

**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

**MOHAMMED AAMER ANWAR, Aamer
Anwar & Co., Carlton Buildings, Ground Left,
63 Carlton Place, Glasgow**

Respondent

1. A Complaint dated 5 March 2021 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Mohammed Aamer Anwar, Aamer Anwar & Co., Carlton Buildings, Ground Left, 63 Carlton Place, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal fixed a virtual procedural hearing for 10 June 2021 and notice thereof was duly served on the Respondent.
5. A Minute of Amendment was lodged on behalf of the Complainers together with a motion that the Minute be received and allowed and thereafter the virtual procedural hearing adjourned. In terms of Rule 56 of the Tribunal Rules 2008, the Tribunal received and allowed the Minute of Amendment and adjourned the virtual procedural hearing

administratively to a virtual procedural hearing on 21 July 2021. The Respondent was allowed until 12 noon on 20 July 2021 to adjust his Answers.

6. A Minute of Amendment to the Answers for the Respondent was lodged together with a motion to allow the amendment to the Answers, discharge the virtual procedural hearing administratively and fix a full hearing. The Complainers intimated their consent to this motion and to the Respondent's evidence-in-chief being led by way of affidavit. In terms of Rule 56 of the Tribunal Rules 2008, the Tribunal adjourned the virtual procedural hearing fixed for 21 July 2021, allowed the Minute of Amendment of the Answers to be received and granted, allowed the Respondent to give evidence-in-chief by way of affidavit with the affidavit to be lodged four weeks in advance of the hearing and fixed a virtual hearing on 20 September 2021.
7. At the virtual hearing on 20 September 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Claire Mitchell, QC, instructed by Johnston Clark, Solicitor, Dundee. The Tribunal formally received a Record, Joint Minute and a Second Inventory of Productions for the Respondent. Having heard evidence and submissions, the Tribunal continued the hearing for the Tribunal to commence deliberations and for further procedure to 5 November 2021.
8. On 5 November 2021, the Tribunal members met by virtual conference to commence deliberations. These completed, later that day, the full virtual hearing was reconvened when the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented by Claire Mitchell, QC, instructed by Johnston Clark, Solicitor, Dundee.
9. The Tribunal found the following facts established:-
 - 9.1 The Respondent's date of birth is 30 December 1967. He was enrolled as a solicitor on the 20 December 2001. He was employed by TF Donaldson & Reid between the 17 January 2002 and the 28 February 2002, then Beltrami Anwar between the 1 March 2002 and 14 June 2005. He was the sole principal in the firm of Beltrami Anwar between the 15 June 2005 and the 31 October 2006. From the 1 November 2006 to date he has been the sole principal of Aamer Anwar & Co.

9.2 The Secondary Complainer met with the Respondent for the first time on the 24 September 2015 when he accepted instructions to act on her behalf. On the 1 October 2015 the Respondent wrote to the Secondary Complainer regarding their recent meeting and confirmed that the firm was pleased to accept instructions to act on her behalf. Accompanying the letter was a copy of the firm's standard Terms of Business for signature.

9.3 The Secondary Complainer signed, and the Respondent countersigned the Terms of Business on the 7 and 8 October 2015 respectively. The Terms of Business were the Respondent's style Terms of Business.

9.4 Specifically the eighth paragraph of the Terms of Business stated inter alia:

"By signing this agreement, you undertake and accept that the amount of fee charged will not be subject to taxation by the Auditor of Court, nor will it be capable of forming the basis of any complaint to the SLCC or Law Society of Scotland. Prior to signing this agreement, we would remind you that you have the right to consult with an independent solicitor prior to signing this contract and should you choose not to exercise this right our firm cannot be held responsible for your failure to do so"

9.5 The Respondent has through his agent accepted that no solicitor can contract out of a complainer's right to complain to the Scottish Legal Complaints Commission or the Law Society of Scotland.

