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

F I N D I N G S

in Complaint

by

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

Complainers

against

STEPHEN RICHARD LOCHRIE, Young & Partners Business Lawyers Limited, 1 George Square, Castle Brae, Dunfermline

Respondent

1. A Complaint dated 28 February 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 Stephen Richard Lochrie, Young and Partners Business Lawyers Limited, 1 George Square, Castle Brae, Dunfermline (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were two Secondary Complainers.

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

4. In terms of its Rules, the Tribunal appointed the Complaint to be set down for a virtual Procedural Hearing on 16 May 2024 and notice thereof was duly served on the Respondent.

5. At the virtual Procedural Hearing on 16 May 2024, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh, who also appeared, of consent, on behalf of the Respondent. On Joint Motion, the Complainers were given time to amend the Complaint and the Respondent to adjust his Answers in response. The Procedural Hearing was continued to

24 July 2024. The Fiscal conceded that the Respondent's expenses in relation to preparation for the Procedural Hearing of 16 May 2024 and the Minute of Amendment procedure would be borne by the Complainers on the usual basis, to include the involvement of both Senior and Junior Counsel.

6. At the virtual Procedural Hearing on 24 July 2024, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Helen Watts, K.C. and Victoria Arnott, Advocate, who were instructed by Ruth Waters, Solicitor, Edinburgh. On the unopposed motion of the Fiscal, the Tribunal allowed the amended Complaint and Answers to be received. The Fiscal invited the Tribunal to fix a substantive Hearing. The Respondent invited the Tribunal to fix a Preliminary Hearing. Having heard parties' submissions, the Tribunal continued the matter to an in-person Preliminary Hearing of two days duration, to take place on a date to be afterwards fixed. The Tribunal requested that the Complainers lodge a Record and directed that both parties lodge written submissions in advance of the Preliminary Hearing.

7. 14 and 15 November 2024 were identified as suitable dates for the Preliminary Hearing to take place and notice thereof was duly served upon the Respondent.

8. At the Preliminary Hearing on 14 November 2024, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Helen Watts, K.C. and Victoria Arnott, Advocate, instructed by Ruth Waters, Solicitor, Edinburgh. Following lengthy discussions between the parties, a Joint Minute was lodged with the Tribunal which substantially amended the Record. Ms Watts confirmed that the Respondent was withdrawing his preliminary pleas. The Fiscal indicated that both parties agreed that the Respondent was not guilty of professional misconduct but the facts agreed might amount to unsatisfactory professional conduct in terms of section 53ZA of the Solicitors (Scotland) Act 1980 ("the 1980 Act"). He invited the Tribunal to find the Respondent not guilty of professional misconduct but to remit the matter back to the Council in terms of section 53ZA. Ms Watts confirmed that these were agreed matters.

9. The Tribunal found the following facts established:-

9.1 The Respondent's date of birth is 12 February 1969. He was admitted as a solicitor on the 7 October 1993. He was employed by Shepherd & Wedderburn between December 1993 and June 1994. Thereafter he was employed with TC Young & Company, which became

Young & Partners LLP in 2005. He became a partner of that firm on 1 December 1997. He remained a partner until incorporation of the firm as Young & Partners Business Lawyers Limited where he became and remains a Director. He holds a current practising certificate.

9.2 When he wrote to DC on 26 April 2022 and stated that *"I'm not clear what you mean by "searches" in the context of a BVI registered company. Can you please clarify"* and *"You do not get searches for a BVI company – there is no such thing. That is the whole concept of a BVI company – privacy"* the respondent provided information to DC that was subsequently found to be incorrect. At the time when the respondent provided DC with this information he honestly believed it to be true.

10. The Tribunal gave careful consideration to the agreed facts and the submissions made. It found the Respondent not guilty of professional misconduct. With regard to the motion to remit the matter in terms of section 53ZA of the 1980 Act, the Tribunal continued the Preliminary Hearing to 15 November 2024 for submissions from both parties in relation to the basis upon which the parties suggested that the Tribunal could make such an order.

11. On 15 November 2024, the Tribunal heard submissions from both parties in relation to the issue of unsatisfactory professional conduct and the basis for an order under section 53ZA.

12. The Tribunal gave careful consideration to the agreed facts and the submissions in relation to unsatisfactory professional conduct. It concluded that an order under section 53ZA was not appropriate and declined to make such an order.

