

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL**

F I N D I N G S

in Complaint

by

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, 26
Drumsheugh Gardens, Edinburgh**

against

**ALEXANDER GILMOUR
MALCOLM, Solicitor, formerly of
23 Tarvit Drive, Cupar and now
residing at 14 Melgund Place,
Lochgelly, Fife**

1. A Complaint dated 9th August 2006 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Alexander Gilmour Malcolm, Solicitor, formerly of 23 Tarvit Drive, Cupar and now residing at 14 Melgund Place, Lochgelly, Fife (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 Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
3. In terms of its Rules the Tribunal appointed the Complaint to be heard on 28 September 2006 and notice thereof was duly served on the Respondent. The case was adjourned to 14th December 2006.

4. When the Complaint called on 14 December 2006 the Respondent was present and represented himself. The Law Society were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The matter was adjourned in the interests of justice on the Respondent's motion as Tribunal members had seen a Reporter's report which should not have been included in the papers. It was adjourned to 16 January 2007.
5. When the Complaint called on 16 January 2007, the Law Society were represented by their Fiscal, Paul Reid, Solicitor, Glasgow. The Respondent was present and represented himself. A Joint Minute had been lodged on 14 December 2006 admitting some of the facts in the Complaint. The Complainers led the evidence of one witness and the Respondent gave evidence of on his own behalf.
6. The Tribunal found the following facts admitted or proved.
 - 6.1 The Respondent was born 15th July 1952. He was admitted as a Solicitor on 10th September 1976. He was enrolled as a Solicitor in the Register of Solicitors in Scotland on 30th September 1976. Following his admission as a Solicitor, the Respondent obtained employment with the firm Campbell Brooke & Myles, Solicitors from 1st April 1984 until 31st December 1998. Thereafter he was a partner in the firm of R & J Burns & Company from 1st January 1999 until 11th May 2001. Thereafter he was a partner in the firm Messrs Clark & Ross, Solicitors from 14th May 2001 until 31st October 2001. From 1st November 2001 until 31st May 2002 he was a Consultant with the firm, J & G Wilson, Solicitors. He was thereafter a partner in the said firm J & G Wilson, Solicitors from 1st June 2002 until 30th September 2003. From 1st October 2003 until 3rd September 2004 he became an employee of the said firm J & G Wilson, Solicitors. The Respondent is not presently practicing as a Solicitor.

6.2 Mr & Mrs A

Mr & Mrs A reside at Property 1. On or about 24th April 1992 Mr & Mrs A were involved in a road traffic accident in which there was a fatality. As a result of the road traffic accident, Mr & Mrs A suffered serious injury. They consulted with the Respondent and instructed him to act on their behalf in pursuit of a claim for compensation as a result of their loss. The Respondent accepted these instructions. Of significance to this Complaint, during the currency of his instruction, the Respondent was associated with a number of different firms of Solicitors, in particular:-

- (a) He was a Partner in the firm Campbell Brooke & Myles, from 1st April 1984 to 31st December 1998.
- (b) He was a Partner in the firm R & J Burns & Co from 1st January 1999 to 11th May 2001.
- (c) He was a Partner in the firm of Clark & Ross, Solicitors from 14th May 2001 to 31st October 2001.
- (d) He was a Consultant in the firm J & G Wilson from 1st November 2001 to 31st May 2002.
- (e) He was a Partner in the firm J & G Wilson from 1st June 2002 until 30th September 2003.
- (f) He became an employee of the firm J & G Wilson from 1st October 2003 until 3rd September 2004.

From the date he was first instructed by Mr and Mrs A until 1st October 2003, the Respondent was associated with a number of different Solicitor firms either in the capacity as Partner or Consultant. In that role he would be expected to

work as a principal and not be subject to the normal standards of supervision expected of an employee.

