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, 26 Drumsheugh Gardens, Edinburgh

against

DAVID HADDOW CAMPBELL, care of Balfour & Manson Solicitors, 54-66 Frederick Street, Edinburgh

1. A Complaint dated 30 January 2012 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, David Haddow Campbell, care of Balfour & Manson Solicitors, 54-66 Frederick Street, Edinburgh (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

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

3. In terms of its Rules the Tribunal appointed the Complaint to be set down for a procedural hearing on 16 April 2012 and notice thereof was duly served on the Respondent. On this date the case was adjourned to a substantive hearing on 3 December 2012.

4. The hearing took place on 3 December 2012. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by Mr Moynihan, Senior Counsel. The Tribunal heard evidence from the Respondent, Professor Meston, William Grant and John Kerrigan. The matter was then adjourned part-heard until 20 February 2013.

5. When the case called on 20 February 2013 the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented by Mr Moynihan, Senior Counsel. The Tribunal heard evidence from Brenda Rennie and submissions from both parties.

6. The case was then adjourned until 26 February 2013 for the Tribunal to make its decision.

7. The Tribunal held deliberations on the afternoon of 26 February 2013 and the morning of 11 March 2013. The Tribunal came to its decision and made the following findings in fact:

7.1 The Respondent is David Haddow Campbell. He was born 18th February 1965. He was admitted as a solicitor and enrolled in the Register of Solicitors practising in Scotland in November 1989. From on or about 8 January 1990 until 16 November 1990 he was employed with the firm Allingham & Co Solicitors, Edinburgh. From on or about 19 November 1990 until 8 July 1994 he was employed with the firm Marshall Henderson & White, Solicitors, Edinburgh. From on or about 11 July 1994 until 30 June 2003 he was initially employed and laterally a partner with the firm Ward Bruce & Company, Solicitors Edinburgh. From on or around 1 July 2003 until 1 April 2010 he was a partner in the firm Lindsays Solicitors, Edinburgh. At present the Respondent is a partner in the firm Balfour & Manson Solicitors, Edinburgh.

The Estate of the late Mr A

7.2 The late Mr A died on 5 February 2009. The late Mr A left a Will. In terms of the said Will he appointed the solicitors Mr D (who had retired by the date of Mr A's death) and the Respondent as his Executors. In terms of the said Will a bequest of £5,000 was to be paid to the nephew of Mr A with the remainder of the Estate bequeathed to his spouse, a Mrs B. The Death Certificate of the late Mr A confirmed that he had previously been married. His first wife died in the late 1940s or early 1950s. His widow, Mrs B survived him, as did his son from his first marriage.

7.3 Initial work in connection with the administration of the Estate was dealt with by the solicitor Mr D. He sent an email to the Respondent on 6 February 2009 referring to the death of the late Mr A and advising the Respondent that Mrs B had already contacted the firm. Further he emailed the Respondent on 16 February 2009 informing the Respondent that the late Mr A had a son from his first marriage and that this son *'might be entitled to make a claim on the Estate'.* He enquired of the Respondent *'what could be claimed?'* Following this email the Respondent replied on 17 February *'yes the son has legal rights'*, these legal rights amounted to one-third of the moveable Estate of the late Mr A. He further advised Mr D that '*there is arguably no duty on the Executors to inform the son of his father's death and his legal rights.*' He further enquired of Mr D as to whether the son knew of his father's death.

7.4 On 6 March 2009 the solicitor Mr D emailed the Respondent indicating that the son of the deceased, Mr C lived in Northumberland and was disabled being registered blind. He reported to the Respondent that according to the widow there

had been little interest from the son for some time and that *'there is no love lost with the daughter-in-law. Mrs B says that if the daughter-in-law knows a claim for legal rights can be made she will be in there like a shot'.* The said Mr D further advised the Respondent that *'the house and other property is all in Mrs C's name'*. Following an initial meeting Mr D had on 6 March 2009 with the widow regarding the estate, where he advised her of the law governing legal rights, she wrote on 11 March 2009 expressing dissatisfaction and mistrust of him. Her letter continued that she had been speaking to *'quite a few knowledgeable people about him turning Mr A's Will and giving my inheritance to Mr A's son'*. She advised Mr D further that people were *'amazed that you can do that with a Will'*. She further advised that she was not going to let this happen and had a newspaper on her side. She indicated to the said Mr D that she wished nothing further to do with him and that she now no longer trusted him.

7.5 This attitude and approach was discussed by the Respondent. On 13 March 2009 he sent an email to Mr D advising that *'the position in Scots law is that Mr A's son has legal rights'* and that as Mr A was married at the time of his death, his son was entitled to claim one-third of the moveable Estate *'no matter what his Will says'*. The email continued that the Respondent did not think that *'Mrs B or you and me as Mr A's Executors'* were obliged to tell the son that he was entitled to claim one-third of the moveable Estate and that there was an interesting article in The Journal about a year ago on whether one should tell a beneficiary that he has rights in an Estate.

7.6 Having received the original letter from the widow criticising him unjustly the solicitor Mr D decided to decline his appointment as Executor in the Estate of the late Mr A. On 23 March 2009 Mr D wrote to the widow advising that he had been

unaware that the late Mr A had a son until he observed the death notice in the Scotsman newspaper and that having confirmed the position with the Respondent he had advised Mrs B that the son would be entitled to claim a share of up to one-third of the moveable Estate. He advised the widow that the rights enjoyed by the son were provided for in terms of the Law of Scotland and that there was nothing which could be done to change the legal position. He concluded his communication by advising that he had passed the papers relating to the Estate of the late Mr A to the Respondent and that it would be for her to liaise with the Respondent as the sole Executor under the Will.

7.7 The Respondent proceeded to administer the Estate. On 25 March 2009 he issued a Terms of Business and Engagement Letter to himself indicating that he, the Respondent, would have overall responsibility for the proper conduct and supervision of the work. A copy of the Terms of Business and Engagement Letter was sent to the widow Mrs B. With his letter enclosing the Terms of Business and Engagement Letter the Respondent mentioned to the widow that the son had a claim called legal rights and that they would require to discuss this further when they met. The Respondent accepted appointment as executor by 25 March 2009 at the latest. A review of the file maintained by the Respondent reveals a file note of 26 March 2009 relating to a conversation between the Respondent and the widow which begins with the words *'not a knucklehead – but can't cope with it'* and indicates that in the view of the widow there was *'no way that Mr A wanted his £ to go to his son and daughter-in-law'.* There was also a handwritten inventory of the deceased's assets and liabilities. There was a copy of the Will on which the widow had written *'this is my husband's Will. I would like you to carry out what it says and forget about Mr A's son because he had'*. By letter of 25 March 2009 the Respondent advises the widow of Mr A's son's claim to legal rights and

advises that these would amount to one third of the moveable estate after payment of debts and that these could be substantial. Also on the file was a copy of this letter from the Respondent to the widow dated 25 March 2009 upon which the widow had written various comments. In the letter where the Respondent made reference to legal rights enjoyed by the son of the late Mr A the widow wrote *'giving Mr C money – earned by Mr A – would make Mr A so angry and hurt and I don't like it'*. A further handwritten note on the file related to a meeting on 4 April 2009 with the widow at Esperston. This note indicated that the Respondent *'explained re position as sole Exec'* and that *'I have to let Mr C know what his legal rights are'*. Mr Campbell had not personally met the widow until 4 April 2009. As at the date of this meeting it was no longer open to Mr Campbell as a matter of law: (a) to decline appointment as executor; or (b) to resign that appointment without assuming a replacement (in terms of Section 3(a) and proviso 1 of the Trusts (Scotland) Act 1921). Mr Campbell did not have a plan in mind when he arrived to meet the widow on 4 April 2009. The widow affirmed her opposition to the son receiving a share of the estate at that meeting.

7.8 On 6 April 2009 the Respondent emailed the solicitor Mr D indicating that he would require to send him an amended Letter of Declinature. The email made reference to the meeting the Respondent had with the widow and stated that he had agreed to continue as Executor and that *'as soon as the money is in, resign and appoint her as sole Executor so that she takes the rap and not me/Lindsays if Mr C wants to sue someone for not telling him about his legal rights'*. On the same day being 6 April 2009 the Respondent wrote to the widow. This letter reminded the widow that children have a claim in terms of Scots Law in relation to the Estate of their parents which was based on the extent of the moveable Estate. The letter

confirmed that *'as Mr A was married as at the date of his death'* the claim amounted to one-third of the moveable Estate *'which is a considerable figure given that Mr A had extensive savings'.* The Respondent in this communication advised the widow that in his opinion *'the Executors have a legal duty to inform Mr C of his right to make a claim'.* He added that he did not want *'to wind up Mr A's Estate as Executor and pay everything to you and then for Mr C to make a claim against me personally'.* He advised the widow that *'we can get round this'* and that doing so would involve his declining to act as Executor *'or more likely appointing you as Executor and then for me to resign leaving you as sole Executor'.* He went on to indicate that when he had discussed this proposal previously with her she was generally in agreement. He concluded that he thought it made sense for him *'to stay as Executor until the Confirmation had been issued by the Sheriff Court and the funds ingathered'*. This approach was accepted by the widow. The appropriate documentation in respect of securing Confirmation was prepared by the Respondent. In terms of the application for Confirmation the Respondent indicated that the legitim fund had not been claimed or discharged in full. It identified that un-discharged legal rights were reckoned at £84,498.52 based on a total Estate, all of it moveable, of £256,604.20. An application for Confirmation was prepared and sent to the Commissariat on 14 April 2009. On that date the Respondent wrote to the widow advising her that he had applied for Confirmation and providing her with details of her husband's assets. Confirmation was granted on 17 April 2009. In terms of said Confirmation the Respondent was appointed Executor on the Estate of the late Mr A. The Respondent telephoned the widow on 22 April 2009. His corresponding handwritten note advised that she was very pleased. On that date he wrote to two banks attaching Confirmation and

withdrawal forms. HBOS responded on 28 April 2009 and the Abbey National on or around 10 May 2009.

7.9 On 10 May 2009 a Deed of Assumption and conveyance was prepared by the Respondent. It was sent to the widow on 11 May 2009 with a covering letter from the Respondent which explained that the deed would leave her as the sole Executor and that if Mr C were to claim his legal rights *'it will only be a matter between you and him'*. The Respondent added that as she knew, he could not run the risk that either he personally or the firm *'is sued by Mr C for not informing him of his legal rights'*. He further wrote to the widow that he was beginning to disburse the funds and that he would send £110,000 to her by electronic transfer on 12 May 2009. The same day he issued a cheque for the sum of £5,000 to the nephew. The widow returned the letter of the Respondent on 13 May 2009 together with the signed deed. This was presented for registration. The extract confirmed that it was signed by the widow on 12 May 2009 and by the Respondent on 19 May 2009 and was presented for registration in the Books of Council and Session on 21 May 2009. The Respondent's resignation was effective as at 19 May 2009. The estate passed over to the widow as executor on 20 May 2009 and was adequate to meet any legal rights claim that Mr A's son might make. A further CHAPS payment was paid to the widow to the sum of £135,000 on 20 May 2009. Thereafter the firm of Lindsays issued their professional account. The widow wrote to the Respondent thanking him for all his help *'re Mr A's Will and wishes'*.

7.10 As at the date of death, there was no clear authority on the obligation of an executor to inform a potential legal rights claimant of his entitlement.

8. The Tribunal reconvened on the afternoon of 11 March 2013 and issued its oral decision. The Tribunal heard submissions from parties on publicity and expenses and then pronounced an Interlocutor in the following terms:-

> Edinburgh 11 March 2013. The Tribunal having considered the Complaint dated 30 January 2012 at the instance of the Council of the Law Society of Scotland against David Haddow Campbell, care of Balfour & Manson Solicitors, 54-66 Frederick Street, Edinburgh; Find the Respondent not guilty of Professional Misconduct; Find the Complainers liable in the expenses of the Respondent and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Certify the cause as suitable for the employment of Senior Counsel; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.
>
> **(signed)**
> **Dorothy Boyd**
> **Vice Chairman**

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

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

The majority of the facts in the Complaint were admitted in terms of the Answers. It was explained that the parties wished to lead evidence as to the law from various experts. Mr Moynihan stated that if the experts gave a view on whether or not the Respondent's actings could amount to professional misconduct, it could be argued that this would not be appropriate as it was a matter for the Tribunal whether or not the Respondent's actions amounted to professional misconduct. Mr Moynihan however asked the Tribunal to give latitude and to allow the evidence to be led from the expert witnesses in respect of the differences in practices in connection with the subject matter and that it would be up to the Tribunal to decide after having heard the evidence where to draw the line. This was agreed.

EVIDENCE FOR THE COMPLAINERS

Mr Reid indicated that he wished to lead the evidence of one witness and led evidence from Professor M Meston.

Evidence from Professor Meston

Professor Meston confirmed that he was a Professor of Scots Law at Aberdeen University and that his specialist area was Wills and Succession. He had written a book The Succession (Scotland) Act 1964. He had also contributed to Stairs Encyclopaedia and had prepared about 20 – 30 Opinions for the profession on this subject matter each year. Professor Meston explained that the law of succession regulated the assets of the person who had died. Legal rights fixed to certain relatives being the spouse and issue of the deceased who were entitled to a share of the deceased's estate. The historical background to this was to create a deads part of the estate which the deceased could do with as they liked and this amounted to one-third. If there was a spouse and a single child, the child would be entitled to one-third of the deceased's moveable estate. Professor Meston stated that there had been discussion about whether or not legal rights were a debt. Professor Meston stated that they were a debt but were not the same as genuine debts for example an electricity bill. Genuine debts would have to be paid first then legal rights. Professor Meston stated that the

son in this case could elect to accept the Will or take his legal rights. Professor Meston stated that the son had no need to make a claim because he had an entitlement. Mr Reid referred Professor Meston to the Complainers' First Inventory of Productions, Production 1 being the email from Mr D to the Respondent of 6 February 2009. Production 2 was the Will appointing Mr D and the Respondent as executors. Production 3 was email correspondence between the Respondent and Mr D. It was clear that from 16 February 2009 the Respondent was aware of the son's legal rights. Professor Meston stated that an executor has a duty to inform the son of his legal rights however Professor Meston accepted that there was a lack of authorities on this point. It would be very unusual and not good for the estate if this was not done because it would be possible for the son to obtain his legal rights with interest until the expiry of the prescriptive period of 20 years. Professor Meston stated that the executor could not perform the division of the estate in accordance with the law if legal rights were ignored. Professor Meston's view was that they should be treated in the same way as a legacy. Professor Meston stated that the step-mother issue was a common problem in executries. Mr Reid referred Professor Meston to Production 8 of the Complainers' First Inventory of Productions being an email from the Respondent referring to an article in the Journal by Mr Kerrigan. Professor Meston stated that there was a debate about this and that was why he had been less precise on this point in his book on the Succession Act. Professor Meston stated that the minimum that the executor should do would be to inform the son of the death and advise him to take legal advice. If a solicitor was only acting as agent for the executor, the duty would be to tell the executor of their duty in connection with legal rights and record that this had been done and point out the potential damage to the estate if there was a late claim.

