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

F I N D I N G S

In Complaint

by

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

Complainers

against

DUNCAN McKINNON BURD, Anderson MacArthur Limited, Somerled Square, Portree, Isle of Skye

Respondent

1. A Complaint dated 12 June 2019 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that Duncan McKinnon Burd, Anderson MacArthur Limited, Somerled Square, Portree, Isle of Skye (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. The Secondary Complainer was the Scottish Legal Aid Board, Thistle House, 91 Haymarket Terrace, Edinburgh (hereinafter referred to as "SLAB"). SLAB made no claim for compensation.

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

4. In terms of its Rules, the Tribunal fixed a hearing for 11 November 2019 and notice thereof was duly served upon the Respondent.

5. On 4 November 2019, the Respondent lodged with the Tribunal Office a motion to adjourn the hearing fixed for 11 November 2019. The Respondent invited the Tribunal to convert the

hearing to a procedural hearing. On 7 November 2019, on the Respondent's motion, the Chair, exercising the powers of the Tribunal under Rules 44 and 56, adjourned the hearing and directed that the matter should call as a procedural hearing on 11 November 2019.

6. At the procedural hearing on 11 November 2019, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate. The Respondent was present and represented by Andrew Mason, Advocate. Parties indicated that agreement had been reached on some matters. Parties moved for a hearing to be fixed but the Tribunal considered that a further procedural hearing was desirable to ascertain the parties' positions regarding outstanding issues. The Tribunal fixed a procedural earing for 16 December 2019 and a hearing for 7 February 2020.

7. At the procedural hearing on 16 December 2019, the Complainers were represented again by their Fiscal, Mr Stewart. The Respondent was not present but was represented by counsel, Mr Mason. Parties indicated that it was likely that all evidence would be agreed and the matter would proceed on submissions. On joint motion, the Tribunal continued the case to the hearing previously fixed for 7 February 2020.

8. At the hearing on 7 February 2020, the Complainers were represented by their Fiscal, Mr Stewart. The Respondent was present and represented by counsel, Mr Mason. At the Chair's invitation, and there being no objection from the Respondent, the Fiscal moved various amendments to the Complaint to deal with typographical errors. On the Respondent's motion, and there being no objection from the Complainers, the Tribunal allowed the late lodging of First and Second Inventories of Productions for the Respondent. On the Complainers' motion, and there being no objection from the Respondent, the Tribunal also allowed the late lodging of a Third Inventory of Productions for the Complainers.

9. The Tribunal received a signed Joint Minute of Agreement. As there were substantial areas of agreement between the parties, no evidence required to be led. Both parties made submissions. Having carefully considered the terms of the Complaint, Answers, Joint Minute of Agreement and the Productions referred to therein, and the parties' submissions, the Tribunal found the following facts established:-

9.1 The Respondent's date of birth is 24 May 1962. He was enrolled on the Register of

Solicitors in Scotland on 12 August 1985. He has been a partner/director of Anderson McArthur & Co/Anderson MacArthur Limited since 1990.

9.2 The Respondent is registered with SLAB and authorised to carry out criminal and civil legal aid. The Respondent carried out work on behalf of his clients who had been granted legal aid. On the clients' legal aid certificates, the Respondent was named as the nominated solicitor. As nominated solicitor he was responsible for amongst other things the correct submission of the accounts. In order to be registered to provide criminal and civil legal aid the solicitor was required to work in line with the Society's Code of Conduct for Criminal Work, along with primary and secondary legislation regulating the provision of legal aid in Scotland.

9.3 In particular, the Respondent has the following obligations:

The Code of Conduct for Criminal Work Article 3:
"A solicitor is under a duty to prepare and conduct criminal cases by carrying out work which is actually and reasonably necessary and having due regard to economy"

Guidance issued by SLAB in respect of the Article states:
"Every solicitor should carry out these duties in a responsible and professional manner. With these duties uppermost in mind, the solicitor must not view criminal cases only as a means of financial enrichment. For the purposes of cases which are legally aided, this statement is declaratory of Regulation 7(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. Regulation 7(1) states that 'subject to the provisions of Regulations 4, 5, 6 and 9 and paragraph (2) of this Regulation, a solicitor shall be allowed such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy' ... Abuse of the Legal Aid system may be fraudulent and may be considered as professional misconduct and may lead to disqualification under Section 31 of the Legal Aid (Scotland) Act 1986."

Section 3.7.1 of Code of Practice for Criminal Legal Assistance (as authorised by the Section 25B Legal Aid (Scotland) Act 1986), which states that a solicitor is expected

to engage with SLAB in the exercise of any of its functions or otherwise, in an open, timely and co-operative manner.

SLAB's related Guidance includes a requirement to :-

- co-operate with SLAB in responding to requests for information and answering any questions about the firm's or solicitor's applications, legal assistance accounts, compliance with the Code or performance on behalf of clients (including questions relating to the measurement of that performance). Any documentation is made available on request and, if requested, authorised officers of SLAB are allowed access to the firm's or solicitor's premises (including off-site storage) and records. Responses to any requests for information are made timeously and in writing, preferably by electronic means.
- submit applications (whether initial applications, sanction applications, or otherwise), accounts and supporting documentation in a standard and in a format that meets SLAB's requirements.
- in all interactions with SLAB, assist in the efficient and effective discharge of SLAB's functions and refrains from any steps which cause additional or unnecessary administration or over use of SLAB staff resources. This includes avoiding, where possible, late submission of applications and requests for additional expenditure, incomplete applications, or applications unsupported by required documentation.

Criminal Legal Aid (Scotland) Fees (Regulations) 1989

Regulation 8 states:-
"...expenses actually and reasonably incurred by [themselves] [.....] in travelling to and from the court at which the accused person appears or the trial or appeal takes place (not being a court in the town or place where the solicitor has a place of business)"; that, "where public transport is not used a reasonable mileage allowance shall be treated as an outlay"; and "any out of pocket expenses actually and reasonably incurred"

9.4 Client: "JF" – Legal Aid Account submitted 29 June 2012

This account contained the following entries:

1. 17 March 2012 Paid Hotel accommodation £342.37. A second night stay in Glasgow having travelled from Dumfries to Glasgow post consultation.
2. 23 March 2012 Paid accommodation in Inverness £183.25
3. 27 April 2012 Paid Hotel Bill Inverness £186.95
4. 29 May 2012 Paid Hotel Bill £465.26
5. 1 June 2012 Paid Hotel Bill £374.75

Entry no 1 was vouched by a bill including £94.55 for restaurant dinners.
Entry no 2 vouching has not been provided to the secondary complainer.
Entry no 3 was vouched by a bill from the Drumossie Hotel including £96.95 for dinner and drinks (including £46.00 for wine)
Entry no 4 was vouched by a bill from the Rocpool Reserve including accommodation at £315 (for 1 night); £49.00 for food; £87.60 for wine & drinks
Entry 5 was vouched by a hotel bill from the Bonham including £330 for bed & breakfast (2 nights); £2.75 newspaper; 2 bar lunches for the same day (1 June).

9.5 Some hotel stays included charges for alcoholic drinks which are not recoverable. The Respondent accepted in correspondence dated 7 September 2012 that charges for alcoholic drinks and newspapers were improper. The solicitor accepted as reasonable overnight accommodation charges of £100 for his stays Inverness and Edinburgh.

9.6 Client: "WH" – Legal Aid Account submitted 16 May 2013

This account contained the following entries:

1. Jan 10 Paid Ferry fare to Lochmaddy on 7/1/13 and return 10/1/13 £63.40
2. Jan 10 Paid Accommodation charges £388.33

The ferry fare was vouched by an advance booking reference WF72159 with both the 7 and 10 January ferry journeys booked in advance. The accommodation was vouched with a hotel invoice for 3 nights 7, 8 & 9 January.