- 6.3 Following his instruction, the Respondent failed to properly and competently pursue the claim for reparation on behalf of his clients, Mr and Mrs A. He failed to deal with his clients affairs or to bring the matter on their behalf to a conclusion. As a result of their dissatisfaction, the clients complained to the Law Society on 8th October 2004. In the course of their investigation it was necessary for the Law Society to correspond with the Partners of the various firms with which the Respondent was associated during the currency of his instruction on behalf of Mr and Mrs A. In pursuit of this investigation the Law Society recovered the various paper files maintained by the Respondent during the currency of his instruction. This examination revealed that the Respondent had failed to properly manage the affairs of his clients, to competently deal with the matter in which he was instructed and an abject failure on his part to pursue the claim properly or to endeavour to bring the matter to a conclusion.
- 6.4 At the time of instruction, the clients were led to believe that an application had been submitted on their behalf for Civil Legal Aid to meet the cost of pursuing the litigation. Despite this belief, the Respondent failed to advise his clients that Legal Aid had not been applied for. The clients had attended at the office of the Respondent and completed and signed the Legal Aid Application Forms. They were assured by the Respondent that the Legal Aid Application Forms would be submitted to the Scottish Legal Aid Board. They heard nothing further from the Respondent and believed that Legal Aid had been granted. Examination of the file operated by the Respondent revealed that the Legal Aid Application had been refused. There was nothing on the files to suggest that

the refusal of Legal Aid had been intimated by the Respondent to his clients. This is of particular significance given that not only does legal aid fund the cost of legal representation on behalf of a client but in the event of a failure of a court action, the normal rule is that the individual enjoying the benefit of a Legal Aid Certificate will not be found liable for the expenses of the process in which they are involved. As a consequence of the Respondent's failure to advise his client that Legal Aid had been refused, not only were they left in the belief that they enjoyed the benefit of a Legal Aid Certificate, they were also exposed to considerable risk insofar as the potential award of any expense is concerned. Applications for Legal Aid were submitted by the Respondent on 20th April 1995. Certificates in terms of Regulation 18, dealing with emergency Legal Aid cover, were issued by the Scottish Legal Aid Board on 11th May 1995. A subsequent application for full Legal Aid was submitted by the Respondent on 16th May 1995. This was returned by the Legal Aid Board to the Respondent advising that it could not be registered for a number of reasons relating to the competency of the application submitted by the Respondent. Such were the number and variety of reasons for rejection, the application submitted by the Respondent was clearly incompetent. There was no application submitted for Mrs A. There was no Memorandum for Legal Aid, the Memorandum had neither been signed nor dated and the intimation forms for opponents were missing. This rejection and the reasons therefore were not conveyed by the Respondent to his clients. No attempt or effort was made by the Respondent to rectify matters. The clients at that time were in receipt of Income Support. In these circumstances if the Legal Aid Application had been properly completed, it is possible that it would have been granted.

- 6.5 The Respondent was employed as a Partner with the firm Campbell Brooke Myles, Solicitors from 1st April 1994 to 31st December 1998. Whilst a Partner in that firm, he acted on behalf of Mr and Mrs A. Following his departure, efforts were made by the remaining Partners to recover outlays incurred by the firm on behalf of Mr and Mrs A. These outlays amounted to £857.98. Despite their efforts, the outlays have never been recovered. No fee had been prepared by the Respondent or intimated to Mr and Mrs A. Little, if any work, was carried out by the Respondent on behalf of Mr and Mrs A during his appointment as Partner with this firm. The file reveals a lack of urgency or focus on the part of the Respondent in his approach to the claim. Any progress arose as a result of a reaction on the part of the Respondent to correspondence from his opponents rather than to him assuming the initiative. On 20th September 1995 the insurers' Solicitors wrote to the Respondent suggesting a meeting to progress matters. It was suggested that the meeting take place in Glasgow. The Respondent replied that he had no plans to attend Glasgow. The Respondent allowed considerable inactivity to take place on his file. Nothing was accomplished until 2nd September 1996 when the Respondent eventually managed to attend a meeting with the insurers' Solicitors. This inordinate delay is an example of the inactivity and lack of attention given to the subject matter at hand by the Respondent.
- 6.6 A review of the file revealed that the Respondent clearly lacked the appropriate expertise and experience to deal with the particular matter at hand. He sought advise from junior members of staff asking them if they could recollect basic principals from their Law School lectures. His lack of expertise and competence was amplified in the pointless correspondence he engaged with the insurance company

Solicitor allowing the claim to be delayed unnecessarily. The file records maintained by the Respondent were incomplete and inaccurate. Copies of significant correspondence, referred to in other correspondence were not kept on the file. Reports of meetings were inadequate. Records of meetings were absent. Telephone conversations were noted incorrectly. The file was littered by examples of correspondence ignored by the Respondent and failure on his part to accept telephone call enquiries or to return these enquiries. The client concerned at the inactivity in relation to pursuit of the claim wrote to the Respondent cajoling him to progress matters. On 18th August 1995 the court action had been sisted. The clients wrote to the Respondent instructing that the sist be recalled and the claim pursued. This instruction was acknowledged by the Respondent on 2nd June 1998. Despite this acknowledgement nothing was done in connection with the clients' instructions. On 9th September 1998 the clients again wrote to the Respondent assuming in this correspondence that the sist had been recalled. As late as 22nd January 2003 the sist still had not been recalled. No explanation had been provided by the Respondent to his clients explaining why he was ignoring their instruction or why the sist had to remain in place. No explanation was tendered by the Respondent to his client explaining what was being done by him on their behalf at this particular time.