Mr Reid referred Professor Meston to Production 13 being the death notice which referred to the son. Production 16 was the terms of business letter from the Respondent to himself which was acceptable as he was the client and the sole executor. The letter at Production 17 to the widow referred the legal rights being substantial. Mr Reid referred Professor Meston to Production 18 being the Respondent's notes dated 26 March where the widow referred to "not a knucklehead but can't cope with it". Production 22 was a note of a meeting held between the Respondent and the widow on 4 April 2009. In this note the Respondent explains that

as sole executor he has to let the son know of his legal rights but the Respondent suggests that if he resigns and the widow becomes the executor, the matter would be between her and her step-son. Mr Reid then referred Professor Meston to Production 23 being an email from the Respondent referring to this being a way to ensure that the widow took the rap not the Respondent or his firm. This was suggestive of a device to excuse himself from having to inform the son of his entitlement. Mr Reid further referred Professor Meston to Production 24 being the Respondent's letter to the widow which set out on Page 2 his views on legal rights and the scheme. Production 25 was the confirmation in April 2009 confirming the estate as £256,604.20. Professor Meston stated that the duty on the Respondent as executor came in as soon as he knew that the son existed and once he had authority to ingather the estate. He should have told him. Mr Reid referred Professor Meston to Productions 26 and 27 showing cheques banked and a cheque sent to the Legatee for £5,000. Production 30 was the Respondent sending the widow £110,000 and stating that he had drafted a Deed of Assumption in Conveyance to have her assumed as an executor. Production 31 was the Assumption in Conveyance which the Respondent signed on 19 May. Mr Reid put it to Professor Meston that by 19 May very little was left of the estate, most had been transferred. Funds would have been cleared by 20 May.

Mr Reid then referred Professor Meston to the two Opinions prepared by him. In the first one prepared in August/September 2011, Professor Meston was cautious because there was no clear authority but Professor Meston clarified that his personal view now is that there is a duty on the executor to advise the son of legal rights. The impression from the Kerrigan article that it is difficult to say what the view is is accepted. The Respondent held that view. Professor Meston explained why there were two copies of his written Report. The first one included his view on whether or not the Respondent's actions would amount to professional misconduct or unsatisfactory professional conduct but this had been taken out because it was considered that it was a matter for the Tribunal to decide. Professor Meston stated that it was his view that as an executor the Respondent was bound to recognise the legal rights entitlement. Professor Meston stated that in his view an executor has a clear duty to contact all creditors of whom he is aware. Professor Meston stated that the other nominated executor, Mr D did the correct thing declining office in view of the widow's refusal to accept the state of the law. Professor Meston's view was that the Respondent should

have done the same thing but chose the course of completing the administration up to the point of realising funds and then expressly and openly getting round the law and his responsibilities as executor by transferring the funds to the widow with an implication that this entitled her to keep the estate for herself.

Cross Examination of Professor Meston by Mr Moynihan

Mr Moynihan referred Professor Meston to his Opinion at page 30 in Production 33. Professor Meston stated that he would welcome a decision of the Tribunal formally establishing the existence of an executor's duty to inform those potentially entitled to legal rights. Professor Meston confirmed that this was his view as there was at present no decided authority. There was a lack of clarity in the law with regard to the executor's duty in this regard. Professor Meston accepted that at the time of the Respondent's actings, the law was not clear. Mr Kerrigan was more bullish about the matter but referred to Professor Meston's view in his book. Professor Meston stated that in his view, legal rights were a right in succession. Mr Moynihan referred Professor Meston to the Opinion of William Grant in the Respondent's Inventory of Productions. Mr Grant's view was that legal rights were not rights of succession as had been held by Lord Watson of the House of Lords in Naismith-v-Boyes [1899] 1F 79. Professor Meston stated that he did not agree with this. Mr Moynihan then referred Professor Meston to Page 120 of his book where it is stated "a problem which has been the subject of some discussion is whether an executor has a duty to tell a spouse or descendant of the possibility of claiming legal rights instead of accepting the provisions of the deceased's will. It can be argued that an executor has the usual duty of a trustee to uphold the trust and thus to carry out the terms of the will, so that any advice to beneficiaries on how to defeat the trust purposes would be contrary to his duty. In practice, however, an executor will often take the view that some information should be given, possibly in a guarded form suggesting separate advice, and this compromise would seem to be a sound course of action." Professor Meston stated that in his textbook he acknowledged that there could be an argument that the executor had a duty to implement the Will but that the prudent course of action would be to provide the information. Professor Meston stated that legal rights were prescribed 20 years after the person becomes aware of their entitlement.

Professor Meston accepted that if a solicitor was acting as agent and the family member was the executor, the solicitor would have to tell the family member of the duty but if the family executor stated that they did not wish to tell the person who was entitled to legal rights, the solicitor could not then tell this person. The solicitor would have to follow the executor's instructions. Webster at Page 89 5.05, Page 6 of Mr Moynihan's authorities, suggests that it would be sensible to get a specific discharge in this regard. Mr Moynihan also referred Professor Meston to Page 11 of his authorities being an Extract from Paterson & Ritchie paragraph 12.13 which suggested that there could be a problem releasing a copy of the Will against the executor's instructions. Professor Meston accepted that the Respondent as sole executor would not have been entitled to resign but he could have declined to accept the office. Professor Meston accepted that this may have led to the widow being appointed as executor and could have also led to the Respondent continuing to be instructed as solicitor. The Respondent could have assumed the widow and then resigned as executor and continued on as solicitor at an early stage but both these scenarios would have had the same outcome as what happened in this case. Professor Meston stated that there was a difference in this case in relation to the timing. Professor Meston stated that he could not know what the Respondent's motivation was. Professor Meston accepted that the timeline was that the death occurred on 5 February 2009, Mr D declined to be an executor on 23 March 2009. On 25 March 2009, the Respondent issued terms of engagement to himself as solicitor and it was probable that this was when he started carrying out the duties of executor. Professor Meston accepted that the Respondent would have been entitled to fees for carrying out work at this stage.

Mr Moynihan again referred Professor Meston to the Opinion of Mr Grant at paragraph 3.6 which suggested that the Respondent was simply under a duty as debtor to pay the son's legal rights or arrange for them to be duly discharged. Paragraph 3.11 of the Opinion quotes a lecture which suggests that it would be best for the professional executor in such a circumstance to resign office as executor whether or not one resigned agency at the same time. Paragraph 4.4 of Mr Grant's Opinion suggested that an executor could resign and retain agency to the estate. Professor Meston agreed that it was a possible option but that the intent and the wording used in the documentation in this case troubled him. Mr Moynihan also referred Professor

Meston to paragraph 4.5 of Mr Grant's Opinion which suggested that the Respondent as executor did not owe fiduciary duties to the son. Professor Meston stated that an executor was a Trustee and is defined as such by Statute. Professor Meston further stated that he did not accept that it was only the beneficiary under the Will who was a beneficiary. Anyone with a benefit was a beneficiary.

Mr Moynihan referred Professor Meston to the letter from Mr Kerrigan being Production 2 in the Respondent's Productions. Page 2 stated that the executor had a duty to inform the son of legal rights but Mr Kerrigan's view was that the Respondent in this case simply made an error of judgment and no more. Professor Meston stated that a decision was required to give clear authority in connection with situations such as this. Mr Moynihan referred Professor Meston to Mr Kerrigan's view that if the Respondent was sole executor, then the beneficiaries under the Will were his client and accordingly it could be argued that he had complied with Rule 4(1) of the Solicitors (Scotland) Standard of Conduct Practice Rules 2008. Professor Meston confirmed that given the lack of authority to justify his view in connection with the executor's duty to notify the son of legal rights, he doubted whether the Respondent's conduct would be sufficient to amount to professional misconduct.

In response to a question from the Tribunal, Professor Meston stated that starting to ingather the estate was acceptance of the role as executor.

Mr Reid confirmed that he had no further witnesses to lead.

Mr Moynihan then asked the Respondent to give evidence.

EVIDENCE FOR THE RESPONDENT

Evidence from the Respondent

The Respondent confirmed that he was a partner with Balfour and Manson and specialised in private client work particularly Wills, Trusts and Executries. He confirmed that he did not know Mr A before he died and that Mr D had acted for him but he had retired as a solicitor. The Respondent stated that he thought he did Mr A's

Will for him but he was not sure if he knew that he was an executor. The Respondent explained that these days it was unusual for an individual solicitor to be an executor due to the issue of continuity. Mr Moynihan referred the Respondent to the email of 17 February being Production 3 of the Complainers' Inventory of Productions. The Respondent stated that at this stage his view was that there arguably was no duty to inform the son of his legal rights. This was because legal rights were subject to long negative prescription and he thought that this meant that a person had 20 years to claim their legal rights. The Respondent stated that there was also the issue of inheritance tax because payment of legal rights did not reduce the estate for the purposes of inheritance tax. The Respondent explained that also in his mind at this time was the fact that the Department of Work and Pensions do not insist that a person claims their legal rights in order to be able to obtain benefits and the local authority's position was that it would not affect a child in care's entitlement to state help. The Respondent stated that he did not remember this being covered at university and his firm had no protocol about what to do in these circumstances.

The Respondent was referred to the Application for Confirmation. He stated that the Form C5 had a question about legal rights and used the word "claim". At this stage the Respondent knew that there was a potential claim but he was not aware that he had a duty to inform the son. The Respondent explained that at this time he had not done any research. Mr Moynihan referred the Respondent to Production 8 being his email and attached letter from the widow. In this email the Respondent stated that he did not think there was an obligation on the executors to inform the son of his legal rights but he remembered that there was an article in the Journal about it and he looked it out. The Respondent was referred to Complainers' Third Inventory of Productions number 35 which was the article by John Kerrigan which suggested that an executor did have an obligation to advise those who were entitled to claim legal rights. The Respondent stated that he read the cases referred to in the article but did not consider them to be in point. However, the Respondent considered that Mr Kerrigan was authorative on the matter and must be correct. The Respondent explained that he had not had much experience personally of being an executor. As at 25 March he had not met the widow. He had not at this stage knowingly taken a decision to become an executor. He went to pick up the drawers of papers from Mr D and dictated letters from home. The Respondent stated that by doing so he felt he had

accepted the office of executor. Production 17 was a list of his queries, some of which had been previously raised by Mr D. On 14 April 2009 he applied for confirmation. Production 18 was a note of his phone call with the widow including quotes of what the widow said. She made it quite clear that there was no way that her husband would have wanted the money to go to his son.

The first time the Respondent met the widow was on 4 April 2009 at her house. Production 21 was the widow's comments annotated on the list written by someone else. She was far from keen for her step-son to obtain legal rights. The Respondent explained that he wrote up his notes after the meeting. By this time he had read the article by Mr Kerrigan and was accordingly of the view that an executor must tell the son of his legal rights. The Respondent explained that he had no plan in his mind when he went to the meeting with the widow. She was extremely upset. She had been in hospital and was not in robust health. The Respondent was very aware that the widow did not want him to write to the son to advise him of his legal rights. The Respondent provided what he thought was a solution which would let them move forward. This was for him to resign and appoint her as an executor. The Respondent explained that he had not gone through different options in his head but he thought that this way forward would comply with the law. The Respondent explained that he had been involved in another case where an executor had resigned in favour of two beneficiaries and the beneficiaries became aligned with the person who would be responsible for meeting any future claim for legal rights. The Respondent was adamant that he did not think he was doing anything inappropriate. It did not even cross his mind that there was any need to consult anyone else. The Respondent considered his suggestion as a solution to the impasse of his obligation to write to the son about the legal rights against the wishes of the widow. The Respondent was referred to a letter of 6 April 2009 where he put in a letter to the widow his suggestion. He set out that this meant getting round the problem of her step-son having a claim against the Respondent personally or his firm. The Respondent stated that it was not open to him to decline appointment of executor at this stage as he had already accepted office by acting as executor. The Respondent assumed that he would remain as the Executry Solicitor. The Respondent stated that he regretted the language used in his email at Production 23 and that he had used this colloquial phrase from watching a lot of cop shows in the 1970's. He did not think of it in the sense of being

something illegal. It was lawful and he applied the general principles that he knew. He as an executor could legitimately resign and appoint someone else. He felt that to appoint the widow as executor would align her with being the person who would be responsible for settling any legal rights.

The Respondent explained that between 6 April and 19 May he stayed on as executor because administratively it made things easier because he could sign the confirmation forms etc rather than post them out to the widow. The Respondent advised that his firm charged £2,500 plus VAT by way of fees for dealing with the estate which was approximately 1% of the estate. The charges were for his services as a solicitor and there was no greater charge made because he was also an executor. In connection with the suggestion made by Professor Meston in his second Opinion at paragraph (e), the Respondent explained that it did not occur to him at the time to decline the appointment as executor. By 4 April it was not open to him to decline because he had already started to do work as an executor and accordingly had accepted office. The Respondent pointed out that if he had declined to take up the office as executor then the widow would probably have been a replacement executor. He also submitted that if he had resigned earlier it would have made no difference because the widow would have appointed him as her solicitor with the same instructions. The Respondent emphasised that he had no thought at the time that what he was doing was wrong. With hindsight he still did not think that he had done anything wrong but he would, in a similar situation now, decline agency.