9.7 In correspondence with SLAB the Respondent accepted that he had failed to ensure that the ferry fares and accommodation was apportioned between 4 other cases. He agreed an abatement after extended correspondence of 4/5ths.

9.8 Client "JG"- Legal Aid Account submitted 26 January 2015

The account was submitted online and contained the following entries

1. 14 October 2014 -Travel/subsistence – Ferry £81.89
2. 10 November 2014 Travel/subsistence Ferry £105.37
3. 12 January 2015 Travel/subsistence Ferry £117.05

Entry No 1 was vouched with Calmac booking reference W128554 travel out on the 13 October and back on the 15 October 2014 at a cost of £70. An invoice for the Lochmaddy Hotel for two nights at £75.00 per night and bar food at £107.56 over two nights. A total of £327.56. There was no breakdown of the food purchased. The Respondent had apportioned the outlays.

Entry No 2 was vouched with a Calmac booking reference W134592 for travel out on the 10 November 2014 add return on the 12 November 2014 at a cost of £70.00. The invoice from Langass Lodge shows a room tariff of £115 per night (x2); Champagne; wine and; whisky. The evening food bill of the 11 November shows 2 starters; 2 main course and 2 sweets; cheese cake and sticky toffee pudding. Accommodation and food amounted to £351.45. The Respondent had apportioned the outlays.

Entry No 3 was vouched by a Calmac booking reference 1638367 travel out on the 5 January and back on the 8 January 2015. The Langass Lodge accommodation and food bill narrated accommodation for 3 nights at £85 per night (£255). The bar/restaurant bill totalled £69.25 for the 6 January and £73.95 for the 7 January – there was no breakdown. The Respondent had apportioned the outlays.

9.9 The Respondent accordingly submitted an account seeking payment of a proportion of alcoholic drinks and potentially for meals for other diners on the 11 November 2014. The Calmac ferry bookings were made in advance of travel for the journeys

mentioned. The Respondent was only required to attend court on behalf of JG on one day. SLAB entered into correspondence with the Respondent in connection with the account. In particular they sought a breakdown of the restaurant bill for the January stay.

9.10 On the 7 May 2015 the Respondent wrote: *"Your request for a breakdown of a restaurant bill is completely unreasonable having regard to the passage of time. It is accepted that there are items contained therein that are non-recoverable. However, given that a standard main course varies between £18-£22 and a starter, £6-8 it is quite obvious that the standard £25 dinner allowance is properly payable. In respect of the entry of 11th November, we have repeatedly told the Legal Aid Board that the writer is diabetic and therefore has special dietary requirements. As such, he does not do sweet and will regularly have a second savoury dish. We have also repeatedly told the Legal Aid Board that the writer travels from Uig to Lochmaddy on the ferry on a Monday evening and cannot return until the following Wednesday as there is no ferry returning to Uig on a Tuesday."*

9.11 The Respondent further wrote on the 5 June 2015: *"... the Legal Aid Board have a cap on food and given that the accounts far exceed this we would imagine you would only require to pay the cap. ...That the writer may have bought food for third parties is irrelevant to your consideration of the modest amount claimed. If you bother to check with Caledonian MacBrayne and the metrological offices you will note that it was not properly possible to return on the 7 [January] due to ferry cancellations. As it was the writer was able to obtain travel on a ferry on the 8 [January] before the Island was cut off for a further five days. ..."*

9.12 Client "SC" – Legal Aid Account submitted 4 March 2015

This was a civil legal aid case which involved 9 callings at Lochmaddy Sheriff Court. The main observation of the SLAB assessor was that the Respondent did not submit the references of the cases he was apportioning the outlays with. They suggested the Respondent should walk from the ferry at Lochmaddy to and from his hotel and court. The assessor suggested evening accommodation should be restricted to £70.00. The Respondent rejected these abatements. However, he was able to provide SLAB with

all the references for all the cases the outlays were to be apportioned between. The Respondent had not submitted vouching for his ferry trips, accommodation & sustenance. He required to be asked for that. SLAB restricted the outlays – which when the vouching was supplied *inter alia* included meals for more than one guest and evening meals at £50+.

9.13 Client "AM" – Legal Aid Account submitted 12 August 2015

This account contained the following entries:

1. Dec 2014 Paid Travel fares & Hotel Accommodation £99.03
2. Jan 2015 Paid Travel fares & Hotel Accommodation £93.64
3. March 2015 Paid Travel fares & Hotel Accommodation £224.48
4. April 2015 Paid Travel fares and Hotel accommodation £74.04

Initially the Respondent did not submit vouching, and SLAB required to request the same. In due course vouching was provided. It is clear the sums sought were following apportionment.

Entry 1 the ferry voucher and an invoice from Langass Lodge including accommodation charges of £85 per night and bar/restaurant bills totalling £99.70 and £70.65. The bar/restaurant bill either covered 2 people eating and/or alcoholic beverages.

Entry 2 the ferry voucher and an invoice form Langass Lodge which included accommodation charges of £85 per night. And "bar/restaurant" bills amounting to £69.25 & £73.95. The bar/restaurant bill either covered 2 people eating or alcoholic beverages.

Entry 3 the ferry voucher and an invoice from Langass Lodge which include accommodation charges of £115 per night; red and white wine; whisky and 2 meals which averaged in excess of £31.

9.14 Client "SM" – Legal Aid Account submitted 8 September 2015

The account extends to some 44 pages; it had been prepared on the Respondent's behalf by Alex Quinn & Co. There are numerous entries where the Respondent sought payment for overnight stays in Lochmaddy. Some were for court appearances, but most were to visit and take instructions from SM. The account did not list the other files the outlays were to be apportioned with. Some of the vouchers sent in support of the outlays have been identified in the previous paragraphs e.g. (for the 8-10 December 2014 Langass Lodge, 5-7 January 2015 Langass Lodge). The vouchers did not break down the "Bar /restaurant" charges and were excessive. The bar /restaurant bills were either for two people or included alcoholic beverages.

9.15 Mr M appeared in Glasgow High Court before proceeding to trial in the High Court at Edinburgh. The Respondent claimed first class rail travel between Inverness and Glasgow. The Respondent claimed for a double apartment in Edinburgh between 28 June & 4 July (6 nights). The total cost was £890. The Respondent's wife stayed with him at the apartment. The Respondent submitted a voucher for dinner on the 29 June, it was for £79.20. It was for dinner for two. It included charges for alcoholic beverages amounting to £33.95. The full amount was entered into the account. The Respondent submitted a voucher for dinner on the 1st July 2015. The voucher was for £351.80. The full amount was included in the account. The voucher was for Martin Wishart, dinner for two. It included alcoholic beverages totalling £146.00.