9.6 The Auditor of Court is an impartial adjudicator who has been tasked for decades to independently assess that a fee charged by a solicitor is fair and in accordance with the terms of the agreement between client and solicitor. He acts as a check and balance in conflicts between Solicitor and clients.

10. Having given careful consideration to the foregoing circumstances, the Tribunal found the Respondent not guilty of Professional Misconduct. The Tribunal went on to consider

Section 53ZA of the Solicitors (Scotland) Act 1980 and declined to remit the Complaint to the Council of the Law Society of Scotland.

11. Having heard further submissions from the parties in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 5 November 2021. The Tribunal having considered the Complaint dated 5 March 2021 at the instance of the Council of the Law Society of Scotland against Mohammed Aamer Anwar, Aamer Anwar & Co., Carlton Buildings, Ground Left, 63 Carlton Place, Glasgow; Finds the Respondent not guilty of professional misconduct; Finds no expenses due to or by either party; and Directs 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)

Catherine Hart

Vice Chair

12. 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 10 JANUARY 2022.

IN THE NAME OF THE TRIBUNAL



Catherine Hart
Vice Chair

NOTE

At the Hearing on 20 September 2021, on the joint motion of both parties, the Tribunal allowed a Record and Joint Minute to be received. On the motion of the Respondent, not opposed by the Complainers, the Tribunal allowed a Second Inventory of Productions to be received late. Accordingly, the Tribunal had before it the Record, Joint Minute, Affidavit for the Respondent, two Inventories of Productions for the Respondent and List of Authorities for each of the parties. In the course of submissions it became apparent that the Complainers' List of Authorities had not been intimated to the Respondent. Ms Mitchell objected to the Fiscal referring to the authorities included in that List which were not already included in the Respondent's List of Authorities. After some enquiry, the Fiscal ascertained that although the heading of the email lodging the List of Authorities with the Tribunal Office refers to the Respondent's agent, an error had occurred and the email had not in fact been sent to the Respondent's agent. The Tribunal considered that as the authorities objected to were simply extracts from the Parliament House book and were referred to within the pleadings, they should be allowed, subject to Ms Mitchell having an opportunity to consider them in detail. The Tribunal adjourned to allow Ms Mitchell to do that.

The Tribunal sought clarification from Ms Mitchell in relation to apparent issues of relevancy and competency raised within the Respondent's Answers. She explained that the only live issues of relevancy related to Rules B1.3 and B1.4 of the Practice Rules 2011. It was her submission that the contents of the Terms of Business did not amount to "advice" or "acting on behalf of clients". Both parties agreed that these issues were best dealt with in submissions following the leading of evidence.

The Fiscal intimated that he was not leading any evidence given the extensive admissions within the Respondent's Answers.

Ms Mitchell confirmed that the Affidavit previously lodged with the Tribunal was to be taken as the Respondent's evidence-in-chief and that the Respondent was to be made available for cross-examination by the Fiscal.

EVIDENCE FOR THE RESPONDENT

The Respondent adopted the Affidavit as his evidence-in-chief. The Affidavit was in the following terms:-

"I, Mohammed Aamer Anwar, Solicitor, Glasgow, do solemnly affirm as follows:-

1. My full name is Mohammed Aamer Anwar. I am 53 years of age and am the sole principal of Aamer Anwar and Company, Solicitors and Notaries, Carlton Buildings, 63 Carlton Place, Glasgow G5 9TW.
2. I plead not guilty to professional misconduct.
3. I trained with TF Reid and Donaldson, Paisley between 2000 to 2001 and then assigned my second-year traineeship to Beltrami Berlow Solicitors in 2002. I completed my traineeship in 2002 and became an assistant with Beltrami Berlow.
4. In 2005 I became a partner in the new firm of Beltrami Anwar before setting up my own practice of Aamer Anwar & Co. on the 1st November 2006 to date.
5. My practice is largely a criminal law practice.
6. I first met with the client on the 24th September 2015, and she signed her Terms of Business on the 7th October 2015. I sent them to her, she did not sign them in my office or in my presence. The client matter was under investigation by Police Scotland and was a case of utmost sensitivity and urgency. The client made her payment to the client account on the 7th December 2015 Agency eventually terminated. I was the subject of 12 issues of complaint to SLCC. Three of which were conduct issues. The only issue of complaint regarding money was issue 11. The client had incorrectly alleged that she had been charged for an initial meeting with Queen's Counsel and a forensic accountant fees of £450, but this was subsequently shown conceded by her to be incorrect as no such outlays for the QC or accountant were charged.

