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

KENNETH JOHN BAILLIE STEWART MACLEOD, MacLeods WS, 13 Lombard Street, Inverness

Respondent

1. A Complaint dated 13 November 2020 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Kenneth John Baillie Stewart MacLeod, MacLeods WS, 13 Lombard Street, Inverness (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. No Answers were lodged with the Tribunal Office on behalf of the Respondent.

4. In terms of its Rules, the Tribunal set the matter down for a virtual Procedural Hearing on 14 January 2021 and notice thereof was duly served upon the Respondent.

5. At the virtual procedural hearing on 14 January 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. On the unopposed motion of the

Fiscal, the Tribunal allowed the Complaint to be amended in terms of the Minute of Amendment dated 11 January 2021. Both parties indicated they were content that a hearing could proceed virtually. The Tribunal fixed a virtual hearing for 31 March 2021 at 10am and notice thereof was served upon the Respondent.

6. At the virtual hearing on 31 March 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. Prior to the hearing, parties had lodged two signed Joint Minutes. After the case had been called, it was discovered that the Respondent's Answers dated 4 December 2020 had been sent to the Fiscal but had not been lodged with the Tribunal Office. A copy was provided by email to the Tribunal. During discussion of these preliminary matters, the Tribunal was not confident that the Respondent could hear everything that was said or that it could fully hear and see the Respondent using the video conferencing platform. A Tribunal member also experienced some technical difficulties during the hearing. Having read the Answers, the Tribunal considered it would be of benefit to allow parties further time to consider if evidence required to be led in this case. The hearing was therefore adjourned *ex proprio motu* to a hearing in person to be held on a date to be afterwards fixed. Parties were instructed to liaise with the Clerk regarding any special arrangements required to accommodate parties or witnesses at the hearing.

7. In terms of its Rules, the Tribunal set the matter down for a hearing in person on 4 June 2021 and notice thereof was duly served upon the Respondent.

8. At the hearing in person on 4 June 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Fiscal indicated that the Complainers did not intend to lead any evidence. The Complainers would rely on the admissions in the Answers, the agreed facts in the two Joint Minutes, and the Productions referred to in the pleadings and Joint Minutes. The Respondent noted he had lodged Answers and had already made an amendment to them by deleting the second sentence in Answer 3.9. He wished to amend Answer 4.4 by deleting "£6,000" and substituting "£10,000". The Tribunal allowed that amendment to be made. The Chair confirmed with the Respondent that he also intended to proceed by way of submission.

The Fiscal made submissions for the Complainers. At the end of the Fiscal's submissions, the Respondent indicated that he had not been able to hear the Fiscal. He had not brought his hearing aids with him to the hearing. Following submissions from parties, the Tribunal adjourned the hearing and indicated that the Tribunal Office would obtain a transcript of proceedings which would be shared with parties. The Fiscal moved for expenses. The Respondent said he could not oppose that motion. The Tribunal reserved all questions of expenses meantime. The Chair suggested that the Respondent might wish to use this opportunity to take independent legal advice. Independent representation might also be of assistance.

9. In terms of its Rules, the Tribunal set the matter down for a continued hearing in person on 1 July 2021 and notice thereof was duly served upon the Respondent.

10. On 29 June 2021, the Respondent by email moved the Tribunal to adjourn the continued hearing on the grounds of his ill health. The Complainers indicated by email that they opposed the motion to adjourn and requested that the case call virtually on 1 July 2021 for argument to be made. The Chair considered the correspondence, exercising the functions of the Tribunal under Rule 56 of the Tribunal's Rules. The Clerk indicated to parties by email on 29 June 2021 that the Chair had considered parties' correspondence and that the Tribunal would hear arguments on the motion to adjourn at the continued hearing on 1 July 2021. Parties were informed that the Hearing would be conducted virtually unless the Respondent indicated he was going to be present. The Respondent was given information regarding the type of medical evidence the Tribunal required to support a motion to adjourn. It was noted that the Respondent might wish to consider instructing a representative.

11. On 30 June 2021, the Respondent renewed his motion to adjourn by email. He opposed the motion for the hearing to be heard virtually. The Chair considered the correspondence, exercising the functions of the Tribunal under Rule 56 of the Tribunal's Rules.

The Clerk indicated to parties by email on 30 June 2021 that the Chair had considered the matter and that the continued hearing would be conducted virtually, since the Respondent had not indicated that he or a representative would be attending.

12. At the virtual continued hearing on 1 July 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate. The Respondent was present and represented himself. The Respondent indicated that he no longer insisted upon his motion to adjourn. He was content to proceed with the hearing of the case. The Respondent made his submissions and answered questions put to him by the Chair. The Fiscal made a short submission in response.

13. The Tribunal found the following facts established:-

13.1 The Respondent is Kenneth John Baillie Stewart Macleod who has a place of business at MacLeods WS, 13 Lombard Street, Inverness, IV1 1QQ. His date of birth is 8 January 1936. He was admitted to the roll of solicitors on the 14 August 1980. He has been a partner in several firms in Inverness to date - Macleod & Co; Macleod Mackay WS; Macleod McClurg WS and on the 13 March 2004 he became a partner in MacLeods WS where he continues to practise.

13.2 The Secondary Complainer became a client of the Respondent in May 2004. The Respondent provided advice regarding the Secondary Complainer's investments. Between 2004 and 2010 the Respondent received a small number of payments from the Secondary Complainer which he invested on his behalf. In 2010 the Respondent noted that the return on the invested funds with Scottish Building Society was very low.

