

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

D E C I S I O N

**in Appeal under Section 42A(7) of
the Solicitors (Scotland) Act 1980**

by

**MESSRS MACROBERTS,
Solicitors and RICHARD
BARRIE, 152 Bath Street,
Glasgow**

Appellants

against

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

First Respondents

and

**MR A, of Company 1
Second Respondent**

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 by Messrs MacRoberts, Solicitors and Richard Barrie, 152 Bath Street, Glasgow ("the Appellants") against a finding of the Council of the Law Society of Scotland ("the Law Society") dated 13th January 2005 that the Appellants had provided an Inadequate Professional Service in relation to their client Mr A("the Complainer") of Company 1 and a Direction that the Appellants should pay Mr A five hundred pounds by way of compensation.

2. In accordance with the Rules of the Tribunal the Appeal was formally intimated to the Law Society and Mr A and Answers were lodged on behalf of the Law Society.
3. Having considered the Appeal with the Answers, the Tribunal resolved to set the Appeal down for hearing and appointed that the Appeal should be heard on 26th July 2005.
4. At the hearing on 26th July 2005 the Appellants were represented by Mr Macreath, Solicitor, Glasgow and by Mr Brown, Advocate. The Law Society were represented by their Fiscal, Mr Sean Lynch, Solicitor, Kilmarnock. Mr A appeared to give evidence but the hearing was adjourned part heard before he could do so. He was not represented. The Appellants led evidence from two witnesses, Mr B and Mr Barrie of MacRoberts.
5. At the adjourned hearing on 19th September 2005 the Appellants were again present and represented by Mr Macreath, Solicitor, Glasgow and by Mr Brown, Advocate. The Law Society were again represented by their Fiscal, Mr Sean Lynch, Solicitor, Kilmarnock. Mr A did not appear and was not represented. No further evidence was led.

6. Having considered the productions lodged and the submissions made on behalf of the Appellants and the Law Society, the Tribunal pronounced an Interlocutor in the following terms:

Edinburgh 19th September 2005. The Tribunal having considered the Appeal by Messrs MacRoberts, Solicitors and Richard Barrie, 152 Bath Street, Glasgow (“the Appellants”) against a Finding of Inadequate Professional Service by the Council of the Law Society of Scotland (“the Law Society”) in relation to Mr A of Company 1, and the Determination and Direction that the Appellants should pay the sum of five hundred pounds by way of compensation to Mr A, Company 1: Quash the said Determination and Direction; Find the Law Society liable in the expenses of the Appellants and in the expenses of the Tribunal excluding the expenses of the employment of Counsel; Expenses are to be awarded as the same may be taxed by the auditor of the Court of Session on an agent and client indemnity basis in terms of Chapter Three of the last published Law Society’s Table of Fees for general business with a unit rate of £11.85; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellants.

(signed)

Kenneth R Robb

Vice Chairman

7. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Appellants by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

This is an Appeal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 as amended against the finding of Inadequate Professional Service and Determination and Direction under Section 42A(1) and 42A(2)(d) of the said Act.

Prior to commencement of the hearing the Chairman asked parties to address him on the procedure for the Appeal. He asked parties to address him on whether the purpose of the hearing was to have a complete re-hearing or whether the issue for the Tribunal was whether it was reasonable for the Law Society to come to the decision which they originally did. Mr Brown indicated that it had been agreed between the parties that the correct approach was that the Tribunal should re-hear the case and consider for itself whether or not there had been an inadequate professional service provided to Mr A whilst paying due regard to the Law Society's decision. Mr Brown cited three cases as authority for this proposition namely - Lothbury Investment Corporation Limited – v- Inland Revenue Commissioners (1981) CH47; McMahon –v- The Council of the Law Society of Scotland 2002 SC 475 and Chief Constable of Avon & Somerset Constabulary –v- The Police Appeals Tribunal reported in Times Law Reports on 11th February 2004. Mr Brown submitted copies of these cases and stated that he could address the Tribunal further on this point if required. Mr Lynch agreed that to re-hear the case was the correct procedure in this case but that this should not be considered to be setting a precedent for the Tribunal in similar cases.

The Tribunal agreed to note the authorities and the consensus view by the parties that the correct procedure should be to have a fresh hearing but determined that this would not result in a precedent being set for the Tribunal.

Mr Brown led the evidence of Mr B, a solicitor and managing partner with MacRoberts. Mr Lynch indicated that the Respondent's plea in law as contained in the Record objects to evidence being given regarding the events subsequent to the Appellants' withdrawal, and that any evidence relating to that should be heard under reservation. Mr B stated that he was the Appellants' Client Relations Partner and Managing Partner and has a role regarding clients' relationships and complaints. He advised that his was a wide ranging role managing all executive functions of the firm

– human resources, finance, computers, staff, partners and fee gathering. He advised that he has been in this role for seven and a half years.

He stated that the turnover was substantial, running to millions of pounds. For 24 years the firm's financial year-end has been 30 April and that for tax purposes profits are calculated on a work in progress assessment. The partners had decided that the profit basis should be calculated on cash received, so if cash is not received by that date then it does not count for the profits earned in that year. This had consequences for the management of fees. About ten to fifteen per cent of the total turnover is received in the last three weeks before the financial year-end as a result of a major drive to collect fees, motivated primarily by partners' self interest. Procedures are in place to identify outstanding fees and chase them up. This involved him in individual meetings with partners who had fees outstanding. He advised that he could get printouts any time, advising him which fees were outstanding. He met with partners regarding outstanding fees looking for them to collect the fees as soon as possible and for them to give him an indication of whether these fees would be received before the financial year-end so they could factor them out or in of the income calculations.

He did not remember meeting with Mr Barrie with regard to the outstanding fees due by Mr & Mrs A. He stated that in February 2003, a fee note of £4500 rendered in May 2002 would be the subject of concern and that any fee outstanding for getting on for a year would be worrying. It did not matter if the case involving the fees was not concluded as the firm had a practise of issuing interim bills. Partners always kept an eye on court actions if fees were not paid. Mr B stated that more often than not it is left to the partner involved to decide that the firm should withdraw from acting when bills are outstanding but that sometimes these matters are discussed with him.