In response to a question from the Tribunal, the Respondent stated that it was quite clear that the widow would not permit payment to the son or any letter being sent to the son advising him of his legal rights. The Respondent stated also in response to a question from the Tribunal that he did not think that he pointed out the 20 year risk to the widow or the risk that legal rights could accrue interest.

Cross Examination of the Respondent by Mr Reid

The Respondent explained that when he sent the first email to Mr D, he did not think there was a duty on the executor to advise the son of his legal rights. He then changed his mind after he read the article by Mr Kerrigan. The Respondent stated that he did

not accept that he was involved in a scheme. The son was aware of his father's death. The advice in Professor Meston's book at the time was not clear with regard to whether or not there was an obligation on the executor to tell the son of his legal rights. The Respondent again stated that he regretted the informal language used in the email at Production 23. The Respondent pointed out that there was a dearth of guidance for the profession in respect of acting as a Solicitor executor. The Respondent accepted that he had a duty as an executor to identify the estate, ingather it and distribute it in accordance with the law. He confirmed that in this particular case, at the time that he resigned as an executor, there were still six things to be done. The Deed of Assumption and Conveyance had to be registered, accounts had to be drafted, investment advice should have been given to the widow, the residue would require to be identified and an invoice still had to be issued for the services as a solicitor. There was also the question of the additional £500 that came in. The Respondent confirmed that he resigned once all the money had been ingathered. The Respondent did not accept that the widow would have necessarily instructed other solicitors if he had resigned as the executor earlier. The Respondent confirmed that he did not do any work on the executry until he got the papers in March 2009. He was an executor for a period of less than two months. The Respondent confirmed that if he had to go through this again he would have resigned as executor and as solicitor. The Respondent stated that he thought that the widow understood the purpose of his resigning and appointing her as an executor which avoided the Respondent's obligation to advise her step-son of his legal rights. The Respondent stated that, if anything, he got the law wrong and that Professor Meston's view had changed recently.

In re-examination, the Respondent accepted that he could have made the position with regard to legal rights clearer to the widow but he was happy that she understood that her step-son was entitled to one-third of the moveables after deduction of certain debts.

Mr Moynihan then led Evidence From William Grant

Evidence from William Grant

Mr Grant confirmed that he was a consultant with Mitchells Robertson and was an expert in private client work. He had been consulted on about six occasions by members of the profession. Mr Grant confirmed that in this case he studied the file and gave an Opinion which was Production 1 of the Inventory of Productions for the Respondent. Mr Grant stated that the nature of legal rights was that they were a debt and this view was based on the authorities. Mr Grant stated that this was important because it was relevant to the nature of the executor's duty in respect of the payment of a debt. Mr Grant stated that legal rights were a debt rather than a right in succession and referred to Lord Watson's opinion in the Naismith case. Mr Grant confirmed that his view was that legal rights vested on the death of the deceased and therefore there was no need for them to be claimed. Mr Grant stated that the executor had a duty to ensure that legal rights were discharged either because the benefits under the Will were better than the legal rights entitlement or if there was no entitlement under the Will or the legal rights were less than the entitlement under the Will then the executor would be required to ensure that the legal rights were discharged and this would entail informing the legal rights claimant. Mr Grant stated that the law was not wholly clear but executors had to ensure that all debts were paid before implementing the terms of the Will.

Mr Grant stated that there had been uncertainty because of the reference in Professor Meston's book to there being a doubt about this because the executor has a duty to implement the Will and there may be a conflict between the Will and legal rights.

Mr Grant stated that legal rights fell into a curious category because if the executor instructed a solicitor to disregard legal rights, the solicitor would have to follow his client's instructions.

Mr Grant stated that in his opinion the Respondent's conduct did not amount to professional misconduct because the law was not absolutely clear on the points in this case. There was doubt because of what was stated in Professor Meston's book. Mr Grant's view was that a solicitor could resign in favour of a beneficiary as long as the beneficiary was aware of their duty as executor and their personal liability in respect of legal rights. Mr Grant stated that he may have done the same thing as the

Respondent. He stated that this was not a comfortable conclusion for him. He indicated that he might have consulted with others in the firm first.

Cross Examination of Mr Grant by Mr Reid

Mr Grant stated that the problem was the fact that there was a debt that had not been discharged. Professor Meston's book mentioned the difficulty with the legal rights claim involving going against the deceased's Will which an executor has a duty under the Will to fulfil. Mr Grant however confirmed that an executor should not take instructions from a beneficiary. Mr Grant said that in respect of Mr Kerrigan's article the position was not as black and white as the title suggested. Mr Grant stated that the position would have been different if all the money in the executry had been paid out before the Respondent had resigned as executor because whilst there was still sufficient money in the executry to meet the legal rights claim then the executor in paying over the estate was aware that the legal rights debt still had to be met. If there had been no funds left in the estate then Mr Grant indicated that he doubted that it would be legitimate for the solicitor to have acted in this way.

In re-examination, Mr Grant stated that there was a duty to correspond with the beneficiary and consult with them and that in doing so, the Solicitor executor would have to take some account of what they said. Mr Grant clarified that if there was sufficient money in the estate to be able to pay the legal rights then he did not think what the Respondent had done was a concoction. The executor has a fiduciary duty to the beneficiary under the Will and so if the substance of the legal rights debt was still there then the original executor could resign in favour of the family executor but if the estate was already fully paid out then the professional executor's duty would have been done with the knowledge of the family beneficiary. If all the money had been paid out then the executor would have been passing an impossible task to his successor.

In response to a question from the Tribunal, Mr Grant confirmed that if the professional executor resigned when there were still sufficient funds to pay out the legal rights but knew that the beneficiary did not wish to pay out the legal rights, the solicitor was absolved from responsibility provided that he had made it clear to the

family executor that the legal rights debt was still there and still had to be paid. Mr Grant stated that he felt that the Respondent had fulfilled this obligation by telling the widow of her obligations in connection with legal rights and the fact that there was still sufficient money within the executry to pay the legal rights.

Mr Moynihan then led evidence from John Kerrigan.

Evidence from John Kerrigan

Mr Kerrigan confirmed that he was presently a partner with Morisons and specialised in private client work. He had written a number of articles on this matter including the article which appeared in the Journal in November 2007 entitled "Legal Rights and the Black Sheep". Mr Kerrigan confirmed that he had been consulted by other solicitors and had prepared around 250 Opinions since 2008. His view was that an executor should have told the son of his legal rights although other solicitors may not agree. Mr Kerrigan stated that he accepted if the beneficiary instructed a solicitor not to show the Will to someone then the solicitor would not be able to do this. If a lay executor did not want legal rights to be paid then the solicitor should tell the executor that if legal rights are not paid, the executor could be personally liable. Mr Kerrigan confirmed that a solicitor would have to follow the instructions of the executor client. Mr Kerrigan stated that the Respondent in this case could be said to have complied with Rule 4(1) of the Solicitors (Scotland) Standard of Conduct Practice Rules 2008 because this is a situation not encountered before where he was a sole executor and also executor Solicitor and the beneficiary under the Will gave him certain instructions. An executor has a duty to administer the Will. In this case the Respondent told the widow of her legal rights so what he did was not improper although it may not be what other solicitors would have done. The Respondent was faced with a very difficult situation and there was no guidance on the particular point. He was sole executor and solicitor for the estate in a situation he had not encountered before and there was little guidance on the correct procedure. Mr Kerrigan stated that he did not think what the Respondent had done in the circumstances was improper.

In response to a question from the Tribunal, Mr Kerrigan stated that he felt the Respondent had made an error of judgment. If he had been acting he would have

resigned as executor and Solicitor when the beneficiary had been assumed as executor.

At this point the case was adjourned part-heard until 20 February 2013. Parties indicated that written submissions would be provided prior to the next calling of the case.

The Case called again on 20 February 2013 and evidence was led from Brenda Rennie

Evidence from Brenda Louise Rennie

Ms Rennie confirmed that she had been a senior partner with Balfour & Manson. She qualified in 1971 and had specialised in private client work since the early 1980s. She had lectured on this topic for the Law Society and commercial providers and had experience of dealing with executries, acting as an executor and also providing advice on executries.

In connection with the Respondent, she became aware of the circumstances surrounding Mr A's case and it was discussed in detail by the partners at Balfour & Manson before the Respondent was taken on. Ms Rennie confirmed that she was fully aware of all the circumstances and had seen all the documents relating to the case. She confirmed that she had also seen the written Opinions of the experts Mr Grant, Professor Meston and Mr Kerrigan and what they had written was what she would have expected.

Ms Rennie said that the stepson in the case did have legal rights and that every child in Scotland had an entitlement to claim legal rights where there was a will. Ms Rennie referred to the Kerr case in 1968 where a widow was a beneficiary under a will, and the children had a legal rights claim. The widow was able to renounce the will so that on intestacy all the estate came to her. This had been ruled to be an acceptable way to proceed by the Sheriff.

Ms Rennie said that in her opinion the law and practice in connection with the intimation to a legal rights claimant of their right to claim legal rights was unclear and

there was not necessarily an absolute duty on an executor to advise a legal rights claimant of their claim. Ms Rennie explained that she had frequently advised widows who were executors and had children under 16 who had legal rights. In these cases the executor should make sure that there would be funds available to allow the child to claim legal rights once they were 16. Some widows however may not have enough funds to set money aside given that they had to use the money to bring the children up until they were 16. Ms Rennie stated that what was done in these cases was that she would advise the widow that they had to ensure that the children were advised of their legal rights once they were 16 and that the money was available to pay them. Ms Rennie however stated that in her opinion it was in order for her to pay the money over to the widow in these sort of cases while knowing that the mother would spend the money on bringing up the children.

In connection with a professional executor, there was a need to be more forceful about the funds having to be set aside for the child in case there was a claim. The lawyer would require to protect themselves. If the mother was hostile the solicitor would be correct to resign because of a potential future claim against the firm.

Ms Rennie stated that in her opinion Professor Meston's book was the bible and stated that the matter of legal rights and the duty to inform the claimant was not clear. Mr Moynihan referred Ms Rennie to Production 33, being Professor Meston's Opinion and quoted from the 3rd paragraph. Ms Rennie stated that it was not entirely clear whether a solicitor executor was formally bound to inform the son of his legal rights claim. Mr Kerrigan's view of the duty was firmer than Ms Rennie's.

Cross-examination of Ms Rennie by Mr Reid

In cross-examination Ms Rennie stated that it would be good practice for an executor to inform a legal rights claimant. She indicated that she thought she would have informed the son of his legal rights in this case. She did not however agree that it was trite law that there was such a duty. If the view was formed that there was such an obligation, it was possible to do what the Respondent did without it being a device/scheme. Ms Rennie stated that in her opinion it would have been better if the Respondent had resigned at an earlier stage and not continued to act as solicitor but he

was entitled to act as he did because the widow was the beneficiary and he did as she requested. Ms Rennie stated that in her opinion a legal rights claimant was not a beneficiary and did not have the same right or importance as the beneficiary.

In re-examination Ms Rennie stated that the Respondent should have assumed another executor and resigned and not continued on as solicitor to be absolute best practice. She stated that in her opinion in would be acceptable practice for an executor to resign after assuming a widow as executor and to continue on as solicitor and pay the money to the widow, advising her of the potential legal rights claim of the child when it attained the age of 16. This would not be improper acting.

At this stage the Tribunal asked for clarification in connection with which findings in fact parties were asking the Tribunal to make. After an adjournment parties lodged a document setting out the agreed facts and the facts that were in dispute. Mr Moynihan also lodged a further document being findings in fact that he wished the Tribunal to make. The Tribunal then heard submissions from both parties.

SUBMISSIONS FOR THE COMPLAINERS

Mr Reid referred to his written submissions lodged with the Tribunal which were as follows:-

1.0 Professional Misconduct

1.1 The Law Society invite the Tribunal to make a finding of professional misconduct against the solicitor, David Haddow Campbell. It is not in dispute that the test to be applied is the test delivered by Lord President Emslie in the case *Sharp –v- The Law Society of Scotland 1984 SC 129* at page 134 where he said:-

> "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".

1.2 In this matter the Law Society invite the Tribunal to make a finding that the conduct of the Respondent in his dealings with the estate of the late Mr A are serious and reprehensible and amount to professional misconduct.

2.0 Chronology of Events

2.1 In considering whether the conduct complained of amounts to professional misconduct, it is necessary for the Tribunal to consider the circumstances surrounding the matter. Although evidence has been led by a number of witnesses, the factual circumstances do not appear to be in dispute. They are as follows:-

(a) Mr A died on 5th February 2009. He left a Will. In terms of the Will he appointed the solicitors Duncan McLean Mennie and David Haddow Campbell as his Executors.

(b) The Will provided for a bequest of £5,000 to be paid to a nephew with the remainder of the estate to be bequeathed to his then spouse, Mrs B.

(c) The Death Certificate of Mr A confirmed that he had previously been married. Information was provided to the Respondent that a son from the first marriage of the deceased had survived him. On 16th February 2009, Mr D e-mailed the Respondent advising that the deceased had a son by his first marriage and that "he might be entitled to make a claim on the estate". In reply by e-mail dated 17th February 2009, the Respondent advised that "yes the son has legal rights to one-third of his father's moveable estate."

(d) On 6th March 2009, Mr D e-mailed the Respondent advising that the son did exist. That the son was blind and lived in Northumberland He advised further there was no love lost with the daughter-in-law and that the widow had expressed a view if the daughter-in-law was aware a claim for legal rights could be made then she would be in there like a shot. It was clear that the widow was vehemently opposed to the prospect of a

claim for legal rights being made by the son. This was evidenced by correspondence received by the Respondent, copies of which have been lodged as Productions on behalf of the Law Society.