13.3 In 2010 the Respondent set up a company ("Company 1"). The Respondent advises this was on behalf of Mr X. The company was incorporated for the purposes of establishing a treatment centre. Mr X was an established client of the Respondent. The Respondent acted for Mr X when Mr X (personally) leased the premises from which the company would trade. The company was incorporated on the 17 February 2010. Company 1's registered office was the Respondent's business address. The company was incorporated by Corporate Service Ltd, Edinburgh, which appointed two of their employees as Director/Secretary and Director. Both resigned their positions on the 17 February 2010. The two shares in the company were transferred to the Respondent on the 17 February 2010. No director or secretary was appointed

until Mr Y was appointed as Secretary and the Respondent as Director on the 10 June 2010. Mr Y was employed by the Respondent as a financial adviser.

13.4 The Respondent assisted Mr X in setting up the business. He discussed with him the business model, advised Mr X that he should instruct an accountant to prepare a business plan with projected income and costs, advised him to prepare an investment brochure and provided assistance on attracting funding for the venture. The Respondent received investment monies on behalf of Company 1. The Respondent set up a client account in the name of the company. The Respondent appealed for investment in the company, including in an article in the Press & Journal.

13.5 In April 2010 the Respondent met with the Secondary Complainer at the Respondent's office to discuss the Secondary Complainer's invested monies. The Secondary Complainer was advised of the company. He was advised of a high rate of return. The Respondent first wrote to the Secondary Complainer on the 20 April 2010. He also wrote to three other potential investors in the same terms on the same day. The text of that letter was:

"Dear [Secondary Complainer]

[COMPANY 1]

I would refer to your meeting with me regarding investing £10,000 in [Company 1].

There will be a strict limit of £50,000 in total for the investment. In other words we will not be taking as investments more than £50.000.

For each tranche of £5,000, £1,000 of this will go towards ordinary share capital. The remaining £4.000 will be invested in preference shares which will have a return of 8.5% per annum. It is the intention that these shares can be redeemed by the company after the purchase of the building [...]. Initially the property is being leased to enable the project to "get off the ground".

There will be regularly financial appraisals of how matters are progressing and the project will not commence until sufficient amount of money has been gathered for investment. In the meantime your monies will be invested in an interest bearing account until the project starts to trade..."

13.6 No further correspondence or advice was given to the Secondary Complainer. On the Secondary's Complainer's instructions, the Respondent uplifted £10,000 from the Secondary Complainer's Scottish Building Society on the 23 April 2010 and placed the sums into the Secondary Complainer's client account. Thereafter, on the 29 April 2010, the Respondent transferred the same sum to the Company 1 client account held by him. On the face of it the company had no officers in place at the time of the transfer.

13.7 Companies House holds no records indicating the transfer of shares to the Secondary Complainer. The Respondent's files hold no records of any transfer of shares to the Secondary Complainer. The Respondent's files do not hold a written loan agreement between Company 1 and the Secondary Complainer.

13.8 The Respondent made numerous applications on behalf of Company 1/Mr X including a planning application for change in use and a HMO application in 2010. The Northern Constabulary objected to Mr X being the employee/daily manager in their letter dated 14 January 2011. This letter was intimated to the Respondent by Highland Council by letter dated 30 January 2011. The letter narrated Mr X's use of at least two aliases, false addresses, a history of criminal behaviour and advised of an ongoing prosecution alleging fraud (in regard to goods to the value of £45,000) against Mr X.

13.9 The Respondent was appointed as a Director of Company 1. Subsequent to this, loans to Company 1 were made by Kenneth McLeod Ltd, a company in which the Respondent held more than 75% of shares and was a Director. In addition, the Company 1 ledger card shows payment from and to KJBS MacLeod. The latter payments are loans from the Respondent. The loans mentioned in the preceding two sentences were repaid by Company 1. All funds were paid through the Company 1 client account operated by the

Respondent. The premises from which Company 1 was trading suffered a flood in December 2010 which prevented the company from operating for a number of months and incurring charges of around £60,000. The Company was struck from the Register of Companies on the 7 October 2011. The Respondent petitioned for restoration which was granted on the 30 May 2012. The Respondent as Director of Company 1 received numerous debt collection letters for, inter alia, electricity, Council Tax, Scottish Water and DVLA penalties. These were received in the years 2011 through 2013. The Respondent acted for Mr X in defence of an action for payment, for in excess for £50,000, raised by the owner of the premises in 2013. The payment was due for unpaid rent and damage caused to the property while Mr X was the tenant. The Respondent did not advise the Secondary Complainer of any of these occurrences.

13.10 The relationship between Company 1/Mr X on the one hand, and Highland Council on the other, soured in late 2012 early 2013, and as a result the Council declined to enter into a further contract and they ceased their *ad hoc* placements. The Respondent was aware of these developments. Company 1 stopped receiving income. Company 1 was compulsorily dissolved on the 12 April 2016. Until dissolution the Respondent was a Director and fully aware of the lack of income and proposed dissolution.

13.11 The Secondary Complainer has not received any return from his investment, far less 8.5% per annum as per the respondent's letter of the 20 April 2010. The Secondary Complainer has not received the return of his capital investment/loan from the company, Mr X or the Respondent.

13.12 The Respondent did not write to the Secondary Complainer in the years 2011-2016 advising him of the progress of his investment/loan. He did not report on the ongoing viability of Company 1.