Mr B said that there is a standard procedure for dealing with complaints and confirmed that even if there is a small complaint such as a client dissatisfaction letter, it has to be referred to him. He stated that the Law Society encourages conciliation and that he usually endeavours to meet or speak with the client to see if the matter can be resolved. He confirmed that the complaint by the As was brought to his attention in early May 2003. He confirmed that the trigger for that complaint was that Mr A telephoned him and advised that Mr Barrie had withdrawn from acting. Mr A had

stated he was extremely upset. Mr B advised that his memory was not sharp in relation to the sequence of events but stated that as far as he could remember he had looked into the complaint and called Mr A back. He advised that in the course of the conversation when he called back two things developed, firstly that it was clear that the As' would not pay any of the outstanding invoices and secondly Mr A said that Mr Barrie had been dishonest with regard to a) communications, b) the fee note and c) Mr Barrie and his colleagues had charged for work not done, and Mr A said that all this was in the category of a deliberate pattern of deceit. Mr A could not have been clearer about his position; about both aspects, the reference to non-payment and to the actings of Mr Barrie in relation to the fees. Mr B advised that personally he had a strong view that you have to have the trust of the client and the solicitor has to have trust in the client and when this relationship is broken he personally would be very uncomfortable about the lawyer staying in the case. He advised that clearly Mr A had lost confidence in Mr Barrie.

Mr B stated that given what was said he had decided that there was little to gain by discussing the possible resumption of agency. However, before he spoke to Mr A that possibility had not been ruled out and that he had phoned back to try to get things resolved.

Mr B stated that when people complain there are usually a lot of possible ways to resolve matters, sometimes there is a misunderstanding about costs, sometimes they calm down. Mr B understood that the trigger for withdrawal was the failure to pay the fees but stated that it is sometimes possible to resolve these issues with negotiations or payment plans. Mr B confirmed that it varied from case to case as to how much MacRoberts were willing to restrict their fee. Sometimes MacRoberts are prepared to go to a no win no fee basis because a client has fallen on hard times.

Under cross-examination, Mr B confirmed that Mr A telephoned him in early May 2003. Mr B advised that this could not have been before the decision to withdraw as Mr A had spoken to him about the decision to withdraw. It was his understanding that MacRoberts had withdrawn at that point and that it was not just a threat. Mr B confirmed that from page 361 of the file(Appellants production) – the fax from Mr A to Mr Barrie dated 29th April 2003 and the document immediately prior to that which

was a fax dated 28th April that it was apparent that only one fee note was disputed. Mr B confirmed that the language used by Mr A was temperate in the circumstances. Mr B confirmed that page 362 of the file was a fax from Mr A to Ms I the credit controller of MacRoberts sent late in the evening. Mr B agreed that it seemed that Mr A had discussed the matter with someone previous to sending the fax. He accepted that Mr A's tone had hardened but that he appeared to be looking for a solution to matters. Mr B stated that he had done a file note after the second conversation noting his conversations with Mr A and the fact that Mr A was refusing to pay and a note to Richard Barrie at the same time saying that that he should prepare to raise an action to recover the fees. Mr B stated that he had not looked at the file which had been produced, but that there was a note. Mr B accepted that it was possible that Mr A phoned him back but disagreed that he used the exact words "let down" and "disappointed". Mr B stated that he himself had said that it wasn't worth meeting regarding the decision about continuing to act but that he would meet Mr A to discuss his complaint. There was no doubt that Mr A was alleging dishonesty on the part of Mr Barrie and that the specific allegations were that Mr Barrie had been dishonest in communications and had charged for work which had not been done and that Mr A had been misled in relation to the price for the work. Mr B denied that he could have been mistaken about the allegations of dishonesty because he had written to Mr A and to the Law Society in such terms and there had been no demurral in response to either letter. He clearly understood from Mr A that he alleged with reference to the billing guide i.e. the computer printout that he had been charged for work which had not been done rather than charged twice for work. Mr B advised that following the complaint from the Law Society he had reviewed the files. He stated that he had not specifically analysed the level of communication with the client. Mr B stated that the firm normally quoted an hourly rate if it was to be charged on a time and line basis, or it could be a fixed price or on an interim basis with staged payments and they had a practice of issuing engagement letters where possible but not always. Mr B advised that in 2001 engagement letters were done sometimes but by 2005 it would have definitely been the practice to issue them.

In re-examination, Mr B confirmed that he had told Mr A in the course of the second conversation that the relationship of trust had broken down and that Mr A did not

refute this in any way. Mr B stated that his recollection was that Mr A appeared to agree with his concerns about how bad the relationship had got.

Mr B stated that the letter dated 19 May 2003 from Company 1 in the small inventory of productions was the letter which Mr A had referred to during their second telephone conversation. The fourth and fifth paragraphs shed light on the timing of Mr A's telephone call to him. He stated that the letter suggests that when he spoke to Mr A the firm had already withdrawn. Mr B confirmed that his reply was dated 2nd June 2003, as he had not been available for a week after the letter was received. Mr B confirmed that in that letter he confirmed the view that the relationship had broken down and that the papers would be passed to Mr A's new solicitors as discussed in the second telephone conversation. Mr B confirmed that he had told Mr A that there was no question of a lien and that he would pass the papers to another solicitor because of the ongoing proof.

Mr B confirmed that he wrote Mrs C at the Law Society by letter dated 25 June 2003 and that the final paragraph of the letter reiterated his two concerns. Mr B confirmed that there was no suggestion from Mr A direct or from the Law Society that Mr B's understanding of the telephone conversation was incorrect. Mr B confirmed that Richard Barrie replied to the next letter from the Law Society as that letter was received while he was on holiday in July. Mr B confirmed that he was happy with Mr Barrie's reply, as the fees had already been significantly abated.

Mr Lynch asked for an opportunity to re-examine because he didn't have the papers that Mr Brown referred to latterly when he cross-examined. There was no objection from Mr Brown. The Tribunal agreed to the further re-examination.

Mr B confirmed that he was pretty sure that what had triggered the first conversation with Mr A was the withdrawal. Mr B confirmed that he decided to look into the complaint and try to resolve the difficulties. He confirmed that the second conversation was about the dishonesty. Mr B stated that he was ninety nine per cent certain that the two conversations were on the same day. Mr B agreed that with reference to the last paragraph of the letter of 25 June 2003, the dishonesty allegations were not the same as work not being done. Mr B stated that he did not consider that

Mr A was complaining about duplicate work. Mr B confirmed that the client would not be charged for an assistant calling a partner and the phone ringing out. He stated that when the fee is assessed he would expect the partner to excise that from the entry in the billing guide. He denied that Mr A complained about such a charge and advised his complaints were much less specific. Mr B said that such a charge would be acceptable in circumstances where repeated attempts had been made to contact a partner at court to provide him with urgent information regarding the case.