9.16 Consideration of the Respondent's accounts was escalated within SLAB. On the 15 September 2015 a Manager of the Compliance & Solicitor Investigation team at SLAB wrote to the Respondent. Some key points in the letter are:

9.16.1 *"It seems that your approach is to put the burden on SLAB to disallow what you otherwise claim, and to the effect that what is not disallowed will be paid. It seems you do not, or at least generally, take steps to limit your claims to…that are … established to be allowable. Your approach appears to be to claim the full amount incurred, bundling together the types of expenses that are generally reimbursable to some extent, and expenses that will never be allowable, on the understanding that through the SLAB scrutinizing process, the correct amount will be calculated and paid.*

9.16.2 *You appear to be somewhat under a misapprehension that the SLAB approach is a simple one, and that standard allowances are simply imposed by SLAB. If this is your view, it is mistaken. The account process and principles are well published. SLAB will allow reasonable and necessary outlays incurred with due regard to economy. What is reasonable and necessary varies according to the circumstances.*

9.16.3 *Unless full details of the totals and the apportionment are available for all accounts there is a real danger that the apportionment will un-sight those assessing of a claim, to the effect there is overpayment.*

9.16.4 *...if alcohol is not itemised, or not deducted from an invoice prior to submission of the account, the Accounts Assessment department may, inadvertently, not reduce the bill. Consequently, SLAB will pay an account with outlays included for alcohol that we cannot legitimately pay. ... SLAB staff must recalculate invoices to establish what the correct claim should be, unnecessary work for a department with limited resources particularly when this is something that a firm should do themselves.*

9.16.5 *I enclose for your attention a copy of the Caledonian MacBrayne timetable Uig- Lochmaddy from 27th October to 31 December 2014, the timetable that was in effect when you were compelled to stay overnight on the Tuesday 11th November. As you will note there is a ferry on the Tuesday, departing at 16:00 hours... I would appreciate your comments on this apparent inconsistency in what you state are the days the ferry operates compared to what is on the Caledonian MacBrayne timetable.*

9.16.6 *SLAB does not consider it reasonable to pay for two main courses. Furthermore, if your dietary requirements mean that you cannot 'do' sweets, why does the itemised invoice detail cheesecake?*

9.16.7 *I have to add that I am concerned you may not have a full appreciation of the seriousness of this situation. Knowingly and persistently charging*

irrecoverable items such as alcohol is a serious matter, and it may not be brushed aside as some characteristic of the way you do things which is otherwise acceptable, and something that merely and only causes an administrative inconvenience for SLAB as a result of its own peccadillos. Had that been the only issue, and although wholly unsatisfactory in itself, a proportionate response would remain the non-payment of such outlays until adequate vouching is available."

9.17 The Respondent wrote, in response, a letter dated 30 September 2015. Some key points in the letter are:

9.17.1 "*You state that the obligation on the solicitor in submitting an account is not just to provide full information to permit an assessment by SLAB of the circumstances and the reasonableness of assessing charges but failing to claim on the basis that only such items are claimed in the first place. Please refer to the specific regulation that this pertains to.*

9.17.2 *It is not my fault that the SLAB staff have inadequate and limited resources. That is a matter that you need to take up with those that fund you.*

9.17.3 *Specifically with reference to [JG] I can assure you that I had no desire to stay in Uist any longer than I wished but if you bothered to check with Calmac you will see that was a week where there was serious ferry disruptions and being left with very bizarre circumstances of booking onto a ferry on a Wednesday which is subsequently cancelled and you cannot get a ferry on a Thursday or a Friday as these are otherwise fully booked.*

9.17.4 *I feel however that it is pertinent to remind you that in a previous existence the Legal Aid Board asked me to apportion preparation and attendance at Lochmaddy Sheriff Court between five files. That was under the old regime when you used to pay two hours preparation time for all Trials. Up to that point the Board were only ever charged one Trial preparation per sitting at Lochmaddy but as a result of the Board's desire to save funds it cost them an*

additional £400 on that particular occasion and several hundred additional funds in subsequent situations."

9.18 There followed further correspondence between SLAB and the Respondent dated 11 December 2015, 21 January 2016, 14 January 2016, and 10 February 2016 (which correspondence contained one sentence "Do you know me?"). Comments by the Respondent of note are:-

9.18.1 *Unfortuantely (sic), this cannot be a full response to your letter due to the fact that I am heavily involved in preparing for a Debate with Counsel on Friday of this week, the consequence of which will see me conducting a ten day jury trial in the near future. However, there is a common factor that I have identified with outsourcing accounts to what I assumed to be a reputable firm of Law Accountants and whom I had otherwise understood worked with the Board. The accounts included that of [JF], [SM] (which is still subject to negotiation) and [SC]. When you pay for a service you expect it to be done competently. I would stress however that [JG] was dealt with inhouse.*

9.18.2 *You state that you are concerned that I do not have a full appreciation of the seriousness of the situation(sic). As such this statement does cause me concern to the point that I ask should a formal caution be issued or are you content to deal with this adminstratatively (sic) going forward. For the record, I refute the four concerns you have raised but otherwise reserve my position in regard to that.*

9.18.3 *... your letter of 11 December 2015 is defamatory in nature and contains bullying and discriminatory statements. As such, I am not willing to engage with you and request that this matter be passed to someone more superior in order that we can resolve outstanding issues."*

9.19 Caledonian MacBrayne operated a ferry on the winter season of 2014/15 from Lochmaddy to Uig. It departed at 16.00 hours. The check in for cars closed at 15.15 hours.

9.20 Before SLAB consider a claim for payment of fees or outlays the nominated solicitor must complete a certificate (either in writing or online) that the items charged for are *inter alia*:

9.20.1 Accurate and represent a true and complete record of all work done.

9.20.2 That all work was carried out accordance with Code of Practice in relation to criminal assistance

10. The Tribunal found the Respondent guilty of Professional Misconduct in respect that he:-

10.1 Submitted accounts to the Scottish Legal Aid Board which included outlays which were unrestricted for alcoholic beverages and food for others in breach of Rule B1.2 of the Law Society of Scotland Practice Rules, Article 3 of the Criminal Code of Conduct, Regulation 8(1)(c) of the Criminal Fees Regulations 1989 and SLAB's Code of Practice for Legal Assistance (April 1998)

and

10.2 Failed to communicate effectively with SLAB in breach of Rule B1.9.1 of the Law Society of Scotland Practice Rules and failed to cooperate with SLAB in breach of Section 3.7.1 of SLAB's Code of Practice for Legal Assistance (April 1998)

The finding of misconduct at paragraph 10.1 was made individually. The finding of misconduct at paragraph 10.2 was made *in cumulo* with the finding at paragraph 10.1.

11. The Tribunal found the Respondent not guilty of professional misconduct in respect of the averment of professional misconduct regarding apportionment of fees contained at paragraph 6.3 of the Complaint.

12. The Tribunal's decision was communicated to parties at the hearing on 7 February 2020. However, due to lack of Tribunal time, the hearing was adjourned to 10 March 2020.

13. On 10 March 2020, the Complainers were represented by their Fiscal, Mr Stewart. The Respondent was present and was represented by counsel, Mr Mason. The Tribunal heard submissions in mitigation.

14. Having heard Counsel for the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 March 2020. The Tribunal having considered the Complaint dated 12 June 2019 at the instance of the Council of the Law Society of Scotland against Duncan McKinnon Burd, Anderson MacArthur Limited, Somerled Square, Portree, Isle of Skye; Find the Respondent guilty of professional misconduct in respect that he (1) submitted accounts to the Scottish Legal Aid Board which included outlays which were unrestricted for alcoholic beverages and food for others in breach of Rule B1.2 of the Law Society of Scotland Practice Rules, Article 3 of the Criminal Code of Conduct, Regulation 8(1)(c) of the Criminal Fees Regulations 1989 and SLAB's Code of Practice for Legal Assistance (April 1998) and (2) failed to communicate effectively with SLAB in breach of Rule B1.9.1 of the Law Society of Scotland Practice Rules and failed to cooperate with SLAB in breach of Section 3.7.1 of SLAB's Code of Practice for Legal Assistance (April 1998), the first finding of misconduct being found individually and the second finding of misconduct being found *in cumulo* with the first; Censure the Respondent; Fine him in the sum of £5,000 forfeit to Her Majesty; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)
Beverley Atkinson
Vice Chair

15. 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 11 JUNE 2020.