The only action taken was relative to issue 12 now before this Tribunal which relates to the wording of the eighth paragraph of the Terms of Business I issued in this case. The clause complained about was only ever intended to protect my hourly charge rate of £250 per hour plus applicable VAT and I believed s61A, Solicitors (Scotland) Act 1980 introduced in 1990 entitled me to properly achieve that without departing from conduct standards. With the benefit of hindsight and many re-readings of the chapter in Paterson Ritchie and discussions, now I realise that in trying to protect my hourly rate, I had inadvertently confused the ability to

exclude taxation in certain circumstances with the ability to complain and how this might interact with the issue of an ethical duty not to overcharge.

This area of practice is complicated. I did know that neither SLCC nor the Law Society has any locus in relation to hourly rates. I acknowledge I made a mistake in that s 61A is intended to dispense with the requirement for taxation when pursuing a client for fees and does not exclude either the Society's powers to order taxation where there may be excessive fee charging or SLCC's power to order repayment where there is inadequate professional service, but believe my subsequent acting's demonstrate I had no intention when issuing terms to behave other than entirely properly in relation to my client.

7. It is important to state that at no stage was any attempt made by myself to stop the former client from complaining to the Law Society or the SLCC about anything else than hourly rate. Right above the signature box she is in fact given full contact details of the Scottish Legal Complaints Commission in terms of professional guidance.

As soon as I received the complaint on 16 December 2016, I instructed my solicitor, James McCann, Clydebank to deal with it on my behalf. At no stage did I seek to invoke the parts of the clause complained about. Mr McCann wrote to the complainer on 17 January 2017 and stated

Para 3- "it does appear to us that some of the points which you seek to raise, are in relation to the appropriate level of charging of legal fees and outlays. You will have received a Terms of Business letter from Mr. Anwar and no doubt a copy of that will be among the papers that have gone to your new agent. It should be possible for your advisors to explain to you the prevailing law and practice in regard to how any client can ask for more detail of and if necessary, put to taxation a solicitor's account that involves a process of assessing legal fees undertaken by an independent auditor. These are not primarily matters for the Scottish legal Complaints Commission as there is already in place a long-standing and well recognised system for dealing with such issues"

8. The area of fees is complicated and taking on board the complete absence of guidance from the Law Society, even a senior practitioner like myself with an impeccable record on financial

matters could make an innocent error. The communication guidance told me what we have to say in Terms of Business, but not what we could not. Whilst I appreciate it is not for the Law Society to legislate for all circumstances as regulator, it merits principles-based guidance on the interaction between black letter law like s61A and conduct standards.

9. I would submit that in all dealings with this client I always acted with integrity. I was not untruthful, dishonest, self-interested, or deceitful. There was no absence of independence in my advice and certainly at no time did I permit personal interests to influence the advice the client was given on the subject matter in which I was instructed. On the question of ability to complain, in fact it was quite the reverse and the client was given details at the very end on a 'standalone page 3' of her Terms of Business of the complaints process, it was not hidden away in small print in the Terms of Business, therefore highlighting to the client even before she signed off that she had the right to complain and how to do it.
10. The language used in my Terms of Business is simple and technical terms are avoided to allow effective communication.
11. It should also be noted that I particularly stated she was also welcome to seek advice from another solicitor, had it been my intention to take advantage why would I invite another solicitor to have a look at my Terms of Business, it would make no sense at all.
12. This matter has in my view only ever been about the terms of a communication and in the whole facts and circumstances my conduct I would submit has never amounted even to unsatisfactory professional conduct let alone to professional misconduct which is a serious and reprehensible departure from the normal standards of a competent and reputable solicitor. I believe my subsequent actions should be considered an important factor in determining whether the threshold is reached."

