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

DECISION

in Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended

by

COLIN N HOWIE, 138 Midstocket Road, Aberdeen

Appellant

against

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

First Respondent

and

ALAN J NICOLL, Laurie and Co Solicitors LLP, 17 Victoria Street, Aberdeen

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Colin N Howie, 138 Midstocket Road, Aberdeen (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") on 10 March 2016 not to uphold a complaint of unsatisfactory professional conduct in respect of heads of complaint 1(a), 1(e), 1(g), 7, 8 and 9 against Alan J Nicoll, Laurie and Co Solicitors LLP, 17 Victoria Street, Aberdeen (hereinafter referred to as "the Second Respondent"). The appeal also noted that the First Respondent incorrectly narrated the terms of head of complaint 1(b) in the decision to appoint a Fiscal under s51 of the Solicitors (Scotland) Act 1980. The Appeal on the heads of complaint listed above were contained in 14 separate grounds of appeal.

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First Respondent and the Second Respondent. Answers were lodged on behalf of the First Respondent and the Second Respondent.

3. Having considered the Appeal with Answers, the Tribunal set the matter down for a procedural hearing on 16 August 2016 and notice thereof was served on all parties.

4. On 16 August 2016 a procedural hearing took place. The Appellant represented himself. The First Respondent was represented by Paul Marshall, Solicitor, Edinburgh. The Second Respondent was represented by William Macreath, Solicitor. A further procedural hearing was fixed for 1 November 2016 for the Appellant to provide a skeleton argument to support his Appeal and for the parties to produce a Record.

5. On 31 October 2016 the procedural hearing due to take place on 1 November 2016 was adjourned due to the Appellant's ill health. The Tribunal set the matter down for a hearing on 27 January 2017 as progress had been made with regard to the skeleton argument and Record and a procedural hearing was no longer required.

6. On 27 January 2017 the case called for a hearing. The Appellant represented himself. The First Respondent was represented by Paul Marshall, Solicitor, Edinburgh. The Second Respondent was represented by William Macreath, Solicitor. The Tribunal heard oral submissions from both parties. The Tribunal also had regard to the written arguments and productions lodged by the Appellant and Second Respondent. The Tribunal retired for deliberations and continued the hearing to 21 February 2017.

7. In early February the Tribunal adjourned the hearing set down for 21 February 2017 to 17 March 2017 as one of the Tribunal members could not attend on that date.

8. The continued hearing called on 17 March 2017. The Tribunal continued its deliberations in the morning and announced its decision to the parties at 1400 hours. The Appellant represented himself. The First Respondent was represented by Grant Knight, Solicitor, Edinburgh, on behalf of Paul Marshall, Solicitor, Edinburgh. The Second Respondent was represented by Iain Cahill, Solicitor, Glasgow on behalf of William Macreath, Solicitor, Glasgow. The Decision of the Tribunal was to uphold grounds of appeal 1, 3, 4, 5, 6, 7, 8, 10, 11 and 12 and therefore to quash the determination appealed against in respect of heads of complaint 1(a), 1(e), 1(g) and 8

and make a determination upholding those heads of complaint. The Tribunal refused grounds of appeal 2, 9 and 13 and confirmed the determination regarding heads of complaint 7 and 9. The Tribunal did not consider ground 14 to be a competent ground of appeal and accordingly this too was refused.

9. The Tribunal accordingly pronounced an Interlocutor in the following terms:-

> Edinburgh 17 March 2017. The Tribunal in respect of the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Colin N Howie, 138 Midstocket Road, Aberdeen ("the Appellant") against the Decision of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondent") dated 10 March 2016, not to uphold a complaint of unsatisfactory professional conduct in relation to heads of complaint 1(a), 1(e), 1(g), 7, 8 and 9 against Alan J Nicoll, Laurie and Co Solicitors LLP, 17 Victoria Street, Aberdeen ("the Second Respondent"); Uphold grounds of appeal 1, 3, 4, 5, 6, 7, 8, 10, 11 and 12, quash the determination appealed against in respect of heads of complaint 1(a), 1(e), 1(g) and 8 and make a determination upholding those heads of complaint; Refuse grounds of appeal 2, 9 and 13 and confirm the determination of the Law Society in respect of heads of complaint 7 and 9; Refuse ground of appeal 14; Find the First Respondent liable in the expenses of the Appellant and of the Tribunal including the 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; and Direct thereafter that publicity will be given to this decision and that this publicity should include the name of the Appellant and the First and Second Respondents.

Kenneth Paterson

Vice Chairman

10. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Appellant by recorded delivery service on 9 MAY 2017.

IN THE NAME OF THE TRIBUNAL

Kenneth Paterson

Vice Chairman

NOTE

The Appellant lodged an Inventory of Productions and the Second Respondent lodged two Inventories of Productions. The Appellant and the Second Respondent also provided written outline arguments. A Record was lodged. The parties confirmed that they were content that the matter proceeded and that they did not wish to await the result of the recent *Anderson Strathern* appeal.

SUBMISSIONS FOR THE APPELLANT

The Appellant made oral submissions in support of his Appeal and skeleton argument.

Ground 1 – In relation to head of complaint 1(a) the Committee erred in finding that there was no actual or potential conflict of interest between the company and its majority shareholders in relation to the terms of the loan advanced by the majority shareholders to the company.