13. Both parties made submissions in relation to expenses and the Respondent made submissions in relation to publicity.

14. Having given careful consideration to these submissions and to all of the information before it, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 15 November 2024.The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against Stephen Richard Lochrie, Young and Partners Business Lawyers Limited, 1 George Square, Castle Brae, Dunfermline; Find the Respondent not guilty of professional misconduct; Find the Complainers liable in the expenses of the Respondent,

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; Certify the Cause as appropriate for Junior Counsel, with the exception of the expenses in relation to the preparation for the virtual Procedural Hearing of 16 May 2024 and the following Minute of Amendment procedure where the expenses of both Senior and Junior Counsel are to be included; and 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.

(signed)

Kenneth Paterson

Vice Chair

15. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 19 DECEMBER 2024.

IN THE NAME OF THE TRIBUNAL

[redacted]

Kenneth Paterson

Vice Chair

NOTE

On both 14 and 15 November 2024, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Helen Watts, K.C. and Victoria Arnott, Advocate, instructed by Ruth Waters, Solicitor, Edinburgh.

Prior to the Preliminary Hearing, the Complainers had lodged a Record and both parties had lodged written submissions. Additionally, the Respondent had lodged a List of Documents and List of Authorities.

Lengthy discussions took place between the parties on 14 November 2024, and when the case called a Joint Minute was lodged with the Tribunal agreeing substantial amendments to the Complaint and Answers. Ms Watts confirmed that the Respondent was withdrawing his preliminary pleas. The Fiscal conceded that the Complainers were no longer insisting on the averments of professional misconduct. He submitted that agreement had been reached that the remaining conduct before the Tribunal may amount to unsatisfactory professional conduct and he invited the Tribunal to remit the agreed averments to the Council in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 ("the 1980 Act"). Ms Watts confirmed that these were agreed matters, subject to further submissions regarding expenses.

DECISION IN RELATION TO PROFESSIONAL MISCONDUCT

The Tribunal found the facts noted in paragraph 9.2 above to be established.

There remained only one averment of professional misconduct before the Tribunal and this read as follows:-

4.6.1 When he wrote to DC on 26 April 2022 and stated that "I'm not clear what you mean by "searches" in the context of a BVI registered company. Can you please clarify" and "You do not get searches for a BVI company – there is no such thing. That is the whole concept of a BVI company – privacy.", he provided information to DC that was subsequently found to be incorrect.

4.6.2 The respondent provided incorrect information to a fellow regulated person in a manner which is arguably inconsistent with mutual trust and therefore arguably in breach of Rule B1.14.1.

Albeit that the parties were agreed that the conduct did not meet the test for professional misconduct, the question of professional misconduct is always one upon which the Tribunal must be satisfied.

The first question for the Tribunal was whether the conduct now agreed amounted to a breach of Rule B1.14.1 of the Practice Rules 2011 which is in the following terms:-

"You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it."

The only averments of fact now before the Tribunal were that the Respondent had provided information to another solicitor which he genuinely believed at the time to be true but which was subsequently found to be incorrect. There was no suggestion that the statement was made recklessly or otherwise. All that was before the Tribunal was that the Respondent had made an honest mistake.

The Tribunal was not satisfied that a breach of Rule B1.14.1 was established and found the Respondent not guilty of professional misconduct.

The next step for the Tribunal was to consider whether it was competent and appropriate for it to remit the matter to the Council in terms of section 53ZA of the 1980 Act.

Section 53ZA states that where the Tribunal is not satisfied that the Respondent has been guilty of professional misconduct but it *"considers that he may be guilty of unsatisfactory professional conduct, it must remit the complaint to the Council"*.

Having concluded that the conduct did not amount to a breach of Rule B1.14.1, the Tribunal was unable to identify on what basis it could competently consider that the conduct might amount to unsatisfactory professional conduct.

Given the late hour of the day, the Tribunal continued the Hearing to the following day and invited the parties to make submissions on how an order under section 53ZA could be justified.

UNSATIFACTORY PROFESSIONAL CONDUCT

Submissions For The Complainers

The Fiscal referred the Tribunal to section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 ("the 2007 Act") which defines unsatisfactory professional conduct as "professional conduct which

is not of the standard which could reasonably be expected of a competent and reputable solicitor...but which does not amount to professional misconduct and which does not comprise merely inadequate professional services". He submitted that the Tribunal was entitled to rely upon the contents of the Joint Minute in order to make a referral under section 53ZA. He submitted that both parties had agreed the terms of the referral to be made in terms of section 53ZA.

