chairman pointed out that in terms of this section an Appeal had to be made to the Court of Session within 21 days of the issue of the purported decision in May. The difficulty came to light before the 21 days was up. Mr Brown submitted that if there was no statutory appeal the matter could be dealt with by Judicial Review or a petition to the nobile officium to have the judgement quashed. Mr Brown submitted that the Tribunal could not revisit its own decision. Mr Brown referred to a previous instance a number of years ago when the start date of a restriction in a Tribunal Interlocutor was taken to the

Court of Session to get round a difficulty caused by a delay in the issue of the Tribunal Findings. He however accepted that there was no question of the Interlocutor being invalid on that occasion. Mr Brown submitted that the Interlocutor of 24 May 2012 was *ex facie* valid because the other three members were members of the Tribunal at the time. The Court of Session would have to reduce the Interlocutor as the Tribunal could not do this. Mr Brown referred to the case of *A C Whyte* where the Ombudsman had invited the Law Society to reconsider their decision and the Appeal to the Tribunal was accordingly overtaken by this. It was held in this case that the Law Society did have an inherent power to reconsider its decision which meant that the new decision superseded the first one. The Tribunal however did not have this power under the statute. Mr Brown said that he understood that there had been some other cases affected by the Chairman's lapsed appointment but these had been resolved because the parties had given an express informed waiver but this had not happened in this case. Mr Brown stated that if this matter went to the Court of Session it would not be protracted because all the parties would agree that the matter should be remitted to the Tribunal.

SUBMISSIONS FOR THE COMPLAINERS IN RESPECT OF THE TRIBUNALS POWERS TO DEAL WITH THE CASE.

Ms Motion stated that in this case there was no Interlocutor and no valid Findings and accordingly there is nothing to appeal / reduce / take to the Nobile Officium. The Chairman sitting on 24 May 2012 was not a member of the Tribunal at the time. According to Schedule 4 of the Solicitors (Scotland) Act 1980 the Tribunal, to be validly constituted, has to have four members sitting, being two solicitor members and two lay members. The Tribunal on 24 May 2012 did not have four members and did not have two solicitor members. The Chairman who had signed the Interlocutor was not a member of the Tribunal at the time and accordingly the Interlocutor could not be valid. Ms Motion stated that the saving provisions in paragraph 1B of Schedule 4 to the 1980 Act did not apply as they were there to deal with a situation where there was some defect in the appointment of a member not a situation where the member was not a member at all at the time. Ms Motion referred the Tribunal to the case of *DJL-v-Central Authority* (2001) 201 CLR 226. Ms Motion submitted that it was perfectly in order for the Tribunal to proceed to hear the case afresh now. Ms Motion also

referred the Tribunal to the case of *Young-v-The Law Society of Scotland* where the Court of Session had found that the 21 day period for lodging an Appeal could not be extended, although she conceded that this was prior to the 2007 Act being brought into force and the matter had not been tested since. Ms Motion submitted that if paragraph 1B was given a wider interpretation it would cure any invalidity and there would be no point in having provisions in the legislation about being quorate.

DECISION IN RESPECT OF PRELIMINARY POINT RAISED

The Tribunal considered that the Interlocutors and Findings issued by the Tribunal following the hearing on 24 May 2012 were either a decision or they were not. The Tribunal did not consider that there could be any such thing as a purported decision as referred to by Mr Brown. The Tribunal which sat on 24 May 2012 was not properly constituted in terms of Schedule 4 to the Solicitors (Scotland) Act 1980. The Tribunal's view accordingly is that the Findings and the Interlocutors flowing from that hearing are a nullity and there is no Interlocutor or decision which would require to be quashed. The Tribunal's view is that the matter reverts to the position immediately before the hearing on 24 May 2012. Fresh notices of hearing were issued for the Tribunal on today's date, 23 January 2013 and the Tribunal considered that it was open to it to use its own powers of procedure to cause the hearing to take place on this date. The Tribunal accept that once it has issued a valid decision it is functus and it cannot vary or quash a previous decision issued by it. However in this case there is no valid decision to be quashed. The Tribunal did not consider that paragraph 1B of Schedule 4 to the 1980 Act applied as it is there to deal with technical defects. In any event, if it did apply and cured the defect in the constitution of the Tribunal on 24 May 2012, the Findings of that Tribunal would stand and could not be challenged on the basis of competency.