13.13 The Respondent received a letter of complaint from the Secondary Complainer on the 22 July 2016. He replied on the 25 July 2016 stating inter alia:

" *the project we both invested in...the man behind the whole scheme and*

whom I have been chasing on your behalf had promised me that your money will be repaid. I know he is working on certain contracts which will earn him enough money in the next four months to be able to pay your money back plus interest....As I introduced this matter to you I am completely clear that whatever happens with the person who ran the project, I feel ultimately I am responsible to make full recompense to you...I feel I can do so by March next year [2017]."

13.14 The Secondary Complainer had not received any sums from Mr X nor the Respondent at the date of lodging the Complaint, or by the date of the continued hearing.

14. Having regard to the foregoing facts and the submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct singly and *in cumulo* in respect that:-

(a) The Respondent acted for two or more clients whose interests conflicted. The Respondent acted for Mr X, and Company 1. He also acted for the Secondary Complainer. The interests of Mr X and Company 1 conflicted with those of the Secondary Complainer. The interests of an investor and the company/person raising funds are in conflict. A lender and a borrower's interests are in conflict. The Respondent should not have acted for both the Secondary Complainer and Company 1/Mr X. The investment was high risk and the Respondent did not advise the Secondary Complainer of the risk involved. Said conduct was contrary to Rule 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and Rule 3 of the Solicitors (Scotland) Practice Rules 1986.

(b) The Respondent from March 2010 was heavily involved in the financing and provision of business and legal advice to Company 1. The Respondent held all the shares in Company 1. He acted for Company 1 and Mr X in securing the lease of the property from which the company traded, he applied for the change of use and HMO applications for Company 1 and he was named as the Licensee in the HMO application. He charged Company 1 fees. He was appointed along with his employee as a director of Company 1 in June 2011.

He instructed/permitted a loan to Company 1 from Kenneth MacLeod Ltd. He had invested/loaned the company his personal funds. Said conduct and the failure to advise the Secondary Complainer of this information was contrary to Rules 1, 2, 3, and 7 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008.

(c) The Respondent received an objection by Northern Constabulary to Mr X being appointed as manager of the House of Multiple Occupation application in February 2011. That objection advised of Mr X's past criminal convictions, his use of aliases, and fake addresses. It also advised he faced a trial for a large fraud. In failing to advise the Secondary Complainer of the questionable history of Mr X to allow him to assess whether he wished to continue investing in Mr X/Company 1, the Respondent was in contravention of Rules 1, 2, 3, 6 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008.

(d) The Respondent failed to communicate to the Secondary Complainer the trading difficulties experienced by Company 1 and Mr X (the striking off, debt collection letters, damage to property, action raised against Mr X). In failing to alert the Secondary Complainer of the difficulty trading and therefore the poor investment, the Respondent acted contrary to Rule 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, and Rules B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011.

(e) The Respondent did not advise the Secondary Complainer of the dissolution of Company 1 on the 12 April 2016 contrary to Rules B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011.

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

By Video Conference, 1 July 2021. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against

Kenneth John Baillie Stewart MacLeod, MacLeods WS, 13 Lombard Street, Inverness; Find the Respondent guilty of professional misconduct in respect of his breaches of Rule 3 of the Solicitors (Scotland) Practice Rules 1986, Rules 1, 2, 3, 6, 7 and 9 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, and Rules B1.2 and B1.9 of the Law Society of Scotland Practice Rules 2011; Order that the name of the Respondent be struck off the Roll of Solicitors in Scotland; Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order 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; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify the Secondary Complainer or any other person; and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation with the Tribunal Office.

(signed)

Ben Kemp

Vice Chair

16. 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 31 AUGUST 2021.

IN THE NAME OF THE TRIBUNAL

[redacted]

Ben Kemp

Vice Chair

NOTE

At the hearing on 4 June 2021, the Tribunal had before it the Complaint as amended; the Answers as amended; a letter from the Respondent to the Fiscal copied to the Tribunal Office by email on 1 December 2020; and two Inventories of Productions for the Complainers. The Fiscal indicated that the Complainers did not intend to lead any evidence and would proceed on the basis of the admitted Answers, the Joint Minutes, and the productions referred to in those documents. The Respondent confirmed that he also intended to proceed by way of submission.

SUBMISSIONS FOR THE COMPLAINERS (4 June 2021)

The Fiscal noted that the Joint Minutes agreed certain correspondence, ledgers and payments. He indicated he would describe the pertinent facts of the Complaint while directing the Tribunal to the relevant productions which were agreed by Joint Minute.

The Fiscal noted that the Respondent was enrolled in 1980 and is a sole practitioner in Inverness. The Secondary Complainer became a client of the Respondent in May 2004. The Respondent gave him advice on his investments. In 2010, the Respondent noted the return on these investments was low.

In February 2010, the Respondent set up Company 1 on behalf of Mr X, who was an established client of the Respondent. The registered office was the Respondent's business address. Company 1 was incorporated by a corporate service provider. That provider's employees were appointed as Director and Secretary. They resigned on 17 February 2010. The company's shares were transferred to the Respondent. However, there were no directors or company secretary until the Respondent and his employee were appointed in June 2010 (some 4 months after incorporation). The Respondent assisted Mr X in setting up Company 1. He discussed with him the business model, advised Mr X that he should instruct an accountant to create a business plan, advised him to create an investment brochure, and assisted him with regard to attracting funding. The Respondent received investment on behalf of Company 1. He set up a client account in the company's name. He appealed for investment, including an article in the Press and Journal. At the time when he did this, there were no directors appointed and the

Respondent held only two shares. The Respondent acted for Mr X when he personally leased the premises from which Company 1 would trade. The lease was in the sole name of Mr X.