(e) By e-mail dated 13th March 2009, the Respondent advised Mr D that the son had a claim for legal rights. That the son was entitled to claim one-third of the moveable estate of his late father no matter what the Will provided. This e-mail made reference to an article in the Journal of the Law Society of Scotland. This article was an article by John Kerrigan, a witness on behalf of the Respondent which is lodged on behalf of the Law Society of Scotland as Production 35. This article stated that "It is settled law that Executors are obliged to advise all who might have a claim to legal rights of their entitlement. Executors should ensure that potential claimants are aware of their legal rights and what options they have". The article went on "Executors should never suppress the existence of the right and must provide a potential claimant with all information required to enable them to decide whether to proceed with the claim". Later in the article whilst discussing the concept of informed consent, the author states "Given that I consider it to be trite law that Executors are required to supply a potential claimant with all information required to enable them to reach a decision, and in particular given that we are now in the age of informed consent, I see no point whatsoever in refusing to make a copy of the Will available. In my view such a refusal in relation to a potential legal rights claimant is insupportable in law."

(f) By letter dated 11th March 2009 the widow wrote to Mr D criticising him for the approach he recommended. As a consequence of this attitude, Mr D decided to decline his appointment as Executor. The papers comprising the estate were passed to the Respondent for him to deal with.

(g) Having received the papers from Mr D, the Respondent proceeded to administer the estate by writing to various financial institutions to ascertain the extent or otherwise of the investment the deceased had with that institution.

(h) By letter dated 25th March 2009, the Respondent wrote to the widow regarding her late husband's estate. In that letter he mentioned the existence of the son's entitlement to legal rights and assured the widow that they would discuss matters when they met at the weekend.

(i) On 4th April 2009 the Respondent visited with the widow. His notes of that meeting have been lodged as Production 22. The notes reveal the attitude of the widow was not to entertain the claim for legal rights. The notes of the meeting taken by the Respondent reveal that he advised the widow that he had to let the son know about his legal rights but if he resigned and appointed her to be Executrix then it would be between her and the son. The note revealed that he did not consider that she fully understood the implications of this scheme.

(j) By e-mail dated 6th April 2009, the Respondent communicated with Mr D regarding the letter of declinature. In that e-mail he confirmed that he had met with the widow and that agreement had been reached for him "to continue on as the sole Executor and as soon as the money is in, resign and appoint her to be the sole Executor so that she takes the rap and not me/Lindsays if Allan wants to sue some someone for not telling him about his legal rights."

(k) By letter dated 6th April 2009, the Respondent wrote to the widow referring to the meeting. In that letter the Respondent confirmed advice in relation to the claim to legal rights for the son. The letter confirmed that in the opinion of the Respondent the Executor had a legal duty to inform the son of his right to make a claim. The letter identified a scheme devised by the Respondent whereby "we can get round this". The scheme involved the Respondent declining to act as Executor or more likely appointing the widow to be an Executor then for him to resign as Executor thus leaving her as the sole Executor. The letter confirmed that in the opinion of the Respondent it made sense for him to remain as Executor until confirmation had been issued and the funds ingathered.

(l) Confirmation was submitted to the Sheriff Court on 17th April 2009. The moveable estate of the deceased amounted to £256,604.20. The value of the potential legal rights claim amounted to approximately £84,498.52.

(m) Thereafter having been confirmed, the Respondent proceeded to ingather the estate which comprised the interest of the deceased in a number of bank accounts. When monies were received from the financial institutions, the Respondent paid out the bequest to the nephew and the balance to the widow. On 10th May 2009, a deed of assumption and conveyance was prepared by the Respondent and sent to the widow. It was executed by the interested parties and presented for registration on 21st May 2009. The Respondent confirmed in evidence by then the estate of the deceased had been ingathered and paid out, there was little, if any, work left to be attended to.

3.0 Legal Principles

3.1 The Tribunal is fortunate in that it has heard the oral evidence of a number of senior and experienced members of the profession who have a particular speciality in this field of the law. There would appear to be little dispute between the legal principles which these witnesses spoke to, which are as follows:-

(a) An Executor has a duty to advise all who might have a claim to legal rights of their entitlement. An Executor should ensure that potential claimants are aware of their legal rights and the options available to them. An Executor should ensure that sufficient information is provided to the potential claimant for them to make an informed decision. The Respondent in his role as Executor ignored his duty in this respect.

(b) A solicitor appointed to work on an executry (not as Executor) had a duty to advise the Executor of their obligations to inform potential claimants of legal rights. The advice should remind the Executor of the existence of

legal rights and of the potential difficulties which might arise in the event of a child or spouse not being informed. The considered view of the expert witnesses was that, for their own protection the solicitor in these circumstances should maintain a clear and concise record of having given this advice. At the conclusion of the scheme devised by the Respondent he was no longer Executor but rather a solicitor dealing with the estate. There was little, if any, work to be completed. In this capacity the Respondent did not provide the widow who was now Executrix as to her obligations or as to the potential consequences of her failing to contact potential claimants.

3.2 The oral evidence of the expert witnesses supplemented the written reports and opinions which were lodged by both parties to the process. Consideration of the views expressed by the experts reveal there is little, if any, distance between their opinions. Where they appear to differ is on the issue of whether the behaviour of the Respondent could be viewed as serious and reprehensible.

3.3 The Law Society led in evidence Professor Meston. He is recognised as the leading authority in this field. He was categoric that there was a duty upon an Executor to advise a legal rights claimant of their entitlement to make a choice as to whether to make a claim. His opinions have been lodged as Productions. Although in his written opinion he was not as categoric as to the duty, he explained this was then because of the absence of clarity on the issue by judicial authority. In his evidence he stated that he now held a quite clear view there was a duty upon an Executor to inform the son of his entitlement to claim.

3.4 He questioned the timing of the resignation of the Respondent. He identified that the resignation occurred after the damage had been done, namely the estate had been ingathered and paid out. He should have resigned much earlier.

3.5 The Tribunal heard evidence from Mr Grant. His view does not appear to differ in any great respect from that of Professor Meston. His view proceeds upon the misunderstanding that the resignation occurred at a time when the estate had not

been ingathered. When this was brought to his attention he accepted the position of the Respondent to be uncomfortable.

3.6 The Tribunal heard evidence from John Kerrigan. He was the author of the article in the Journal of the Law Society of Scotland in November 2007. He has expressed the view that it was trite and established law that an Executor required to make contact with a legal rights claimant to allow them to make an informed choice whether to intimate a claim. He was experienced in his field. He described the conduct of the Respondent as being an error of judgement. The Tribunal is invited to consider that this is a most generous appraisal of the conduct of the Respondent, and is not borne out by the evidence.

4.0 Serious and Reprehensible

4.1 In assessing the culpability of the Respondent in this matter, the Tribunal is invited by the Law Society to view his behaviour as serious and reprehensible. In particular the Tribunal is invited to consider the following circumstances:-

(a) The Respondent was aware of his duty as Executor to inform the potential claimant of legal rights of their entitlement. The Respondent chose to ignore this obligation. This is not a situation where the Respondent stumbled through the administration of the estate not realising the significance of the duty or the existence of the claimant. Instead having the knowledge of the requirement and the existence of the claimant he sought to devise a scheme which was contrary to his duty as Executor.

(b) The Respondent was confronted with a widow who was vehemently opposed to any information being provided to the son. In the circumstances of this case, the Respondent failed to act independently.

(c) His former co-Executor was vilified by the widow having given her certain advice regarding the obligations he had as Executor in relation to the son and chose to decline his appointment.

(d) The Respondent described the scheme he devised as a solution to what he called a difficult problem. There was neither a problem nor a difficulty. The Respondent had knowledge of his obligation as Executor and chose to ignore this obligation. Instead he devised a scheme in which he exposed an elderly widow to an expensive difficulty later when the son learned of his entitlement. The Respondent carried out the work to the financial advantage of his firm in that prior to removing himself from the role of Executor in terms of the scheme, the estate was ingathered and the fee taken.

(e) It is difficult to label the behaviour of the Respondent as a mere error of judgement. The Respondent had knowledge of his duty as Executor and chose to ignore same. Instead, with some consideration and thought, he devised a scheme which usurped the duty completely. He acted in a conflict of interest situation. He preferred the demands of the widow to his obligation to contact and inform the son.

(f) The Respondent acted in a dishonest and unscrupulous fashion. He was aware as to his duties as Executor. He chose instead to conceive a scheme whereby he usurped these duties. This was not a solution to a difficult problem. It was him succumbing to the demands of an unreasonable client. Instead the Respondent should have acted independently and ignored the wishes of the unreasonable client. If the situation became impossible he should have declined to act. The instructions from the widow were improper and accepted by the Respondent. He acted in a conflict of interest situation by failing to act independently insofar as the interests of the widow and the son were concerned. He failed to communicate effectively with the son as to his proper entitlement. He failed to communicate effectively with the widow as to the risk she was exposing herself to.

5.0 Conclusion

5.1 The Tribunal is invited to have regard to the documentation lodged as Productions on behalf of the Law Society comprising the file of the Respondent. The Tribunal is invited to consider the language employed by the Respondent in his communications. It is quite clear that the Respondent was aware as to the duty of an Executor to inform a claimant as to their potential entitlement. The Respondent chose not to comply with his duty, instead he succumbed to the wishes of an unreasonable client who provided him with improper instruction. He devised a scheme which allowed him to ingather the estate for a professional fee and thereafter exposed the elderly widow to a claim at a later date believing himself and his firm would be absolved from any liability. This was not behaviour in ignorance or on the spur of the moment. Instead it was behaviour calculated and considered designed to defeat the legal principle.

5.2 In these circumstances the Tribunal is invited to consider that the conduct of the Respondent fell far short of the standard expected of competent and reputable solicitors, that the conduct of the Respondent was serious, reprehensible and improper and that there should be a finding of professional misconduct.

Mr Reid stated that he had the following supplementary submissions to make.

In connection with Article 2.4 (a) of the Respondent's submissions he invited the Tribunal to recollect the evidence of Mr Kerrigan who stated that there was a duty to inform the legal rights claimant and that it was trite law. Mr Reid submitted that Webster's book was not explicit but that it was reasonable to deduce that there was such a duty. Mr Reid stated that there was not only one course of action open to the Respondent, he could also have decided not to act for the widow. In connection with Articles 3.1 to 3.6 Mr Reid stated that there was a disagreement between the parties in connection with Mr D's reasons for declining to be an executor. Mr Reid referred to Productions 5, 6, 9 and 14 and stated that it was reasonable to deduce that he departed because he had brought bad news to the widow. In connection with Article 3.7 of the Respondent's submissions, Mr Reid stated that the research done by the Respondent worsened the situation because he could not claim ignorance. He chose to subvert a duty which he knew he had. Mr Reid submitted that it was a simple case – the Respondent had a duty to inform the legal rights claimant which he ignored and he

pandered to an unreasonable client. When the money had all been paid out he resigned, which was contrary to his duty. Mr Reid stated that nobody had made enquiries in connection with the whereabouts of Mr C but that he and Mr Macreath had been uncomfortable with this situation. Mr Reid explained that his apprentice had located Mr C and Mr Reid had told Mr C that he may wish to speak to a solicitor. Mr C had received payment of his legal rights yesterday 19 February 2013. Mr Reid stated that Professor Meston had indicated that the executor's appointment was accepted as at the date of death. Mr Reid further submitted that Professor Meston had indicated that the resignation was effective when the deed was presented to the books of Counsel in Session which was 21 May.

SUBMISSIONS FOR THE RESPONDENT

Mr Moynihan explained that Mr C had received payment of his legal rights. The Law Society had not made previous contact with him because it did not believe it had the right to contact the son in view of the executor's opposition. The Law Society however took the view that in the public interest they should inform the son.

Mr Moynihan then referred to his written submissions which were as follows:

The issue

2.1. The sequence of events is to be seen from the documentation produced. Subject to some incidental observations below, the sequence of events is not the subject of substantial dispute. The question is whether Mr Campbell's conduct amounts to 'misconduct' by the test in ***Sharp v The Law Society of Scotland*** 1984 SC 129[1].

2.2. There are incidental aspects of the Chronology of Events set out in the submission for the Law Society that require to be corrected but the main issues in contention relate to:

(1) the nature of the allegation of 'misconduct' properly before the Tribunal;

[1] Page 13 in the bundle

(2) the correct approach to the application of the test of 'misconduct' in the circumstances of this case; and

(3) in particular, the relevance of the evidence from the experts that the Tribunal has heard.

2.3. In short, it is submitted that there is no relevant case in support of the first allegation of misconduct, an allegation of dishonesty. There is not sufficient specification of that allegation in the Complaint, despite the call in Answer 4.1 (p. 14) and it is a matter of grave concern that the Law Society's submission should invite a finding that "The Respondent acted in a dishonest and unscrupulous fashion" (para 4.1(f) of the Submission) without such an allegation having been put to Mr Campbell for his comment.

2.4. Even as regards the second allegation – a failure to comply with certain specific rules in the Solicitors (Scotland) Standard of Conduct Practice Rules – the Law Society is trying to have its cake and eat it too.

(a) The Law Society introduces the evidence of an expert witness (Professor Meston) as to the substantive content of the law and was even prepared to ask him whether Mr Campbell's conduct was "proper and legitimate" (document 34,page 4). It is unusual (perhaps even of doubtful relevance) to introduce 'evidence' as to the content of the law but that course of action must have reflected the belief (correctly) that the law was uncertain. As will be debated later, the law is uncertain in key respects, and certainly was at the time when Mr Campbell's conduct occurred. Having gone to an expert in circumstances of uncertainty the Law Society should not ignore his view on the question whether misconduct occurred. It is accepted that the judgment as to whether or not 'misconduct' has occurred is for the Tribunal and not for the witnesses but it is respectfully submitted that this Tribunal has to reflect carefully on the rationale underlying Professor Meston's conclusion that no misconduct occurred. That rationale is that the law was uncertain at the time when the conduct occurred.