In the Appellant's submission there was an inherent conflict of interest in acting for a borrower and a lender in connection with agreeing the terms of a commercial loan. The interests of the borrower and lender were diametrically opposed. They had entirely different priorities. He submitted that there may be circumstances where there is no conflict and a solicitor can act for both parties but this is limited to documenting an agreement by way of granting a security, not agreeing the terms of the loan. The Appellant submitted that in the present case, the Second Respondent was present and gave advice during the meeting when the loan was first proposed by the lenders. According to the minute of the meeting he gave advice on options for managing debt including shareholders repaying the debt and advice about the security to be granted. The Appellant argued that the PCC finding was perverse. He noted that the Law Society accept that the sub-committee erred.

The Appellant referred to the Second Respondent's written outline argument. He said it was "nonsense" to suggest that the company would have gone into liquidation without the loan. He suggested options other than liquidation which could have been employed. The Appellant also rejected the sub-committee's reasoning that the decisions had been ratified by the shareholders. The Appellant noted that there was no reference to this in the complaints investigator's report. The decision could only have been ratified with the Appellant's involvement. The Appellant submitted that the sub-committee "plucked this out of the air". The Appellant accepted that the company was in breach of its overdraft limit but he invited the Tribunal to consider Productions 3 and 4 in the

Appellant's Inventory of Productions which showed that the company did not accept the bank's offer of an overdraft in October 2013. The Appellant submitted that if they had, they would no longer have been in breach.

The Appellant referred the Tribunal to Production 5 on the Appellant's Inventory of Productions which was the notice of the special general meeting. He invited the Tribunal to consider the terms of the agenda which was concerned with whether shares should be issued to shareholders. In his submission that was the only business which should have been considered at the special general meeting. The Appellant said it was not possible to ratify invalid acts by a majority. The Board, and in some circumstances the shareholders, might have power to do this within a reasonable time but these circumstances never occurred.

Ground 2 – In relation to head of complaint 1(a) the Committee erred in finding that the company would have gone into liquidation had the majority shareholders not refinanced the company's borrowings without reference to the company's board of directors.

The Appellant believed that the sub-committee had based their decision regarding conflict of interest on this particular finding but there was no evidence before the PCC to make this finding or draw this inference.

In the Appellant's submission the suggested overdraft would have brought the company within its borrowing limit. Alternatively, the Appellant would have been able to pay in £2000 by January. He suggested that if the company did not want the bank to call up the loan, it had the option of selling the property. He said there was substantial equity in the property and that no bank waiting to foreclose would offer an overdraft. He said that the company didn't even try to lease the property. The Appellant claimed that at the December 2013 meeting, the Second Respondent misrepresented the company's financial position and the £25 per day bank charge. The Appellant alleged that the Second Respondent did not tell the directors that this would not have been charged if he had accepted the overdraft the bank had offered. In the Appellant's submission the directors were commercially naïve and did not query what the Second Respondent was told them. Even if the bank had foreclosed, liquidation would be a long way off. Therefore, the Appellant submitted that there was no evidence the company would be liquidated. He submitted that the decision was "completely perverse".

Ground 3 – In relation to head of complaint 1(a) the Committee erred in failing to consider whether the personal financial interest of Mr Nicoll and of Mr Nicoll's wife as a lender to the company, resulted in a conflict between the interests of the company and the interests of Mr Nicoll in connection with the terms of the loan.

The Appellant stated that the Second Respondent's personal financial interests were opposed to the client's. The Appellant claimed that the Second Respondent acted and advised and the minute of the meeting made that clear. The Appellant noted that the Second Respondent suggested that the shareholders accepted a risk the Appellant was not prepared to take on. However, in the Appellant's submission it was a safe, secured investment. The loan was for £88,000 and the value of the property was £130,000. In any case, the Appellant submitted that the risk was irrelevant because the client's actions were immaterial so far as the solicitor's conduct was concerned. The question should have been: Did the solicitor act in a conflict of interest situation?

Ground 4 – In relation to issue1(e) the Committee erred in finding that there was no conflict of interest in Laurie and Co acting in a situation in which the interests of the company conflicted with the personal interests of Mr Nicoll; and in particular where Mr Nicoll was the partner supervising the work.

The Appellant said that the company was due him money and he requested it. The Second Respondent issued a refusal without instructions from the Board. The Appellant referred the Tribunal to Production 8 in the Appellant's Inventory of Productions which was a letter by Laurie and Co to the Appellant. The Appellant said he received it on 14 February. The Appellant said that it was signed by the Second Respondent. The Appellant said that the Second Respondent had no authority to issue that letter. The Second Respondent had a direct financial interest in the company not paying the money back to the Appellant. There was a conflict between the company and the Second Respondent's own personal and financial interests but he continued acting without authority or instructions. The PCC erred in finding otherwise and the Law Society accepted that the sub-committee got it wrong.

The Appellant noted that Mr Macreath's written submissions were to the effect that the majority shareholders gave instructions. The Appellant contended that the shareholders had no right to give these instructions. These decisions should be taken by the board of directors. The Appellant gave his opinion that the court assistant at Laurie and Co would not have done anything without checking

first with the Second Respondent. The Appellant highlighted Mr Macreath's written argument which said that it was not the company which denied the statutory demand but the majority shareholders. However, the Appellant said that majority shareholders have no power to do this. He said it was entirely incorrect to say that it was not the company which disputed it. The letter was issued on behalf of the company.