In addition to the terms of the Joint Minute, the Fiscal submitted that the Tribunal was entitled to look at the full circumstances of the case as set out in the pleadings within the Record before the amendment was made. He argued that these gave the Tribunal the flavour of the whole circumstances and demonstrated that the statement made by the Respondent was inadvertent or ill-advised. He submitted that this was not consistent with the standard to be expected of a competent and reputable solicitor.

The Fiscal referred the Tribunal to two summaries of cases where he submitted that the Professional Conduct Sub Committee ("the PCSC") had held that conduct amounted to unsatisfactory professional conduct on the basis of inadvertent mistakes. He submitted that what was before the Tribunal could properly be assessed as possible unsatisfactory professional conduct as requested by the parties.

In response to a question from the Tribunal, the Fiscal accepted that the statement made by the Respondent was an honestly held belief at the time the statement was made. The Fiscal conceded that the admitted averments of fact now before the Tribunal gave no context to assess whether the statement was made carelessly or recklessly but he argued that the Tribunal was entitled to look at the background previously set out in the averments in the Complaint.

Submissions For the Respondent

Ms Watts submitted that the Respondent did not accept that he had done anything wrong. She emphasised that the terms of the Joint Minute did not agree that the matter should be remitted back to the PCSC for consideration of unsatisfactory professional conduct and that the Fiscal was wrong to suggest that it did. She argued that it would be incompetent for the Tribunal to look at the averments in the Complaint that had been deleted in order to provide background and that the only averment of fact remaining before the Tribunal left no room for a finding of unsatisfactory professional conduct.

Ms Watts did not accept that the two findings of unsatisfactory professional conduct before the PCSC referred to by the Fiscal were analogous and submitted that if the Tribunal was to hold that the conduct before it here amounted to unsatisfactory professional conduct then it would result in wide ranging and inadvertent consequences.

Ms Watts emphasised that it was her position that this prosecution was incompetent, oppressive and an abuse of process from the very beginning.

In response to a question from the Tribunal, she explained that although the wording of the Joint Minute referred to the Respondent providing incorrect information *"in a manner which is arguably inconsistent with mutual trust and therefore arguably in breach of Rule B1.14.1."* it was her position that it was not in fact inconsistent with Rule B1.14.1. The Respondent had accepted from the beginning that the statement that he had made was wrong. The wording now before the Tribunal was carefully agreed between the parties and left no context that would entitle the Tribunal to consider that the conduct was unsatisfactory professional conduct.

The Tribunal asked Ms Watts if the content of the Joint Minute was inconsistent with her submission that the prosecution was incompetent, oppressive and an abuse of process from the beginning. She explained that whilst the Joint Minute stated that the conduct might arguably be a breach of Rule B1.14.1 in fact there was no evidence that it was.

In response, the Fiscal conceded that the Joint Minute itself did not agree that a referral under section 53ZA should be made, it was his position that the motion to do so was an agreed joint motion.

DECISION ON UNSATISFACTORY PROFESSIONAL CONDUCT

The Tribunal had been provided with a Joint Minute that invited it to delete the averments of fact and five out of six of the averments of professional misconduct in the Complaint, including the Answers thereto. Parties had agreed averments of fact to replace the deleted averments and the remaining averment of professional misconduct was amended. In these circumstances, the Tribunal concluded that it was not competent for it to go back to the deleted averments in order to supplement the facts now before it.

The Tribunal was not satisfied, in the absence of some context that the conduct was something more than a simple, honest mistake, that a breach of Rule B1.14.1 had been established. If there was no breach of the Rule, there was no basis for an allegation of unsatisfactory professional conduct. The Tribunal concluded that an order under section 53ZA was not appropriate or well-founded.

The summaries of the findings made by the PCSC provided to the Tribunal were too brief to be of any particular assistance in this case.

EXPENSES AND PUBLICITY

Submissions for the Respondent

Ms Watts invited the Tribunal to make an award of expenses, insofar as not already dealt with, in favour of the Respondent. She submitted that the Respondent should be awarded expenses on a fully indemnifying basis, calculated on the normal, commercial hourly rate charged by Ms Waters, and not restricted by Chapter Three, as is done in the usual order of the Tribunal. She submitted that this award should include sanction for the employment of Senior and Junior Counsel.

Ms Watts explained that she had attended on the first day of the hearing to present a case on relevancy and specification that disclosed that the Complainers' pleadings were disgraceful. Extensive work was done on behalf of the Respondent with detailed written submissions, a List of Authorities and detailed written submissions in rebuttal of the Complainers' written submissions. By contrast, the Complainers had done none of that. She submitted that it was unfair that the Respondent should have to pay for any of that.