6.7 The Respondent was a Partner in the firm R & J Burns & Co. That firm ceased business on 31st October 2004. The Respondent spent 26 months as a Partner with the firm. During that period the Respondent continued to act on behalf of Mr and Mrs A. Examination of the file operated by the Respondent during this period revealed that he failed completely to progress the case on behalf of his clients. The file comprised correspondence from Mr and Mrs A

complaining about the inordinate delay and lack of obvious progress. The file revealed a failure on the part of the Respondent to reply to their enquiries or offer an explanation as to the inattention of lack of pursuit of the claim on their behalf.

6.8 The Respondent was a Partner in the firm of Clark & Ross, Solicitors for a period of 5 months. The Respondent continued to act for Mr and Mrs A during this period. An examination of the file operated by the Respondent during this period revealed a failure on his part to advise the firm Clark & Ross that he had continued to act on behalf of Mr and Mrs A or that the court action that had been raised, was being transferred to the agency of that firm. The Respondent failed to set up or maintain proper client records in connection with Mr and Mrs A. Once again, no progress at all was made by the Respondent during his period with this firm to pursue the claim on behalf of Mr and Mrs A. The client wrote repeatedly to the Respondent complaining at the failure to progress matters. No reply was made by the Respondent to their enquiries.

6.9 The Respondent was appointed a Consultant to the firm J & G Wilson on 1st November 2001. From that date until 3rd September 2004 the Respondent was associated with the firm initially as a Consultant, then a Partner and latterly an employee. During this period the Respondent continued to act on behalf of Mr and Mrs A. He failed to inform the firm J & G Wilson that he was acting on their behalf or that the agency in relation to the existing court action was being transferred to that firm. He failed to advise Mr and Mrs A that their affairs were being transferred and dealt with by that firm. He failed to set up and maintain proper client records concerning the affairs of Mr and Mrs A. Outlays incurred

by the Respondent whilst associated with a previous firm of Solicitors were not transferred to Messrs J & G Wilson. He was associated with the firm J & G Wilson for a period of 35 months. During that period the Respondent failed to progress the claim on behalf of Mr and Mrs A. During that period the Respondent failed to keep Mr and Mrs A fully informed as to development and progress in relation to their claim. The clients were concerned at the lack of progress and inactivity on the part of the Respondent in dealing with their affairs. From at least September 1995 and glaringly from 7th February 2003 onwards, the clients repeatedly wrote and telephoned the Respondent to ascertain what progress was being made. From 7th February 2003 the file operated by the Respondent revealed no communication by the Respondent with his clients. The file contained no evidence of any action taken by the Respondent to prosecute and further the claim nor any communication from him to his clients explaining why there was a delay or the manner in which or by whom their affairs would be dealt with. Inordinate delay had already occurred in relation to the prosecution of the claim. These delays were exacerbated by the Respondent's failure to properly progress the claim or report to his clients. On 18th August 1995 the court action, which had been raised, was sisted. The Respondent apparently was endeavouring to identify a firm of Solicitors acting on behalf of surviving relatives of the third party. A firm of Solicitors wrote to the Respondent indicating that they were not instructed. On 7th February 2003 the Respondent wrote to Mr and Mrs A advising that he was making further enquiries concerning the whereabouts of the surviving relatives. Examination of the file revealed thereafter no further work was carried out by the Respondent in respect of the claim. No effort was made by him to progress the claim on behalf of his clients. The file is evident of a failure on the part of the Respondent to answer or

return telephone calls or correspondence from his clients. It is clear during the currency of his instruction that the Respondent failed to maintain effective communication with his clients. The association of the Respondent with the firm J & G Wilson terminated on 3rd September 2004. The Respondent at that date still had not advised Messrs J & G Wilson that this firm had assumed agency on behalf of Mr and Mrs A. Following the termination of his association, the Respondent did not advise Mr and Mrs A of his departure. He made no arrangements to explain to them as to how their claim would be pursued further, who would be dealing with it and who they should contact in the event of enquiry. The Respondent simply abandoned Mr and Mrs A with no legal representation.