The Respondent insisted that his intention had only been to "protect his hourly rate". He could not recall what resources he had referred to in order to draft the Terms of Business. He explained that the Terms of Business were, to his recollection, drafted for this particular client. It was his belief that there was no specific guidance from the Law Society in relation to the meaning and extent of section 61A and how Terms of Business should be worded to incorporate it. He was asked if he was "stepping away" from the

proposition in his Affidavit that there was no guidance and explained he was saying there was no specific guidance on this.

The Respondent accepted that in hindsight the clause could have been clearer. He explained that he had included the condition regarding his hourly rate in the Terms of Business in order to be as “helpful, honest and plain” as he could be.

Ms Mitchell confirmed she had no re-examination.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal submitted that there were two elements to his case: (1) whether it is reprehensible to enter into a contract that excludes scrutiny by the auditor and the Scottish Legal Complaints Commission (“SLCC”) and (2) whether the contract here was such a contract.

He emphasised that the Joint Minute agreed the content of the Terms of Business and the Respondent had also agreed that no solicitor could or should exclude a client from making a complaint to the SLCC.

He stated that the Law Society accepted that Section 61A of the Solicitors (Scotland) Act 1980 (“the 1980 Act”) provided an exception to the normal rule of taxation but that was restricted to (1) civil litigation and (2) written fee agreements amounting to a fixed total fee, not just an hourly rate.

He did not accept the narrow interpretation put on Rules B1.3 and B1.4 by the Respondent. He submitted that if clause 8 of the Terms of Business precluded taxation or a complaint to the SLCC then the Respondent was putting his own interests before his client. The right of a member of the public to complain about a solicitor is enshrined in statute and cannot be excluded by a solicitor.

He emphasised that there was guidance given by the Law Society and pointed to his averments 4.8 and 4.9. He drew the Tribunal’s attention to an apparent inconsistency between the Respondent’s Affidavit and his oral evidence. He said that, in his Affidavit, the Respondent stated that there was no guidance whilst in evidence he had accepted that there was guidance but suggested it was not clear.

The Fiscal submitted that the question for the Tribunal was whether the Terms of Business restricted the right to taxation and to complain to the SLCC. If they did that then this amounted to professional misconduct. He argued that the terms of the business required to be given their plain and simple meaning.

The intention of the Respondent was irrelevant. He invited the Tribunal to reject the Respondent's explanation, stating that this could not simply be a case of poor drafting. Clause 8 referred to "the amount of fee charged" and that could only mean "the figure at the bottom of the invoice". He argued that the Tribunal was not entitled to look behind what was "written in black and white".

He submitted there were two issues with clause 8: (1) the exclusion of taxation and (2) the exclusion of a complaint to the SLCC. In relation to the former, the Respondent appeared to be relying on Section 61A of the 1980 Act in his defence. The Fiscal suggested that this was a red herring as Section 61A only applied to civil litigation. Whilst he accepted the terms of Section 61A were vague, he pointed to the commentary in Paterson & Ritchie, *Law, Practice and Conduct for Solicitors* at pages 331 to 333 and to the guidance in the Parliament House book. Furthermore, he submitted that it was good practice to include the right to taxation in a solicitor's Terms of Business letter unless Section 61A applied and drew the Tribunal's attention to Paterson & Ritchie at page 93. The plain reading of clause 8 was to exclude taxation which brought into question the integrity of the Respondent. The Respondent was seeking to avoid scrutiny of his fee and this brought the profession into disrepute.

With regard to the second issue, namely the exclusion of the right to make a complaint to the SLCC, whilst the Fiscal accepted that the Respondent's Terms of Business properly included reference to the SLCC, clause 8 restricted the client's right. This, he argued, must amount to serious and reprehensible conduct. He referred the Tribunal to the case of The Law Society of Scotland-v-Mark Thorley (20 August 2020).