The gravity of the situation faced by the Respondent was set out in her written submissions. The Respondent had an unblemished career extending more than 30 years. The Council now accept that the Complaint was without foundation. The Respondent has been devastated by the unfounded allegations made against him, as a result of which his health and his business have suffered.

She explained that Ms Waters was the managing director of the Respondent's firm and had spent more than 280 hours dealing with the Complaint. The Complainers complete capitulation meant that all of that work was a complete waste. The time spent by Ms Waters in preparing the defence to this Complaint represented a significant loss in revenue to their firm.

The Respondent was entitled to expect that his regulator would take an approach to this prosecution that reflected the gravity of the allegations made. Allegations of failures of honesty and integrity should not be made without detailed analysis and mature consideration, which simply did not happen here.

Ms Watts described the numerous occasions over the past year on which she had pointed out to the Fiscal the insurmountable problems he faced with his case and yet it was only yesterday that he deleted all of the averments of professional misconduct and dishonesty and accepted that the statement made by the Respondent was honestly made.

She described this as an "egregious" approach for a regulator to take, which was something the Tribunal should be concerned about.

Ms Watts submitted that the first Record produced by the Complainers contained numerous errors which were pointed out by Ms Waters. A further Record was presented which the Fiscal had stated contained all of the corrections. That in fact was not the case, as was discovered by Ms Waters when she reviewed the second Record. Not all of the errors were simple typographical errors, some were of substance.

Ms Watts drew the Tribunal's attention to the typographical errors in the Fiscal's written submissions for the Preliminary Hearing, one of which she indicated was arguably misleading. Given the seriousness of the allegations faced by the Respondent, she argued that the least the Respondent could expect was for the pleadings to be accurately repeated within the Record. These preparational errors, however, were subsidiary to the problems with the approach taken to the case as a whole. Several attempts to amend had been suggested by the Complainers over the history of the case. Now all of the averments of dishonesty had been deleted. She argued that to do less than fully indemnify the Respondent for the costs of his defence would simply compound the injustice.

Ms Watts submitted that she had been unable to properly describe the full extent of the failures on the part of the Complainers to the Tribunal due to the Complainers *"throwing in the towel"*.

She drew the Tribunal's attention to paragraph 3 and 4 of the Fiscal's written submissions which she argued gave a misleading impression of the decision of the PCSC. The PCSC had in fact concluded that the facts before it did not support any suggestion of deceit or lack of integrity on the part of the Respondent. Despite that, the Fiscal had insisted upon including such averments within the Complaint, as a result of which the Respondent suffered indescribable anxiety. The Respondent had cancelled a family holiday in order to appear at this hearing.

Ms Watts referred the Tribunal to the case of McKie v Scottish Ministers [2006] CSIH 54 in particular paragraph 3 which set out how the Tribunal should approach the issue of the level of expenses to be awarded. She submitted that where one party to proceedings had conducted them incompetently or unreasonably, then it was appropriate for the Tribunal to apply a sanction by way of imposing a higher level of expenses. Here, the sanction would be by ordering an award of expenses on a basis which completely indemnified the Respondent for the costs of his defence. She highlighted to the Tribunal that, in considering the reasonableness of a party's conduct, it could look at the adequacy of the preparation

of the case, which was lacking here, and could consider the party's position on the strength of its case, which was reflected here in the complete abandonment of the Complainers' case. She argued that if the circumstances in this case did not justify a sanction in expenses, then she was unable to say what would.

With regard to publicity, Ms Watts submitted that the Respondent should never have been accused of professional misconduct or dishonesty and so should not be prejudiced by any publicity.

Ms Watts was asked if the fact that a Joint Motion was made to remit the case back to the Law Society, and that the Joint Minute conceded that there was an argument to be made, conflicted with her criticism of the prosecution. She responded that she did not recall associating herself with the Fiscal's motion with regard to section 53ZA and that in any case a prosecution for misconduct including aspects of dishonesty was in complete contrast to allegations of unsatisfactory professional conduct, involving an enormous disparity in the amount of work necessary and the expenses incurred.

She emphasised that, because the Complainers had opted to capitulate, she had not been able to clarify her concerns that (1) the whole matter was misconceived in law and (2) the approach taken by the Fiscal in persisting with the prosecution, despite the numerous opportunities to recognise its deficiencies, until his last minute change of mind , represented a complete waste in expense.