IN THE NAME OF THE TRIBUNAL

Beverley Atkinson
Vice Chair

NOTE

At the hearing on 7 February 2020 and 10 March 2020, the Tribunal had before it the Complaint as amended, Answers, the Joint Minute of Agreement, three Inventories of Productions for the Complainers, two Inventories of Productions for the Respondent, a List of Witnesses for the Complainers, a List of Witnesses for the Respondent and a List of Authorities for the Complainers.

SUBMISSIONS FOR THE COMPLAINERS

With reference to the Complaint and Productions, the Fiscal detailed the Respondent's obligations when undertaking legal aid work. In particular he took the Tribunal through the obligations on the Respondent when acting as a nominated solicitor carrying out legal aid work. He referred to Regulation 8(1)(a) and (c) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and Section 3.7.1 of the Code of Practice in Relation to Criminal Legal Assistance which were summarised at paragraph 4.2 of the Complaint. The Fiscal then took the Tribunal through the Complainers' productions in some detail. He referred, in particular, to the accounts submitted by the Respondent to SLAB in respect of matters set out in the Complaint at paragraphs 4.3 – 4.14. The accounts contained improper charges. The Respondent had submitted, and asked for payment of, alcohol, meals for persons other than himself, and expensive hotels, all of which were not reasonable charges to SLAB.

In respect of matters set out at paragraph 4.3 – 4.4 of the Complaint, the Respondent submitted an account to SLAB containing entries for restaurant bills which included charges for alcoholic drinks. He had submitted hotel bills which were excessive and did not meet the requirement of Article 3 of the Criminal Code of Conduct. He had submitted charges for 2 bar lunches for the same day. The Fiscal submitted that 2 bar meals had been eaten and charged but only one was payable by SLAB.

In respect of matters set out at paragraph 4.5 – 4.6 of the Complaint, the Respondent had submitted an account to SLAB containing entries for (a) a ferry fare; and (b) 3 nights' accommodation. The Respondent should have apportioned these costs between 5 cases but had failed to do so.

In respect of matters set out at paragraphs 4.7 – 4.10 of the Complaint, the Respondent had submitted a charge for 2 nights' accommodation together with a charge for bar food but he had failed to provide a breakdown of the food purchased. He had submitted a charge for accommodation at the Langass

Lodge which included claims for champagne and whisky. He submitted a charge for an evening food bill which showed the purchase of 2 starters, 2 mains courses and 2 sweets. The Fiscal submitted that 2 meals had been eaten and charged but only one was payable by SLAB. On another occasion, the Respondent had submitted a charge for 3 nights' accommodation at the Langass Lodge. The restaurant bills submitted in respect of that stay did not provide a breakdown of the costs incurred. When SLAB requested a breakdown, the Respondent refused to provide one.

The Fiscal referred the Tribunal to correspondence between SLAB and the Respondent in around May 2015 which correspondence was summarised at paragraphs 4.9 – 4.10 of the Complaint. The Respondent had suggested that SLAB's request for a breakdown of a restaurant bill incurred in November 2014 was completely unreasonable with regard to passage of time. The Respondent accepted that he had submitted an account containing non-recoverable items. The Respondent advised that he was diabetic and therefore "does not do sweet" and will regularly have a second savoury dish. The Fiscal referred the Tribunal to an invoice showing the purchase of 2 sweets. He submitted that the inference to be taken was that the Respondent had charged SLAB for the cost of a meal for 2 diners. He submitted that the Respondent's response to SLAB in his regard was either misleading or an attempt by the Respondent to disguise that there had been a second diner.

The Respondent had also submitted a charge for a return ferry voucher from Uig to Lochmaddy. The ferry had been pre-booked by the Respondent with travel out on Monday 13 October 2014 and returning on Wednesday 15 October 2014. The Respondent was only required to attend court on his client's behalf on one day. SLAB queried why a 2-night stay was required. In correspondence with SLAB, the Respondent advised that he could not return until Wednesday because there was no ferry returning to Uig on a Tuesday. The Fiscal referred the Tribunal to a ferry timetable showing that there were Tuesday sailings. The Respondent's response to SLAB was therefore misleading.

In respect of matters set out at paragraph 4.11 of the Complaint, the Respondent had submitted an account for payment without providing vouching. SLAB had to request vouching from the Respondent. The Fiscal said it was reasonable to infer from the vouching that the Respondent had submitted charges which either included alcoholic drinks and/or were costs incurred for 2 diners. These were not recoverable costs.

In respect of matters set out at paragraph 4.12 of the Complaint, the Respondent again submitted an account to SLAB without proper vouching. This vouching had to be requested. One of the invoices

provided by the Respondent included charges for alcohol and the cost of a meal for 2 diners. In respect of 2 other invoices produced by the Respondent, the Fiscal submitted that it was reasonable to infer that the Respondent had submitted charges which either included alcoholic drinks and/or were costs incurred for 2 diners. These were not recoverable expenses.

In respect of matters set out at paragraphs 4.13 – 4.14 of the Complaint, the Respondent had submitted an account with numerous overnight stays in Lochmaddy. Some were for court appearances for, and some related to visits to, a particular client, SM. The Respondent did not list the other matters that outlays incurred were to be apportioned with. The Respondent submitted charges for first class rail travel. He submitted a charge for 6 nights' accommodation in Edinburgh for himself and his wife. He submitted a charge for dinner for 2 people which included alcoholic drinks. He submitted a voucher for dinner for 2 people at Martin Wishart which included alcoholic drinks. The Fiscal submitted that a bill for dinner amounting to £351.80 was excessive and not a reasonable charge against the legal aid fund.

The Fiscal also referred the Tribunal to the correspondence between SLAB and the Respondent relating to his accounts. This correspondence was summarised at paragraphs 4.15 - 4.17 of the Complaint. The Respondent was not co-operative in responding to SLAB's queries. The Respondent had instructed a law accountant to prepare his accounts, however, the Respondent could not abrogate his responsibilities. He had personal responsibility to certify that his account was accurate and represented a true and complete record of all work done and that all work was carried out in accordance with the Code of Practice in Relation to Criminal Legal Assistance. He signed certificates on submission of the accounts. Signing of a certificate is a deliberate, positive, act. It is not an omission. Either the Respondent knew the true position or was reckless.

The Fiscal summarised the duties detailed at paragraph 5 of the Complaint. The Fiscal submitted that the Respondent's admitted conduct was sufficient to meet the *Sharp* test. He said it was a serious and reprehensible departure from the standards of competent and reputable solicitors. He submitted that the Respondent's conduct had been dishonest and therefore breached Rule B1.2 of the Practice Rules. If the Tribunal was not with him regarding dishonesty, he submitted that the conduct lacked integrity.

The Fiscal submitted that even after SLAB had indicated that the Respondent could not claim for alcohol, and the Respondent had acknowledged this, he continued to do so. Therefore, the Respondent had been dishonest in asking SLAB to pay for alcohol. The Respondent had asked

SLAB to pay for hotels costs, such as those for stays at the Bonham or Rocpool, which were far in excess of what could be considered reasonable in terms of the Regulations. The Respondent had no regard to economy. The Respondent had asked SLAB to pay for meals for second diners. This was also dishonest. The Respondent knew or should have known that charging for alcohol, excessively expensive meals and meals for more than one person was not a proper use of public funds.

The Fiscal referred to Law Society of Scotland v Raymond Bainbridge. In that case, the solicitor had made a large number of incorrect claims, and had double charged on more than sixty occasions over fourteen months. It was noted in that case that the system for the payment of fees to solicitors in criminal legal aid proceedings is based on trust. There is a heavy onus on the solicitor to ensure that he is not associated with a claim reflecting a sum in excess of what he or his staff are entitled to for their services. The matter was of particular gravity because public funds were involved, and the Respondent's conduct brought the profession into disrepute.