The second witness was Richard Alexander Barrie who said he had been a partner in MacRoberts for 13 years. His area of practice was commercial litigation, primarily construction disputes and that eighty to ninety percent of his work was in relation to building contracts. His clients were both large and small. He stated that in the commercial unit there were five partners and that he probably more than others tended to deal with sub-contractors and smaller clients. He stated that he also acted for some PLC clients. On or about April 2001 he was instructed by the Mr & Mrs A regarding a dispute. He had an initial meeting with the two of them to identify the facts. Mr & Mrs A had a rot preservation business specialising in rot removal and had carried out a significant amount of work at a property in West Kilbride for a couple called D. Mr A had a low opinion of the Ds and he was instructed to raise immediate proceedings; the sum sued for was £17,000 and he was instructed to arrest and to inhibit. He advised that Mr A had been pretty dismissive of the Ds and had said that in essence they were chancers. He was instructed to proceed with litigation and not even to send the usual seven-day letter. Mr Barrie initially formed the view that there was not much construction law in the matter; it was effectively a debt recovery exercise. He was instructed that Mr A had done a superlative job and that any criticism was unfounded.

Mr Barrie stated that on being asked regarding the prospects of success he had indicated that if the case was as straightforward as portrayed i.e. A had done a good job and could prove it, then the matter could be dealt with quickly and the prospects were good, but that he would take stock when detailed defences came in at an appropriate stage later on. Mr Barrie stated that he suggested the inhibition because the As were worried about the Ds possibly re-mortgaging the property, as they feared that lack of money was the reason for non-payment.

Mr Barrie was reasonably confident that he would not have quoted an hourly rate. Mr Barrie stated that it was not likely that he said if the action was defended and involved two days at Kilmarnock Sheriff Court it might be between £7,000 and £10,000. He stated that he always makes it clear that what he is giving is a ballpark figure and it is always exclusive of VAT and outlays. If it goes to proof there is always a charge for the shorthand writers notes to be extended, and in addition, if there is an expert witness this is also expensive. He advised that clients like the As want to know how much it will cost them and if we win what proportion of MacRoberts fees are likely to be recovered. Mr Barrie stated that he stood by that figure today as it erred on the side of caution from experience. Mr Barrie advised that a two-day proof and litigation would cost around £4-8,000 depending on the numbers of meetings and the amount of contact with the clients.

In cross-examination he rejected that he ever said to a client that he would win a case. He had indicated the likely prospects based on what Mr A said to him. He may have said the prospects were good or have even ventured very good. He didn't recall who raised the likely costs of litigation but conceded that the £7-10,000 band mentioned by Mr A is consistent with the approach he would take in response to a ballpark figure being asked. Mr Barrie stated that whenever you deal with contractors they talk in VAT net figures. Mr Barrie refuted the suggestion that he had given a figure of between £7 and £10,000 all in including VAT and outlays. Mr Barrie denied that he had discussed worst-case scenarios and that part of him, even at the early stages thought that the £10,000 total would be the net fee because MacRoberts fees would be around £20,000. Mr Barrie denied that he said that Mr A would get all his expenses back as that was impossible.

Mr Barrie stated that he did not write to Mr A about fees after the initial meeting as the fee structure was either discussed at the first meeting or would be apparent when the first interim fee note went out. Mr Barrie said it would have been apparent that a) we charge interim fees, not fixed fees at the conclusion of the action and b) there would have been some insight into the level of fee. Mr Barrie stated that at that time it was not general practice to issue letters of engagement detailing the fee structure although it is now. Mr Barrie stated that he thought that it would have not been

helpful if he had sent out a letter regarding his hourly rate as the clients don't know how many hours it takes him to take a case to a debate.

Mr Barrie stated that it is possible to work out his hourly rate from the printouts but that the firm doesn't charge full commercial rates for growing companies. Mr Barrie advised we were dealing with initially a debt recovery action in the Sheriff Court and it didn't warrant £200 per hour which was one of the reasons he didn't do a letter of engagement. He thought he could render a reasonable fee in the end and everyone would be happy.

Mr Barrie advised that initially the defences were far too vague and it had all the hallmarks of not being much of a defence and a stalling tactic. It was only later that it became clear that the Ds were serious about the quality of the rot work. Mr Barrie advised that it took between 6 and 9 months for the Ds to quantify the cost to remedy the alleged defects. He advised that later on they produced the name of Mr E who had carried out substantial remedial work. He advised that this work was described by the Mr & Mrs A as not being possible. Later there was a video produced of the Ds' house before and after the work and Mr A then became dismissive of Mr E's ability as a rot work contractor.

Eventually specification was provided of the alleged defects and alleged remedial work. By then there had been two diets of debate. The pleadings were by no means perfect but rather than take it to a debate, standing the confidence of Mr A in his workmanship, a proof before answer was fixed. Mr Barrie stated that at this stage, based on the information from Mr A he was reasonably confident that the Ds would make an offer to settle.

Mr Barrie advised that there came a point in 2002 when the Mr & Mrs A wanted to see him alone as they were very keen that he conduct the proof personally. Mr Barrie stated that maybe there was an undercurrent that his assistant Ms F wasn't sufficiently aggressive enough and could be a bit harder with the other side but that there was no direct criticism of her. Ms F was undertaking the work at all times but that he had a good idea of the strengths and weaknesses of her position. He did not take over from Ms F; she was still involved in the preparation. In cross-examination he said he had

agreed to personally conduct the Proof. He stated that if her competence had been called into question she wouldn't have been involved after that.

Mr Barrie stated that when the evidence came out in court it did not bear any resemblance to Mr A's contention that there was a spurious defence. Mr Barrie advised that it turned out that the Ds had a video of their house before and after the A's work was stripped out. It became apparent that at the very least there were shades of grey but he was continually assured by Mr A that even if they could prove that there was work done by Mr E that he could prove that the work done was not eradicated outside the scope of the As' contract and therefore this was not a valid defence and that the other work that Mr E carried out should not have been eradicated. Mr Barrie said that he impressed on Mr A the need to get an independent expert witness. Mr A dismissed the quality of the defenders' expert witness.

Mr Barrie stated that Mr A originally approached Mr G as an expert but that Mr A fell out with Mr G. Mr Barrie advised that this would have worried him but Mr A told him that the UK expert in rot eradication a Mr H was willing to help. Mr Barrie said he was still relaxed but about success even after four days of evidence. Mr Barrie said from memory at this stage the defenders' case was finished but the pursuers' case was not started and there was a considerable amount of evidence to be introduced for the pursuers.