- 6.10 During his period of association with the firm J & G Wilson, the Respondent failed to create and maintain proper client records which would have identified Mr and Mrs A as being clients of that firm. Given the manner in which the Respondent failed to deal with the claim on behalf of Mr and Mrs A and their repeated letters of enquiry expressing concern at the delay, Mr and Mrs A wrote to the Senior Partner of the firm J & G Wilson on 20th April 2004 registering a Complaint at the inactivity on the part of the Respondent. The Respondent thereafter replied to the client by way of a handwritten note maintaining that the Senior Partner had asked him to provide the clients with a response. The Respondent's letter to Mr A of 30th April 2004, a Friday, was handwritten prior to the Respondent's departure on holiday with his wife. The letter was one of many items of correspondence to be dealt with by the Respondent, prior to his departure. The Respondent even called at the office on Sunday, 2 May, 2004, en route to Glasgow Airport, to finalise matters.

7. Having considered the foregoing circumstances the Tribunal unanimously found the Respondent guilty of Professional Misconduct in respect of his failure to actively prosecute a claim on behalf of his clients, his failure to deal competently with the matters at hand, his disguising his incompetence by his failure to inform his clients as to progress or lack thereof with the claim, his failure to reply to the repeated enquiries made of him by his clients, his failure to submit a competent proper Legal Aid application and his allowing an excessive inordinate and unreasonable delay to occur in the prosecution of his clients claim, all contrary to Articles 5 and 7 of the Code of Conduct for solicitors holding practising certificates issued by the Law Society of Scotland in 1989. The Tribunal by a majority decision found the Respondent not guilty in respect of his acting in a dishonest and deceptive fashion by intercepting his client's letter of complaint.

8. Having heard the Respondent in mitigation and having noted two previous findings of misconduct against the Respondent, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 16 January 2007. The Tribunal having considered the Complaint dated 9th August 2006 at the instance of the Council of the Law Society of Scotland against Alexander Gilmour Malcolm, Solicitor formerly of 23 Tarvit Drive, Cupar and now at 14 Melgund Place, Lochgelly, Fife; Unanimously Find the Respondent guilty of Professional Misconduct in respect of his failure to actively prosecute a claim on behalf of his clients, his failure to deal competently with the matters at hand, his disguising his incompetence by his failure to inform his clients as to progress or lack thereof with the claim, his failure to reply to the repeated enquiries made of him by his clients, his failure to submit a competent proper Legal Aid application and his allowing an excessive inordinate and unreasonable delay to occur in the prosecution of his clients claim, all contrary to Articles 5 and 7 of

the Code of Conduct for solicitors holding practising certificates issued by the Law Society of Scotland in 1989; By a majority decision Find the Respondent not guilty in respect of acting in a dishonest and deceptive fashion by intercepting his client's letter of complaint; Order that the name of the Respondent, Alexander Gilmour Malcolm, be Struck Off the Roll of Solicitors in Scotland; Find no expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)

Gordon Cunningham

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

The first hearing was set for 28 September 2006 but was adjourned to allow the Law Society to conclude the investigative process and to have time to recover the files. The complaint then called on 14 December 2006. The Respondent made a motion to adjourn the hearing in the interests of justice as Tribunal members had seen a Reporters Report which should not have been included in the papers. It was agreed in order for justice not only to be done but to be seen to be done that the matter be adjourned until 16 January 2007.

The Respondent advised that the Law Society Reporter's report had been included in the Law Society productions which had been sent out to Tribunal members. This report was, the Respondent considered, extremely prejudicial to his case, the Respondent indicated that the Complainers did not intend to lead the Reporter to speak to the report and there would be no opportunity for cross examination. The Respondent indicated that at a meeting with the Complainers Fiscal on 1 December 2006 it was agreed that the fiscal contact the Tribunal to have the Reporters report withdrawn before it was circulated to Tribunal members but this had not been done until the day before the Tribunal hearing and the papers had been sent out a week before. The Respondent submitted that although he was aware that the Tribunal members were professional in their duty, justice could not be done or be seen to be done in this case by Tribunal members who had read the Reporter's report.