The Tribunal asked Ms Watts in what way the effect on the Respondent of these proceedings was in any way different to any other respondent. She submitted that the difference in this case was that the allegations were not properly brought in the first place.

The Tribunal asked Ms Watts to clarify in what way she considered the case to be complex. She explained that demonstrating in law exactly why something is not right is complex.

Whilst she accepted that the matter resolved at a Preliminary Hearing, she emphasised that the Respondent had faced a year of worry for which he could never be compensated.

The Tribunal asked Ms Watts why she considered that it was necessary for both Senior and Junior Counsel to be involved. She explained that having both Senior and Junior actually resulted in a cost saving to the Respondent, with Junior Counsel carrying out much of the preparation work which then only had to be reviewed by Senior Counsel. She submitted that Senior Counsel was justified in this case because of the serious nature of the allegations and the possible consequences for the Respondent.

Ms Watts submitted that if the Complainers had made an approach sooner to resolve matters, then she might not have been in such a strong position. However, to make the Respondent attend fully prepared for a debate only to capitulate was egregious and made an enhanced award of expenses appropriate.

Submissions for the Complainers

The Fiscal stated to the Tribunal that the Respondent had only conceded the possibility of unsatisfactory professional conduct on the first day of the Preliminary Hearing . Until then, he submitted that this had been a hard-fought litigation. He argued that many of the criticisms being made by Ms Watts were part and parcel of the very nature of litigation.

He emphasised that this was the first substantive hearing of the Complaint.

The Fiscal clarified that he had not averred that the Respondent was deliberately deceitful. He argued that Rule B1.2 is a wide ranging rule, including issues of integrity. It was well understood that there are different degrees of *"misleading"*. The Fiscal stated that he was content that he had pled a proper case which, *in cumulo with* the contraventions of the Money Laundering Regulations, could have amounted to professional misconduct.

The Fiscal submitted that it was appropriate for the Complainers to *"weigh up"* their case, having regard to the contents of the Respondent's written submissions taken together with the approach made by Senior Counsel on the first day of the hearing asking if it was possible to have the Complaint remitted back to the Council for consideration of unsatisfactory professional conduct.

The Complainers as the regulator to the profession act in the public interest, not in their own interest, in contrast to normal litigation.

He conceded that his documents may not have been of a high standard in terms of containing typographical errors.

It was his understanding that the motion to remit matters back to the Council was a joint motion. He understood that to have been the conclusion of the negotiations between himself and Senior Counsel.

The Fiscal referred to the case of The Council of the Law Society-v-John Ross Boyle [18 November 2022] and reminded the Tribunal of the words of Baxendale-Walker-v-Law Society [2007] EWCA Civ 233. He invited the Tribunal to make no award of expenses, beyond that already conceded by the

Complainers. If the Tribunal considered an award in favour of the Respondent to be appropriate, he invited the Tribunal to restrict it to 20% of expenses incurred since the date of the lodging of the Respondent's written submissions for the Preliminary Hearing , based on the the usual scale.

Regarding sanction for Counsel, the Fiscal submitted that it was very unusual to have both Senior and Junior appearing before the Tribunal. He argued that there was nothing unusual about this case and that sanction should be restricted to Junior Counsel only.

The Fiscal submitted that there had been nothing said to support the contention that the Law Society, as regulator, had been unreasonable. He did not accept that his concession regarding expenses on 16 May 2024 was relevant to the Tribunal's decision on sanction for Counsel for the whole procedure.

Response by Respondent

Ms Watts advised the Tribunal that she had a telephone note of a conversation between her and the Fiscal on 11 December 2023 where she had, hypothetically, asked him if there was scope for the Respondent to accept unsatisfactory professional conduct. The Fiscal had responded that he would not consider that in any circumstances.

Counsel accepted that the discussions between the parties, on the first day of the Preliminary Hearing, had centred around a joint motion to refer the matter back to the Council in order to consider unsatisfactory professional conduct. Parties had been advised by the Clerk that an order under section 53ZA was a matter for the Tribunal to make a decision upon. The Tribunal had now declined to make such an order.

Ms Watts argued that the Fiscal was not seeking to prove unsatisfactory professional conduct in this Complaint but was alleging deceit and professional misconduct. She drew the Tribunal's attention to the Fiscal's written submissions where it was said that the Respondent's statement was false and lacked integrity.

Ms Watts drew the Tribunal's attention to the original averments of misconduct and emphasised that these were presented to the Tribunal on both a singly and *in cumulo* basis.