Mr Barrie stated that at the point that Ms F issued the first invoice she discussed the fees with him. The clients had been on board for a couple of months and there had been seven or eight outlays. The figure Ms F obtained from the work in progress account was calculated in five minute units. The hourly rate was applied depending on the seniority of the fee earner. Mr Barrie stated that one of the reasons he would ordinarily delegate work was there was no point in paying for a specialist to do something that an assistant could do. He stated that in relation to the bill, maybe half of the work would be Ms F' time. Mr Barrie said that there was £1,300 on the clock and he told her to render a fee of £800. Mr Barrie said that in relation to the next fee note at pages 131-132 of the file, that that fee would have been almost entirely Ms F's work. Mr Barrie stated that the first fee note was rendered and sent on 26th November. There was a telephone note on file from 29th November when Mr A rang

querying the fees. There was a note that a billing guide was to be sent to Mr A. Mr Barrie advised that asking for a more detailed breakdown doesn't mean there was anything sinister. Mr Barrie explained that the billing guide at pages 137-144 of the file was a computerised printout from the feeing system. Mr Barrie advised that the fee note was paid on 18th January. He was not at any stage contacted by the Mr & Mrs A with concerns about that fee note.

When Mr Barrie wrote to Mr A enclosing the third fee note the proof had commenced. Mr Barrie advised that there was no contact from Mr A regarding the fee note and no request this time for a breakdown of the fees. Mr Barrie stated there was no suggestion that the fee was excessive despite the fact that the third fee note took what was owed to £7,550 in total. Mr Barrie stated that his department were subject to the control of the credit control department and after an approximate period of five to six weeks when an invoice is unpaid a first gentle reminder is sent and thereafter matters escalate and letters get more serious. The matter is only referred back to the partner if credit control receives a letter of complaint. There was no feedback as such to this fee. He would have been aware of the unpaid invoice from the figures that he sees at the end of every calendar month. He advised that in general building contractors are the worst payers so his department have problems in obtaining fees as building contractors see accountants and lawyers as suppliers.

Mr Barrie thought by January 2003 that Mr A was just a slow payer. Mr Barrie stated that he was shocked at getting the letters regarding the expert Mr G's unpaid bills and immediately contacted Mr A. Mr A's response was that Mr G was a crook and a fraud and that he should be fired.

Mr Barrie said that following the breakdown of the fourth invoice he met the As at the end of March. Mr Barrie stated that a note of this meeting was not done. Mr Barrie confirmed the meeting had taken place in the interval between 22 March and 28 March and that he was pretty sure it was on the 25 March and that there was only one item of discussion at that meeting, that of the outstanding fees. The meeting lasted in excess of one hour and that he was extremely concerned that the matter be resolved at that meeting. Mr Barrie stated that at the beginning of the meeting Mr A's views were that the fees were high, not as against a benchmark but as against his firm as a small

concern. Mr Barrie advised that he spent half an hour going through the time recording printouts and that Mr A kept saying that Ms F had charged £20 for calling and not getting through and that Mr Barrie kept saying that they hadn't been charged anything like that. He advised that they had been charged the equivalent of his time at normal rates plus zero at Ms F's rates. The fees charged were less than they would have recovered if they had been awarded expenses of fees to date. He advised that the plan was to revisit the fees after the litigation. He was happy that the clients were satisfied that the fees had to be paid. He said he laid it on the line that the fees had to be paid by the end of April not 1st May, by the 30th April. Mr Barrie stated that he explained to Mr A the significance of the year-end. Mr Barrie stated that there was no scope for uncertainty, either they were going to pay or he would have to reconsider continuing to act for them. Mr Barrie stated that he remembered the meeting and was relieved when they confirmed that the fees would be paid.

In cross-examination Mr Barrie said that at the end of the March meeting there was no need to threaten withdrawal, as at the end of the meeting not paying wasn't on the agenda. Mr Barrie stated that he genuinely never thought that they wouldn't pay. He stated that they said they would pay both fees at the latest by 30th April and he got the impression that they were grateful to him for giving them that further credit. Mr Barrie denied that the 3rd invoice was still being queried at the end of the meeting. Mr Barrie conceded that he is not the best at keeping file notes and that one would probably struggle to find one from him in the whole file. He advised that he has never had an issue where a client has called him dishonest before and he was probably too naive before this issue with the As.

Mr Barrie agreed that his fax of 8th April was slightly curter than earlier correspondence. He stated that he didn't say if you don't pay, I will withdraw but that the As must have realised that from his position it was extremely important to pay. Mr Barrie stated there was no response to that fax, it was ignored.

Mr Barrie advised that after the meeting in March he faxed two weeks later and then on Monday 28th April when he became worried. Mr Barrie confirmed that he advised the As that it was critical that the cheque was received on or before 30th April and that 1st May was no use. Mr Barrie confirmed that there was a promise to pay despite this

not being explicitly mentioned in his fax of 8th April 2003. He thought the As were a small company with a cash flow problem. Mr Barrie stated that he did not think he had misjudged the situation but that his misjudgement was to trust the As.

Mr Barrie stated he remembered calling at 4pm on Friday 25th April 2003. He advised that Mr A was not there and that he spoke to Mrs A. In cross-examination he rejected that he had spoken to Mr A's mother. He told her he was more than concerned that the fees had not been paid and that they had to be paid by the close of business on the 30th. He advised he stated that a late cheque was no good and that if they missed the deadline we would have a very real problem. Mrs A said that Mr A had the cheque lying on his desk and that he was a terrible man and that she would post it. Mr Barrie thought she was referring to a cheque for both fees. Mr Barrie stated that the fees were not in either post, and that on the Monday he got really worried for the first time that the fees would not be paid and sent a fax that day threatening withdrawal if the fees remained unpaid. Mr Barrie reiterated that from the meeting in March it must have been clear to the As what would happen if they didn't pay. Mr Barrie stated that the terms of Mr A's fax at page 361 were inconsistent with what was decided at the meeting. Mr Barrie stated that he felt that Mr A was renegeing on his promise.

In cross-examination he described the Friday telephone call as a gentle reminder. Mr Barrie stated that in his view the terms of the fax dated 28th April were consistent with there being an undertaking despite the fact that it doesn't explicitly mention that. Mr Barrie confirmed that Mr A was left in no doubt after the March meeting that in terms of the solicitor client relationship, if he didn't pay the fees by the end of April there would be a real difficulty. He stated that he would have thought that anyone would have realised that that was code for get yourself a new lawyer.