(b) Mr Campbell should be judged relative to the state of the law as at the date when his conduct occurred. The Law Society's summary of the legal principles (in para 3.1. of its Submission) looks only at the measure of

consensus among the witnesses as at the date of the hearing before the Tribunal and we know that Professor Meston's own view changed from the dates of his opinions (themselves post-dating the events). Where all of the witnesses acknowledge that the law was uncertain at the time, it is quite wrong to judge Mr Campbell on the basis of hindsight with the benefit of clarification of the law by expert witnesses.

(c) Professor Meston was not alone in discounting misconduct. That was unanimous view of all of the experts. Because that evidence does not preclude a finding of misconduct by the Tribunal again it is necessary to concentrate on the reasoning and not the conclusion itself. The Law Society characterises what Mr Campbell did as devising and implementing a 'scheme'. In fact, all the experts are agreed that assuming Mrs A as an executor and then resigning was not only the proper course of action in the circumstances; it was actually the only course open to him. The essence of the criticism relates only to timing. It is respectfully submitted that the nub of the case is to be found in the comments by Mr Campbell at the conclusion of his evidence in chief when he was asked to address the options that Professor Meston says were open to him. Mr Campbell's response was that whatever he had done the outcome would probably have been the same. That explains why Mr Grant (after long and detailed consideration of the matter in his Opinion – Respondent's document 1) concluded that he was in the uncomfortable position that he might have acted in the same way. Answer 3.3 (page 13) for Mr Campbell focuses that evidence in the proposition that competent and reputable executry practitioners would have proceeded in the same manner as Mr Campbell. Mr Grant is testament to that conclusion. The Tribunal should so find and it is respectfully submitted that such a finding is inconsistent with a conclusion that misconduct has occurred.

At this point Mr Moynihan added to his written submissions and stated that it was beyond the pale to suggest dishonesty and that Ms Rennie would have been horrified with this suggestion because this might have meant that what she had been doing in the past was not in accordance with the law. Mr Moynihan stated that it was either 19th or 21st May that the Respondent resigned and that even if 6th April, which was the

Monday after the meeting, was the earliest date when he could have been taken to have accepted office as the executor. It was ok to resign as executor and continue as solicitor. Mr Moynihan referred to Webster's book which states that a solicitor is obliged to take instructions from an executor. Ms Rennie had given examples of cases where there were young children and the solicitor had to hand over funds to the widow knowing that the money would be spent on bringing up the children. This was not a scheme but a practical solution and it was not dishonest.

Mr Moynihan pointed out that Professor Meston had stated that the options available to the Respondent included what he actually did. Mr Moynihan referred to Production 33, being Professor Meston's Opinion. He quoted from the second paragraph which indicated that there was no requirement for the solicitor to withdraw agency. Mr Moynihan stated that the experts were there to assist the Tribunal and could lay information before the Tribunal but could not ask the Tribunal to reach a particular conclusion on the specific issue before it. Mr Moynihan referred the Tribunal to Professor Meston's Opinion at Production 34 and stated that paragraph e was the Law Society asking Professor Meston the same question by the back door. Mr Moynihan stated that the date that the Respondent accepted the position of executor was around the 25 March 2009 when the letter of engagement was sent by the Respondent as solicitor to himself as executor. He had accepted office by then and accordingly could not thereafter decline. He then became a sole executor and could not resign without assuming another executor first. Professor Meston stated that the Respondent by delaying his resignation earned a fee but the Respondent was entitled to continue as solicitor and the fee was the same or less than it would have been if he had resigned earlier. Mr Moynihan stated that he was asking the Tribunal to accept that there was no preconceived plan and that the Respondent's motive was that it was more convenient and cheaper for him to stay on as executor rather than resign earlier. Mr Moynihan returned to his written submissions.

Chronology – Mr D

3.1. Para 2.1 of the submission on behalf of the Law Society sets out the sequence. While it is largely correct, paragraphs (e) and (f) are confused by the introduction of reference to Mr Kerrigan's article, and the introduction of that article gives a false

impression of the background to the declinature of Mr D. This is important because that confusion carries over in to one of the circumstances on which the Law Society relies in para 4.1(c) of its Submission when assessing culpability:

"His former co-Executor was vilified by the widow having given her certain advice regarding the duties that he had as Executor in relation to the son and chose to decline his appointment."

3.2. The inference would seem to be that the 'certain advice' tendered related to an executor's duty to contact the son. There is no evidence to support the contention that Mr D said anything of that nature to Mrs B; and, indeed, there is evidence to the contrary.

3.3. Mrs B wrote to Mr D on 11 March 2009 (document 6) and concluded her letter by telling Mr D: "I now don't trust you". Mr D explained his reasons for declinature in his email of 16 March (document 9) and he highlighted "the last few words" of her letter. It was Mrs B's expression of lack of trust in Mr D that precipitated his declinature.

3.4. Did Mr D tell her that he was obliged to contact the son? It is clear from Mr D's email of 16 February 2009 (document 3) that he was not familiar with the law of succession and was dependent on Mr Campbell for advice. The initial advice given by Mr Campbell was in his email of 17 February (document 3) and at that date Mr Campbell thought that there was arguably no duty to inform the son of his legal rights claim. That remained Mr Campbell's understanding on 13 March 2009 (document 8), which was after the date of Mrs B's letter to Mr D of 11 March 2009 (document 6). Given that order of events it would appear to be unlikely that Mr D would have told Mrs B of any duty to inform the son because it does not seem that Mr D was himself aware of that duty himself. That is consistent with Mr D's email of 16 March (document 9): "I advised her of a possible claim for legal rights and said that we would need to speak to you about this position in more detail". In that email Mr D makes no reference to contacting the son. His letter to Mrs B of 23 March (document 14) is also silent on this point.

3.5. The Tribunal is asked to conclude that there is no evidence that Mr D told Mrs B that there was any duty to inform the son. All that can be taken from the involvement of

Mr D was that Mrs B was resistant to the proposition that her step-son should have an entitlement to a share in the estate.

3.6. There is, in any event, a critical distinction between Mr D and Mr Campbell. Mr D had the option to decline appointment safe in the knowledge that Mr Campbell was still available and was, in any event, the one with the requisite expertise. Practically speaking Mr Campbell did not have that option.

Mr Campbell checking Mr Kerrigan's article

3.7. Correctly locating Mr Campbell's study of Mr Kerrigan's article in the sequence of events also has implications for the Law Society's contention that Mr Campbell "acted in a dishonest and unscrupulous fashion" (para 4.1. (f)). More will be said later about allegations of dishonesty but suffice it to say that the Law Society's submission omits important elements in the sequence.

(a) As noted, the Law Society's chronology implies that the article was consulted before 11 March. In fact, that must have occurred later. Mr Campbell expressed the view that there might be no duty to inform the son in his emails of 17 February (document 3) and 13 March (document 8). However, he subsequently followed up his recollection of "an interesting article in the Journal", this being Mr Kerrigan's article (document 35). He must have read that article at some date between 13 March and 4 April when Mr Campbell met Mrs B for the first time. What is more, Mr Campbell's undisputed evidence was that he read the case law referred to in that article. That case law merits attention but for present purposes what matters is that the reading of the article by Mr Kerrigan must have come after the declinature by Mr D and before the meeting with Mrs B.

(b) What is more, in that same period (on 25 March) Mr Campbell had raised the possibility of appointing Lindsay's trust company as the sole executor (document 17) but in the event he agreed to his personal appointment as executor. He thereby retained personal responsibility.

(c) The acts of researching the law and retaining personal responsibility are not the hallmarks of a person who would act in a dishonest and unscrupulous fashion; quite the reverse.

Chronology

3.8. With those corrections the sequence of events in outline is as follows.

(a) Mr A died on 5 February 2009 leaving a will (document 2).

(b) There was initial contact between Mr D and Mr Campbell as the prospective executors nominate between 6 February (document 1) and 6 March (documents 3 and 5) and Mr D met Mrs B on the last of those dates (document 5). Her letter of 11 March (document 6) and Mr Campbell's email of 13 March (document 8) have already been discussed.

(c) On 16 March 2009 Mr D told Mr Campbell that he was going to decline and would pass the papers to Mr Campbell (document 9). He did decline on 23 March (document 15) and informed Mrs B (document 14). Meantime Mr Campbell had collected the papers.

(d) On 23 March 2009, before he met Mrs B, Mr Campbell wrote to Mr A's banks for details of the funds held and for the appropriate forms to be signed by the executors. (documents 10-12) and on 25 March wrote to himself (as executor) to confirm his terms of engagement (document 16).

(e) On 25 March he also wrote to Mrs B preparatory to meeting her. In that letter (document 17) he updated Mrs B, reaffirmed that the son had a claim to legal rights and mooted the possibility of appointing Lindsay's trust company as the sole executor for the reasons mentioned in the letter.

(f) They had a telephone conversation on 26 March from which it was clear that the son's legal rights claim remained a problem. The notes of the conversation are document 18.

(g) Mr Campbell met Mrs B at her own home on 4 April 2009. The notes of this meeting are document 22 and the meeting was followed up by a letter to her on 6 April (document 24) and an email to Mr D (document 23). The meeting on 4 April will be the subject of separate submissions.

(h) On 14 April Mr Campbell applied for confirmation and it was granted on 17 April.

(i) On 22 April Mr Campbell wrote to Mrs B to tell her that he had written to the banks (document 26). On 30 April (document 28) he informed her that he had received some of the funds.

(j) On 10/11 May 2009 the deed of assumption and resignation (document 31) was prepared and sent to Mrs B. On 11 May (document 30). Mr Campbell remitted some of the funds to Mrs B. Mr Campbell executed the deed of assumption and it was registered on 19/21 May 2009 and on 8 June he wrote the final letter to Mrs B (document 32).

The allegation of misconduct

4.1. The allegation is presented in the following terms in Statement 3.3 of the Complaint.

"The Respondent acted in a conflict of interest situation in that he failed to properly advise the son, being a child entitled to legal rights in the Estate of the late Mr A, as to what his entitlement was. The Respondent failed to properly communicate with the claimant in the Estate of the late Mr A being his son. He failed to intimate to the son that he was entitled to seek to claim on the Estate of his late father. The Respondent failed to act in an independent fashion and to resist the pressures brought to bear upon him by the widow of the deceased. The Respondent devised and engineered a process whereby he believed he was excusing himself from his obligation to advise the son as to his entitlement in order to gain a professional fee. Further having resigned as Executor in implementation of his scheme, he continued to intromit with the Estate by administering certain payments in connection therewith and allowed the widow who was appointed Executrix to continue to act wrongfully and unlawfully by failing to properly account to the son of the deceased in respect of his entitlement. The Respondent should have remained independent as Executor and should not have devised and engineered a scheme to suit the interests of the widow of the deceased. He had identified a view that he was obliged to let the son of the deceased know that he could make a claim for legal rights on the estate of his late father. The Respondent should have identified that there was a conflict of interest and he should have declined to act as Executor earlier than he did."

4.2. It can be viewed at two levels.

(a) It is an allegation of conflict of interest (not dishonesty); and

(b) The crux of the allegation is in the final sentence, and it is that Mr Campbell should have 'declined at act as Executor' earlier than he did.

4.3. Concentrating for the present on (b), the first point to note is that the case for the Law Society conflates two different matters: (a) declinature of appointment; and (b) accepting office and then resigning. This conflation is to be seen in the final answer by Professor Meston in his second Opinion dated 1 April 2012 (document 34) where, asked whether acting as executor and then resigning was proper and legitimate", he replied:

"Resigning at an earlier stage, or preferably declining to act in the first place, would not have been questionable, but the apparently deliberate attempt to avoid his obligation was not acceptable".

4.4. The 'first' (undated) Opinion (document 33) had given precedence to the first of those options:

"It would be very welcome if there were to be decision of the Tribunal formally establishing the existence of an executor's duty to inform those potentially entitled to legal rights. He would have failed as executor to carry out that duty (of which he was aware). He did of course eventually resign as executor, but only after setting up an attempt to avoid liability for himself and his firm. He did not take decisive action at the right time. I agree that he should have resigned as executor immediately he found himself caught between his duty as executor and the intransigence of the widow – obviously after first complying with his statutory duty to assume a new executor. In effect he appears to have tried at have his cake and also eat it by ducking responsibility only after justifying fees."

4.5. This is the passage that Professor Meston was asked by the Law Society –perfectly properly – to revise by taking out what might be thought to be the conclusion for the Tribunal. Restoring the deleted sentences (underlined) the passage originally read:

"It would be very welcome if there were to be decision of the Tribunal formally establishing the existence of an executor's duty to inform those potentially entitled

to legal rights. However, even although he would have failed as executor to carry out that duty (of which he was aware) I would question whether the Tribunal would regard Mr Campbell's actions as sufficiently serious to amount to professional misconduct. He did of course eventually resign as executor, but only after setting up an attempt to avoid liability for himself and his firm. He did not take decisive action at the right time. I agree that he should have resigned as executor immediately he found himself caught between his duty as executor and the intransigence of the widow – obviously after first complying with his statutory duty to assume a new executor. In effect he appears to have tried at have his cake and also eat it by ducking responsibility only after justifying fees. I think that I would have inclined to suggest that this amounted only to unsatisfactory conduct (assuming that the events occurred within the timescale when that was a possible finding)." (Respondent document 3)

At this stage Mr Moynihan stated to the Tribunal orally that it was the Respondent's rationale that he was interested in.

4.6. In its original form the significance of the opening phrase of the middle sentence ("He did of course eventually resign") is more evident. There is no criticism that Mr Campbell accepted office. Nor (by omission) crucially is there any criticism that he assumed Mrs B as executor and then resigned. What he did was acceptable, but he should have done so earlier.