With regard to integrity, the Fiscal referred the Tribunal to Fyfe v Law Society of Scotland 2017 S.C.L.R. 464. He quoted from paragraph 36 of the judgement which notes *"The fact that the Tribunal did not make, and were not asked to make, a finding of dishonesty does not prevent a conclusion that the conduct was deceitful. Effectively, the tribunal concluded that the actions of the petitioner, whilst not dishonest, lacked integrity."* Reference is also made in that paragraph to Scott v SRA [2016] EWHC 1256 (Admin) which notes that a person lacks integrity if he/she acts in a way which, although falling short of dishonesty, lacks moral soundness, rectitude and steady adherence to an ethical code. For this purpose, a person may lack integrity even though it is not established that he/she has been dishonest. Want of integrity is capable of being identified as present or not by an informed tribunal or court by reference to the facts of a particular case.

The Fiscal noted the occasions on which the Respondent had paid for more than one diner, had his wife stay with him in Edinburgh, bought alcoholic drinks, dined in exclusive restaurants and stayed in excessively expensive hotels. The Respondent had sought that the taxpayer cover these expenses. These had all been submitted by the Respondent as a proper charge. The Fiscal invited the Tribunal to find that the conduct was dishonest. The Respondent knew, and acknowledged, in September 2012 that alcohol was not a proper charge but he continued to submit charges for alcoholic drinks. If this was not dishonest, it certainly lacked integrity.

The Fiscal submitted that the apportioning issues did not arise as a result of mistakes. He

acknowledged that if they were just mistakes, they would not amount to misconduct, however, there were numerous times when outlays had not been properly apportioned. A repeated failure could be evidence of disregard.

The Fiscal noted that the Respondent had submitted several accounts which included claims for two desserts when two people were dining. This brought into question the Respondent's integrity when, in correspondence with SLAB, he indicated that he did not "do sweets". The Fiscal submitted that, where two meals were claimed for, it was reasonable to infer that two people had been dining. It is not proper to ask SLAB to pay for someone else's meal. This shows a lack of integrity and/or a failure to communicate effectively with SLAB. The Respondent ought to have claimed only for half of this food bill.

The Fiscal also referred to Tribunal to the Respondent's correspondence with SLAB. SLAB had to request information and breakdowns from the Respondent rather than this being volunteered with submission of accounts. The Fiscal referred to SLAB's request for a breakdown of a bill from the Langass Hotel. The Respondent had declined to ask the hotel for a breakdown of his bill. As could be seen from other bills provided to SLAB, the Langass Hotel was capable of providing a breakdown, yet the Respondent refused to request one. This conduct was not open, honest and cooperative.

The Fiscal said that the Respondent knew there were ferry sailings on a Tuesday. There was a sailing on Tuesdays at 4pm. It may have been reasonable for the Respondent to say that he could not book on with his car at 3.15 in case he was still at Court. However, the Respondent did not give any explanation. He said in his correspondence with SLAB that there were no ferries on a Tuesday and that, the Fiscal submitted, was false.

In relation to the January 2015 ferries, the Respondent stated to SLAB in correspondence that he could not get off the island because of bad weather. There had been bad weather on that day, however, the Respondent had pre-booked the ferry. He never intended to leave. The Fiscal submitted this was another example of dishonesty or lack of integrity.

The Fiscal submitted that the Respondent's conduct brought the profession into disrepute. He was seeking public money to pay for his lifestyle. He had certified these as proper charges. At best, he did not look at the accounts. However, in the Fiscal's submission, he did see them and was dishonest. In

his correspondence with SLAB, his responses to issues raised had not been honest and he had not been co-operative.

In response to questions from the Chair about the charges for hotel accommodation, the Fiscal confirmed it was correct that SLAB issues no guidelines regarding the maximum outlay for accommodation it will pay. It says that what is reasonable may vary according to circumstances. The Chair asked the Fiscal for his submission on what the Respondent's duty was in those circumstances. The Fiscal said he had only picked out three hotel bills. These were examples of claims that went far beyond what was reasonable. The Respondent had no due regard to economy. The Chair asked if the Respondent should be criticised for choosing to stay in a particular hotel. The Fiscal said there is no criticism regarding the choice of hotel but not restricting the amount claimed for is subject to opprobrium. The Chair asked what level of cap the Respondent should have placed on his own costs where SLAB had provided no guidance and no specific cap. The Fiscal said the Respondent should have had due regard to economy and restricted the figure sought accordingly. By claiming over £300 for overnight accommodation, the Respondent showed a lack of integrity. Just because the Respondent has to produce a receipt for the full cost, does not mean he can claim it. The Respondent did claim the full amount for the accommodation. He also submitted charges for alcohol and for meals for more than one diner. These were not proper charges and they should not have been claimed for. It was the signing of the certificate certifying these as reasonable charges that amounted to misconduct.

A member asked how the Respondent would know that alcohol was not a recoverable item. The Fiscal said that he was not able to produce any SLAB guidance in this regard, but that competent and reputable solicitors know not to claim for alcohol. In addition, the Respondent accepted this in his letter of 7 September 2012 (Production 2/4 in the First Inventory of Productions for the Complainers).

SUBMISSIONS FOR THE RESPONDENT

Counsel for the Respondent, Mr Mason, noted that this case involved conduct which was five to eight years old. There are papers missing from the files and so only part of the picture is available to the Tribunal.

Mr Mason submitted that it was for SLAB to clearly set out guidance. They had not done so. SLAB

are the arbiters of what is reasonable in terms of travel, accommodation and work. He referred to Articles 7, 8 and 11 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (Production 23 in the Second Inventory of Productions for the Complainers). With reference to Article 7, he noted in respect of fees allowable, that a solicitor is allowed such amount of fees "*as shall be determined to be reasonable remuneration…*". That must, he submitted, be a reference to an arbiter, that arbiter being SLAB. It is not for a solicitor to determine what is reasonable. That is the function of SLAB. Mr Mason referred the Tribunal to Article 11 of the Regulations and submitted that if any question arises regarding what is allowable, then the matter shall be referred for taxation. Mr Mason submitted again that it was for SLAB to determine what was reasonable. He noted that Article 8 of the Regulations refers to a solicitor being "allowed" outlays. This language should be construed as being permissive of SLAB. It is for SLAB to set out what is reasonable or determine what is reasonable.

Mr Mason said that the Complaint was predicated on a misinterpretation of the law. It was for SLAB to carry out the assessment and that is exactly what they had done in each of the cases referred to in the Complaint. The accounts were rigorously checked, information was requested and provided, and abatements were made. SLAB followed their recognised procedure of abatement. Ultimately a figure was agreed that all parties were content with. There was no fraudulent conduct. There was no duplication of work entries or invention of work. No work or fees were challenged. The subject matter of the complaint related only to outlays for travel and subsistence. The Chair asked a question about whether failure to apportion could amount to double charging. Mr Mason indicated he would address this in full, however, there had been no double accounting. There was no question of apportionments not having taken place.

In respect to matters set out at paragraph 4.3 – 4.4 of the Complaint relating to client JF, Mr Mason said the issues arose in respect of an account for work carried out many years ago. There had been difficulties in obtaining accurate information. He referred the Tribunal to two letters from a law accountant (Production 20 in the Second Inventory of Productions for the Respondent and Production 24 in the Third Inventory of Productions for the Complainers). The law accountant noted that in the past it would always have been the case that any outlay incurred and posted to a client ledger would be included in an account of expenses. It would then be for the solicitor and SLAB to negotiate any abatements or restrictions to be applied to the account. In her view, in the past, the onus was on SLAB to scrutinise a solicitors account and propose modifications where they felt appropriate. However, in more recent times, SLAB has been more forthright in advising what they will reimburse, and this information has been filtered back to them through practitioners. Mr Mason submitted that

this approach was consistent with the regulations. He invited the Tribunal to find that there had been a change in SLAB's practice and nothing improper or deceitful had occurred.