The Tribunal was reinforced in its decision by the fact that unnecessary delay and expense in justice would occur if the matter had to be taken to the Court of Session merely to be remitted back to the Tribunal on a future date to do what it proposes to do on this date.

The Tribunal proceeded to invite submissions from parties in respect of the substantive case.

After allowing Mr Brown an adjournment to discuss matters with his client, the Tribunal reconvened and Mr Brown advised that the Respondent pled guilty to the averments of fact, averments of duty and averments of professional misconduct in the Complaint. Mr Brown advised that the findings in fact made by the previous Tribunal would be identical to what he was asking the Tribunal to find today. It was confirmed that the Respondent was pleading guilty to the slightly amended Complaint, a further amendment being made to paragraph 2.16, which was agreed.

SUBMISSIONS FOR THE COMPLAINERS

Ms Motion explained that the Secondary Complainer was not in attendance as he had now retired but he was not a Secondary Complainer in his capacity as an individual but as the liquidator of Company 1. Mr B was the new liquidator but was unable to attend today due to the weather conditions.

Ms Motion stated that the Joint Minute previously signed was being adhered to. Ms Motion submitted that the Respondent's failings in respect of his non-cooperation with the liquidator occurred between June 2009 and June 2010. There was an initial flurry of activity in 2009 but a court action was required and the Respondent was found liable in the liquidator's expenses of the process. Expenses were awarded on a party and party basis and were paid in March or April 2012. A lot of time, work and expense was required to obtain the Respondent's cooperation. The Secondary Complainer estimated that around £40,000 of costs were incurred as set out in his letter at Production 62. The Respondent then went on to fail to respond to the Law Society between July 2010 and July 2011 which was a period following on from his failure to respond to the Secondary Complainer. He also failed to respond to the financial compliance department between December 2009 and June 2011.

Ms Motion drew the Tribunal's attention to the two previous sets of Findings against the Respondent. She submitted that this showed a repeated trend of failure to deal with matters. Ms Motion stated that due to the Respondent's procrastination the

public required protection and that in all the circumstances his conduct should be viewed as being very serious.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown stated that it was accepted that there were three strands to the professional misconduct in this case which made it significant. The Tribunal had made it clear that failure to respond to the Law Society would not be tolerated. Mr Brown submitted that there were underlying background factors in this case and that the Respondent had failed to face up to and deal with matters. Matters were put to one side and before you knew it months had passed.

In connection with the failure to respond to the liquidator, Mr Brown explained that Company 1 was a property development company on a reasonably substantial scale. There was also a fringe of related interests and other companies which overlapped and related to each other. The Secondary Complainer was the liquidator of Company 1 only and not the other companies connected with it. It was accepted that the first response to the liquidator was insufficient. The Respondent perhaps should have responded to claim confidentiality in some of the cases. Once the liquidator had confirmed that he would meet the Respondent's expenses, the Respondent should have produced the information requested. It however became clear that much of what was not sent would not have been of any use anyway. Mr Brown however stated that it was accepted that it was not for the Respondent to decide this.

Mr Brown referred the Tribunal to Article 2.20 of the Complaint which narrated what was not sent. Mr Brown submitted that these were small files with a nil balance ledger where no litigation had taken place. Mr Brown stated that by this time the seeds of mistrust had been sewed and the Secondary Complainer had concluded that items of value were being withheld but everything of substance had already been delivered by December 2009. Mr Brown stated that it was accepted that the liquidator was entitled to the other files but they were just historic relics. The liquidator promptly resorted to the court. The Sheriff requested a list of outstanding papers. Some of these comprised papers the liquidator may not have been entitled to.

Expectations of the liquidator were massively greater than they should have been. Expenses of the court action were awarded because the Respondent accepted that the liquidator did not get all he was entitled to. The Sheriff however refused expenses on an agent client basis and only awarded on party party. The Chairman queried, given the amount of expenses awarded, as to whether there were other issues. Mr Brown advised that the account was taxed at £4347. The Chairman queried as to how that amount would have been reached without a lot of action being necessary by the liquidator. Mr Brown stated that the Sheriff ordained the liquidator to produce a list of what he needed.

The Chairman queried as to whether Mr Brown was saying that the Respondent took a conscious decision not to produce documents because the liquidator was not entitled to them or whether the Respondent did not produce the documents because he could not be bothered and due to his medical condition. Mr Brown stated that he was saying both. He explained that once the process continued the Respondent did start to say that the liquidator was not entitled to certain matters but this was not the case with the original response which was just superficial and not reasoned.