Ground 5 – In relation to head of complaint 1(g) the Committee erred in finding that there was no conflict of interest in Mr Nicoll acting for both the company and the majority shareholders in relation to the grant of a standard security by the company in favour of the majority shareholders.

The Appellant noted that the Second Respondent had a personal financial interest as the lender and the borrower. He was not allowed to act in such a situation. He could not give impartial advice and could not been seen to do so. He said that the Accounts Rules made that very clear. A solicitor should not act when his family member is a party to the security. The sub-committee's decision was perverse and an error in law. The Appellant noted that the Law Society accepted that the sub-committee erred.

The Appellant made reference to the Second Respondent's answers and skeleton argument. The Second Respondent's representative made reference to legal fees owed by the company to the firm. The Appellant said that the legal fees were not part of this complaint. The Second Respondent claimed that there was a "comity of interest" between the company and the shareholders and there were no viable alternatives. In the Appellant's submission, there were plenty of viable alternatives. He said the sub-committee was wrong to consider the client's actions. It should have been considering the Second Respondent's actions. Just because a "comity of interest" exists, doesn't mean there's not a conflict. A comity of interest can occur in a house purchase when one party wants to buy and the other wants to sell for an agreed price. That's not to say that there isn't a conflict. There might be a comity of interest re the purchase and sale of a company. That doesn't mean that a solicitor should be acting on both sides of a transaction. The Appellant claimed this was a substantial error of law.

The Appellant submitted that the Second Respondent's interpretation of Rule B.2 was also wrong. He submitted that the Second Respondent gave the lenders advice at the time the loan was agreed. The Law Society now agree this was the case. The company did not agree to accept the loan. The only people who agreed were the majority shareholders and they did not have the power to agree

anything on behalf of the company. The terms of the loan could not have been agreed before the solicitor acted in granting the standard security.

Ground 6 – In relation to head of complaint 1(g) the Committee erred in finding that the terms of the loan had been agreed by the company before Mr Nicoll had been instructed to act in connection with the standard security.

The Appellant indicated that he covered this ground when making earlier submissions. He submitted that the terms of the loan were never agreed by the company. They were only agreed by the lenders. No board meeting was ever convened to consider whether or not the company agreed to the lenders' terms. The Law Society accepted that the sub-committee erred. The majority shareholders had no authority to ratify.

Ground 7 – In relation to head of complaint 1(g) the Committee erred in failing to consider whether the personal financial interest of Mr Nicoll's wife as a lender in the security transaction resulted in a conflict of interest between Mr Nicoll and the company as borrower in the transaction.

The Appellant said that the security was granted in favour of the Second Respondent's wife and conferred a significant financial benefit on her. The Law Society sub-committee erred in failing to take this into account and this was a significant error of law. The Law Society had conceded this ground of appeal.

The Appellant referred to Production Number 9 of the Appellant's Inventory of Productions which was the security prepared by the Second Respondent. It granted an obligation on the company to pay the Second Respondent's wife and other shareholders £88,000. Even the "totally flawed minute" only said the security would be granted over a loan of £80,000. The Second Respondent was benefitting himself and his friends. After preparing it, the Second Respondent signed it on behalf of the company and had it witnessed by his secretary. He certified it as a true copy. The Second Respondent "has his fingerprints all over it". He prepared it and registered it with all the Registers.

The Appellant said that during the investigation process the Second Respondent tried to blame his court assistant despite the fact she had nothing to do with the loan or the standard security. The Appellant referred to Production 11 of the Appellant's Inventory of Productions. He noted that on p11.6 the Second Respondent said that he did not act on behalf of the company and the majority

shareholder in February 2014 when the Company granted a Standard Security in favour of the majority shareholders and that the matter was dealt with by his court assistant (para 24). He also noted that on p11.9, the Second Respondent said that his court assistant acted on behalf of 4/5 directors and the majority shareholders on 19/12/13 (para 32). However, the Second Respondent changed his position when presented with the evidence from the Registers.

Ground 8 – In relation to head of complaint 1(g) the Committee erred in failing to consider Rule B6.21 of the Accounts etc. Rules which prohibit a solicitor from acting for a lender in the creation of a standard security where the borrower is a company in which the solicitor or his wife have an interest.

The Appellant said that the Second Respondent was the firm's accounts partner and was well aware of the rules which prevent a solicitor acting in the constitution of a standard security in these circumstances. He deliberately chose to ignore them. The rules are designed to work where personal interests conflict with clients' interests. The Law Society admit this was an error by the sub-committee.

Ground 9 – In relation to head of complaint 7 the Committee erred in finding that the preparation and service by Laurie and Co of a notice on behalf of the company without instructions or authority from the company's board of directors did not amount to unsatisfactory professional conduct or professional misconduct.

The Appellant said that he had already made submissions with regard to this ground. He claimed that the Second Respondent said that the Directors ratified the decision. However, the Appellant was a director throughout this period and was never called to a meeting to ratify any decisions. The Board of Directors was never consulted with regard to ratification. The Appellant's position was that by acting without authority, the solicitor was able to better his own financial position and so acted in a conflict of interest situation.

Ground 10 – In relation to head of complaint 8 the Committee erred in finding that the preparation, registration and signing of a standard security on behalf of the company without instructions or authority from the company's board of directors did not amount to unsatisfactory professional conduct or professional misconduct.