4.7. There is a subtle but legally significant distinction between (a) declinature and (b) resignation.

(a) An individual who declines appointment has no right to nominate any other person as executor. Had Mr Campbell, like Mr D, declined appointment section 3 of the Executors (S) Act 1900[2] would have applied and Mrs B would have been entitled to have been confirmed as executor nominate by virtue of the fact that she was the residuary legatee.

(b) An individual who accepts appointment as an executor may resign but a sole-executor may only do so after a willing replacement has been either (a)

[2] Page 142 in the bundle

assumed or (b) appointed by the court: Trusts (S) Act 1921, section 3(a) and proviso (1)[3].

4.8. An individual can accept appointment as executor either expressly in writing or by implication through conduct. With respect, it was not easy to discern from Professor Meston's evidence at what point in time he believed that Mr Campbell accepted appointment; whether it was only on confirmation – 17 April – or earlier. Be that as it may, Professor Meston made no criticism of the fact that Mr Campbell accepted the appointment. Equally, he made no criticism of the fact that Mrs B was assumed as executor in place of Mr Campbell. The only criticism relates to the timing of the transition but, with respect, Mr Campbell was correct in his evidence in chief that the timing of the transition would have made no difference whatsoever in this case.

4.9. It is this point that one has to take a step back from the apparent simplicity of the Law Society's analysis of the legal principles in para 3.1 of its Submission.

4.10. Paragraph 3.1 (a) opens with the general statement that it is the duty of an executor to advise all who might have a claim to legal rights of their entitlement. So stated that applies to both lay executors and solicitors who are acting as executor. As to the former (i.e. lay executors), para 3.1 (b) adds that a solicitor acting for an executor should advise the executor of this duty and, "for their own protection the solicitor in these circumstances should maintain a clear and concise record of having given this advice".

4.11. This implicitly acknowledges that the lay executor may refuse to accept that advice but the flaw in the Law Society's entire case is that it omits any reflection on the duty of the solicitor in that event. This is the subject of an unequivocal statement in ***Webster*** on ***Professional Ethics and Practice*** (4th ed.) at para 5.05[4]:

"Occasionally, in an executry, the executors will refuse to accept your legal advice, particularly, for example, that parties otherwise cut out by the will should be advised of their legal rights which would thereby cut down the executors' own share. In those circumstances, you have little option but to carry out the executors' instructions and hand over the executry funds, provided you fulfil your professional duty of advising the executors; but if you do have to do this, you should, for your

[3] Page 143 in the bundle
[4] Pages 5-6 in the bundle

own protection, take a specific discharge from the executors and residuary beneficiaries."

Mr Moynihan added that obtaining a discharge would minimise the liability of the solicitor and was a form of risk avoidance. The Respondent in this case acted similarly to protect himself.

4.12. The Law Society's submission (in paragraph 3.6) draws on the evidence of Mr Kerrigan and notes that he described Mr Campbell's conduct as an error of judgment. Again the Law Society's analysis is superficial and misapplies the evidence of Mr Kerrigan. Asked by Mrs Boyd what the error of judgment was, Mr Kerrigan said that if it had been him he would have resigned as executry solicitor. That cannot justify a finding of misconduct because such a finding would be in conflict not only with the passage in ***Webster*** but also (a) the reaffirmation of that guidance in ***Paterson & Ritchie, Law, Practice and Conduct for Solicitors***, para 12.14 at page 272[5] and (b) the evidence of Professor Meston that withdrawing from agency was not an automatic requirement (page 1 of document 33).

4.13. Coincidentally, it may be observed at this stage that the passage quoted from ***Webster*** that is reaffirmed in ***Paterson & Ritchie*** speaks of the solicitor taking a discharge for his own protection. Professor Meston likewise spoke of the solicitor keeping a clear record of the advice tendered again for his own protection (document 33). In his email to Mr D of 6 April (document 23) Mr Campbell spoke of Mrs B taking 'the rap' and not him. As was put to Professor Meston in cross, the two propositions are essentially the same: the textbooks are advising a course of action that seeks to absolve the solicitor of liability and in an informal email not intended for public consumption that can readily be expressed in the colloquial expression that the solicitor is not going to take 'the rap'. Nothing turns on the choice of language in that email.

4.14. Returning to the substance of the matter, Mrs B well knew of her step-son's entitlement to claim legal rights and was opposed to him receiving any share of the estate. The outcome would have been entirely the same however much earlier Mr Campbell had resigned after having assumed her as executor. Mr Campbell would have been entitled to act as her solicitor and would have been entitled to distribute

[5] Page 12 in the bundle

the estate in accordance with her instructions without contacting the son. Indeed, had Mrs B insisted that the son not be contacted – which seems a certainty – Mr Campbell would have had no right to contact him.

4.15. That is, of course, why Mr Grant was driven to the uncomfortable conclusion that, but for the grace of God, it could have been him who was the subject of complaint. He could well have done as Mr Campbell did.

4.16. It will be recalled that Professor Meston concluded:

> "In effect he [Mr Campbell] appears to have tried at have his cake and also eat it by ducking responsibility only after justifying fees."

The Law Society seems to have adopted this line by contending (in para 4.1(d) of the submission) that Mr Campbell carried out the work "to the financial advantage of his firm". This does not bear a moment's scrutiny. Whether one takes the date on which Mr Campbell accepted appointment as executor as either (a) 23/25 March or (b) 17 April, Lindsays had done extensive work sorting out paperwork and ascertaining the potential estate, for which they would have been entitled to have been paid even if Mr Campbell had resigned. What is more, after he resigned as executor he would have been entitled to continue to act as solicitor to Mrs B as executor, earning at least the same fee for work done from that date. Indeed, as Mr Campbell himself said in evidence, he might even have been able to have justified greater fees had he resigned earlier than he did and acted as solicitor to Mrs A as executor.

Mr Moynihan clarified that it had been agreed between the parties that the Respondent had accepted appointment as executor at the latest by 25 March 2009. Mr Moynihan further clarified that the only difference between the Record and the facts set out in the submissions was the reference to documents which were included in the submissions.

4.17. This takes us to the heart of what occurred at the meeting on 4 April. There is no reason to doubt the evidence of Mr Campbell that he arrived at his meeting with Mrs B without any plan. He found her resistant to the son's claim and that did pose a practical problem. The Law Society's submission says that there was no problem (para 4.1(d)) but that assertion is contrary to the essential premise of their case.

Why should Mr Campbell have resigned, as the Law Society suggests, if there was no problem? As Mr Grant says there is a duty to correspond with beneficiaries such as Mrs B and this must include some duty to take account of what they say (Respondent's document 1, para 4.4) and at para 3.7 he quotes from Professor Meston's own book to support the conclusion that an executor can be in a "somewhat invidious position" (para 3.8).

4.18. Far from being a 'scheme' or 'concoction', Mr Campbell had already accepted appointment as executor by 4 April 2009, everyone is agreed (Professor Meston included) that resignation was a proper option open to him. What is more, the Trusts (S) Act 1921, section 3(a) and proviso (1), effectively required him to assume a replacement executor before doing so. As noted, no one criticises the assumption of Mrs A as executor. The issue relates to the timing of the transition.

Mr Moynihan emphasised that the essential issue between the parties was whether or not the Respondent was involved in a scheme/concoction.

4.19. What was Mr Campbell's reason for the delayed transition? He explained that in his evidence when he discussed the meeting on 4 April. It was administratively more convenient for him to continue to act. Mrs B was elderly and frail. Had she been appointed executor immediately Mr Campbell would have had to consult her more and to take instructions from her doubtless requiring more meetings and correspondence and greater expense (i.e. earning himself a greater fee). The delayed transition kept cost to a minimum. The Tribunal is invited to find that that was his motivation. Again, hardly the motivation of a dishonest and unscrupulous individual.

4.20. In his Opinion Mr Grant addresses the timing of the resignation and notes that it occurred at a time when there were, as yet, sufficient funds to meet the son's legal rights claim in full (Respondent's document 1, para 4.5). In the Law Society's submission at para 3.5 it is suggested that Mr Grant's view proceeded on a misunderstanding of the facts and that when the correct facts were brought to his attention he accepted that Mr Campbell's position was 'uncomfortable'. It is for the Tribunal to study its own notes of Mr Grant's evidence but it is suggested that it is the Law Society's submission that is in error. Far from Mr Grant thinking that the estate had not been ingathered (as the Law Society now suggests), at paragraph 1.2

of the Opinion it is clear that Mr Grant knew that Mr Campbell was in funds at the date of his resignation. Contrary to what the Law Society submits, Mr Moynihan's note of this passage in the cross-examination of Mr Grant was on the hypothesis that there were no funds in the estate at the date of transition. Mr Moynihan's note reads:

"if no funds in estate – Not a legitimate solution to problem but a scheme – if no funds – would doubt if legitimate solution to problem".

At this stage in response to a question from the Chairman, Mr Moynihan clarified that funds were in the estate until 20 May 2009 and the Respondent resigned on 19 May 2009 and accordingly there were still in funds at the time the Respondent resigned. Mr Grant's position was that as there were funds in the estate, the duty of the executor could still be performed.

4.21. The point is essentially pragmatic.

(a) If Mr Campbell, as executor, had paid away the estate to third parties before he passed over to Mrs B as his successor he would have been passing to her a duty that she could not have fulfilled. That could not have been a practical, let alone a legitimate, solution.

(b) However, only £5,000 was paid to a third party (the nephew who was entitled to a legacy). The balance of the estate was paid to Mrs B and therefore as executor she had access to more than sufficient funds to pay her step-son's claim. The funds remained in the hands of an executor who was able to meet the claim in full. It was a legitimate solution.

(c) Yet again the point has to be made that the crux of the complaint relates to the timing of the assumption of Mrs B and resignation of Mr Campbell and not to the fact that such a transition occurred. In the circumstance in which the whole estate, less an inconsequential £5,000 legacy, was passed over to Mrs B the delayed transition is irrelevant. The financial result would have been the same whether the transfer had occurred at the earliest possible date (e.g. 6 April) or the date on which it in fact took place (19 May).

4.22. During the hearing a new issue arose that was not foreshadowed in the Complaint and that relates to the interest payable to the son. This may underlie the Law Society's inspecific assertion in paragraph 4.1 of the Submission that Mr Campbell exposed Mrs B (an elderly widow) to "an expensive difficulty later when the son learned of his entitlement". Whether the entitlement to interest is "an expensive difficulty" depends on the rate of interest, a matter not explored in evidence. Fortunately, the rate of interest is a matter of law not fact and hence no evidence is required. The law is conveniently summarised in ***Professor Meston's*** textbook on ***The Succession (Scotland) Act 1964*** at page 55[6].

"The rate of interest is at the discretion of the court, taking account both of prevailing rates and of the interest actually earned by the estate in this period."

Mr Moynihan stated that interest ran from the date of death.

The case cited is ***Kearnon v Thomson's Trs.*** 1949 SC 287[7] which is consonant with that proposition. Given that the rate of interest will be geared to prevailing rates or the rate actually earned by the estate, there is no basis on which it can be asserted that Mrs B is exposed to any "expensive difficulty".

4.23. It is instructive to note that neither ***Webster*** nor ***Paterson & Ritchie*** (both referred to in paragraphs 4.11 and 4.12 above) make any reference to any need to give advice to the executor about interest. They make no reference to interest at all and that is because ***Kearnon v Thomson's Trs.*** is the clearest possible authority that there is no penal rate of interest. For completeness, it may also be observed that Professor Meston also speaks of the 'liability' of a solicitor advising a (lay) executor being "limited to giving clear advice to the executor that the legitim had to be paid as a debt to the estate" (document 34, page 3, under heading (c)), which is consistent with the evidence given by Mr Grant in answer to Mrs Boyd that the executor would need to know that legal rights were still extant. There is no doubt that Mrs B knew that fact having been repeatedly told by both Mr D and Mr Campbell.

4.24. There is no basis on which to conclude that there was a failure on the part of Mr Campbell to give adequate advice to Mrs B.

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[6] Pages 107-108 in the bundle

[7] Page 111 in the bundle (in particular at 119-120

Conclusion

4.25. This section contains an analysis of the evidence of the three experts. On this analysis it is evident why no one of them has ever suggested that misconduct occurred. As has already been said, and the legal basis for this statement will be analysed below, the Tribunal will doubtless be more impressed by the underlying reasoning than by the bare assertion of that conclusion. Having had the benefit of the analysis the Tribunal should conclude that no case of misconduct has been made out.

4.26. Parties are agreed that the ***Sharp*** test applies. Misconduct is a 'grave charge' (see ***Lord President Emslie*** at page 135)[8] and requires a 'serious and reprehensible' departure from the standards to be expected of competent and reputable solicitors' (pages 134-135)[9]. Reference may also be made to the judgment of the Privy Council case concerning a complaint of professional misconduct against an attorney at law in Trinidad and Tobago, ***Campbell v Hamlet*** [2005] 3 All ER 1116[10] at para 16, per ***Lord Brown***:

"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt."

4.27. An analogy can be drawn with the recent case of ***McEntagart v Fishman*** 2012 SLT 1133[11] that concerned a complaint of misconduct under the Debtors (S) Act 1987 against a Sheriff Officer for failing to charge fees for work done in recovering some outstanding council tax. The failure to charge a fee was consistent with a practice followed by a significant proportion of the profession but the Sheriff Principal held that there was misconduct because on his reading of the Regulations he held that there was an obligation to charge a fee. Reversing him, the Inner House of the Court of Session held that the Sheriff Principal had misconstrued the Regulations which only fixed the maximum fee and did not oblige the charging of a fee. The Court (the opinion of which was delivered by ***Lord Bonomy***) also made an observation on the relevance of practice within the profession:

[8] Page 19 in the bundle
[9] Pages 18-19 in the bundle
[10] Page 145 in the bundle
[11] Page 21 in the bundle

"...we consider it appropriate to observe that the sheriff principal's rejection of the test in Sharp v Law Society of Scotland as inapplicable is not adequately explained in his judgment. The fact that a significant proportion of a profession follow a particular practice is plainly a relevant consideration in determining whether following that practice amounts to misconduct in the course of undertaking that profession. The sheriff principal is no doubt correct when he says that conduct does not necessarily fall short of misconduct "merely" because a significant proportion of the profession take the same approach. However, that statement cannot on its own amount to justification for a finding that the conduct did amount to "misconduct" in terms of s.80 of the Debtors (Scotland) Act 1987." (para 19)[12]

4.28. The submission has been made at paragraph 2.4(c) above that competent and reputable executry practitioners, typified by Mr Grant, would have proceeded in the same manner as Mr Campbell. The Tribunal is invited to so find. There is nothing here to suggest that the Tribunal should conclude that that practice merits characterisation as 'seriously reprehensible' in the circumstances of this case when (a) the essence of the complaint relates only to the precise timing of the assumption and resignation and not to the fact that Mr Campbell resigned in favour of Mrs B and (b) there were ample funds available to Mrs B as the succeeding executor to meet the claim for legal rights in full. The Tribunal is invited to conclude that there has been no misconduct on the part of Mr Campbell.