The Fiscal accepted that the Tribunal required to consider the culpability of the Respondent. In doing so he submitted that the Tribunal required to give the Terms of Business their plain meaning which he said was simply not consistent with a mistake on the part of the Respondent. It appeared that the Respondent was suggesting that all solicitors are entitled to make errors which do not amount to misconduct. In this case, the Respondent had been a principal in private practice for several years. The Respondent was unable to say what guidance he had considered before drafting his Terms of Business. It is fundamental that Terms of Business be clear and concise.

The Fiscal invited the Tribunal to hold that the Respondent had considered both the issues of taxation and of complaint and had attempted to exclude both. He submitted this amounted to professional misconduct. If the Tribunal was not satisfied that the circumstances met the test for professional misconduct then he invited the Tribunal to refer the Complaint back to the Council in terms of Section 53ZA of the 1980 Act.

SUBMISSIONS FOR THE RESPONDENT

Ms Mitchell invited the Tribunal to find the Respondent not guilty of professional misconduct or unsatisfactory professional conduct.

She argued that the Fiscal was wrong in his proposition that the Tribunal could not look behind what was written in “black and white”. She referred the Tribunal to the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313 and submitted that the Tribunal was bound to consider the culpability of the Respondent in the whole circumstances. In other words, the Tribunal required to look at the case in the round.

The commentary in Paterson & Ritchie was simply that and did not have status of guidance. There was no specific requirement for Terms of Business to include reference to the right of taxation. Good practice and professional misconduct are not the same issue. She argued that Section 61A of the 1980 Act “was absent guidance in an authoritative way”.

The Fiscal was not correct to suggest that the issue starts and ends when the agreement was made. She referred to the case of Thorley and emphasised that the Tribunal in that case looked at the whole circumstances and, in particular, that the Respondent insisted for some time on the clause that attempted to exclude a complaint to the SLCC. She invited the Tribunal to look at the whole circumstances here. Clause 8 specifically refers to the client having a right to consult with another solicitor about the Terms of Business. The final paragraph of the Terms of Business signposted the client to the SLCC. As soon as the complaint arose the Respondent had instructed his solicitor to remind the Secondary Complainer of her right to taxation and this was done in an email dated 17 January 2017. At no stage had the Respondent attempted to prevent the Secondary Complainer’s complaint proceeding to the SLCC. The Sub Committee did not have the benefit of the Respondent’s evidence and proceeded to conclude that the conduct was serious and reprehensible without considering the question of culpability. The Tribunal had the benefit of the Respondent’s evidence.

Ms Mitchell referred the Tribunal to a decision on the Law Society’s website regarding a finding of unsatisfactory professional conduct on 14 November 2019.

Even if it was accepted by the Respondent that he had tried to exclude the right to taxation, there was no clear line that this would amount to professional misconduct. She argued that it was not a matter of

dubiety that taxation can be properly excluded in terms of Section 61A of the 1980 Act. However, that section does not define a written fee agreement. She submitted that a written fee agreement was not restricted to a fixed fee. This is an ongoing thorny issue and there is no written guidance given by the Law Society on the requirements of a written fee agreement. The only guidance given is Rule 8.1 of the 2011 Practice Rules which does not help with this issue.

The Law Society and the SLCC have no jurisdiction in regard to quantum of fees. This, she said, is a matter of contract. Whilst it is accepted that the SLCC is the gateway to complaints, any such complaint could not be about quantum of fees only adequacy of service.

Ms Mitchell submitted that at worst the Respondent had made a mistake in the wording of the Terms of Business. His intentions, however, were clearly demonstrated in his subsequent actings.

Whilst Ms Mitchell accepted that the Law Society cannot be expected to issue guidance for everything, this issue was a constant one. The Law Society should not be relying upon the Tribunal on an *ad hoc* basis to issue guidance. A conduct standard or guidance would have prevented difficulties arising here.