He stated that he was deeply disappointed by the fax as he had worked very hard for the As and that it was clearly established that the fees would be paid. Mr Barrie stated that they had assured him that the fees would be paid and then completely ignored that assurance. Mr Barrie stated that he couldn't trust them.

Mr Barrie confirmed the cheque for the fourth fee note was received after the deadline and was not honoured after Mr A spoke to Mr B. Mr Barrie rejected Mr A's allegation that Mr Barrie was lying about when the cheque was received and that Mr Barrie had held onto the cheque for a day to get out of the litigation. He said that there was a copy of the envelope in the file confirming when the cheque was received. Mr Barrie advised that when the cheque was stopped after the conversation with Mr B it was clear that the As weren't going to pay. MacRoberts raised proceedings in Kilmarnock Sheriff Court for payment. It was initially defended but while the Law Society complaint was ongoing the As settled the two fees in full.

Under cross examination, Mr Barrie accepted that it might be argued that the fees were paid for economic reasons because Mr & Mrs A didn't want to be involved in further litigation but stated that that was unlikely as they had said they would pay between £7-10,000 to recover £17,000.

Mr Barrie agreed that there appeared to have been a meeting on 16 January between him and the As prior to the first fee note being paid. Mr Barrie agreed fees were discussed but that if there was a hint of problems with the fees that would have been noted. He advised that Ms F did the file note when the meeting was relatively fresh. Mr Barrie denied that Mr A mentioned concern at the level of fees regarding the progress in the litigation. Mr Barrie said he could not remember if he was asked if fees were on track but stated that if he had been asked he would have probably said yes on track for between £7-10,000 exclusive of VAT and outlays.

Mr Barrie stated that the likely cost to finish the proof was difficult to assess and said that what he suspects he would have done would have been to render another abated fee note for £3,000 and probably not charged a fee for the final 2-3 days until the judgement came in. This was because he was aware that if they had won, MacRoberts would have received significantly more than they would have charged the Mr & Mrs A. Mr Barrie agreed that it was potentially another £7,000 to complete the proof.

Mr Barrie advised that he could not have squared his original ballpark figure with the total cost as what he was told at the beginning had changed dramatically. Mr Barrie advised that it became apparent during the proof that the Ds' remedial work costs

were significantly in excess of what the As were suing for and that if the Ds had won they could have then sued the As. Mr Barrie stated that Mr A knew he would be liable for expenses if he lost as they had numerous conversations about expenses and the consequences of winning and losing. Mr Barrie stated that he gave Mr A a ballpark safe estimate of around £20,000 plus judicial expenses in excess of that if they lost the action. Mr Barrie stated that this discussion took place on more than one occasion but certainly prior to the proof starting.

Mr Barrie accepted that said that he was reasonably familiar with the terms of the Code of Conduct for Solicitors in paragraph 5(e) (i) and (ii). Mr Barrie accepted that the reference to the earliest practical opportunity was not complied with. He accepted that he didn't write to the Mr & Mrs A at the earliest practical opportunity in relation to fees and outlays. They had to wait eight weeks for an invoice.

Mr Barrie stated that whilst he did not read the Code prior to withdrawal, that he was very mindful of his professional responsibility. He said the issue was not non-payment as such but that the professional relationship had broken down. If Mr A had spoken to him and if a cheque for a sensible amount had arrived at a sensible time he might not have withdrawn. Mr Barrie advised that he withdrew because he couldn't trust Mr A any longer. Mr Barrie stated even after he had withdrawn he realised it was possible to take up the agency again. He realised that was not good practice but knew of cases where solicitors withdraw on a Monday and take up agency again on a Wednesday. However Mr Barrie advised that the final nail in Mr A's coffin was the telephone conversation on 1st May. He said that he could not act for a client who said that he was dishonest.

Mr Barrie stated that he wasn't surprised that the one fee note Mr A was prepared to pay in April 2003 was the one he didn't have the breakdown for, because that one was issued after three days in court. Mr Barrie agreed that the stage of the fax at page 361 being sent the relationship had not broken down and it would have improved if the cheque had arrived that day or the next. Mr Barrie confirmed that he and Ms I the credit controller discussed the fax and that she told Mr A that MacRoberts were unwilling to discuss negotiating the fees. Mr Barrie confirmed that in the fax of 1st

May withdrawing from acting that there was no mention of an undertaking or a promise.

Mr Barrie advised that if the situation arose again he didn't know what he would do. He stated that he might contact the Law Society for their advice because the criticism was that he shouldn't have trusted the As, he should have shown them the door in March. Mr Barrie advised that it was unlikely to happen again because now they have formal letters of engagement, but if it was to happen now with clients who have been in litigation for several years he might send a fax reminding them that there had been a promise to pay.

He had considered that by withdrawing on 1st May there was a potential for inconvenience and a potential for prejudice. However he stated that having said that Mr A had four and a half weeks to contact a new solicitor. Mr Barrie stated that he reckoned that the new solicitor could have devoted two days to the case to get up to speed. Mr Barrie stated that if he had withdrawn a day before or a week before there would have been a problem. He advised that the new solicitors could have applied to the court to have the dates adjourned and new dates fixed as one of the dates had already been discharged. He thought that the court would have been sympathetic bearing in mind that the case wasn't going to finish then anyway, in his view, the prejudice was minimal. Mr Barrie advised that he stayed in the case until the penny dropped that his version of events was not being accepted by Mr A. Mr Barrie denied that by staying in the case until 1st May 2003 he had a professional duty to conduct the proof. Mr Barrie denied that he had failed to give prior notice of withdrawal; he stated that he had done so by fax on the Monday.

THE APPELLANTS' SUBMISSIONS

Mr Brown asked the Tribunal to quash the Determination of the Law Society's Client Relations Committee in its entirety, which failing partially in respect of either of the two heads of complaint.

In relation to Head of Complaint 2 – that of failing or delaying to advise Mr A in writing of the fees and outgoings to be charged or the basis upon which the fees and

outgoings were to be charged – Mr Brown stated that the Client Relations Committee had adopted the Reporter’s reasoning. He advised that there was no independent reasoning to consider. He stated that the Reporter’s reasoning was flawed in that it was manifestly clear that the Reporter had misunderstood the factual position. Mr Brown stated that it was clear from correspondence which was sent to Mr Barrie by the Law Society that they were aware of what the billing guide was, yet it was stated in the Report that the Reporter was not aware of the existence of the guide.