Mr Reid opposed the motion indicating that he had two witnesses present. Mr Reid explained that he lodged the first inventory of productions in September 2006 prior to the first hearing scheduled for 28 September. Thereafter he recovered a number of files and agreed to withdraw the first inventory of productions which had been lodged which included the Reporter's Report. Mr Reid confirmed that he would not be referring to the Reporter's Report and suggested that the Tribunal members could put the Reporter's Report out of their minds.

The Tribunal was satisfied that the members could take the case as presented to them on the day without them being influenced by a Reporter's opinion. However the Tribunal had to consider what a well-informed observer would think of the Tribunal members having read the Reporter's opinion giving precise information about this particular case. If this report was not to be referred to there would be no opportunity for any cross examination on it. The Tribunal accordingly decided that in the interests of justice and to be fair to the Respondent the matter should be adjourned to a differently constituted Tribunal. The matter of expenses was reserved.

The Complaint then called on 16 January 2007 before a completely differently constituted Tribunal. A Joint Minute had been lodged on the 14 December 2006 admitting the majority of the facts in the Complaint. The Joint Minute also admitted the terms of the productions lodged.

EVIDENCE FOR THE COMPLAINERS

The Complainers led the evidence of Douglas Neil Gifford, Senior Partner with J & G Wilson, Solicitors. Mr Gifford confirmed that the Respondent had been with his firm from 1 November 2001 until 3 September 2004. Mr Gifford explained how the Respondent came to work for his firm. He indicated that he was unaware that his firm acted for Mr & Mrs A. Mr Gifford explained that he had office systems in place which clearly showed who the clients of the firm were. There was no client information sheet for Mr & Mrs A, they were not on the office computer or in the office filing system. Mr Gifford confirmed that all legal staff should have followed the practice of filling in a client information sheet, putting information on the computer and opening up a file in respect of all new clients. Mr Gifford stated that the first he knew about the problem with Mr & Mrs A was when he received a letter from the Law Society on 18th October 2004 which enclosed a copy of the letter of complaint from Mr A dated 20th April 2004 addressed to him. Mr Gifford explained that the handwritten letter sent by the Respondent in response to this letter on 30th April 2004 was also with the letter sent to him by the Law Society on 18th October and this was the first time that he had seen this letter. He indicated that he recognised the writing on this letter as being the Respondent's handwriting. Mr Gifford stated

that he had no recollection of discussing matters with the Respondent or instructing him to reply to Mr A. Mr Gifford stated that he would not have tolerated a handwritten letter of reply going out from his office as this was unprofessional. Mr Gifford stated that he did not know if he was on holiday on the 26th April. Mr Gifford was referred to the Respondent's production being a letter by the Respondent dated 25th June 2006 to the Law Society. Mr Gifford stated that he had no recollection of going into the Respondent's office with Mr A's letter and shouting that the Respondent should deal with it.

In cross examination Mr Gifford confirmed that the first he knew of the letter of complaint by Mr A was when he received the Law Society's letter of 18th October 2004. Mr Gifford confirmed that he did not complain with regard to the Respondent's behaviour to the Law Society. Mr Gifford stated that he was unable to say when the Respondent had gone on holiday that particular year. He also indicated that he could not say that the Respondent had intercepted the letter, it could only be an assumption. When referred to a file note in connection with a telephone conversation with Mr A, Mr Gifford accepted that it was his writing and explained that it looked as if he had had a phone call from Mr A taking a message and leaving it for the Respondent. Mr Gifford stated that he would not have investigated matters on the basis of this telephone conversation. In re-examination Mr Gifford indicated that it was probable that the telephone conversation with Mr A took place in 2002.

EVIDENCE FOR THE RESPONDENT

The Respondent explained that the claim arose from a road traffic accident in 1992 when Mr & Mrs A were passengers in a car which was being driven by a Mr B. The car collided with cattle that were on the road. Mr A was injured, the car was towing a trailer which was then obstructing the roadway. Mrs A and Mr B then walked up the road to warn traffic and Mr B was killed by another car. Yet another car then collided with the trailer. The Respondent referred the Tribunal to the productions lodged and explained that there were a number of parties involved in the action. The Respondent pointed out that some of the sentences in the Record were matters of opinion rather than fact. The Respondent referred the Tribunal to the productions which showed that he did make an application for Legal Aid. This application