Mr Mason submitted that the abatement of costs for alcoholic drinks by SLAB from the JF account was just one abatement amongst many abatements. By letter of 7 September 2012 (Production 2/4 for the Complainers), the Respondent sought advice regarding overnight stays. He asked for but did not receive clarification with regard to accommodation charges. In the letter dated 25 September 2012 (Production 2/2 for the Complainers), SLAB confirmed that there was no fixed, standard amount payable in respect of accommodation. However due to their experience of receiving claims from solicitors they *"accordingly are able to make offers of payment based on what, in our view, appears to be reasonable."* In doing that they have regard to examples of costs of hotels in the relevant area based on internet searches. Mr Mason said this was the normal accounting process. Agreement was reached in a cordial, pleasant, way. If there had been dishonesty, as is alleged, agreement of the account would not have proceeded in that way. The JF account was now before the Tribunal but SLAB had not seen fit to refer this matter to the SLCC when making their complaint. In Mr Mason's submission that was reflective of the fact that, at the time, SLAB did not consider anything in the Respondent's account for JF to be out of the ordinary.

Continuing his submissions in respect of matters set out at paragraph 4.4 of the Complaint, Mr Mason noted that 5 entries were relied upon by the Complainers. Entries 1, 3 and 4 included charges for alcohol. There was no voucher for entry 2. Entry 5 did not contain alcohol. In respect of the Respondent's stay at the Bonham, the Complainers appeared to suggest that simply staying there amounted to misconduct. That could not be correct. Mr Mason suggested that, unless SLAB issue a list of permitted establishments, the Respondent can say wherever he chooses, whilst at the same time accepting that it is then a matter for SLAB to say whether the sum claimed is recoverable or not. The Respondent did not do anything other than pass on the voucher to SLAB and ask them to perform their statutory function and assess what was reasonable. In his submission, the JF account followed SLAB's normal accounts procedure at the time.

With regard to the WH account, Mr Mason noted that the Respondent was not asked about apportionment in correspondence with SLAB but instead he took it upon himself to volunteer the information. That was not dishonest conduct.

With reference to the JG case, the Respondent accepted that the full cost of the meal was not

recoverable. He did not expect it to be. The Respondent was essentially seeking a payment of £25 for food in accordance with long established practice. The Chair asked Mr Mason whether he was suggesting that the Respondent had no option but to claim for the full amount of a food bill in terms of the Account submitted but he claimed for the full amount on the assumption that SLAB had the power to, and would, abate the claim. Mr Mason said that was correct. SLAB will require an invoice for dinner no matter where the Respondent dines, what he has, or how many people he dines with. The Respondent knew SLAB would only pay £25 for subsistence. That is what the Respondent expected to receive. The Respondent's practice was to include the full amount on the assumption that SLAB had the power to, and would, abate. That was the practice at the time. However, the Respondent has now bent to the will of SLAB and has changed his practice since issues were raised with him in 2015. Mr Mason said that in 2020 it could be said that alcohol is not an appropriate charge, but the regulations say that SLAB have to determine what is reasonable. If there is no guidance, some practitioners may still fall foul of this.

In relation to the question of ferry travel, Mr Mason said the Respondent was not aware until the date of the hearing that there was a ferry available on Tuesday 7 January 2015. However, SLAB should have been aware that the Respondent was engaged in work on that date. That is why he booked for three nights. He always intended to work that day. There was nothing untoward or dishonest about the conduct. At worst the Respondent made an inaccurate statement. However, it was in fact true that it was not possible to obtain a ferry on that date. The Respondent may have made an inaccurate statement but there was nothing to be gained from it. The conduct was not dishonest.

In relation to the accounts which contained charges for alcohol, Mr Mason noted that the Respondent provided bills which were broken down. He did not try to conceal that he had paid for alcohol. Someone who is dishonest would not submit invoices where these things were so clearly set out. Mr Mason referred to Tribunal to Production 4/25 in the First Inventory of Productions for the Complainers, being an invoice from the Langass Lodge. Mr Mason highlighted the deductions marked on the invoice by SLAB, which included abatements for costs of alcohol. Mr Mason said this invoice was an example of abatements being made by SLAB, negotiations taking place, and the account then being agreed. There was no notification made to the Respondent that his practice was anything other than acceptable, there was simply an abatement made. This was the normal account assessment process at the relevant time.

In respect of matters set out at paragraph 4.11 of the Complaint relating to client SC, Mr Mason

noted that the Respondent did apportion these cases and that the Complainers had been unable to produce the SLAB "mailshot" regarding this procedure.

In respect of matters set out at paragraph 4.12 relating to client AM, SLAB and the Respondent reached agreement. Mr Mason noted that all cases in the Complaint except JF, were submitted during the same five month period and the work related to an earlier period between October 2014 and July 2015.

It was not until the submission of the SM account in September 2015 (referred to at paragraphs 4.13 – 4.14 of the Complaint) that SLAB first suggested to the Respondent there could be a compliance issue and drew his attention to the seriousness with which they viewed matters. By correspondence from SLAB dated 12 September 2015, the Respondent received a notification that he required to take corrective action. That was the first proper notification that his earlier practice was not considered acceptable. Mr Mason highlighted, as is agreed in the Joint Minute, that the Respondent has since complied with requests made of him by SLAB. No further complaints have been made.

Mr Mason addressed the tone of the Respondent's correspondence with SLAB. He said the Respondent's language was redolent of someone feeling as if he was being treated unfairly by an organ of the state with power over him. The Complainers admitted by way of the Joint Minute that some of the abatements and suggestions made were unreasonable. Mr Mason suggested that the tone and content of the Respondent's correspondence was influenced by his feeling that SLAB was acting unreasonably toward him. His choice of language may have been intemperate but the Respondent was entitled to express his views. Any lack of co-operation had to be seen against that background. The Respondent was entitled to stop co-operating when SLAB suggested his actions might be criminal.

Mr Mason told the Tribunal that on occasion, the Respondent had bought meals for other people. However, he considered this to be irrelevant to the modest amount claimed. He did not lie to SLAB about what he ate. He will regularly eat two fish dishes. This is supported by the evidence produced to the Tribunal. The Respondent's claim that there was no ferry on Tuesday was simply a mistake. He asked the Tribunal to take account of the context that the Respondent has been travelling by ferry frequently since the 1980s and timetables change over time. The Respondent accepted that he made a mistake in correspondence with SLAB on this issue. Mr Mason said that, in any event, all of the concerns raised by SLAB had been accurately addressed. The Respondent did not lie about travel

arrangements by ferry. He made a genuine mistake in his response to SLAB on this issue. He did not lie about dining with third parties, he said he may have done so. He accepts he bought meals for other people. His position was that it should not matter as he knew that SLAB would only pay him a standard rate of £25 for an evening meal.

Mr Mason said there have been no further instances of the Respondent submitting claims which covered meals for others or alcohol. The Respondent now manually deducts these items from the vouchers before submitting them to SLAB. Almost five years later, there has been no repetition. This was essentially a compliance issue which was raised and addressed satisfactorily in 2015. The Respondent does not concede that the SLAB manager's approach is the correct one. The Regulations and practice of the time was that it was for SLAB to scrutinise any vouchers put to them. Nevertheless, the Respondent has complied with all requests made of him by SLAB. Everything depends on the interpretation of the guidelines. It is clear that this is a function SLAB are used to performing and is reflective of the regulations. In Mr Mason's submission, the Complaint was misconceived given the regulations and SLAB's practice at the relevant time.