Mr Brown stated that on receipt of the report from the Reporter, MacRoberts sent a detailed letter of response. Then the Committee properly asked for a supplementary report. However the supplementary report did not perform the function required of it. It appeared defensive and argumentative and appeared to be responding to criticisms of the original report. Mr Brown stated that the function of the supplementary report was to establish whether the reported original conclusion that no information was given to Mr A regarding fees was correct. Mr Brown submitted that the information given by Mr Barrie established that this original conclusion could not stand as it was clear that the billing guide had been submitted to Mr A. Mr Brown submitted that the Reporter went wrong in this respect and since the Committee adopted the Reporter’s position it follows that the Committee went wrong also.

In summary, Mr Brown stated that the Appellant’s position regarding the initial meeting which took place between MacRoberts and Mr A was that the information given as to the charging of fees was reasonable and appropriate and indicated that it was going to be a time based charge and could vary and therefore could not be predicted. A ballpark estimate was given on the basis of the information which was known at the time. Mr Brown submitted that it was beyond dispute that the Appellants’ position would have been better if this meeting had been followed up by a letter confirming all of this. He accepted that no such letter was sent. He submitted that the Tribunal is entitled to have regard to Mr Barrie’s clear oral evidence as to what was said and is entitled to conclude that the information was given.

Mr Brown stated that three months into the case the file demonstrates a picture whereby the dispute is being progressed, the client has had a ballpark estimate and an interim bill has been issued giving him a clear indication that regular payments will be

required and prompt payment of the first bill has been made. The second fee note is then issued at the end of November and Mr A asks for a breakdown. That breakdown is properly provided by means of the billing guide. That second fee note is then paid within a reasonable period. Mr Brown submitted that Mr A's complaint regarding the fee structure not being explained is not a true position, merely an after the event position, taken by Mr A to try to avoid payment of fees and expenses which had been properly incurred by the Appellants in progressing Mr A's litigation.

Mr Brown referred to the Code of Conduct for Solicitors as issued by the Law Society. He referred in particular to paragraph 5(e)(ii) of that Code and stated that this code was not of course a binding statutory obligation. He submitted that it is a useful yardstick to judge solicitors against but it is not binding and that each case must be considered on its own facts and circumstances. Mr Brown referred to the statutory definition of inadequate professional services found in section 65 (1) of the Solicitors (Scotland) Act 1980 which states that inadequate professional services are professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor. Mr Brown submitted that it is plain that a decision on the test cannot be decided by merely asking if there had been compliance with the Code of Conduct. Mr Brown invited the Tribunal to infer from the absence of any further correspondence after November 2001 contesting the basis on which the initial charges had been made that Mr A was perfectly content with the charging basis at that early stage when the litigation was going well.

In conclusion, Mr Brown stated that from the evidence and documentation before the Tribunal it is clear that this is far from a complete failure to advise on costs. Mr Brown submitted if there was a failure that was only a failure to send a confirmation letter and that that alone should not be sufficient to amount to a finding of inadequate professional service.

Mr Brown then turned to Head of Complaint 3 as detailed in the Law Society's Determination namely that the Appellants withdrew from acting for Mr A at a time that prejudiced Mr A's court action. Mr Brown submitted that in this case in the Determination there was an element of independent reasoning from the Client Relations Committee albeit that this reasoning closely followed the Reporter's

reasoning. Mr Brown stated that the Reporter accepted that solicitors shouldn't have to work for nothing and that in the abstract withdrawal from acting is appropriate for persistent failure to pay fees but what the Reporter's recommendation rested on was the proposition that the client requires to be specifically told that failure to pay will result in withdrawal. Mr Brown submitted that the Tribunal ought to come to a different conclusion on the issue of withdrawal from acting for six reasons.

Firstly, Mr Brown submitted that a very significant material fact was omitted by both the Reporter and the Committee i.e. that this was not simply a matter of non-payment – it went further than that. There had been a specific undertaking given and then reneged upon. Mr Brown submitted that Mr Barrie's evidence was that if Mr A had called before the 30th April to advise that he could not pay then Mr Barrie would have been sympathetic. Mr Barrie's problem was that there was failure to pay by the agreed date and a denial that there had been an agreement to pay. Mr Brown submitted that this evidence of the undertaking and the subsequent breach of it and the denial that it existed was a material fact which neither the Reporter nor the Committee had regard to.

Secondly, Mr Brown submitted that both the Reporter and the Committee fell into error on the underlying assumption that in this case – a commercial debt recovery matter that a businessman needs to be told in words of one syllable that if he fails to pay that work will be withheld. Mr Brown submitted that this couldn't possibly have come as a surprise to Mr A as that is how it is in the commercial sphere and the Mr A himself would have withdrawn his services in a similar situation.

Thirdly, Mr Brown submitted that there is no basis for a link between the prejudice caused by withdrawal and the withdrawal itself. Mr Brown submitted that to withdraw after any litigation had commenced would cause difficulties for any client. Mr Brown submitted that the Reporter and the Committee were in error in supposing that this prejudice arose solely from the timing of the withdrawal. He submitted that Mr A would have found it difficult to get another solicitor to act in the circumstances i.e. that the Appellants had withdrawn due to non-payment of their fees. Mr Brown submitted that the idea that Mr A's difficulties would have been less or avoided completely if the withdrawal had been made in March were without foundation. He

submitted there was no evidence that of the forty solicitors approached by Mr A to take on the case, it was the timescale which was crucial and not the other circumstances. If time was the issue then in early May it was still a month or more before the proof and it would have been possible to enrol a motion to discharge the proof and fix other dates. There were shorthand writer's notes of the defender's evidence and the pursuer's evidence was still to be led. Mr Brown submitted that in this context there was no indication that by 1st May the time was inadequate and no indication that another five weeks would have made any difference.

Fourthly, Mr Brown submitted that the conclusion reached by Reporter and the Committee begs the question of what Mr Barrie and MacRoberts should have done. Were they obliged to see the case through to a conclusion, however long that took? Mr Barrie confirmed that as at the start of this appeal Mr A's case is at avizandum and not yet concluded. Mr Brown stated that it was clear that it was a question of timing and at the time of the withdrawal it was nothing like the end of the case. Mr Brown wondered whether the correct course of action would have been to have done the two days in June and then to withdraw but stated that the same problem would have arisen. Mr Brown submitted once the element of trust has gone how can a solicitor know when he can rely on his client. He wondered whether a solicitor in those circumstances would need a witness at every meeting and to document everything. Mr Brown submitted it was clear from Mr Barrie's evidence that the trust had broken down as Mr A had reneged on their agreement.