Mr Brown referred the Tribunal to Respondent's Production 4, being his letter of 4 March 2010, which showed a level of detail in his response. Mr Brown stated that it was accepted that the Respondent should have provided this information in response to the original request. Mr Brown however stated that despite this letter the liquidator still asked for more and there was fault on both sides. The Chairman queried the meaning of the ledger attached to the letter which appeared to have been created in August 2007 by the Respondent, which showed different matters having the same number. The Chairman also asked why the Respondent did not get a report from his financial system showing a list of all the files held etc. Mr Brown said that the Respondent did not have his eye on the ball and had not thought properly about what he required to do. The 2007 ledger was historical. Mr Brown stated that it was accepted that the Respondent could and should have produced a list of all the transactions and files and ledgers etc but that there was a lot going on in the Respondent's life at the time.

The Chairman asked for clarification as to whether or not the Respondent was saying that the liquidator was not entitled to some of the documents asked for, as this would be mitigatory but the Chairman could not see anything in the productions which showed that this was the position. Mr Brown referred to Production 2, being the letter of 8 December 2009 when the Respondent sent 16 files to the liquidator. He also referred to the third paragraph on the last page of the letter of 4 March 2010 where the Respondent states that he did not act for Company 1 in connection with that particular transaction. In response to a question from a Tribunal member, it was confirmed that no further files were delivered after the court case and the production of the list by the liquidator. It was clarified that the 16 files initially produced after 6 months had been in the Respondent's office. The Chairman questioned as to whether this was a deliberate act of not getting the files. Mr Brown stated that towards the end of the process it was protracted by the liquidator's conspiracy theory idea.

In respect of the failure to respond to the Law Society, Mr Brown stated that the Respondent had his head in the sand and refused to face up to matters. Mr Brown referred the Tribunal to the medical report and stated that the Respondent was dealing with mounting stress in a recession, was working long hours, had a large Court of Session litigation which was ongoing and was suffering from fatigue and insomnia. His wife also had health difficulties. The Chairman queried if this was the case why there was little mention of the Respondent's ill health in the references provided which stated that the Respondent was doing a good job and dealing with his work very competently and efficiently. Mr Brown stated that it was not uncommon for people in the Respondent's situation to be able to deal with some things but not others. The Respondent prioritised ongoing client business rather than responding to the liquidator or the Law Society but this only made matters worse. Mr Brown stated that he could not avoid the fact that there were previous Findings against the Respondent which were analogous. They related to failure to record deeds, failure to respond to clients and the Law Society and failure to take remedial action in connection with a standard security. Mr Brown advised that the Respondent was a principal in practice in a two partner firm. Both he and his partner were nearing retirement age and he had commenced discussions with another firm about being taken on as a consultant. This firm however was looking to merge with another firm and it was accordingly not possible to make much progress with this at present.

Mr Brown stated that the procedural irregularities had had regrettable consequences. The liquidator had issued a circular which the Respondent considered to be in defamatory terms and contained inaccuracies, after the first set of Findings were issued. The Respondent had suffered a loss of business and required to make arrangements to deal with his firm. Mr Brown suggested that the Tribunal leave the Respondent as a principal in private practice and deal with the matter by way of a Censure and a fine. If the Tribunal considered a restriction necessary, Mr Brown asked that the Respondent be allowed a period of grace.

In connection with compensation, Mr Brown stated that the Respondent's failures were conceded and that it could be seen that, however one categorised the later stages, the failures were made at the turn of the year. The Secondary Complainer had had to put a note to the court and although the expenses had been awarded on a party and party basis there would be further costs. Mr Brown also stated that it was accepted there was a causal link between the Respondent's failures and an increase in costs to the liquidator. Mr Brown stated that it was open to the Tribunal to award compensation but that the Secondary Complainer had made extravagant suggestions with regard to the amount of the costs. The Chairman stated that the liquidator would have had to have had correspondence with creditors in connection with the delays and that if the hourly rate was £300 it would only take 17 hours to get up to the maximum amount of compensation that the Tribunal could award. Mr Brown stated that the irrecoverable amount of expenses by the liquidator taxed off in the court case were £2258. Mr Brown stated that it was accepted that the liquidator and his staff would have been involved in time taken up in instructing the matter and reviewing the files etc. Mr Brown said that it would not be helpful to anyone if the matter was deferred to have an enquiry in detail into the amount of compensation. He stated that in the circumstances he would not dissent from the Tribunal making its own assessment of compensation due.