The Respondent met with the Secondary Complainer at the Respondent's office. The Respondent told him about Company 1 and advised of a high rate of return. The Respondent wrote to the Secondary Complainer on 20 April 2010. The Respondent also wrote to three others on the same day in similar terms. The Respondent advised that, *"for each tranche of £5,000, £1,000 of this will go towards ordinary share capital. The remaining £4,000 will be invested in preference shares which will have a return of 8.5% per annum"*. The Fiscal noted that at the date of the letter, Company 1 had no directors, no secretary and the two shares were held by the Respondent. The Respondent admits he issued no further correspondence and gave no more advice to the Secondary Complainer. On 23 April 2010, on the Secondary Complainer's instruction, the Respondent uplifted £10,000 from the Secondary Complainer's building society account and placed it in the Respondent's client account. On 29 April 2010, the Respondent transferred £10,000 to his firm's client account for Company 1.

Companies House has no records of a transfer of shares to the Secondary Complainer. The Respondent's files record no transfer of shares to the Secondary Complainer. There is no written loan agreement between Company 1 and the Secondary Complainer in the Respondent's file. The Fiscal therefore submitted that no shares were issued to the Secondary Complainer.

The Respondent made numerous applications on behalf of Company 1, including a planning application for change of use and a House of Multiple Use (HMO) application. Northern Constabulary objected to Mr X being employed as daily manager for Company 1. In a letter to the Respondent they noted Mr X's use of aliases and false addresses; previous criminal history; and an ongoing prosecution for fraud involving goods worth £45,000. The Fiscal noted this part of the Complaint was not admitted in full in the Answers. However, it was proved by the productions agreed in the Joint Minute. He referred the Tribunal to Production 1 in the Complainers' First Inventory of Productions, a letter from Highland Council to the Respondent's firm dated 31 January 2011 which enclosed a letter from Northern Constabulary to Highland Council dated 14 January 2011. The Fiscal noted that the Respondent agreed in the first Joint Minute that this was a true and accurate copy of correspondence he received.

The Fiscal said the Tribunal should not give cognisance to the Respondent's Answer to this averment in the absence of any supporting evidence on the matter.

The Respondent, or companies which he controlled, made numerous loans to Company 1. The Fiscal referred the Tribunal to the ledger entries agreed in the first Joint Minute at paragraphs 3-11. £10,271 was loaned and £5,281 was repaid.

The Fiscal explained that in December 201● there was a flood at the company's premises. This prevented the company from operating for a number of months. Significant charges were incurred. The company was struck from the Register of Companies on 7 October 2011. The Respondent's petition for restoration was granted on 30 May 2012. The Respondent, as a director of Company 1, received numerous debt collection letters from 2011-2013. The Respondent also acted for Mr X in defence of an action for payment in excess of £50,000 raised by the owner of the premises from which the company was operating. It was alleged that rent had not been paid and damage caused. The Respondent failed to notify the Secondary Complainer of any of these issues.

The Fiscal noted that it was not admitted that the company was struck from the register or restored, or that the company was in debt. He referred the Tribunal to the second Joint Minute, which agreed that copy productions in the Complainers' Second Inventory of Productions were true and accurate copies of correspondence and documents taken from the file kept by the Respondent in regard to Company 1. The Fiscal referred to the documents contained in the Complainers' Second Inventory of Productions. He noted that the Respondent's letter to E-on dated 5 February 2013 at Production 12 of the Complainers' Second Inventory was "less than candid" because it suggested that Mr X (the tenant) did not have authority to connect the property to the grid or use electricity. It was clear from the documents in the Second Inventory for the Complainers that the Company was being chased for a significant debt. The company was struck off. All this was known to the Respondent. He wrote to E-on suggesting that Company 1 was not contracted to pay for electricity. The Fiscal asked the Tribunal to consider the firm's ledger for Company 1. There is no payment for electricity recorded.

The relationship between Company 1 and Mr X, and Highland Council soured in late 2012 or early 2013. The Respondent was aware that due to this, the company had no income. Until dissolution in April 2016, the Respondent was a director of this company.

The Fiscal noted that the Secondary Complainer has not received back his original investment or any return on it. There was no contract, no shares, no transfer of ownership and no guarantee. The Respondent did not write to the Secondary Complainer in the years from 2011 to 2016 advising him of progress of the investments/ loan or the ongoing viability of the company. Despite in July 2016 offering to make full recompense to the Secondary Complainer by March 2017, no funds have been paid to the Secondary Complainer. The letter the Respondent sent to the Secondary Complainer in July 2016 fails to take responsibility for the running of the company. It disassociates Mr X as being the man behind the project but the Respondent was the only shareholder and director.

The Fiscal described the applicable practice rules and the averments of misconduct. He referred to the test for professional misconduct. He submitted that the Respondent's behaviour constituted professional misconduct and was also dishonest and deceitful. He referred to the test for dishonesty contained in Ivev v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.

The Chair asked the Fiscal whether the Respondent was authorised to give investment advice. The Fiscal said he did not understand that the Respondent was an independent financial adviser. A solicitor can within the rules give incidental financial advice. However, the Fiscal's position was that the Secondary Complainer relied upon the Respondent to look after his money. He was not aware of the Secondary Complainer receiving financial advice from anyone else.