Mr Mason referred to the *Sharp* test. He referred section 3.7.1 of the Code of Practice no longer being in force and suggested that the duties referred to no longer applied. He questioned whether it was competent to find a breach of a duty no longer in force. In response to a question from the Chair, Mr Mason conceded, however, that the Code of Practice had been in force at the time of the conduct complained of and accepted that the Respondent required to comply with the Code at that time. Mr Mason said that the *mens rea* in the case was lacking. Perhaps there were elements of carelessness in not checking the accounts which came from the law accountant. However, the Respondent relied on the law accountants at that time. The case is not proven beyond reasonable doubt.

In answer to the Tribunal's questions, Mr Mason explained that it was the practice of the day to submit the full receipt in the expectation that SLAB would make abatements. The Respondent does not eat sweets. He has bought food, including sweets, for others. It was not false or misleading to advise SLAB that he did not "do sweets" because, if desserts were consumed, the Respondent was not eating them himself. When he signed the declaration on the legal aid forms, he expected there would be an assessment and abatements would follow. This was based on his twenty years' experience with SLAB.

FURTHER SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the Respondent did not give evidence and was not subject to cross examination. Similar issues arose regarding the information provided by the law accountant, in her three letters. These letters had not been spoken to. There had been submissions on what the Respondent would like the Tribunal to take from the letters. The law accountant referred to a practice "in the past" but we did not know what period was being referred to. The Fiscal said that the Tribunal was being asked to take more from the letters produced from the Respondent's law accountant than was there. The Tribunal did not know the content of conversations between Mr Mason and the law accountant or the terms of his email correspondence.

The Fiscal said, in respect of claims for food, that the Respondent knew he was claiming for the full amounts. The Respondent knew that SLAB considered a sum in the region of £25 to be a recoverable amount. That is not, however, what he claimed for. Not all the Respondent's statements were true and accurate. The frequency of the claims and the signing of the certificates shows that the Respondent was reckless, not careless.

DECISION ON PROFESSIONAL MISCONDUCT

The Tribunal carefully considered the admitted facts contained in the Complaint, the agreed facts in the Joint Minute and the Productions lodged by both parties.

The accounts submitted to SLAB and the terms of the correspondence between SLAB and the Respondent were not in dispute, however, the Complainers and the Respondent offered different interpretations of the applicable regulations and the general practice of SLAB and legal aid practitioners.

The Tribunal noted that the ferry timetables lodged by both parties were not spoken to or covered by the joint minute. However, the content of the timetables did not appear to be in dispute. The Tribunal also noted that Mr Mason took no issue regarding matters which had not been reported to the SLCC and in the absence of any objection from him, proceeded to deal with all matters contained in the Complaint.

The Tribunal noted that the Respondent's defence to the charge was largely based on the law

accountant's letters of 19 November 2019 (Production 11 in the First Inventory of Productions for the Respondent), and two letters of 5 February 2020 (Production 20 in the Second Inventory of Productions for the Respondent and Production 24 in the Third Inventory of Productions for the Complainers). The Tribunal noted that the evidence of the law accountant had not been tested in cross examination, however, the parties agreed in the joint minute that the Tribunal should treat it as equivalent to oral evidence. The Tribunal approached the evidence as it would an affidavit.

From the terms of the law accountant's letter of 19 November 2019, the Tribunal noted that, if itemised hotel or restaurant bills were provided, the law accountant's practice was to deduct any costs in relation to alcohol or newspapers but if the bills were not itemised or if a ledger card was provided, she would not have known what was included and *"would have left it for Mr Burd and SLAB to attend to"*. The Tribunal found the letter helpful in explaining the law accountant's general practice but noted that the letter provided no detail about when that practice began or ceased.

In respect of the letter dated 5 February 2020 being Production 24 in the Third Inventory of Productions for the Complainer, the law accountant set out her practice from some 5 or 6 years ago when dealing with claims for alcohol and/or newspapers. She could not speak specifically to her practice in respect of the Respondent's files but noted, where a restriction has not been applied by her for alcohol or newspapers, that would likely be explained by hotel or restaurant bills not being itemised or the law accountant not having sight of the bills when the accounts were prepared.

The law accountant's longer letter of 5 February 2020 being Production 20 in the Second Inventory for the Respondent, appeared to be a response to a specify e-mail query from Mr Mason. The Tribunal was not aware of the specific issue that the law accountant was asked to address, however, she spoke again about her general practice and noted that *"In the past, it would always have been the case that any outlay incurred and posted to a client ledger would be included in an account of expenses. It would then be for the solicitor and SLAB to negotiate any abatements or restrictions to be applied to the Account. We may be asked to provide advice as to any proposed abatement or restriction however ultimately, on the whole, negotiations with SLAB were between solicitor and SLAB. I would venture to suggest, albeit I do not have any firm evidence to back this up, that the view was taken the onus was on SLAB to scrutinise a solicitor's account and propose modifications where they felt appropriate. Over the years, and certainly in more recent times, SLAB have been much more forthright in advising as to what they will, or will not pay for..."*. The Tribunal noted that the SLAB's practice appeared to have changed but the law accountant could not say exactly when

SLAB's practice, or indeed as a result her own practice, had changed.

The Tribunal appreciated that the law accountant was trying to assist. However, the information was said to be to the best of her recollection and the Respondent's files had been destroyed. The picture regarding a change of practice by SLAB was unclear.

The Tribunal considered the test for misconduct set out in Sharp v The Law Society of Scotland 1984 SLT 313. There are certain standards of conduct to be expected of competent and reputable solicitors and 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.

The first averment of misconduct concerned items which the Respondent had included in his accounts to SLAB. The Complainers alleged that certain accounts submitted by the Respondent contained claims for excessive hotel costs, alcoholic drinks and food for others. In respect of claims for accommodation costs, the Tribunal took into account the absence of any guidance from SLAB, any capped limit or list of approved establishments. The Tribunal considered that the Respondent could not be criticised, in the absence of such guidance, for choosing any particular hotel. The Tribunal accepted that the Respondent chose accommodation on an assumption, based upon past experience, that SLAB would abate his claim for accommodation expenses to an amount which they determined was reasonable. The Tribunal accepted that he did not expect to be reimbursed for the full cost of his accommodation. The Tribunal did not consider that the submission of claims for certain accommodation, against a background where there was little or no guidance available from SLAB, could constitute a serious and reprehensible departure from the standards of competent and reputable solicitors. Therefore, it found him not guilty of this part of the averment of misconduct. The Tribunal did consider however, that the Respondent fell short of the standards of competent and reputable solicitors to a serious and reprehensible extent when he included alcoholic beverages in his account and when his claim against the Legal Aid Fund included the costs of food purchased for other people. SLAB had pointed out to the Respondent in August 2012 (Production number 2/6 in the First Inventory of Productions for the Complainers) and he subsequently agreed in correspondence (Production 2/4 in the First Inventory of Productions for the Complainers) that charging for alcohol was not appropriate. The Respondent, nevertheless, continued to include charges for alcohol in the accounts that he submitted to SLAB. Counsel for the Respondent accepted that the Respondent would occasionally buy food for others. These expenses were not properly recoverable and the Respondent was, therefore, in breach of Regulation 8 of the Criminal Fees Regulations 1989. By

including food for others in his account, the Respondent was not making a proper charge against the Legal Aid Fund at the correct rate, in breach of Section 4.5.6 of SLAB's Code of Practice for Legal Assistance.