however was bounced by the Legal Aid Board. The Respondent explained that he was involved in prolonged correspondence with the insurance company to establish whether liability was in dispute. He did not get a response until 1998. The Respondent explained that there was three cornered correspondence in connection with the quantification of the amount of the loss of earnings. The Respondent also explained that Counsel's opinion had been obtained. The Respondent stated that it was not until the end of 1998 that he got a response from Hamilton, Burns and Moore. In connection with Mr Gifford, the Respondent stated that his position was as set out in his letter of 25 June 2006 to the Law Society. The Respondent explained that Mr Gifford brought the letter into his room and requested that he deal with it. The Respondent stated that he did explain matters but that Mr Gifford was not interested as he had a lot on his plate at the time and had been ill. The Respondent further explained that the 30th April, when he wrote the letter was a Friday, and he was going on holiday and he was trying to get a whole lot of matters sorted out before he left. He explained that when he was going on holiday it was his practice to deal with all outstanding matters at the last minute and he was in the office on the Sunday before he left.

In cross examination the Respondent accepted that he had been acting for Mr & Mrs A in their claim for 12½ years. He further accepted that he got a GP report in connection with Mr A which referred to a number of hospitals visited by Mr A and also hospital appointments for Mrs A in connection with psychological trauma but he did not get reports from any of the hospitals. He also accepted in cross examination that his application for Legal Aid was late and that when it was rejected he did nothing and he did not advise his client that it had been rejected. The Respondent further accepted that no fee notes had been prepared and £857 of outlays had been incurred. He indicated that the police report was recovered by the defenders. He accepted that he did not take any precognitions except one from Mr A. He explained that he obtained copies of statements which had been obtained by others. He did not get any books and accounts as Lindsay Foulis had instructed a firm of accountants. He accepted that he did nothing at all during the 26 months when he was at R & J Burns & Company and also did nothing for a further 5 months when he was at Clark & Ross. The Respondent accepted that although he had told Mr Gifford that Mr & Mrs A were clients, none of the formalities had been carried out. He stated that Mr

Gifford was mistaken with regard to only knowing about the letter from Mr A when he received the letter from the Law Society. He explained that he did not criticise Mr Gifford and saw no merit in disputing matters with him.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid submitted that the Respondent had not prosecuted the case on behalf of Mr & Mrs A in a proper manner. He had been instructed on 27th April 1992 and during a period of 12½ years little progress had been achieved. The Respondent had dealt with the matter incompetently. The reasons for rejection of Legal were basic and were not addressed by the Respondent. His preparation and management of the case had been appalling. Mr Reid submitted that the court action had been raised the day before the triennium expired and the only preparation done by the Respondent was a precognition of Mr A and the obtaining of a GP report. No hospital reports had been obtained and there had been no effort made to get further reports. In connection with the loss of income the Respondent did very little. Information was obtained and delivered to the opponents whose claim settled years ago. The Respondent also failed to register his clients with various firms and when he left the firms he did not advise his clients of his departure. He was instructed by his clients to recall the sist and whilst he said he would do this, he did not. Over a period of 31 months he did nothing at all. During the 35 months that he was with J & G Wilson he did very little. He failed to prepare the case and failed to respond to his client over a long period of time. Mr Reid submitted that this was beyond negligence and was improper conduct. In connection with the dishonesty, Mr Reid submitted that there was a clear conflict between what the Respondent said and what the witness Mr Gifford stated. Mr Reid asked the Tribunal to prefer the evidence of Mr Gifford who was adamant that the first time he had seen the letter of complaint was when he received the letter from the Law Society in October 2004. Mr Reid asked the Tribunal to accept that the Respondent had intercepted the letter and concealed the existence from his Senior Partner and had handwritten a reply to conceal matters from the administrative staff. Mr Reid referred the Tribunal to case 822/91 and 671/86 in Smith & Barton, Procedures and Decision of the Scottish Solicitors Discipline Tribunal, T&T Clark 1995 where similar conduct had been held by the Tribunal to amount to professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

The Respondent reminded the Tribunal that it had to be satisfied beyond reasonable doubt. He referred the Tribunal to the Sharp case (Sharp-v-Council of the Law Society of Scotland 1984 SC129) at page 319 where the court used the words “deliberate and inexcusable” which the Respondent submitted suggested that mens rea has to be present. The Respondent submitted that there was a reasonable explanation with regard to what happened in connection with the letter from Mr A and that his explanation of the position was not remote or fanciful. He submitted that it had not been proved beyond reasonable doubt that he intercepted the letter from Mr A.