The Chair asked the Fiscal to clarify his understanding of Mr X's role. The Fiscal indicated that Mr X was the Respondent's client. Originally, Mr X had wanted to purchase the property he eventually leased and he had contacted the Respondent to assist him with this.

The Chair noted the alleged conflict between the interests of Mr X and the Secondary Complainer, and also between Company 1 and the Secondary Complainer. He asked whether there was also a potential personal conflict for the Respondent. The Fiscal agreed there was potentially a conflict between the Respondent and the Secondary Complainer because they were co-investors. However, his main submission was in relation to the conflict between the Respondent advising Company 1 and the Secondary Complainer. Mr X was included in the Complaint for background. He was also a client of the firm and the driving force of the

company. If one was being extremely suspicious, one could say he was deliberately not connected to the company.

The Chair noted the Fiscal's submission regarding dishonesty and the reference to the Ivev case. He queried whether this was something which had been adequately pleaded in terms of the written case. The Fiscal claimed he averred dishonesty failing which, a lack of integrity.

In answer to a question from a Tribunal member, the Fiscal indicated he was not aware of any standard deadline at which a practitioner was expected to update clients on progress of investments or loans.

Following a brief adjournment, the Chair asked the Fiscal a question regarding Production 12 in the Complainers' Second Inventory of Productions. The Chair understood the Fiscal's submission in relation to this letter to be that the Respondent has not acted honestly by hiding behind the different identities of the individual and the entity concerned. The Chair noted there was no specific averment in relation to that letter. The Fiscal said his submission was that the Respondent was "less than candid". There was no specific averment regarding lack of candour in relation to that letter.

The Chair also noted the Tribunal was a little troubled at this stage by the fact there was no specific averment of dishonesty in the Complaint such as to put the Respondent on notice of that position. The fiscal said by quoting Rule B1.2 there was fair notice to the Respondent he may face a case in respect of both dishonesty and lack of integrity.

The Chair asked the Respondent to confirm he had heard the case that had been put by the Fiscal. The Respondent indicated he had not. Although he has suffered hearing loss for many years, he has pleaded in many courts and tribunals throughout the years and has never been in one where audibility was a problem. He had hearing aids but did not bring them to the Tribunal hearing. He had not heard most of what the Fiscal had said but he was familiar with the Complaint and was familiar enough with court pleadings to be able to understand what the Fiscal had been presenting.

Following a short adjournment, the Chair indicated that the Tribunal's view was that it would be inappropriate to continue the hearing that day in circumstances where the Respondent may

not have heard all of the Fiscal's submissions. It invited submissions from parties but indicated that the Tribunal was minded to adjourn to obtain a written transcript of the Fiscal's submissions and then reconvene to hear the Respondent's submissions. The Fiscal resisted that position. The hearing in person had been set in person to accommodate the Respondent following his apparent difficulties on Zoom on the last occasion. The Respondent had put himself in this position by failing to bring his hearing aids. Reasonable adjustments had been made by the rearrangement of furniture and reminders to use the microphones. The Respondent did not indicate during the morning's proceedings that he could not hear or ask for any other adjournments. The Fiscal submitted there had therefore been a fair hearing. The Respondent noted again that he had not anticipated this difficulty but could bring his hearing aids on another occasion if required. He apologised. The Fiscal moved for expenses, in the event that the matter was to be adjourned.

Following a short adjournment, the Chair indicated that the Tribunal was not sufficiently confident it would be in the interests of justice or that a fair hearing would be ensured if the hearing was to continue on that day. The hearing would therefore be continued to another date. A transcript of proceedings on 4 June 2021 would be provided to parties. The Respondent was encouraged to bring his hearing aids on the next occasion. The Chair asked the Respondent to liaise with the Tribunal Clerk regarding any further steps that could be taken to ensure he could participate fully on the next occasion. The Chair indicated that the Tribunal was minded to reserve the question of expenses but gave parties an opportunity to address this question. The Fiscal noted expenses were a matter for the Tribunal's discretion. However, he asked the Tribunal to consider that the hearing was being adjourned due to the Respondent's failings and he should therefore bear the cost of that. The Respondent said he could not oppose the motion although he was not aware of the applicable scale of expenses.

Following another short adjournment, the Tribunal indicated the question of expenses would be reserved. However, parties' submissions were noted, in particular the concession made by the Respondent. The Chair said it was a matter for the Respondent, but he may wish to consider taking the opportunity to take independent legal advice and representation.

In due course the matter was set down for a continued hearing in person on 1 July 2021. On 29 June 2021, the Respondent moved the Tribunal by email to adjourn the continued hearing on the grounds of his ill health. In support of that motion, he submitted a note from his GP

dated 28 June 2021 which certified that the Respondent was unfit for work due to "stress at work". The Complainers indicated by email that they opposed the motion to adjourn and requested in the circumstances that the case call virtually on 1 July 2021 for argument to be made. The Clerk indicated to parties by email on 29 June 2021 that the Chair had considered parties' correspondence; that the Tribunal would hear the motion to adjourn and arguments on it at the continued hearing on 1 July 2021; that proceeding on the basis that the Respondent would not be in attendance (unless he indicated otherwise), the hearing would be conducted virtually rather than in person; that the Tribunal would find it helpful to receive medical evidence which specifically and substantively addressed the Respondent's fitness to attend and participate in the hearing and any concerns from a medical perspective if the Respondent was to attend; and that the Respondent might wish to instruct a representative for the purpose of at least making the motion to adjourn (and potentially for the remainder of the hearing in the event it was to proceed).