The Appellant said the Second Respondent, his wife and their friends paid money into the solicitor's firm's bank account and the Second Respondent used these to repay the Clydesdale Bank loan. This was all done voluntarily. The company did not agree to accept a loan. There was no obligation on the company to repay anything. The resolutions were really just agreements between the majority shareholders and did not involve the company.

The Second Respondent knew or ought to have known that the instructions from the company were not properly constituted but nevertheless he acted without instructions. The Appellant referred to the highlighted sections in Production 7.1 of the Inventory of Productions for the Appellant and quoted the following section from his email to the Second Respondent dated 20 January 2014:

"As you are fully aware, the shareholders had no power to pass these resolutions, which were passed without even being circulated to me, despite being a director and shareholder of the company. They were obviously decisions which should have been considered by the board but no board meeting was ever called for the purpose of considering these matters."

By preparing and registering the security, the Second Respondent created an obligation on the company to pay the solicitor's wife and friends £88,000. Interest was owed at a rate of 10% which was never agreed by the company. They got a right to repossess which was never agreed. They got preference in the event the company was liquidated. None of these matters were ever authorised or agreed by the company.

The appellant submitted that the Second Respondent's actions were "shocking and reprehensible". He was in a position of trust within the company and as a solicitor. He used that trust and legal expertise when preparing the standard security. The Second Respondent breached Rules B.1, B2.1.2 (acting in a conflict) and B6.21 (acting for both parties in a security transaction). No reasonable sub-committee would reach a decision in these circumstances that the Second Respondent was not guilty of unsatisfactory professional conduct. He submitted that the decision was perverse.

The Appellant said that he did not understand the Law Society's answer to ground 10. The First Respondents admitted that the Board of Directors had not authorised the preparation, signing and registration of the standard security but deny everything else. He was not sure what they were trying to deny.

The Appellant noted that The Second Respondent admitted that the Board did not formally instruct him but relied on subsequent ratification by the majority shareholders which he intended to address next.

Ground 11 – In relation to head of complaint 8 the Committee erred in finding that the breach was rectified and ratified by the majority shareholders.

The Appellant submitted that there was no ratification as there was no board meeting. The shareholders did not have the authority to ratify. The Appellant said he was quite happy to go on oath to say there was no board meeting to grant the standard security or ratify the loan. It simply never took place.

The Appellant referred to Production 13.4 in the Appellant's Inventory of Productions which was the response on behalf of the Second Respondent to the Law Society complaints investigator. There was a general statement of the principles regarding quorum and the "Duomatic Principle". The Appellant referred to Production 2 of the Appellant's Inventory of Productions and the "Duomatic Principle" described therein. He noted that this principle was only relevant if the vote was unanimous. The Appellant had been a director all that time and had not agreed to their actions. There was therefore no ratification by this mechanism.

Ground 12 – In relation to head of complaint 8 Committee erred in finding that breach by Mr Nicoll in acting on behalf of the borrower in a security transaction without instructions from the borrower to do so was capable of rectification and ratification by the lenders.

The Appellant submitted that the lender cannot ratify a decision by the borrower. Their interests completely oppose. It can only be ratified/rectified by the board of directors of the borrowers, certainly not by the lenders.

Ground 13 – In relation to head of complaint 9 the Committee erred in finding that Mr Nicoll's providing information that he knew to be misleading in the course of negotiations to buy my shares on behalf of himself and other parties did not amount to unsatisfactory professional misconduct or professional misconduct.

The Appellant referred to Rule B1.12 which says that a solicitor must be trustworthy and honest. A solicitor must not act in a way which is fraudulent or deceitful. The Appellant said there was a clear intention to deceive. The surveyor had told the Second Respondent the property was worth £130,000-£135,000. The solicitor told the other shareholders that the property was valued at £130,000-£135,000. However, on the same day, the Second Respondent told the Appellant that the value was £129,000. The Second Respondent tried to get a personal benefit for himself and his friends by giving a low valuation. The Appellant noted that the Law Society said there were two valuations but he contended that there was only ever one valuation.

Ground 14 – The Committee erred in failing to correctly narrate the terms of head of complaint 1(b) in its decision to appoint a fiscal under section 51 of the Solicitors (Scotland) Act 1980.

The sub-committee erred in narrating the grounds for refusal to the Fiscal.

SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Marshall asked the Tribunal to have regard to the Answers submitted on behalf of the First Respondent. He made oral submissions in support of these.

Grounds 1-8 / Heads of Complaint 1(a), 1(e) and 1(g)

Mr Marshall indicated that the Law Society conceded appeal grounds 1-8 which related to heads of complaint 1(a), 1(e) and 1(g). Mr Marshall invited the Tribunal to examine what he considered to be the three key points in relation to this section of the appeal. Firstly, at the special general meeting on 19 December 2013, the Second Respondent provided advice to the majority shareholders that their options were either to do nothing and let the company default on its bank debt, or loan funds to the company. The shareholders decided to loan the funds and the Second Respondent proposed the security. Secondly, after that meeting, the Second Respondent prepared the standard security on or around 23 December 2013. Thirdly, the Second Respondent's firm acted on behalf of the company in disputing the statutory demand. The Second Respondent sought an opinion from his associate, approved her draft email to the Appellant and supervised her during the dispute.