Fifthly, Mr Brown submitted that the relationship of trust between solicitor and client had broken down anyway as Mr A was making accusations of dishonesty which were clear from his correspondence prior to withdrawal. Mr Brown stated it was clear from Mr A's fax of 29th April to Ms I that the breakdown of trust was coming anyway.

Sixthly, Mr Brown submitted that the Tribunal can and should conclude from the evidence it has heard and the documentation before it that Mr A's version of events is dishonest. Mr Brown submitted that it is clear from the evidence in the file that Mr A is an articulate man perfectly capable of making contact with the firm and asking about matters which he needed further information on. Mr Brown submitted there are examples of this in the file. In particular there is an example at page 302 of the file.

Mr Brown submitted that Mr A was different from some clients who could be overawed in dealing with a solicitor. Mr Brown submitted that the evidence in the file is totally inconsistent with the suggestion of a continuing dispute raised timeously about the third and fourth fee notes.

In summing up in relation to the third head of complaint, Mr Brown submitted that on a true version of the facts this was a stringing along exercise by Mr A to postpone payment of the fees which Mr Barrie for a time consented to as an indulgence to Mr A. However, the stringing along exercise had a finite agreed end – close of business on 30th April 2003. Then at that late stage Mr A reneged. Mr Brown submitted that Mr A could not have been under any illusion that behaviour of that nature would have significant consequences in his relationship with his solicitors. Mr Brown submitted there must be a situation where a solicitor is entitled to withdraw at any stage regardless of the timing. Mr Brown submitted that after the event Mr A had sought to manufacture a dispute which had never been the case. Mr Brown submitted that the Appellants reasoned careful decision to withdraw was not only appropriate but it is difficult to see, in the circumstances, what other course of action was reasonably open to them short of pretending that the breach of the agreement to pay had never happened. Mr Brown submitted that the facts show that the actions of Mr Barrie do not fall below the standards of a competent solicitor.

SUBMISSIONS FOR THE LAW SOCIETY

Mr Lynch reiterated the point which he had made at the beginning of the hearing which was that any evidence relating to communications between Mr A and the Appellants after the decision to withdraw had been taken should not be allowed into evidence.

Mr Lynch stated that it was clear and accepted by all parties that the Tribunal are not hearing an appeal in the narrowest sense but that in this case they are hearing all the evidence and making a decision of new. Mr Lynch submitted that the authority for this proposition is to be found in three cases, firstly Lothbury Investment Corporation Limited –v- Inland Revenue Commissioners (1981) CH47. He referred to Mr Justice Goulding’s judgement at page 57 paragraph D. Secondly the case of McMahon –v-

The Council of the Law Society of Scotland 2002 SC at page 475. Mr Lynch referred to Lord Gill's opinion at paragraph 14 and paragraph 16. Mr Lynch also referred to the third case - Chief Constable of Avon & Somerset Constabulary –v- The Police Appeals Tribunal reported in the Times Law Reports on 11th February 2004. Mr Lynch submitted that the Tribunal must give due weight to the Law Society Committee's decision in dealing with a specific area of professional practice.

Mr Lynch then turned to the heads of complaint and advised that he would be dealing with heads of complaint 2 and 3 and confirmed there was no adverse finding in relation to head of complaint 1.

Mr Lynch stated that he wished to refer to the terms of the report as considered by the Law Society's Committee. He advised that in relation to head of complaint 2 he was relying on paragraph 5(e) of the Code of Conduct. This Code of Conduct was originally promulgated in 1992 but was re-enacted in 1998. Mr Lynch stated that the annotations in some of the prints of the Code state that paragraph 5(e) was new in 1998 and that this is incorrect. He advised that that paragraph has been there since 1992. Mr Lynch accepted that the Code is no more than a code; it is not a practice rule although there has been a very recent practice rule in relation to fees. He stated that in 2001 there was no practice rule regarding letters of engagement. Nonetheless Mr Lynch argued that for many years solicitors were encouraged by the Law Society to give clear transparent information regarding fees. Mr Lynch submitted that the Tribunal needed to look at the position when the instructions were first accepted and also look at what happened in the course of the case. Mr Lynch stated that the case became more complicated as the litigation progressed. There was tension regarding the fees and the solicitor should have committed the position regarding fees to writing. By not issuing written advice by as late as March 2003 Mr Lynch argued that the Appellants had periled their position regarding the second head of complaint. He stated that there was quite a lot made of the billing guide, but it was clear from the terms of the evidence and from the supplementary report and Mr Barrie's letter of October 2004 that the billing guide was not a document which advises as to which fees were to be charged. This billing guide is advice on the fees already charged. Mr Lynch stated that the Code of Conduct is clear that clients have to be given information on the fees "to be charged". Mr Lynch stated that the Reporter said that

there was no evidence of advance notification regarding the charges which Mr A was to be subjected to. Mr Lynch invited the Tribunal to endorse the finding of the Committee and uphold head of complaint 2.

Mr Lynch submitted that heads of complaint 2 and 3 could be linked to some extent. He submitted that if for some reason the Tribunal were against him in relation to head of complaint number 2 they could still uphold head of complaint number 3. Mr Lynch submitted that it was clear that the third head of complaint was still sufficient to justify compensation of £500.

Mr Lynch then turned to the third head of complaint. He advised that the only issue in relation to the withdrawal was the timing of that withdrawal. He stated that it was made clear in the Answers that entitlement to withdraw is not disputed. Mr Lynch referred to Mr Barrie's evidence regarding the alleged undertaking and stated that this would have been disputed had Mr A given evidence. Mr Lynch stated that the alleged undertaking was not referred to in correspondence and there was no ultimatum given prior to 29th April orally or in writing. Mr Lynch referred to Mr Barrie's evidence that Mr A should have inferred that withdrawal would occur if the fees were not paid. Mr Lynch stated that this was not consistent with the picture painted by the correspondence file. In that file withdrawal was only mentioned at the eleventh hour. Mr Lynch invited the Tribunal to conclude that by having stayed in the case and given no prior indication of his intention to withdraw, Mr Barrie had come under a professional responsibility to stay in the case. Mr Lynch then referred to Mr Barrie's other options and stated that there could have been a discussion regarding fees. It would have been possible for Mr Barrie to conduct the two days of proof in June and make it clear that if he was not paid he would withdraw after that. Mr Lynch submitted it was clear that withdrawal came as a surprise to Mr A. If Mr A was aware that withdrawal was likely Mr Lynch submitted that one might ask why he did not contact Mr B until the decision to withdraw had been taken. Mr Lynch stated that the Tribunal is being asked to hold that Mr A was dishonest in his dealings with the Appellants. Mr Lynch submitted there was nothing to lead the Tribunal to that conclusion. Mr Lynch submitted that the correspondence bears out that there was a dispute regarding one fee note and that there was no evidence regarding dishonesty. Mr Lynch then turned to the date of withdrawal and said that this was five weeks

before the additional proof date. Mr Lynch suggested that it was unreasonable to get new solicitors to deal with these proof dates and that it was perfectly appropriate for the Reporter and the Committee to conclude that withdrawal five weeks before fell foul of the provisions of paragraph (f) of the Code of Conduct and entitled them to hold that this amounted to an inadequate professional service.