On 30 June 2021, the Respondent gave some more details regarding his illness by email to the Tribunal Office. He moved again for the matter to be adjourned. He opposed the motion for the hearing to be heard virtually. The Clerk indicated to parties by email on 30 June 2021 that the Chair had considered the matter and that the continued hearing would be conducted virtually, since the Respondent had not indicated that he or a representative would be attending.

At the continued hearing on 1 July 2021, in addition to the papers the Tribunal had for the hearing on 4 June 2021, the Tribunal also had before it; a transcript of proceedings of 4 June 2021; a General Practitioner's Statement of Fitness for Work dated 28 June 2021; copies of email correspondence between the Clerk and the parties on 29 and 30 June 2021; and various authorities lodged by the Fiscal, namely, excerpts from Treverton-Jones' "Disciplinary and Regulatory Proceedings" Ninth Edition and copies of the decisions in Gatawa v Nursing and Midwifery Council [2013] EWHC 3435 and General Medical Council v Adeogba [2016] EWC Civ 162.

The Respondent appeared at the continued hearing. The Chair asked the Respondent to confirm his position before the Tribunal. The Respondent said he wished to address some of the things raised by the Fiscal on the last occasion. He was obliged for the transcript. It was accurate so far as he knew. However, he criticised the Fiscal's presentation as "faulty" and said this was supported by the inaudible sections of the recording which had not been transcribed. He said

the Fiscal's motion for expenses should not be granted because he had been disadvantaged as a result of the Fiscal's presentation.

The Chair asked the Respondent to clarify whether the Respondent intended to continue with submissions, or whether he had a motion for the Tribunal. The Respondent explained the background to his medical complaint. He had taken advice from his doctor. He had been prescribed medication. He noted he had "both ears listening properly". The Chair asked whether the Respondent intended to proceed to make submissions on this day. The Respondent said that was the case. The Chair asked whether the Respondent insisted on his motion to adjourn. The Respondent said he did not. The Fiscal indicated he was content to continue. The Tribunal invited the Respondent to make his submissions.

SUBMISSIONS FOR THE RESPONDENT (1 July 2021)

The Respondent outlined his experience and financial qualifications. He had previously worked for the bank of Scotland Insurance and Investment Department. He had a certificate from the Law Society of Scotland covering incidental investments. He was entitled under its authority to conduct financial business.

With regard to the particular investment which was the subject of the Complaint, the Respondent noted that Mr X had promised him faithfully he would recompense the Secondary Complainer. The Respondent said he accepted responsibility in recommending the investment to the Secondary Complainer. He intended to pay him £20,000.

The Respondent said he was aware of the police objections to Mr X and he discussed these with Mr X. Mr X told him he was a witness in a drugs trial and had been moved around by police (for his protection). Strathclyde Police were unwilling to give the Respondent any information about this. The Respondent spoke to an old school friend who was a former Chief Superintendent at Strathclyde Police. He could not speak about the specifics of the case but gave him general information about witness protection schemes. His friend had indicated that Mr X's account was plausible, in general terms.

The Respondent noted he planned to retire shortly. He intends to compensate the Secondary Complainer, whom he has known for many years. The sale of a recently renovated property

will provide funds for this. The Respondent will ensure the Secondary Complainer receives his money.

Although the Fiscal had made the point that the Respondent had received money from Company 1, the Respondent was not aware of this until the Fiscal identified the entries on the ledgers. The Respondent said an "overzealous bookkeeper" had done this without his knowledge. He wished she had allocated the money to the Secondary Complainer instead.

The Respondent said he was qualified to give advice but he happened to give the wrong advice at the time. He is trying to ensure Mr X pays. Mr X will not escape responsibility for the Secondary Complainer's loss.

The Respondent noted the paucity of records. However, the only two people who invested in the project were himself and the Secondary Complainer. The Respondent did not become a director of the company until after the Secondary Complainer's money had been invested. He was trying to safeguard the investment.

The Chair asked the Respondent to address the alleged conflict of interest. The Respondent said Mr X came to him with a project. He was not a client at that time. The Respondent advised Mr X to get an accountant. It was only when Mr X needed a lease that he asked the Respondent to act for him.

The Chair asked if the Respondent was suggesting he did not raise funds for the company. The Respondent said Mr X was attempting to raise money. The Respondent made clear to the Secondary Complainer he was only passing on information, not recommending the investment to him. The Secondary Complainer made the decision to invest. The Respondent said he became concerned later on, as things developed. He was concerned about the Secondary Complainer's money. He thought becoming a director was a way to safeguard funds.

Following a short adjournment, the Tribunal asked the Respondent questions about four matters.

Firstly, the Respondent was asked to clarify whether he was acting for Mr X. He had admitted this in Answer 3.3, but he had appeared to contradict this in his submissions. The Respondent

said Mr X came to him "off the street" with a project. He had a brochure. Mr X asked him to form a company. The Respondent accepted these instructions.

Secondly, the Respondent was asked whether he thought to inform the Secondary Complainer he had become a director of Company 1. The Respondent said he did not, but he became a director largely to safeguard the Secondary Complainer's money. He did not become a director until after the money had been invested.

Thirdly, the Respondent was asked to address dishonesty and lack of integrity. He said he had never before been accused of dishonesty. He is a Christian and a member of the Free Church. He acts for a group of churches. The Chair noted the allegation of dishonesty related to the Respondent keeping information from the Secondary Complainer. The Respondent said that was why he had got involved in the project. He wanted to be sure the money was used fruitfully (although he had ultimately failed in that).