She moved on to consider the rules of conduct that the Fiscal alleged the Respondent had breached. With regard to the question of effective communication, she submitted that this was an objective test. She argued that it was not for the Respondent to establish that the client did not misunderstand the Terms of Business. There is no averment within the Complaint that the Secondary Complainer misunderstood the Terms of Business. If there was a communication problem here then she argued that it should be considered at the lowest end of the scale as the Respondent had (a) not attempted to invoke any bar to taxation or complaint and (b) had immediately offered taxation.

Looking at Rule B1.2, she submitted there was no averment or allegation of deceit. There was no basis for the Tribunal to hold that the Respondent had acted in any way contrary to honesty or integrity.

With regard to Rule B1.3, which refers to “independent advice”, she submitted that advising a client in relation to Terms of Business does not amount to legal advice in terms of B1.3.

With regard to Rule B1.4, she submitted that the suggestion by the Complainers was that the Respondent had put his interests before the interests of his client in relation to his “advice to or acting for” his client. In fact, the evidence disclosed that the Respondent’s actions were consistent with putting his client first.

Ms Mitchell submitted that the Sharp test required the Tribunal to look at the whole circumstances and the culpability of the Respondent. The Fiscal was wrong to suggest that the simple existence of the clause within the Terms of Business was sufficient to find professional misconduct. As a matter of fact, nothing was put in the way of the Secondary Complainer to prevent her going to taxation or complaining to the SLCC and there was nothing in the Respondent's actions that suggested he was culpable in this regard. She invited the Tribunal to dismiss the Complaint.

RESPONSE BY COMPLAINERS

The Fiscal responded that it was not correct to say that the only guidance was that given in Paterson and Ritchie and he referred the Tribunal to the extracts from the Parliament House Book. Nor was it correct to suggest that the Thorley case was authority for the proposition that the Respondent required to persist in insisting on the clause for it to amount to misconduct.

Whilst the Respondent had included details for the SLCC, clause 8 sought to restrict the right to complain and put an obstacle in the way of the client. It is not for the Law Society to provide guidance for every written line of Terms of Business. Looked at objectively clause 8 should be seen as an obstacle and this is sufficiently egregious to meet the Sharp test.

DECISION

The averments of fact within this Complaint had all been admitted in the Respondent's Answers. The Joint Minute between the parties agreed the Terms of Business document and a copy of the email from the Respondent's solicitor to the Secondary Complainer. The Respondent gave evidence explaining how this situation had arisen.

The Tribunal found the Respondent to be a credible witness. It believed the Respondent's explanation that his intention was only to "protect his hourly rate". This explanation was supported by other background facts and circumstances in the case.

The next step for the Tribunal was to look at this conduct in the light of the averments of duty made within the Complaint. The Fiscal had conceded that the Respondent was entitled to fix an hourly rate. The Tribunal having accepted the Respondent's explanation in evidence, there could be no issues of honesty or integrity (Rule B1.2), no issue of failing to give independent advice (Rule B1.3) and no issue of the Respondent putting his interests before his client's (Rule B1.4.2). It should be noted that this

decision was reached on the basis of the explanation given by the Respondent in evidence and not on the restrictive interpretation of Rules B1.3 and B1.4 suggested in submissions.

The Complaint raised the issue of communication under two headings: (1) Rule B1.9.1 and (2) B4.2(e) and (f). The Tribunal concluded that the conduct proved did not amount to a breach of Rule B4.2(e) and (f). However, the Tribunal was satisfied that the Respondent had failed to communicate effectively with his client in terms of Rule B1.9.1. The plain reading of clause 8 of the Terms of Business was to exclude the client's right to taxation and to make a complaint to the SLCC. That was not what was intended by the Respondent.

Thereafter, the Tribunal required to determine whether this breach of Rule B1.9.1 amounted to professional misconduct. The test for misconduct is set out within the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313:-

“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.”