In relation to prejudice – actual prejudice – Mr Lynch referred to the letter from Solicitors J who took over the litigation. This letter is found at number 22 of the Respondent's bundle and is dated 1st October 2004. In that letter Mr K estimates a reasonable figure in relation to the cost of instructing new agents would be £2000 + VAT.

In conclusion, Mr Lynch submitted that it was clear that the Law Society having regard to their specialist knowledge were entitled to reach the decision that they did and that the Tribunal can consider the evidence and documents and conclude that there was prejudice to Mr A. Mr Lynch invited the Tribunal to adhere to the decision of the Law Society and refuse the Appeal.

DECISION

The Determination made by the Law Society was that the Appellants had provided an inadequate professional service under two separate heads of complaint. Firstly, head of complaint 2, that the Appellants had failed or delayed to advise Mr A in writing of the fees and outgoings to be charged or the basis upon which the fees and outgoings were to be charged. Secondly, in relation to head of complaint 3, that the Appellants withdrew from acting for Mr A at a time that prejudiced Mr A's court action. The Tribunal agreed with the parties at the outset of the Appeal that they would be re-hearing this case and considering whether or not there was an inadequate professional service under either or both heads of complaint whilst paying due regard to the Law Society's decision.

In relation to head of complaint 2, the Tribunal found that there was evidence from the Second Respondent in the documentation submitted to them, that he was told and had understood the likely cost of the litigation to be in region of between £7,000 and

£10,000. Although Mr Barrie in his evidence could not recall this conversation exactly, he readily accepted that such an estimate would be consistent with what he would have said if asked for a ballpark estimate of the likely costs of the litigation. It therefore appears to the Tribunal that there was an effective indication of cost given to the client. Whilst this was not in writing and therefore in contravention of paragraph 5(e) of the current Code of Conduct for Solicitors as issued by the First Respondent in 1998, the fact that Mr A clearly retained the information and produced it in correspondence two years later demonstrated, in the view of the Tribunal, that this was effective communication. The Tribunal took the view that despite the absence of writing when there had been effective communication of the material it did not cause the standard of service to fall short of the quality that could reasonably be expected of a competent solicitor. Nevertheless the Tribunal did regard it as contrary to good practice. The Tribunal noted that the Reporter made reference to a continued failure to advise of the ongoing costs and also noted that reference was made in paragraph 5(e) of the said Code as to the responsibility to advise on such costs. However, the Tribunal noted that the wording of head of complaint 2 specifically addresses the responsibility contained in paragraph 5(e)(ii) to advise on the fees and outgoings to be charged or the basis upon which the fees and outgoings were to be charged. There were no submissions regarding a failure in respect of ongoing charges and the responsibility to advise on them arising. It is not for the Tribunal to expand or vary the charge of which the Appellants have been given notice. In the circumstances the Tribunal makes no findings about the quality of continued service in this matter.

In relation to head of complaint 3, the Tribunal took the view that the word prejudice implies the concept of unreasonable prejudice, as any withdrawal from acting in the course of litigation will cause some prejudice. In the absence of any file note or correspondence regarding the alleged agreement until Mr Barrie's letter of 28th April which refers to his understanding that Mr A was "content to settle the outstanding fee note", the Tribunal, on balance, is not satisfied that there was a clear agreement by Mr A to pay the outstanding balances by close of business on 30th April.

Mr Barrie's practice of not completing file notes of meetings and telephone calls is a matter for him. Even in 2001 this was not good practice.

Given that Mr A was an active businessman the Tribunal, in its consideration of Mr A's correspondence, was satisfied that he had a degree of sophistication in business affairs and was satisfied that he knew, or ought to have known, that non-payment of his solicitors' invoices was bound to, sooner or later, seriously prejudice that business relationship.

Notwithstanding that Mr A knew there would be a problem, the Tribunal was of the view that there was a professional responsibility on Mr Barrie to give reasonable clear notice that continued non-payment would lead to withdrawal of agency. Specifically the Tribunal is not satisfied, from the evidence of Mr Barrie, that he gave any clear indication that failure to pay by 30 April 2003 would result in withdrawal of agency. The impression given by his evidence is that his version of events, as given to the Tribunal, is more reflective of the version of events he was then reporting to his managing partner rather than of the sequence of events actually discussed with Mr A.

Nevertheless the Tribunal do not accept the Reporter's opinion that five weeks is an unreasonably short period in which to instruct other agents and enable them to bring themselves up to speed in the case. The Tribunal therefore find that the point in time when withdrawal was intimated did not unreasonably prejudice Mr A's court action.

The Tribunal finds that as the Appellants had previously given only verbal indications that continued non-payment would be prejudicial to their relationship, followed by a specific threat of withdrawal of agency on 28th April, that to withdraw only three days later was precipitate and unprofessional. However, as the Tribunal found no evidence that when withdrawal was intimated it unreasonably prejudiced Mr A's court action, in the judgement of the Tribunal, what was complained of in head of complaint 3 could not amount to an inadequate professional service. It is not for the Tribunal to expand or vary the charge of which the Appellants have been given notice.

In the circumstances, the Tribunal Quash the Determination of the Law Society and sustain the Appeal in relation to both heads of complaint 2 and 3.

The Tribunal heard submissions from both parties in relation to the award of expenses. In respect that the expenses of the Appeal were conceded by the First

Respondents, the Tribunal found the First Respondents liable to the Appellants in respect to the expenses of the Appellants and of the Tribunal. The Tribunal was of the view that this Appeal did not involve any complex legal issues that could not have been adequately dealt with by a solicitor and therefore the motion made by the Appellants for sanction for the expenses of instructing Counsel was refused. Expenses are to be awarded as the same may be taxed by the auditor of the Court of Session on an agent and client indemnity basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £11.85; The Tribunal made the usual order with regard to publicity.

Vice Chairman