4.29. The Tribunal is invited to accept the conclusion of Mr Grant at para 4.6 of Respondent document 1:

"Having regard to the framework of the substantive law surrounding legal rights and, in particular, to the observations of Professor Meston and Mr Allan referred to above, it could properly be said that the Respondent's actings were consonant with both the law and authoritative advice concerning it."

Mr Moynihan stated that the Tribunal could still conclude that the Respondent's conduct amounted to professional misconduct despite what the experts thought but that it was a material factor if a lot of solicitors followed the same practice as had been followed by the Respondent. Mr Moynihan referred to Mr Grant's Opinion and the quotes from Webster and Allen. Mr Moynihan stated that what was set out in

[12] Page 26 in the bundle

paragraphs 3.10 and 3.11 of Mr Grant's Opinion was consistent with the evidence given by Ms Rennie.

Issues of law

5.1. That conclusion is one reached in effect with the benefit of the short-cut provided by the expert evidence of Professor Meston, Mr Grant and Mr Kerrigan. There are three legal issues underlying that short-cut that require now to be addressed:

(a) the relevance of expert evidence on matters of law;

(b) the state of the law as at the date of the alleged misconduct; and

(c) the relevancy in law of the complaint of dishonesty.

(a) The relevance of expert evidence on matters of law

5.2. It is unusual to encounter evidence being led as to the content of domestic (as opposed to foreign) law. Evidence is led regarding foreign law precisely because it is regarded as a matter of fact, whereas the content of domestic law is addressed by legal submissions because it is a matter of law.

5.3. There are limits to the admissibility of expert evidence. The most recent summary is to be found in a criminal case ***Gage v HMA*** 2011 SCL 645[13] at para 21 per ***Lord Justice Clerk Gill:***

"For opinion evidence to be admissible its subject-matter must fall outwith the jury's knowledge and experience and be based on a recognised branch of knowledge (Dickson, *Evidence* , para.397). It was accepted on behalf of the appellant that opinion evidence must not usurp the function of the jury (Davie v Magistrates of Edinburgh)."[14]

5.4. There are two separate points in that passage. In reverse order:

(a) The witness should not usurp the function of the jury, by which is meant that the expert should not be invited to express a conclusion on the issue that the Court has to determine.

[13] Page 27 in the bundle
[14] Page 35 in the bundle

(b) An expert witness should not be led to give evidence on a matter of opinion which it is within the competence of the court itself to address.

5.5. The first of those points was doubtless the reason why the Law Society asked Professor Meston to delete the parts of his first Opinion highlighted in paragraph 4.5 above and no criticism was, or is, made of Professor Meston or the Law Society for those deletions having been made. Apart from anything else, the Law Society fairly made the original text available to Mr Campbell.

5.6. However, the second rule has also to be considered. This Tribunal is an expert tribunal comprised of legal members and lay members with competence in related fields. It cannot possibly be said that it is beyond the competence of this Tribunal to address the substantive law in this field of practice and therefore expert evidence should be unnecessary. That would explain the reluctance of the Tribunal, at least in times past, to admit expert evidence of professional practice: see ***Paterson & Ritchie*** at para 1.10[15].

5.7. The two rules do have a symbiotic relationship. Where the issue is beyond the competence of the Tribunal there is a natural tendency to allow experts to give an opinion on the conclusion to be drawn, or at the very least come close to doing so: see ***Davidson*** on ***Evidence*** at pares 11.17-11.19[16].

5.8. It must be assumed that the Law Society perceived some obscurity in the substantive law here justifying the exceptional course of leading evidence from Professor Meston. The existence of some obscurity is not in dispute and in the next section this submission will review the uncertain state of the law at the time of the events in question here. However, the Law Society cannot have its cake and eat it too. It cannot turn to an expert to elucidate the law but discard his expert assessment of the conduct in question.

5.9. Put another way, perhaps more directly and with less offence to the ordinary rules on admissibility, the Law Society cannot at one and the same time say that the substantive law was so uncertain as to justify expert testimony from a witness, while maintaining that a practitioner who acts inconsistently with the law as clarified by later expert testimony has been guilty of serious and reprehensible misconduct. The

[15] Page 10 in the bundle
[16] Pages 101-105 in the bundle

practitioner should be given the benefit of the doubt arising from the uncertainty in the law.

Mr Moynihan stated that if the Tribunal went against the experts it needed to give good reasons.

(b) The state of the law as at the date of the alleged misconduct

5.10. The summary of the legal principles in section 3.1. of the Law Society's submission is one prepared with the benefit of the expert evidence. It implies that the law was settled at the time when the conduct occurred, which is simply not the case.

5.11. Professor Meston himself said that "It is not entirely clear whether or not an executor is formally bound to inform a son of his right to legitim" (document 33, page 1). He described the view expressed by Mr Kerrigan in his article as being 'more bullish' and added:

"It was only the apparent lack of hard authority which caused me to fudge the issue in my book on the Succession Act by offering only strong advice that executors should inform potential claimants" (page 2).

It is to be stressed that that Opinion was written as recently as August or September 2011.[17] He did, of course, express a firmer conclusion in his evidence to the Tribunal but two points should be noted: (a) his view had firmed up after the date of Mr Campbell's involvement in this matter; and (b) even then he adhered to the view that there was a 'thinness' of authority.

5.12. It is correct that there is, at the least, a 'thinness' of authority.

5.13. Professor Meston was cross-examined about this aspect of the case. Firstly he acknowledged that the section in his book dealing with the duties of an executor (pages 119-121)[18] did not at all discuss the duties of an executor in relation to relatives who have only a claim to legal rights and no rights under the will. The passage that he 'fudged' (the last paragraph on page 120)[19] deals with the distinct

[17] It is undated but that was the evidence of Professor Meston
[18] Pages 2-3 in the bundle (reproduced in the wrong order)
[19] Page 2 in the bundle

> question of the approach to be taken to relatives who have some entitlement under the will and who, therefore, are entitled to elect as between the will and legal rights.

Mr Moynihan again referred the Tribunal to pages 119 and 120 in Professor Meston's book where Professor Meston deals with a situation where someone has entitlement and in terms of the Will and also has a legal rights claim and there is accordingly a choice. There is no discussion about the situation where there is no entitlement in terms of the Will.

5.14. In his article (document 35) Mr Kerrigan cites two cases: ***Donaldson v Tainsh's Trs*** (1886) 13 R 967[20] and ***Walker v Orr's Trs*** 1958 SLT 220[21]. These are, in fact, authorities dealing with that distinct question, both being cases in which relatives were held not to be barred from making late claims to legal rights despite having accepted the bequests made to them under wills and that because they had not been adequately advised of the options available to them when they initially decided to take under the will. The principle at play can be seen from an excerpt from the judgment of ***Lord Justice Clerk*** in ***Tainsh's Trs***:

Mr Moynihan pointed out that in these cases the relatives had not been given the opportunity to make an informed choice.

> "This case raises a question which has been frequently before the Court, namely, whether a widow, who has signed a document by which she professes to accept the provisions in her favour in her husband's settlement, is altogether barred by the signature from recurring to her legal rights. Of course the circumstances under which such a question arises are very various, but I should be disposed to say that, as a general rule, unless a widow has independent legal advice when called on to make her election, it would require a very strong case indeed to induce me to hold her bound by her signature. I do not put it more highly. I do not say that independent legal advice is absolutely essential, but it is the duty of trustees to see and insist that a widow, before she makes up her mind to an election which will be injurious to her pecuniary interests, is acting not from a mere emotional feeling as to what she may suppose to have been her husband's wishes, but after full information

[20] Page 55 in the bundle
[21] Page 61 in the bundle

and deliberation. In the present case the widow was not in a position to make an intelligent and deliberate choice." (at 971-2)[22]

5.15. In modern terms these are cases concerning the need for informed consent if any person is to be held to have made a legally binding election. They do not directly have a bearing on the separate question of the duty of an executor to contact a potential claimant who has no right under the will and no entitlement to elect as between the will and legal rights.

5.16. It was Mr Campbell's evidence that he not only read Mr Kerrigan's article but also the cases cited. It was also his evidence that he was aware of the limitations of the authorities cited that appeared not directly to support the proposition advanced by Mr Kerrigan. Mr Kerrigan, for his part, highlighted the contrasting passage in Professor Meston's book at page 120 and himself characterised his own opinion as "a very much more bullish attitude" than that of Professor Meston (Respondent's document 2, page 2). Mr Kerrigan commented on the absence of professional guidance on the point and, like Mr Grant, went on to articulate a basis on which "there is almost an argument" that following the wishes of Mrs B as a residuary beneficiary was consistent with his duty under the Solicitors (Scotland) Standard of Conduct Practice Rues 2008 to act in accordance with the instructions of his 'client'.

Mr Moynihan stated that the client was the executor. Was the legal rights claimant a beneficiary? There were a lot of areas of uncertainty.

5.17. The fact that Mr Campbell read Mr Kerrigan's article and accepted his conclusion is very much to his credit in the circumstances. It is not the approach of a dishonest and unscrupulous individual. However, as has already been canvassed at length in this submission, the issue is not whether or not there was a duty on Mr Campbell to contact the son and inform him of his legal rights. Even if such a duty existed, all the experts are agreed that a proper response to the intransigent opposition of Mrs B was for Mr Campbell to assume her as executor and then resign without himself informing the son but plainly advising Mrs B that the claim to legal rights remained

[22] Pages 58-59 in the bundle

extant. That is what Mr Campbell did and the only criticism is that he ought to have done so sooner, which for the reasons discussed would have made no difference.

5.18. Professor Meston called for a ruling from this Tribunal that would clarify the law. With the sad recent death of Professor Meston we are unlikely to have an article by him to reinforce the view expressed by Mr Kerrigan but one critical point should be made. It is one thing for this Tribunal to clarify the law or legal practice for the future as guidance to the profession but quite a different matter for it to conclude that Mr Campbell was guilty of professional misconduct for acting as he did at a time of uncertainty. It is respectfully submitted that that would be entirely inappropriate.

(c) <u>The relevancy in law of the complaint of dishonesty</u>

5.19. The first Complaint (or complaint (a)) is a compound one of failure to act in accordance with the standard of "honesty, truthfulness and integrity". That is a combination of three distinct matters: (1) honesty, (2) truthfulness and (3) integrity. Reflecting that distinction and the obvious gravity of the first two, there was a call in Answer 4.1 for Mr Campbell for specification of the respects in which it was alleged that he had acted dishonestly or untruthfully, if it was being alleged that he had acted dishonestly or untruthfully. That call went unanswered.

5.20. It may be observed that in Statement 3.2 of the Adjusted Record it is only integrity that is picked out: "The pubic expects and is entitled to expect a solicitor to be a person of integrity"; and insofar as detailed specification is given in Statement 3.3. it relates to a conflict of interest and not to any allegation of dishonesty or lack of truthfulness.

5.21. No allegation was put to Mr Campbell in cross-examination of dishonesty or lack of truthfulness.

5.22. It has accordingly come as a considerable and regretful surprise that the Law Society's submission should proceed on the premise that "The Respondent acted in a dishonest and unscrupulous fashion". To be charitable it might be inferred that the Fiscal ad hoc has uncharacteristically lapsed in to hyperbole. Just in case more is intended, objection is taken to the relevancy of that premise. An allegation of dishonesty is tantamount to an allegation of fraud and requires clear specification:

e.g. Shedden v Patrick (1852)14 D 721 at page 727[23], per ***Lord Fullerton***. There is here no more than the most generalised averments subsumed within a spectrum that includes the lesser complaint of lack of integrity. Relevancy should be judged on the lesser alternative and there is simply no basis on which it can be said that there is ample specification of either dishonesty or lack or truthfulness. In fact, the Law Society's submission does not suggest lack of truthfulness but having put up a generalised spread from dishonesty, through lack of truthfulness to lack of integrity it is not for the Law Society at the end of the case to select whichever alternative they choose. They should have made their case clear in advance in the pleadings and put the allegations squarely and in terms to Mr Campbell in cross-examination. In those respect they singularly failed.

5.23. The Tribunal is strongly urged not to entertain the assertion that there has been any dishonest or unscrupulous conduct on the part of Mr Campbell.

5.24. In any event, even if this assertion is entertained, the Tribunal is invited to find it not proven essentially for the reasons covered in the main section of this submission. The gravamen of the Law Society's real complaint is in a single sentence in the passage from Professor Meston's first Opinion quoted at para 4.5 above:

"He [Mr Campbell] did not take decisive action at the right time."

The mistiming of an otherwise correct course of action (assumption of a replacement executor and resignation) cannot properly be described as either dishonest or unscrupulous.

Dismissal

6.1. For these reasons the Tribunal is invited to dismiss the complaint.

Mr Reid indicated that he had nothing to add.

The Tribunal at this stage adjourned the case to 26 February 2013 for the Tribunal to make its decision.

[23] Page 121 in the bundle and in particular at page 127

A further date of 11 March 2013 was fixed for further submissions on publicity and expenses once the Tribunal decision was orally issued.