The Tribunal had regard to the test for dishonesty described in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. The Tribunal should first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. When that is established the question whether his conduct was honest or dishonest is determined by applying the objective standards of ordinary decent people. The Tribunal was not persuaded that the Respondent had been dishonest in his actions. He had not attempted to hide these items. Several of the invoices submitted by the Respondent to support his expenses claims itemised the alcohol purchased and the fact that two diners were present. Instead, the conduct demonstrated a lack of integrity (Wingate & Evans v SRA; SRA v Malins [2018] EWCA Civ 366). The Respondent had been reckless in submitting claims for alcohol and food for others and expecting SLAB to find them and abate them without making the true situation plain to them. The Respondent had failed, on occasion, to provide SLAB with sufficient information to allow them to make a proper determination. On repeated occasions, the Respondent certified to the best of his knowledge and belief that the items charged in the account were accurate and represented a true and complete record of all the work done. The Respondent lacked integrity when making this declaration as he knew that he had submitted expenses for alcohol which he had already accepted could not be charged, and for food for other people.

The second averment of misconduct concerned an alleged failure to apportion outlays between files. The Tribunal noted that in the WH case, the Respondent self-reported his failure to make an apportionment to SLAB. The Tribunal did not consider that failure to apportion on two occasions, one of which the Respondent reported to SLAB himself, could constitute a serious and reprehensible departure from the standards of competent and reputable solicitors. Therefore, it found him not guilty of this averment of misconduct.

The third averment of misconduct concerned the Respondent's correspondence with SLAB. The Tribunal was not persuaded that the Respondent had been dishonest in his communication or that it had lacked integrity. However, the Respondent had failed to communicate effectively with SLAB and had failed to co-operate with them. The Respondent corresponded with SLAB in terms that were not transparent or straightforward. His choice of language was intemperate. He was evasive in answering legitimate queries posed to him by SLAB staff. He ought to have sought a breakdown of

the hotel bill when that was requested. He was reckless when he stated that certain ferry sailings did not place on Tuesdays. It was correct that one particular ferry sailing could not take place due to bad weather, but the Respondent was not open in his communication regarding the reason for his pre-booked sailing for the next day. Despite the background of the deteriorating relationship between the Respondent and SLAB, the Respondent's lack of communication and cooperation was not acceptable and *in cumulo* with the first averment of professional misconduct, demonstrated a serious and reprehensible departure from the standards of competent and reputable solicitors.

The Tribunal's decision was communicated to parties at the hearing on 7 February 2020. However, due to lack of Tribunal time, the hearing was adjourned to 10 March 2020.

SUBMISSIONS IN MITIGATION

At the hearing on 10 March 2020, the Tribunal invited submissions from both parties in relation to disposal.

The Fiscal advised the Tribunal that the Respondent had a previous finding of Unsatisfactory Professional Service dated 12 April 2018. Counsel for the Respondent confirmed that the Respondent's Record was admitted subject to a clarification regarding the length of time that the Respondent had held a position on the Law Society Rural Affairs Subcommittee. It was a matter of agreement between the Parties that the Respondent had held this position since around 2005.

Counsel for the Respondent invited the Tribunal to take into account that the Respondent took corrective action as soon as issues regarding his accounts were escalated within SLAB in 2015. There had been no repeat of the conduct complained of and the Respondent's practice was now totally compliant. SLAB had suffered no loss and no compensation was being sought. The Respondent had practised as a solicitor for 35 years. He had modified his practice. With regard to the Respondent's personal circumstances, he had income of around £18,000 per annum. The Tribunal was referred to 2 wage slips produced by the Respondent (Productions 1/13 & 1/14 of the Respondent's First Inventory of Productions). The Respondent had limited means to pay a penalty. The Tribunal was asked to take into account that the Respondent had been a Law Society Council member between 2003 and 2006. He had been a member of the Law Society's Rural Affairs Subcommittee for 15 years. The Respondent had represented the Law Society by giving evidence to the Scottish Parliament in his capacity as a subcommittee member. He had been a solicitor since

1985 and a principal since 1990. The Tribunal was invited to find that a Censure was appropriate in the circumstances. In response to a question from the Chair, the Tribunal was advised that the Respondent was not practising as a sole practitioner.

SANCTION

The Tribunal had regard to its Indicative Outcomes Guidance. The misconduct was at the middle of the scale. There was more than one facet to the misconduct, and it was not confined to an isolated incident. The Respondent lacked integrity although dishonesty was not present. The Respondent had taken the time to appear personally at the Tribunal. However, the Tribunal also noted a lack of insight and remorse displayed by the Respondent.

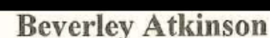
The Legal Aid Board is a public body administering public funds to provide assistance to people who are unable to afford legal representation and access to justice. Legal aid is regarded as central in the provision of access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial. The Tribunal considers conduct which brings into question a solicitor's integrity in his or her interactions with the Legal Aid Board to be a serious matter. Such conduct risks bringing the profession into disrepute. The Respondent was cavalier in his approach to the submission of claims which he submitted. He failed to cooperate with SLAB in answering questions about accounts which he submitted. However, the lack of integrity arose in respect of a discreet issue. There was a lack of guidance from SLAB concerning what might constitute a reasonable charge in particular circumstances. There is no cap or upper limit placed on expenses claims which may have resulted in the Respondent having a misconceived notion about what was acceptable. When issues were highlighted to him, the Respondent changed his practice. The conduct occurred in 2015 and there had been no repeat. The Respondent did not profit from the misconduct. The Respondent remains registered with SLAB and is authorised to carry out criminal and civil legal aid work.

The Tribunal considered whether a restriction was required to protect the public but was ultimately persuaded that it was not. The Respondent has had a lengthy career with only one finding of Unsatisfactory Professional Service which was not analogous to the present case. The Respondent ought to take the opportunity to reflect upon his actions, however, there was no ongoing requirement for supervision as he has already modified his practice in this area and there has been no repetition of these issues in the last five years. In all these circumstances, a Censure and Fine was sufficient to uphold the reputation of the profession and protect the public. The Tribunal considered that a

significant fine was required to reflect the seriousness with which it viewed the conduct, even taking account of the Respondent's limited means.

The Tribunal invited submissions on expenses and publicity. Counsel for the Respondent had no comment to make on publicity. On the question of expenses, counsel for the Respondent submitted that there had been divided success. The Complainers had taken matters forward upon which no finding of misconduct had been made. The Complainers had alleged that the Respondent had acted dishonestly but the Tribunal had not made such a finding. The Respondent had tried to have discussions with the Complainers to seek to have the allegation of dishonesty removed from the Complaint but the Complainers had refused that. In all the circumstances, it was submitted that the Respondent had been justified in defending the Complaint. Counsel for the Respondent moved for modification of the expenses to reflect the divided success. The Fiscal moved for an award of expenses and had no comment to make with regard to publicity. The Tribunal had to make a binary decision on whether the Respondent was guilty or not guilty. Whilst there had been discussions between the parties, there had not been any acceptance of any professional misconduct on the part of the Respondent at any stage. He had vigorously defended the entire case against him. The Tribunal had made a finding of professional misconduct. In the circumstances, the Fiscal submitted that no modification was required or appropriate.

After considering submissions by both parties, the Tribunal made an award of expenses in favour of the Complainers. With regard to publicity, the Tribunal considered that these findings contained sensitive and personal information pertaining to others. As their identities are not relevant to the central finding of professional misconduct, the Tribunal concluded that publicity should not include their details.



Beverley Atkinson
Vice Chair