Mr Marshall submitted that from the special general meeting in December through to the preparation of the standard security and disputing of the statutory demand in February, the Second Respondent

was acting on behalf of the company. He invited the Tribunal to uphold those complaints on the grounds that the sub-committee erred in failing to hold that the Second Respondent was acting on behalf of the company. He submitted that once it was accepted that the Second Respondent was acting as a solicitor, if followed that there was a conflict of interest.

Mr Marshall submitted that there was a conflict of interest in the loan terms which were preferable to the Second Respondent and the other lenders. That conflicted with the company's interest in getting favourable borrowing terms. Conflict arose when the Second Respondent acted for both borrower and lender in the grant of the standard security in breach of Rule B6.21.1(b).

The Law Society's position was that the Second Respondent was acting, a conflict did arise, and the sub-committee erred in failing to recognise that. However, the Second Respondent did not concede Ground 2 which related to the claim regarding the inevitability of the company going into liquidation. He submitted that on the basis of the information before the sub-committee he could not contend that the sub-committee's decision was so unreasonable that it could be said to have erred. He therefore invited the Tribunal to refuse this minor ground of appeal but uphold the overall head of complaint to which it referred. He submitted that this point was not of great significance when considering the other grounds which related to the same head of complaint.

Grounds 9-12 / Heads of Complaint 7 & 8

With regard to these grounds which related to the Second Respondent not having proper instructions, Mr Marshall submitted that although the Board of Directors did not give instructions, the shareholders did. Therefore, he did not ask the Tribunal to interfere with the sub-committee's decision. He said that there were only limited circumstances in which a Tribunal should interfere with a sub-committee's decision and submitted that these circumstances were not sufficient to justify doing so.

Ground 13 / Head of Complaint 9

Mr Marshall noted that according to the Complaints Investigator's report, the Second Respondent received a valuation of £129,000 which he passed on to the Appellant. Mr Marshall noted that the Tribunal must make its decision based on what was before the sub-committee. It appeared as though

the Second Respondent may have received another valuation but that was not to say the first one was misleading.

Ground 14 / Head of complaint 1(b)

Mr Marshall submitted that the sub-committee made a labelling error when narrating the terms of the decision to appoint a Fiscal. However, the subject matter was identified in the discussion and it would be clear to the Fiscal when he/she considers prosecution. Mr Marshall highlighted that the Tribunal must keep in mind what the appeal is for, namely it is an appeal against a decision not to uphold a conduct complaint. He did not think that Ground 14 was a competent ground of appeal because it did not fit within the terms of section 42ZA(10).

Conclusion

In summary, the First Respondents conceded that there was a conflict of interest and submitted that was the real mischief of the conduct. Mr Marshall indicated that there were issues regarding compliance with company law and appropriate instructions by the Board of Directors which the sub-committee could have dealt with in closer detail. However, he suggested that the Tribunal should only intervene if there are clear grounds to do so on the basis of information before it and the sub-committee. He suggested that these were absent when considering grounds 9-14. He therefore invited the Tribunal to find that there had been unsatisfactory professional conduct with regard to conflict of interest grounds only.

The Chairman asked Mr Marshall to clarify what he was inviting the Tribunal to do. Mr Marshall submitted that the Tribunal should uphold appeal grounds 1, 3, 4, 5, 6, 7, 8, and 11. He suggested the Tribunal refuse appeal grounds 2, 9, 10, 12, 13 and 14.

SUBMISSIONS FOR THE SECOND RESPONDENT

Mr Macreath referred to his written Answers and indicated that he intended to highlight in his oral submissions the Tribunal's role when sitting as an appellate body. In his Answers, the Second Respondent advanced his position that the sub-committee had not erred in its decision making. He submitted that the sub-committee's decisions should be supported regarding conflict of interest and whether the Second Respondent was acting *qua* solicitor.

Mr Macreath noted that the sub-committee was made up of legal members and lay people. He highlighted that the sub-committee was concerned with overall fairness and justice and that every party had an opportunity to made representations.

Mr Macreath quoted Lord Neuberger saying that "*decisions...without reasons are certainly not justice: indeed, they are scarcely decisions at all.*" He said it was axiomatic that the sub-committee must provide reasons which showed that a logical due process had been followed, particularly when it made a decision contrary to the complaints investigator's report. In this case, the sub-committee identified issues and considered properly that head of complaint 1 should be subdivided. He said that was rational and logical. He submitted that it was clear from the decision that the sub-committee had considered the evidence and made findings in fact based on the evidence available to them and the inferences that could be drawn. In Mr Macreath's submission, the decision made for plain reading. He said the sub-committee did not err in fact or in law, or misapply the standard of proof. They had a clear understanding of their role. They said they discussed matters at length.

The sub-committee made it clear that it would only deal with professional practice, not company law, except insofar as it overlapped with conduct matters. The sub-committee carried out an analysis, recognising that the Second Respondent was a director, shareholder and creditor. In addition he acted as company secretary. The sub-committee recognised that each of the roles imposed rights and responsibilities. It took into account the need to be "sedulous" in guarding against conflict of interest.

In Mr Macreath's submission, the Tribunal would have to be satisfied that the sub-committee decision was so illogical, irrational or perverse that it must be quashed. Only then could the Tribunal decide whether there was unsatisfactory professional conduct. Mr Macreath reminded the Tribunal that it should remember its function which was to investigate conduct, not breaches of company law.