Ms Motion stated that the productions gave a full and complete picture with regard to the scenarios. The note was put to the court in November 2009 and the files were produced after that. Ms Motion referred to the liquidator's list and stated that some of these files were legitimately asked for. She referred to Production 62 being the letter

from the liquidator showing what he had to do to put matters together. Production 18 was a list of the matters still outstanding. Ms Motion suggested that the Tribunal could award compensation.

DECISION

The Tribunal was extremely concerned by the Respondent's conduct and had no hesitation in making a finding of professional misconduct in terms of the Sharp test. The Respondent failed to communicate effectively with an officer of the court causing significant problems both in terms of cost and time for the liquidator in trying to sort matters out. The Respondent's failure to communicate effectively caused a member of another profession and the creditors of Company 1 unnecessary difficulties. The Respondent's conduct is also aggravated by his failure to respond to the Law Society when they were investigating the matter and his failure to respond to the Financial Compliance Department of the Law Society.

The Tribunal was concerned to note that the two previous Findings of misconduct against the Respondent are analogous. This shows a pattern of behaviour since 2002/2003 of failure to respond and procrastination. Clients, a liquidator and the Law Society were all reasonably entitled to information and yet the Respondent did not deal with matters and failed to provide them with the information they required. The Tribunal took account of the psychiatric report lodged which, to some extent, would be based on what the Respondent told the psychiatrist. The Tribunal however also noted that the Respondent had not been seeing his GP with regard to a mental health condition and was not on any medication for this at the time. The Tribunal also noted that the references lodged make no mention of the Respondent having a difficulty in dealing with matters and in fact state that he is capable of dealing with his work in a very satisfactory manner. Whilst the Tribunal accept that depression may result in the Respondent being able to deal with some matters but not others, the plea in mitigation made on the Respondent's behalf was somewhat confused in respect of whether the Respondent's reason for failure to respond was just due to his depression or because he decided that some of the documents should not be given to the liquidator.

The Respondent's representative asked the Tribunal to deal with the matter by way of a Censure and a fine. His representative however did not in any way address the Tribunal in connection with the risk to the public if the Respondent was allowed to continue in practice. The Tribunal considered that the Respondent had not shown any real insight into what went wrong and has not expressed remorse. The Respondent has also not made any constructive suggestions about how he would ensure that nothing like this would happen again if he continued in practice. The Tribunal consider that this Complaint on its own would merit a Restriction on the Respondent's practising certificate. However when taken together with the two previous Findings of professional misconduct, from which it appears that the Respondent has not learnt anything, the Tribunal consider that public confidence in the profession would be undermined if the Respondent was not Suspended from practice. The Tribunal also Directed under Section 53(6) of the Solicitors (Scotland) Act 1980 that the suspension will take effect on the date that the Findings are intimated to the Respondent. This is to ensure protection of the public from the danger of the Respondent continuing in practice any longer.

In connection with compensation, the Tribunal note that parties have left it open to the Tribunal to decide what would be appropriate. In respect of the facts found, it is clear to the Tribunal that the Secondary Complainer, as liquidator of Company 1, was involved in a lot of extra time and expense in trying to sort matters out. This was directly attributable to the Respondent's failure to produce everything the liquidator required timeously. In the Tribunal's view the time and expense would not be less than the maximum £5000 which the Tribunal can award and the Tribunal accordingly awarded a sum of £5000 by way of compensation. This is awarded to the Secondary Complainer in his capacity at the time as liquidator of Company 1.

The Tribunal then heard submissions on publicity and expenses. No submissions were made in connection with publicity. In connection with expenses. Mr Brown stated that due to the abortive hearing on 25 May 2012, which was not the Respondent's fault, his expenses had been increased and he asked for expenses to be moderated in the circumstances. He also asked that there be no finding of expenses in respect of the abortive hearing. Ms Motion asked for expenses in the usual way.

The Tribunal considered that it would not be possible to make any kind of award of expenses in respect of the abortive hearing on 24 May 2012 as this was a nullity. In connection with today's hearing it was of no fault of the Law Society or the Respondent that there had to be a second hearing. Despite the Respondent not being cooperative in having matters sorted out with speed and at minimal expense, the Tribunal agreed to an abatement of 25% in the expenses of today's hearing. The Tribunal made the usual order with regard to publicity.

Chairman