DECISION

Although Mr Gifford stated that he had first seen the letter of complaint from Mr A in October 2004 when he received the letter from the Law Society, he was not equivocal in his evidence with regard to whether or not he had discussed matters with the Respondent. He indicated that he had no recollection of this and stated that he assumed that the Respondent had intercepted the letter but could not say for sure that this had happened. It was also evident from the productions that at one time Mr Gifford had had a telephone conversation with Mr A although it was not clear exactly when this was. The Tribunal thought it strange that the Respondent had handwritten the reply. The Respondent explained this by stating that he was trying to deal with all matters before he went off on holiday. Given the Respondent’s explanation that he did discuss matters with Mr Gifford who told him to deal with it, the Tribunal by a majority decision, could not be satisfied beyond reasonable doubt that the Respondent had intercepted the letter of complaint and that Mr Gifford was unaware of the letter at that time. The Tribunal, accordingly, by a majority of 3 to 2, found the Respondent not guilty in respect of this aspect of the Complaint. In connection with the breach of the Code of Conduct, the Respondent had admitted the facts in the Complaint. It was clear that the Respondent had not properly prosecuted his client’s claim, had failed to prepare the case, had not obtained Legal Aid on behalf of his client and failed to respond to his client over a long period of time. The Respondent was instructed by

his clients for a period of 12½ years and at the end of this time he had still not successfully completed dealing with their claim. The Tribunal found this excessive delay completely unacceptable. There was a period of 31 months when the Respondent did absolutely nothing in connection with the claim which the Tribunal considers to be a dreadful neglect of duty. During the period of 12½ years the Respondent only obtained a precognition from one of his clients and a GP report. He failed to adequately advise his client and failed to competently deal with the matter. He also disguised his incompetence by failing to keep his clients informed. The Tribunal accepts that for some of the period of time the Respondent was waiting for responses from an insurance company but he should have chased matters up. The Tribunal considers that the Respondent's actions over a period of 12½ years in this case are regrettably serious and reprehensible and clearly amount to professional misconduct. The Tribunal was satisfied beyond reasonable doubt that the Respondent's conduct amounted to professional misconduct. This was a unanimous decision of the Tribunal.

The Tribunal noted the two previous findings of misconduct against the Respondent which were admitted by the Respondent. The Fiscal advised the Tribunal that Mr & Mrs A were now represented by another firm of solicitors and Legal Aid had been granted but the case has been sisted to await an important court case in connection with delay. Mr Reid advised that Mr A had sent in a declaration which he would like the Tribunal to see. The Respondent objected to this. The Tribunal saw no reason in this case to depart from the usual procedure and accordingly did not allow the declaration to be lodged.

MITIGATION

The Respondent indicated that as far as he was aware Mr & Mrs A's Legal Aid application had actually been refused. He advised the Tribunal that he was restricted until 2012 and was sequestered until August 2007. He indicated that he was presently doing casual work as a taxi driver and had a modest income.

PENALTY

The Tribunal noted that the Respondent had already recently had his practising certificate restricted twice in connection with the two previous findings. It was clear from today's findings together with the two previous sets of findings that the Respondent had been involved in a persistent course of conduct over a period of years of not dealing with clients business properly or keeping clients properly informed. He was clearly not properly performing his role as a solicitor. In this case the Respondent had failed to operate professionally as a lawyer over a period of 12½ years in connection with his clients Mr & Mrs A. He had also not advised his clients of the correct position with regard to Legal Aid and his failure to obtain Legal Aid on their behalf and failure to progress their claim properly could have serious consequences for his clients. In the previous findings the Respondent had misled other clients and not properly dealt with their business. The Tribunal considered that the Respondent had shown a wilful and reckless disregard for his clients over a number of years. The Tribunal accordingly considered that the Respondent was not a fit and proper person to remain on the Roll of Solicitors in Scotland and Ordered that the Respondent's name be Struck from the Roll.

The Tribunal made the usual order with regard to publicity. The Fiscal suggested that there should be no expenses due to or by either party given the findings of the Tribunal. The Respondent indicated that he had no submissions to make. The Tribunal accordingly made a finding of no expenses due to or by either party in connection with all the proceedings in this case.

Vice Chairman