The Respondent was asked to address professional misconduct. He said in retrospect he had made mistakes. He would not be surprised if the Tribunal made a finding of misconduct. He has agonised over this situation for many years. It has caused him a lot of distress. He will continue to make sure Mr X contributes to the Secondary Complainer's loss.

FURTHER SUBMISSIONS FOR THE COMPLAINERS

The Fiscal's submitted that the Respondent was attempting to abdicate all responsibility for his actions. He is a sole practitioner and the cash room manager of his firm. All transactions are his responsibility. He should not blame his staff.

The Respondent was an advisor to the Secondary Complainer, Mr X and Company 1. He asked the Tribunal to consider the Respondent's Answers 3.4-3.6. Mr X was the Respondent's personal client when arranging the lease. The Respondent created the company on Mr X's instruction. The Secondary Complainer was a client. The company had its own ledger card at the Respondent's firm. This suggests that the company was also a client, although this is not specifically averred. The Respondent applied for changes of use for the property.

The Fiscal submitted that the Respondent had been deceitful in failing to tell the Secondary Complainer of the dire circumstances of his investment.

FURTHER SUBMISSIONS BY THE RESPONDENT

The Respondent admitted he was cashroom manager. He is a sole practitioner although the firm has four consultants. He should have told the Secondary Complainer his concerns. He did write to him telling him that they had both lost money. The Respondent will seek to repay the Secondary Complainer before he retires.

DECISION

The Tribunal rejected the Respondent's criticisms of the Fiscal's presentation and the quality of the transcript. It was satisfied that the Fiscal's presentation throughout had been clear and his submissions audible. While the recording may not have allowed for the transcription of every word, the transcript was adequate for the purpose of making the Respondent aware of the Fiscal's submissions, which were based on the Complaint which had been intimated to the Respondent and which he had answered. The Tribunal was confident that the Respondent had understood the complaint against him. The transcript provided an adequate record of the Fiscal's submissions. The Respondent had been given full opportunity to respond to the matters put to him by the Fiscal and the Tribunal.

The Tribunal noted the admissions contained in the Answers and the contents of the two Joint Minutes which agreed certain facts and agreed that the copy productions in the Complainers' First and Second Inventory of Productions were true and accurate copies of correspondence and documents taken from the Respondent's file on Company 1. It was agreed that the Respondent drafted Productions 2, 3 and 12 of the Complainer's Second Inventory of Productions. It was agreed that the Respondent was made aware of the correspondence contained in the Complainers' Second Inventory on or around the date stamp on the incoming mail. Based on these admitted and agreed facts, the Tribunal was satisfied beyond reasonable doubt that the Respondent had acted in the manner set out in the Complaint.

In summary, at the Respondent's suggestion, the Secondary Complainer provided funds to Company 1 by way of an investment or loan. Whether or not the Respondent was authorised to give financial or investment advice in the circumstances was not part of the Complaint. However, the fact the investment was high risk aggravated the nature of the resulting conflict of interest.

The Respondent acted for Mr X, Company 1 and the Secondary Complainer. Their interests were in conflict. This conflict existed long before the Respondent became a director of Company 1. The Respondent was heavily involved in the financing and provision of business and financial advice to Company 1. He invested in the company himself. He was appointed as a director of the company in June 2011. The Respondent did not advise the Secondary Complainer of this highly relevant information. He failed to advise him of Northern Constabulary's objections to Mr X as manager of an HMO. This information was given to the Respondent on the basis it was not to be disclosed more widely. The Respondent was therefore in a difficult predicament but this was created by his own decision to act in a conflict of interest situation. The Respondent's explanation regarding the witness protection scheme appeared fanciful. However, even on the basis this explanation was correct, it was insufficient to overcome the need to make some disclosure to the Secondary Complainer, and/or to withdraw from acting for both clients. The Respondent was in possession of information which was potentially damaging to his client, the Secondary Complainer, but he could not or did not tell him about it.

In addition, the Respondent failed to tell the Secondary Complainer about the trading difficulties encountered by Company 1 and Mr X. He failed to advise the Secondary Complainer of the dissolution of Company 1. Throughout, the Respondent failed to give the independent advice to the Secondary Complainer. His failure to advise the Secondary Complainer could only have been to protect himself and Company 1/Mr X. The Respondent's conduct breached the practice rules regarding trust and personal integrity, independent advice, acting in the best interests of his clients, conflict of interest and disclosure of interest, and effective communication.

The Tribunal considered whether the facts established met the test for professional misconduct set out in Sharp v Law Society of Scotland 1984 SLT 313. According to that case,

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

Considering all the circumstances, the Tribunal considered that the Respondent's conduct outlined above represented a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Tribunal considered the test for dishonesty set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 where it is said that,

"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

While the Respondent may not have set out initially with the intention to deceive the Secondary Complainer when he recommended the investment/loan, his conduct over the following five years was dishonest. The Respondent had knowledge which was highly relevant to his client, given his investment in Company 1. Keeping that information to himself, could only have been to benefit himself and Company 1 to the detriment of the Secondary Complainer. There were repeated opportunities to turn this situation around and the Respondent chose not to take action. This was not just an omission caused by failing to give proper attention to the matter. Rather, it was a continuing choice to deceive the Secondary Complainer as to the safety of his investment.