Mr Macreath quoted the following section from page 6 of the sub-committee's report:

"it was clear that a number of members of the Sub-committee found difficulty in accepting all of what was being put forward by the Complaints Investigator. It did not appear to some of the Sub-committee that there was necessarily any actual or indeed potential conflict between the company and its majority shareholders, and that there was no demonstrable prejudice to the company's

interests in the route taken by the majority shareholders. If nothing had been done the company would have gone into liquidation...".

Mr Macreath noted that the Appellant took issue with the reference to liquidation. Mr Macreath said he understood why he did so but said that the question for the Tribunal was whether that decision was so perverse, illogical or disproportionate that it should interfere with the sub-committee's decision. As an appellate tribunal the issue was narrow. It is a high hurdle for the appellate tribunal to overcome to set aside the decision. He asked the Tribunal whether the decision was so unreasonable that no reasonable person acting reasonably could have come to that conclusion. He reminded the Tribunal that its expertise was in professional conduct regulation, not company law.

Mr Macreath noted that there had been a development of the law of reasonableness over the last seventy years. He invited the Tribunal to put aside illegality as a ground for challenge. He submitted that there was nothing to suggest that the sub-committee had acted *ultra vires*. He asked the Tribunal to consider whether there was something irrational that could justify overturning the decision. He argued that there was not when you read the decision as a whole. He urged the Tribunal to consider the case on the basis of the information before the sub-committee. Was there a conflict? Did the Second Respondent act *qua* solicitor? Which "hat" was he wearing? Was there procedural impropriety? He submitted that there was not. The sub-committee had all the documents before them and decided there was no unsatisfactory professional conduct with regard to these matters.

Mr Macreath referred to the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6) and said that to overturn the sub-committee's decision it would have to have been "outrageous" and in the defiance of logic or morals so that no sensible person could have arrived at that conclusion on the proper application of the minds of the members of that committee. Whether the sub-committee's decision was outrageous would depend on the Tribunal's interpretation of the decision as the appellate body. However, the Tribunal should only intervene if the sub-committee did not judge on the basis of reason. Mr Macreath submitted that there was reason contained in the report. The sub-committee did discriminate because they found conflict on two heads and referred them to a Fiscal. Their decision is very much more detailed than usual which suggests that the sub-committee had given the matter some thought. The Tribunal could see from the sub-committee's minute and decision the list of papers considered. He noted that the sub-committee had before it the statements of the other shareholders whom he suggested were experienced

businessmen. He referred to these and said that there was a "comity of interest" between the parties. Mr Macreath admitted that there may have been failures in terms of company law but said that did not necessarily give rise to conduct issues.

Mr Macreath submitted that the sub-committee had not determined something contrary to law. They had not taken into account irrelevancies. The decision was one which a reasonable committee could make based on the information before it, all parties having had an opportunity to make representation. The sub-committee had discretion and it was properly exercised. The Tribunal hearing was not about rehearing the conduct inquiry. There was nothing illegal, irrational, wrong, procedurally inadequate, outrageous or disproportionate about the sub-committee's decision. It must be open to the PCC to form its own view and disagree with the Law Society's complaints investigator.

DECISION

The Appellant's complaint against the Second Respondent was one of unsatisfactory professional conduct which is defined in section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 as "professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor" and which lies on the spectrum between inadequate professional services and professional misconduct.

The sub-committee did not uphold the Appellant's complaint of unsatisfactory professional misconduct. The Appellant appealed to the Tribunal against that determination under section 42ZA(10) of the Solicitors (Scotland) Act 1980 which provides that a complainer may, before the expiry of the period of 21 days beginning with the day on which a determination under subsection (1) or (2) not upholding the conduct complaint is intimated to him, appeal to the Tribunal against the determination.

The Tribunal had regard to its powers when considering an appeal under section 42ZA(10). These are contained within section 53ZB(2) which provides that on an appeal to the Tribunal under S42ZA(10), the Tribunal

(a) may quash the determination being appealed against and make a determination upholding the complaint;

(b) if it does so, may, where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct;
(c) may confirm the determination.

The Tribunal's approach to the appeal under s42ZA(10) was informed by the decision of the Inner House of the Court of Session following the petition by Alistair Hood for a Review of a Decision of the Scottish Solicitors' Discipline Tribunal [2017] CSIH 21. The Tribunal noted that when it is sitting as an appellate body it should be slow to interfere with the sub-committee's decision on an evaluative question and should only intervene in the following situations:

1. Where the sub-committee's reasoning discloses an error in the application of the law to the facts;
2. Where the sub-committee has made a finding for which there is no evidence, or which is contradictory of the evidence;
3. Where the sub-committee has made a fundamental error in its approach to the case, as by asking the wrong question, or taking account of manifestly irrelevant considerations, or arriving at a decision that no reasonable sub-committee could properly reach.

The Tribunal also noted that the standard of proof to be applied in these cases was the civil standard of balance of probabilities.

The Tribunal considered that its task was not to decide whether the Second Respondent was guilty of any breach of company law. Instead, it was to apply its mind to the reasoning of the sub-committee in coming to a determination regarding the Second Respondent's conduct in a disciplinary context.