DECISION IN RESPECT OF EXPENSES AND PUBLICITY

In terms of Paragraph 19 of Schedule 4 of the 1980 Act, the Tribunal may make *"such order as it thinks fit"* in relation to the expenses of these proceedings. Where an award of expenses is made in relation to a Complaint proceeding under the 2008 Rules, the normal award is one on an agent client, client paying basis, in terms of Chapter 3 of the last published Law Society's Table of Fees for General Business with a unit rate of £14.00.

The normal starting point in most litigation, including proceedings before the Tribunal, is that expenses follow success, although this is not irrebuttable. The Tribunal determined, that in this case, it was fair and appropriate to award expenses to the Respondent. The Tribunal did not consider it appropriate to restrict these expenses, as it had been invited to do by the Complainers.

Counsel for the Respondent invited the Tribunal to make the award on a higher level than the normal basis. She referred the Tribunal to the case of McKie as support for her motion and for guidance on the approach to be taken by the Tribunal. In that case, the successful party was seeking an increase in the award of expenses from a party party basis to an agent client, client paying basis. In that case it was said *"...where one of the party's had conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale.... In its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strength or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which the party had used court procedure, for example to progress or delay the resolution of the dispute."*

The court in McKie recognised that it may be more difficult for it to reach a firm view on a party's conduct in relation to the merits of the action where it has not heard evidence. Here the Tribunal did not have the advantage of hearing the arguments on the Respondent's preliminary issues or any evidence in relation to the allegations made by the Complainers.

Counsel had referred to being *"deprived"* of the opportunity to fully describe the deficiencies in the Complainers' approach to these proceedings. However, it should be noted that the Respondent chose to withdraw his preliminary pleas.

In reaching its decision, the Tribunal gave careful consideration to the oral submissions and had regard to the documents before it, including the stated case and written submissions. The Tribunal noted that it

was being asked to impose a sanction for what was described by Counsel as *"egregious conduct"* and in McKie *"reprehensible"* conduct.

The Tribunal was not satisfied the *"incompetence"* described by the Respondent in this case was of sufficient character to justify such a sanction. Nor was it satisfied that the information before it supported the contention that the Complaint and following procedure was unreasonable. The Tribunal did not agree that the simple fact that the Complainers amended their Complaint to the extent that they did, in itself, demonstrated that the original averments were unreasonable. The Tribunal did not accept that it was inevitable that it would have dismissed the Complaint in its entirety as a result of the Respondent's preliminary issues. It appeared to the Tribunal, on the face of the information before it, having not heard the full legal argument, that there were potentially valid criticisms made of the Respondent's conduct in relation to both the Money Laundering Regulations and the Practice Rules.

Nor was the Tribunal satisfied that it could determine that the Fiscal was unprepared for the preliminary hearing because he had not lodged a List of Authorities or full written submissions. The Tribunal was not privy to the details of the negotiations between the parties but noted that they had been lengthy, the case not calling until late in the day, with the parties' agreed position.

In all of the circumstances, the Tribunal was satisfied that the Respondent had not made out the case that the Complainers or their Fiscal had acted unreasonably.

The Tribunal went on to consider the question of authority for the instruction of Counsel. Ms Watts relied upon two factors for this – (1) the serious nature of the allegations and (2) the complexity of the allegations. Allegations of dishonesty and a lack of integrity are the most serious of matters to come before the Tribunal and are likely, if established, to result in the most serious of consequences. However, whilst they may be serious, they are not, by necessity, inherently complex. Whilst the Money Laundering Regulations are lengthy, they are an essential part of the everyday practice of a solicitor. There did not appear to the Tribunal to be any unusually complex issues of law or evidence involved in the case.

In all of the circumstances, recognising the serious nature of the allegations, the Tribunal certified the case as appropriate for Junior Counsel only.

With regard to publicity, Schedule 4, Paragraph 14 of the 1980 Act obliges the Tribunal to publish every decision subject to Paragraph 14A. The Tribunal had made a decision that the Respondent was not guilty of professional misconduct. No reference had been made to any factor under Paragraph 14A which would

have allowed the Tribunal to anonymise the Respondent. Accordingly, the Tribunal directed that there should be publicity of this decision and that publicity should include the name of the Respondent.

Given that no purpose would be served by naming any other individual involved in the matters, the Tribunal considered it appropriate to otherwise anonymise its decision.

Kenneth Paterson

Vice Chair