The Tribunal initially had some concerns about whether fair notice had been given to the Respondent regarding the allegation of dishonesty in the Complaint. Where dishonesty is alleged, it should be clearly set out in the Complaint so the Respondent knows the case he has to meet (Singleton v Law Society [2005] EWHC 2915 (Admin)). Mere reference to Rule B1.2 of the Law Society's practice rules may not be sufficient in every case. However, the Tribunal was satisfied that, in this case, and in particular once the Respondent had received the transcript of the Fiscal's submissions on 4 June 2021, notice that the Complainers were alleging dishonesty had been given to the Respondent and that he had an opportunity to seek advice and/or representation and to address the Tribunal on this important point.

SUBMISSIONS ON SANCTION, PUBLICITY AND EXPENSES

The parties were informed of the Tribunal's decision on professional misconduct including the finding of dishonesty in relation to his failure to advise the Secondary Complainer of relevant information. Parties were offered a short adjournment to formulate their submissions on sanction, publicity and expenses but both declined.

The Fiscal lodged the Respondent's Law Society of Scotland record card. It disclosed a previous finding of unsatisfactory professional conduct which had also related to a conflict of interest. The Fiscal explained that while a local councillor, the Respondent had failed to disclose an interest in a planning matter at a planning appeals committee. He was legal adviser to one of the objectors. The standards body for elected officials had referred the case to the Law Society.

The Fiscal noted the Tribunal's hands were tied regarding publicity. The Fiscal moved for expenses. The Complainers had been successful. The adjournments were due to the fault of the Respondent.

The Respondent accepted he had contributed to the adjournment on 4 June 2021 by sitting in silence. However, he submitted that the Fiscal had also contributed due to his presentation. The Respondent said he had practised for many years. This was the first time he had encountered a pleader who could not present himself in an audible fashion. He did not know why he should have to put up with it. The Fiscal should not get off with this. The Tribunal

should seriously consider whether it requires another prosecutor. The Fiscal should not get the benefit of expenses.

In mitigation, the Respondent said the unsatisfactory professional conduct findings related to a matter in which the planning committee was well aware the Respondent was representing clients. The complaint had been politically motivated.

In the present case, the Respondent said he had tried to mitigate the result of the Secondary Complainer's loss as far as possible. He submitted that the Secondary Complainer ought not to be named in the Tribunal's decision.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal considered the mitigating factors in this case. The Respondent had practised for a very lengthy period with no previous appearances before the Tribunal. The misconduct was restricted to the consequences flowing from a decision to act in a single conflict situation. Although the conflict had many facets, the misconduct related to a single price of work which had gone badly wrong.

The Tribunal considered the aggravating factors in this case. The Respondent's conduct had been deliberate and dishonest. He had a previous finding for an analogous matter, albeit for unsatisfactory professional conduct. The conduct had the potential to seriously damage the reputation of the profession. Most significantly, the Respondent had no insight into his own conduct or the seriousness of this matter. He repeatedly sought to blame others for his predicament, namely Mr X, his bookkeeper, a political opponent in relation to the unsatisfactory professional conduct case, and during the conduct of this case, the Fiscal. He repeatedly advised he would compensate the Secondary Complainer who was an acquaintance of many years standing. However, despite first offering to do this in 2016, he has not done so. The Respondent showed no evidence of remorse or of having appreciated the wrongfulness of his conduct, or that he would take appropriate steps to avoid a similar situation arising in the future. He did not hold himself accountable for the fundamental failure to represent the Secondary Complainer's best interests.

Given the finding of dishonesty, the Tribunal gave consideration to striking the Respondent off the roll of solicitors, but it also weighed up whether another sanction would be sufficient in the circumstances. Censure and/or a fine would be insufficient to mark the seriousness of the offence or the public interest concerns. Restriction might address some of the public interest concerns but did not offer sufficient protection. Given his lack of insight, even under supervision, there would be a continuing risk to the public. Suspension would not satisfy the need to uphold the reputation of the profession given the seriousness of the offence and the finding of dishonesty which had continued for many years.

The duty of honesty and integrity is a fundamental and underpinning obligation of the profession. There is a need to maintain in the public a well-founded confidence that solicitors are persons of unquestionable integrity, probity and trustworthiness (Bolton v Law Society [1993] EWCA Civ 320). Membership of the legal profession is a privilege. Those who exercise that privilege undertake a duty throughout their professional lives to conduct their clients' affairs to their utmost ability and with complete honesty and integrity. Clients and colleagues should be able to expect these qualities of every solicitor as a matter of course. If the public is to give the profession its respect and trust, it must be assured that, when solicitors fail in these duties they will be suitably dealt with by the disciplinary system.

For all of these reasons the Tribunal concluded that it was necessary and appropriate in this case to order that the name of the Respondent should be struck off the roll of solicitors in Scotland. The order for strike off will take effect on intimation of these findings.

The appropriate award of expenses was one in favour of the Complainers. They had been successful and in general, this Tribunal awards expenses to the successful party. Additional expense in this case had been generated by the Respondent's approach to and conduct of the proceedings, including his failure to bring his hearing aids to the hearing on 4 June 2021.

The Tribunal ordered that publicity would be given to the decision and that publicity should include the name of the Respondent. However, there was no requirement to identify anyone else, including the Secondary Complainer, as publication of their personal data may damage or be likely to damage their interests.

The Secondary Complainer will have 28 days from intimation of the written findings to lodge a claim for compensation.

Ben Kemp

Vice Chair