The Tribunal had regard to the oral and written submissions made by all parties and the productions lodged and in view of the complexity of the appeal, took time to carefully consider each ground of appeal and the sub-committee's decision relating to each one.

Ground 1 / Head of complaint 1(a)

The Tribunal was of the view that there was at least a potential conflict of interest between the company and it majority shareholders in relation to the terms of the loan advanced by the majority

shareholders. Each group would wish loan terms most favourable to themselves. Without making any comment on the particular loan terms in this case, the potential for the interests of borrower and lender to conflict is clear and the Tribunal was of the view that the sub-committee's decision that there was no potential conflict was not reasonable in these circumstances. The Tribunal noted that the Law Society conceded this ground of appeal and no submissions made on the Second Respondent's behalf persuaded the Tribunal to refrain from upholding this ground of appeal.

Ground 2 / Head of complaint 1(a)

The Tribunal was of the view that it might have been prudent for the sub-committee to have used less decisive terminology when assessing the financial implications of failing to make the loan. However, the Tribunal was not persuaded that it should interfere with the sub-committee's decision on this ground as it was within the sub-committee's discretion and was not one which no reasonable sub-committee could have reached on the basis of the information before it. However, the Tribunal did not consider that the sub-committee's decision on this matter had a major impact on the determination of this head of complaint 1(a) as a whole.

Ground 3 / Head of complaint 1(a)

The Tribunal discussed at length whether the Second Respondent was acting *qua* solicitor when the loan was considered and considered carefully the arguments made on behalf of the Second Respondent to the effect that he neither acted nor advised. Although the statements of the fellow directors were to the effect that they did not consider the Second Respondent to be acting as a solicitor, the Tribunal was of the view that the surrounding circumstances overwhelmingly suggested that he was. His firm acted as company secretary and the company's solicitors. The Second Respondent was the only solicitor present at the meeting on 19 December 2013. The minute of that meeting records that it was the Second Respondent who reported the situation with the bank and made recommendations consistent with him giving legal advice. For example, it was noted that;
"Mr Nicoll said that given the position adopted by the Bank, he would recommend either doing nothing and potentially losing a fair proportion of what has been invested...or for the shareholders to fund repayment to the Bank to avoid and escalation of Bank charges and an increasing level of debt."

It was also recorded that it was

"Mr Nicoll who suggested a first ranking Standard Security would be appropriate."

The Tribunal accepted that solicitors must be allowed to take part in commercial life without being presumed to be acting as solicitors merely by dint of their profession. However, the Tribunal was of the view that in this particular case, the circumstances were such that the Second Respondent was acting *qua* solicitor. His firm acted as the company solicitors, he was the only representative of the firm present, he took no steps to make it clear that he was not acting as solicitor and he did not suggest that the company should get separate legal representation. He gave what could objectively be described as legal advice. The Tribunal considered that the sub-committee's assessment that the Second Respondent was not acting as a solicitor in these circumstances was a decision that no reasonable sub-committee could have reached.

Having determined that the Second Respondent was acting as a solicitor, the Tribunal was of the view that his personal financial interest and that of his wife as lenders to the company conflicted with the interests of the borrower company, of which the Second Respondent was Director and shareholder as was discussed above in relation to Ground 1.

Ground 4 / Head of complaint 1(e)

The Tribunal was of the view that there was a conflict of interest between the Second Respondent and the company when Laurie and Co disputed the statutory demand for payment served by the Appellant. The interests of the company conflicted with the personal interests of the Second Respondent. The sub-committee's decision to the contrary was not one which a reasonable sub-committee could make in the circumstances.

Ground 5 / Head of complaint 1(g)

The Tribunal considered that there was a conflict of interest when the Second Respondent acted for both the company and the majority shareholders in relation to the grant of a standard security by the company in favour of the majority shareholders. The Tribunal had regard to the terms of Rule B6.21.1 of The Law Society of Scotland Practice Rules 2011 which creates a prohibition on solicitors acting for a lender in the constitution of a standard security securing a loan which has been advanced or is to be advanced to or has been guaranteed or is to be guaranteed by the solicitor, where

he is a manager, or the manager's spouse. The Tribunal also had regard to the terms of Rule 2.1.2 of The Law Society of Scotland Practice Rules 2011 which provides that a solicitor shall not at any stage act for lender and borrower in a loan to be secured over heritable property except in very limited circumstances. The Tribunal considered that the sub-committee's reasoning on this issue disclosed an error in the application of the rule to the facts and therefore this ground of appeal should be upheld. The Tribunal was not persuaded that a "comity of interest" precludes a potential or actual conflict of interest.

Ground 6 / Head of complaint 1(g)

Given the Tribunal's findings in relation to Ground 1, the Tribunal was not persuaded that the loan had been agreed between the parties before the regulated person had been instructed to act for the lender and that the grant of the security was on an execution only basis.

The Second Respondent, as a solicitor, should have known that those at the Board Meeting could not lawfully approve the proposed terms of the loan because the board meeting had not been properly called. Any purported decision of the board was ultra vires. Therefore the terms of the loan could not have been approved by the company prior to the constitution of the standard security. In failing to address whether the board meeting was properly constituted, the sub-committee misdirected itself as a matter of law. Therefore the Tribunal upheld this ground of appeal.