The Tribunal was clear that Terms of Business are significant documents as they form the contract between solicitor and client and solicitors have an obligation to draft these clearly and accurately. Solicitors should not include clauses in their Terms of Business that attempt to restrict or remove the client's rights inappropriately. However, the Tribunal accepted that clause 8 was carelessly worded by the Respondent and this was an honest mistake on his part. ●f significance was the fact that he he had not attempted to use this clause to prevent the Secondary Complainer from complaining to the SLCC and also his solicitor flagged up to her the right to have the fee reviewed by taxation. As a result, the Tribunal determined that, in the particular circumstances of this case, the Respondent's conduct did not meet the Sharp test and found him not guilty of professional misconduct.

Thereafter, the Tribunal required to consider whether the Complaint required to be remitted back to the Council of the Law Society of Scotland in terms of Section 53ZA of the 1980 Act. Unsatisfactory

professional conduct has a statutory definition. Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 states that unsatisfactory professional conduct is:-

“Professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor”.

Taking account of all of the circumstances, including that there was no suggestion of any prejudice to the Secondary Complainer, the Tribunal held that the conduct fell just short of the test for unsatisfactory professional conduct. It was therefore not appropriate for the Complaint to be remitted back to the Council of the Law Society of Scotland.

In reaching its decision the Tribunal did not require to look in any detail at s61A of the Solicitors (Scotland) Act 1980. The Tribunal did, however, note that guidance from the Law Society had been given as shown in the Complainer’s productions. It noted that, whilst Paterson and Ritchie is only a textbook, it is one well known to the profession and often referred to in Tribunal proceedings.

The Tribunal considered that the Respondent’s submission that neither the Law Society nor the SLCC have the power to consider a complaint in relation to a solicitor’s fees is incorrect. Complaints about overcharging, for example, are dealt with by both.

Both parties had relied upon the Thorley decision. The Tribunal did not find this case to be of assistance given the different facts and circumstances involved in that case.

EXPENSES AND PUBLICITY

The Tribunal invited submissions from both parties in relation to expenses and publicity. Ms Mitchell indicated that she had no submissions with regard to publicity. She moved for expenses, to include sanction for Senior Counsel. She argued that the Respondent had been entirely successful and that expenses should follow success. The Fiscal invited the Tribunal to make no award of expenses due to or by either party. He referred the Tribunal to the case of Baxendale-Walker v The Law Society [2007] EWCA Civ 233 and emphasised the importance of the Law Society being able to proceed with Complaints of misconduct in appropriate cases. He explained that the Sub Committee is made up of both lay and professional members and did not take the decision to refer the Complaint to the Tribunal lightly. The Sub Committee had not had the benefit of hearing the Respondent’s evidence. With regard to publicity, he invited the Tribunal to follow its usual practice.

In response, Ms Mitchell argued that the Respondent should not be prejudiced by the failures in the system. As he had been successful he should be awarded expenses.

DECISION ON EXPENSES AND PUBLICITY

The Tribunal gave careful consideration to both parties' submissions. Whilst the Tribunal noted that the case of Baxendale-Walker was an English authority, it also noted that the Law Society in its role as the profession's regulator was required to consider issues of protection of the public and the reputation of the profession. Terms of Business letters exist to avoid disputes between solicitor and client and require to be clear and concise. The system for client complaints is fundamental to the issues of protection of the public and the reputation of the profession. The Tribunal considered that the Complainers were right to bring this Complaint to the Tribunal. Clause 8 of the Terms of Business was poorly worded. In all the circumstances, the Tribunal considered the appropriate order was one of no expenses due to or by either party.

With regard to publicity, the obligations of the Tribunal are set out within Paragraph 14 and 14A of Schedule 4 to the 1980 Act. The information before the Tribunal suggested that publication of the name of the Secondary Complainer might be likely to damage her interests. The import or clarity of these findings would not be affected in any way by the details of the Secondary Complainer being included in any publicity. Accordingly, the Tribunal determined that publicity of these findings should take place including the name of the Respondent but not necessarily the details of any other individual.



Catherine Hart

Vice Chair