The Tribunal finalised its decision making on the morning of 11 March 2013.

DECISION

The Tribunal considered this to be a very complex case which raised a number of difficult and interesting issues. It is unusual for expert evidence to be led before the Discipline Tribunal. The experts' evidence was very valuable. The Tribunal considered that the experts led for both parties in this case were genuine experts in the field and were also independent. The experts were able to provide evidence not only with regard to the law but also with regard to practice. The Tribunal found the evidence of Professor Meston, who wrote the book on executry law, and from Mrs Rennie to be particularly helpful. It is important to remember however that it is not for the experts to decide whether or not the Respondent's conduct amounts to professional misconduct. This is a matter for the Tribunal.

After the evidence had been led in this case, the parties helpfully lodged a statement of agreed facts with the Tribunal. This incorporated the majority of the facts in the Complaint. There were however some areas of disagreement with regard to the facts between the parties. The Tribunal made its own findings in fact based on the oral evidence and the Productions in relation to these matters. There was a disagreement between the parties with regard to the nature of the advice that Mr D gave to the widow and the precise reasons for her having lost trust in him. The Tribunal considered that the only finding in fact that could be made on the evidence was that Mr D advised the widow of the law governing legal rights and this resulted in her expressing dissatisfaction and mistrust of him. The Tribunal was unable to make a finding in fact as to whether or not Mr D told the widow that he would have to contact Mr A's son.

Mr Reid's position was that the Respondent's resignation was not effective until it was registered in the Books of Counsel in Session on 21 May 2009. The Tribunal however find that the resignation was effective on the date that the Respondent signed

it (it having already been signed by the widow prior to this) on 19 May 2009. As the balance of the estate was not paid out until the 20 May 2009 the Tribunal find as a fact that when the estate was passed over to the widow there were still adequate funds available to meet any legal rights claim that Mr A's son may make. £135,000 was passed over to the widow on 20 May 2009 and the legal rights claim was around £85,000.

Mr Moynihan asked the Tribunal to make a finding in fact that the widow was repeatedly advised that Mr A's son had a claim to legal rights. The Tribunal noted that there were three letters sent by the Respondent to the widow where legal rights were mentioned. The letters of 6 April and 11 May were already narrated in detail in the Complaint. The Tribunal added in a finding in fact in connection with what was narrated in the letter of 25 March for completeness. Mr Moynihan also asked the Tribunal to make findings in fact to the effect that the widow having affirmed her opposition to the son receiving a share of the estate at the meeting on 4 April, the options legitimately and properly available to the Respondent included assuming the widow as executor and then resigning himself and that the Respondent decided to adopt that course but delayed execution of the transfer because it was administratively more convenient. Mr Moynihan also asked the Tribunal to make a finding in fact that the Respondent's motivation was not to secure additional fees for his firm and that the fees were kept to a minimum as a result of the course of action adopted by him. The Tribunal did not consider that it could be satisfied beyond reasonable doubt that the Respondent's motivation was to increase fees for his firm. The Tribunal however felt unable to make a finding in fact on the basis of the evidence before it as to exactly what the Respondent's motivation was. From the Tribunal's own knowledge and experience, the fees charged did not seem to be excessive. Mr Moynihan further asked the Tribunal to make a finding in fact that the course of action adopted by the Respondent was not "a device, scheme or concoction" and it was implementation of one option properly and legitimately open to the Respondent as a competent and responsible solicitor. The Tribunal did not consider it appropriate to make findings in fact in respect of any of these matters. The Tribunal considered that these were conclusions that Mr Moynihan was asking the Tribunal to reach rather than facts. Mr Moynihan also asked the Tribunal to make a finding in fact that the duty incumbent on an executor (lay or profession) to inform a potential legal rights claimant of his

rights was uncertain as at the date of the Respondent's conduct. The Tribunal was able to make a finding in fact that as at the date of death there was no clear authority on the obligation of an executor to inform a potential legal rights claimant of his entitlement. The Tribunal was able to make this finding in fact based on the evidence from the expert witnesses and the productions lodged.

The evidence of Professor Meston who wrote the book on the Succession (Scotland) Act was that he fudged this issue in his book because there was a lack of authority. The evidence from Mr Grant was that he felt uncomfortable because he might have done what the Respondent did in the same circumstances. The evidence of Mr Kerrigan was that there was a legal duty on the executor to inform a legal rights claimant. However he also stated that due to an executor's duties under the Will the Respondent could be said to have complied with Rule 4(1) of the Solicitors (Scotland) Standard of Conduct Practice Rules 2008. He considered that the Respondent was sole executor and also executor solicitor. The beneficiary under the Will gave him certain instructions and as an executor he had a duty to administer the Will. The experts differed in respect of their opinions as to whether or not legal rights claimants were beneficiaries. Professor Meston suggested that they were but Mr Grant stated that legal rights were in the nature of a debt against the executry. There were contradictory authorities and the position of the Law Society's expert witness changed between the time of writing the book and the time of giving evidence to the Tribunal. Professor Meston stated that he would welcome a decision of the Tribunal to clarify this aspect of the law. The Tribunal however can only make a finding on the particular facts of this case and it would not be appropriate for the Tribunal to give a general guidance on how executors should behave. The Tribunal concluded that at the time of the Respondent's actings, law and practice relating to a solicitor executor's rights and obligations with regard to a legal rights claimant in these particular circumstances was not clear.

Mrs Rennie referred to an analogous situation where she had frequently advised widows who were executors and had children under 16 years who had legal rights. In these cases the executors should make sure that there were funds available to allow the child to claim legal rights once they were 16 years. Some widows however may not have enough funds to set the money aside as they had to use the money to bring

the children up until they were 16 years and in these circumstances the money was paid over to the widow even when the executor knew that the widow would spend the money on bringing up the children. There is another similar situation in the knowledge of the Tribunal, where there can be potential debts due against an estate which have not been quantified for example, tax liability and solicitor executors have a number of choices: they can refuse to hand the money to the beneficiary due to the potential liability; they could estimate the amount of the potential liability and keep some money back, (both these courses of action could upset the beneficiary); or they could pay all the money out to the beneficiary and have the beneficiary take sole liability for the potential debt. This could be done by either getting an indemnity from the beneficiary or appointing the beneficiary as executor and then resigning. This was a means of transferring liability to the beneficiary rather than the solicitor.

Janice Webster's book on Professional Ethics and Practice for Scottish Solicitors also refers to a solicitor getting a specific discharge from the executors and residuary beneficiaries for his own protection where the executors refuse to accept legal advice in respect of legal rights. Professor Meston, in his opinion, also refers to a solicitor keeping a clear record of the advice tendered for his own protection. The Tribunal do not see that these situations can be clearly distinguished from what the Respondent did in this case. The informal language used by the Respondent in correspondence is unfortunate but does not change the nature of what happened. Professor Meston states in his opinion that it would not be an automatic requirement for someone acting in the Respondent's situation to withdraw from agency altogether. The expert witnesses indicated that this may be good practice but in the Tribunal's view not to withdraw agency could not in any way be categorised as professional misconduct.

The Respondent appears before the Tribunal as a solicitor. A solicitor's obligations may not necessarily correspond to those of an executor. However the Respondent was executor and solicitor in this case. The Tribunal has found that at the time of the Respondent's actings law and practice was uncertain with regard to whether or not there was a clear obligation on the Respondent to advise the son of his legal rights.

As pointed out by Mr Reid, the Respondent's view in this case was that he did have a duty to inform the son of his legal rights claim. The Respondent's opinion with regard

to this however only crystallised after he had researched the matter and by this time he found himself in the position of being a sole executor in a potentially conflicting situation. The Law Society have suggested that the Respondent should have resigned earlier and should not have continued to act in a conflict of interest situation. The Practice Rules however deal with conflicts of interest between more than one client. In this case it is not clear what the situation is with regard to obligations to a legal rights claimant. If the Respondent had advised the son of his legal rights, he would have been in a conflict situation between the son and the widow. The Respondent had a duty to administer the Will and the beneficiary had told him in no uncertain terms that he must not tell the legal rights claimant. The Tribunal consider that the Respondent was put in a difficult situation at this time. He could not just resign because he was sole executor. He had to assume another executor before he could do this. The widow was not in a good state of health at the time and the Tribunal accept that the Respondent felt that she needed help with winding up the estate. The Tribunal further accept that the Respondent thought that he could fulfil his obligation as executor by assuming the widow as executor and then resigning while there were still enough funds in the estate for the legal rights obligations to be met. It is clear from the correspondence and the evidence that the Respondent did advise the widow of her obligation in terms of legal rights. The Tribunal accept that the Respondent was trying to find some way out of what would have been a conflict of interest situation if he had advised the son of his legal rights. The Respondent's view at the time was that he had a duty as executor to do this but he also had a duty to the beneficiary who was telling him he must not do this. The Tribunal found the Respondent's claim that he wished to appoint the widow as executor because this would align her with being the person who would be responsible for settling any legal rights plausible. What the Respondent did was to protect himself and his firm from any future claim.

The Tribunal considered that the question in this case is whether or not the Respondent compromised himself professionally in acting in the way he did. If he had not advised the widow of her obligations in terms of legal rights or if he had paid out the estate without there being sufficient money left to meet the legal rights claim, he would have put the beneficiary in an impossible situation of not being able to meet her obligations. However this did not happen in this case. The Tribunal note that the

legal rights claim has now in fact been paid. The Respondent did not circumvent the legal rights claim but he did circumvent his liability for it.

The Respondent does not appear to have given the widow any advice in connection with the 20 year prescription period or the payment of interest. Interest however would only have been the same as what the widow would have obtained in the bank and is accordingly a neutral aspect. He advised her that should the son try to claim his legal rights it would be a matter between the son and her.

The Tribunal considered the two averments of professional misconduct. The Law Society has averred that the Respondent has acted contrary to the common law standard expected of solicitors acting in the solicitors' profession in Scotland being honesty, truthfulness and integrity. Mr Moynihan has objected to the relevancy of this allegation given the call in the Answers for specification of what acts the Respondent was alleged to have carried out dishonestly or untruthfully. Unfortunately Mr Reid did not provide further specification. The submissions on behalf of the Law Society allege that the Respondent devised a scheme which was contrary to his duty as an executor and accepted improper instructions. This is perhaps attacking the Respondent's integrity but the Tribunal cannot see any averments which would support the claim that the Respondent acted dishonestly or untruthfully. The Tribunal considers it unfortunate that charges of professional misconduct should be framed in such generalised terms when the allegations are so serious. It is important that Respondents are given fair notice of the case against them. In this case it is unnecessary for the Tribunal to rule on the relevancy of this part of the Complaint given that the Tribunal has not made any findings in fact which support any finding that the Respondent has not acted with honesty, truthfulness and integrity. There was no evidence which satisfies the Tribunal that the Respondent acted for personal gain. The Tribunal accordingly make no finding of professional misconduct in respect of 4.1(a) of the Complaint.

In connection with 4.1(b), the Tribunal considered each of paragraphs 1, 2, 3, 4, 6 and 9 of the Solicitors (Scotland) Standard of Conduct Practice Rules 2008. The Tribunal does not accept that the Respondent failed to act independently or in the best interests of his client. The Tribunal also, as previously explained, does not consider that the

Respondent was acting in a conflict of interest situation in the way envisaged by the Practice Rules. The Law Society has alleged that the Respondent accepted improper instructions from his client. The Respondent provided the widow with advice with regard to her obligations in terms of legal rights. The Tribunal consider that while it might have been best practice for the Respondent to have either resigned earlier or resigned as both executor and solicitor, his failure to do this cannot be categorised as professional misconduct. Professional misconduct is a departure from the standards of conduct expected of competent and reputable solicitors which would be regarded by competent and reputable solicitors as serious and reprehensible. The Tribunal heard evidence from four experts all of whom are competent and reputable solicitors and none of whom would have regarded the Respondent's conduct as serious and reprehensible. On the basis of the findings in fact made by the Tribunal; and on the basis of the evidence heard and productions lodged, the Respondent's conduct cannot be classified as being serious and reprehensible.

The Tribunal went on to consider the terms of Section 53ZA of the Solicitors (Scotland) Act 1980 which states: *"Where after holding an enquiry under Section 53(1) in to a complaint of professional misconduct against the solicitor the Tribunal (a) is not satisfied that he has been guilty of professional misconduct (b) considers that he may be guilty of unsatisfactory professional conduct it must remit the complaint to the Council."* To amount to unsatisfactory professional conduct, the Respondent's actings would have to fail to meet the standard which could reasonably be expected of a competent and reputable solicitor but not amount to professional misconduct and not comprise merely inadequate professional service. The Respondent's advice to the widow could have been more detailed and clearer. His actings may also not have accorded with best practice. However the Tribunal do not consider that his actings were such that they could not reasonably be expected of a reputable solicitor. The Tribunal accordingly did not consider that it required to remit the Complaint to the Council of the Law Society.

The Tribunal reconvened on the afternoon of 11 March 2013 to issue its decision orally and to invite submissions on expenses and publicity. Mr Moynihan moved for the expenses of the proceedings and asked for the case to be certified as suitable for the employment of Senior Counsel. He also advised that Mr Kerrigan would write a

follow-up article on the whole legal rights issue after the Tribunal's decision had been issued. In connection with publicity, he stated that he had no submissions to make but asked that the Tribunal perhaps consider giving anonymity in this case.

Mr Reid stated that he did not oppose the motion for expenses.

DECISION ON PUBLICITY AND EXPENSES

The Tribunal noted that there was no opposition to the Respondent's motion for expenses. The Tribunal further considered the request that the case be certified as suitable for the employment of Senior Counsel. This was a very difficult case involving four expert witnesses and it took the Tribunal some time to come to its decision. In the circumstances the Tribunal considered that it was appropriate to sanction the case as suitable for the employment of Senior Counsel. The Tribunal made the usual order with regard to publicity. There is no provision in the legislation to allow anonymity to be given to the Respondent in this case.

Dorothy Boyd
Vice Chairman