Ground 7 / Head of complaint 1(g)

Having regard to the terms of Rule B6.21.1, the Tribunal was of the view that the sub-committee had erred as a matter of law in determining that the personal financial interest of the Second Respondent's wife as a lender in the security transaction did not result in a conflict of interest between the Second Respondent and the company as borrower. In preparing a security the Second Respondent was clearly acting as a solicitor, whatever other role he may also have been undertaking at that time.

Ground 8 / Head of complaint 1(g)

As was discussed above in relation to ground 7, the Tribunal considered that the sub-committee erred as a matter of law in failing to consider Rule B6.21.1 and its application to a decision on

unsatisfactory professional conduct. The Tribunal was not persuaded that a "comity of interest" precludes a potential or actual conflict of interest.

Ground 9 / Head of complaint 7

The Tribunal was of the view that the sub-committee's reasoning with regard to head of complaint 7 was not particularly clear when read alongside the Appellant's original complaint. However, the Tribunal was unable to make any finding as to how Laurie & Co came to be instructed to dispute the statutory notice. It was also unable to establish which solicitor of the firm in fact disputed the statutory demand on the available evidence. The Tribunal was therefore unable to come to a view about whether the Second Respondent's behaviour amounted to unsatisfactory professional conduct in the circumstances and whether it should interfere with the sub-committee's decision. Due to that uncertainty, the Tribunal was not able to uphold this ground of appeal.

Ground 10 / Head of complaint 8

This ground of appeal related to a head of complaint of unsatisfactory professional conduct with regard to the Second Respondent preparing a standard security and presenting it to the Registers without the instructions or authority from the borrower company which would have been obtained from the Board of Directors. The solicitor had completed the form and the firm's name was used on the form as company secretary. The Tribunal considered that the sub-committee misdirected itself as a matter of law. The preparation and presentation of a security to the registers in these circumstances was a breached Rules B1.5, B2.1.2 and B6.21.1 of The Law Society of Scotland Practice Rules 2011 and satisfied the test for unsatisfactory professional conduct. Given the Second Respondent's recommendations and advice at the meeting on 19 December 2013, it could not be accepted that the loan had been agreed between the parties before the Second Respondent was instructed to act and that the grant of the security was on an execution only basis to give effect to the agreement. The Tribunal considered that this matter was not merely technical and nor was it subsequently rectified or ratified. The Second Respondent acted as a solicitor without proper authority and in a conflict situation. The sub-committee's reasoning disclosed an error in the application of the law to the facts and it made a finding which is contradictory to the evidence and was one which no reasonable sub-committee could have reached.

Ground 11 / Head of complaint 8

The Tribunal considered that the sub-committee's decision that the breach was rectified and ratified by the majority shareholders was contrary to the law which does not permit ratification by shareholders. It was also contrary to the evidence. The resolution in connection with the preparation of the standard security was passed by the majority shareholders on 19 December 2013 which pre-dated the grant of the standard security on 11 February 2014.

Ground 12 / Head of complaint 8

Following its decision with regard to ground 11, the Tribunal considered that the sub-committee's decision that the breach was capable of rectification and ratification was contrary to the law which does not permit ratification by shareholders.

Ground 13 / Head of complaint 9

The Tribunal did not consider that the sub-committee erred in relation to this matter. An explanation was made to the sub-committee and it was within the bounds of their discretion to accept that explanation. The Tribunal could not find fault with the sub-committee's reasoning that the inaccuracy was corrected a short time later and there was no evidence of bad faith. The Tribunal could not disagree with the sub-committee's assessment that the issue was not capable of being proved to the requisite standards of proof.

Ground 14 / Head of complaint 1(b)

The Tribunal did not consider this to be a competent ground of appeal in terms of the statutory framework which is for an appeal against a failure to make a determination of unsatisfactory professional conduct. Therefore this ground of appeal was refused.

Therefore, in summary, the Tribunal upheld appeal grounds 1, 3, 4, 5, 6, 7, 8, 10, 11 and 12 and refused grounds of appeal 2, 9, 13 and 14. The Tribunal quashed the determinations appealed against with regard to heads of complaint 1(a), 1(e), 1(g) and 8, and upheld the complaints in relation to these grounds. The Second Respondent's conduct was not of the standard which could reasonably be expected of a competent and reputable solicitor. He had breached several of the Accounts Rules. He

was guilty of unsatisfactory professional conduct. The Tribunal confirmed the decision in respect of heads of complaint 7 and 9. The Tribunal refused appeal ground 14.

The Tribunal noted the terms of section 53ZB(2)(b) of the Solicitors (Scotland) Act 1980 which provides that the Tribunal may, where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000 for loss, inconvenience and distress. The Tribunal noted that the Appellant had not made any request for compensation in his appeal or made any particular submissions regarding compensation at the hearings. No vouching was provided to support the claims of loss made in submissions and no fair notice given to the Respondents that the Appellant was seeking compensation. There was insufficient information contained within the material before the Tribunal for it to make a determination on this issue which might be more appropriately pursued in the context of other civil litigation or other regulatory proceedings.

The Tribunal heard submissions on expenses and publicity from the parties. Having regard to the substantial concessions made by the Law Society, the Tribunal thought it appropriate that the First Respondent should be liable in the expenses of the Appellant and of the Tribunal. The Tribunal directed that publicity shall be given to the decision and that this publicity should include the name of the Appellant and the First and Second Respondents.

Kenneth Paterson

Vice Chairman