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

ALISTAIR K S HOOD, residing at 5 Glendale Drive, Auchinairn, Bishopbriggs, Glasgow

Appellant

against

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

First Respondent

and

WILLIAM RENFREW, W Renfrew & Co. Ltd. Solicitors, 648 Alexandra Parade, Glasgow

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Sections 42ZA (10) of the Solicitors (Scotland) Act 1980 by Alistair K S Hood, 5 Glendale Drive, Auchinairn, Bishopbriggs, Glasgow (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, 26 Drumsheugh Gardens, Edinburgh (hereinafter referred to as "the First Respondent") dated 29 May 2014 not to uphold a complaint of unsatisfactory professional conduct in respect of heads of complaint 1 and 3 against William E Renfrew, Solicitor, of W Renfrew & Co. Limited, Solicitors, 648 Alexandra Parade, Glasgow (hereinafter referred to as "the Second Respondent").

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 for the First Respondent. The Second Respondent did not lodge Answers.

3. Having considered the Appeal with Answers, the Tribunal resolved to set the matter down for a preliminary and procedural hearing on 18 December 2014 and notice thereof was duly served on all the parties.

4. A preliminary and procedural hearing took place 18 December 2014. The Appellant was represented by Mr Hutcheson, Solicitor, East Kilbride. The First Respondent was represented by Ms Motion, Solicitor Advocate, Edinburgh. The Second Respondent was not present or represented. A preliminary hearing took place regarding firstly whether the Tribunal could consider a letter of 12 July 2012 which was not before the First Respondent's Sub Committee when their decision was made; and secondly whether the Tribunal could consider additional evidence with regard to what happened in court on 11 September 2014. After hearing submissions from both parties, the Tribunal considered the letter of 12 July 2012 to be relevant and allowed it to be lodged at this stage. The Tribunal did not consider that the evidence with regard to what happened in court in September 2014, which was after the date of the Law Society's decision, was in any way relevant to the Complaint which had been made by the Appellant to the Law Society. The Tribunal therefore agreed not to consider that evidence. The Tribunal enquired whether parties were leading evidence or proceeding by way of written submissions based on a written agreement in connection with the facts. It was confirmed that the facts would be agreed between the parties in a Joint Minute which would be lodged. The Tribunal requested written submissions be provided to the Tribunal before the substantive hearing on 12 February 2015.

5. The case called on 12 February 2015. A Joint Minute of Admissions agreeing the contents of productions 1 – 39 for the Appellant and 1 – 8 for the First Respondent was lodged. The Tribunal heard oral submissions from both parties and had regard to these, the written submissions by both parties which had been lodged previously and the productions.

6. The Decision of the Tribunal was to confirm the Determination of the Law Society of Scotland made on 29 May 2014 in relation to the Complaint by the Appellant.

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

> Edinburgh 12 February 2015. The Tribunal in respect of the Appeal under Section 42ZA (10) of the Solicitors (Scotland) Act 1980 by Alistair K S Hood, 5 Glendale Drive, Auchinairn, Bishopbriggs, Glasgow ("the Appellant") against the Decision of the Council of the Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh ("the First Respondent") dated 29 May 2014, not to uphold a complaint of unsatisfactory professional conduct in relation to heads of complaint 1 and 3 against William E Renfrew, Solicitor of W Renfrew & Co. Limited, Solicitors, 648 Alexandra Parade, Glasgow ("the Second Respondent"); Confirm the Determination of the Law Society in respect of Heads of Complaint 1 and 3; Find the Appellant liable in the expenses of the First Respondent 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 Second Respondent.

(signed)
Alan McDonald
Vice Chairman

8. 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

IN THE NAME OF THE TRIBUNAL

Alan McDonald
Vice Chairman

PRELIMINARY AND PROCEDURAL HEARING ON 18 DECEMBER 2014

SUBMISSIONS FOR THE LAW SOCIETY

Ms Motion stated that her submission was that the Tribunal was not empowered to look at information which was not before the Law Society Sub Committee when they made their decision. She indicated that the Tribunal had the power to quash or uphold the decision but had no power to remit the matter back to the Law Society. She indicated that she was aware of the wording of Rule 28 but that this referred to Complaints. She indicated that reference to documents should only be the ones which were before the Sub Committee as this was a common sense approach. She pointed out that in the Appellant's grounds of appeal, it was stated that the Council excluded relevant materials and did not act reasonably. However the letter of 12 July 2012 was not put before the Sub Committee. She stated that Mr Hutcheson was asking the Tribunal to say that the Law Society made an unreasonable decision because it did not take account of documents; but this could not be the case when the document was not placed before it.

In respect of the court diet on 11 September 2014, Ms Motion submitted that Mr Hutcheson was asking the Tribunal to take account of material which was not in existence at the time of the decision and this should not be allowed.

Although the letter of 12 July 2012 was in existence and on the file, it was not before the Sub Committee despite many opportunities being available for it to have been produced. No reasons have been provided as to why it was not lodged earlier. The Sub Committee took March 2013 as their start date and Ms Motion submitted that we have no idea what happened between July 2012 and March 2013 and there could be more documents which would be relevant. Ms Motion referred to two authorities which she lodged with the Tribunal being the case of Oliphant [2014] CSIH 94 and the case of Westminster Motor Insurance Association Limited [2014] CSIH 27. These authorities showed that new grounds of appeal were not allowed as they were lodged too late. She indicated that it was not uncommon for the court to refuse to allow matters to be lodged late. She submitted that it was unfair to criticise the Law Society Sub Committee when they did not have the information. In connection with the court

diet, this did not go to the merits of the appeal but perhaps could be relied on if we got to the stage in the proceedings where a sanction occurred. It however was not appropriate or fair to allow it at this stage.

SUBMISSIONS FOR THE APPELLANT

Mr Hutcheson pointed out that the Tribunal's procedural rules made no mention of the sifting of parts of an appeal in advance of the appeal hearing. He submitted that it would not be fair for parts of the appeal to be removed prior to the full hearing. He stated that Rule 40 of the Tribunal Rules allowed the Tribunal to postpone and adjourn hearings but there was no exercise of that power here. He indicated that in terms of Rule 23, an appeal could be struck out in its entirety as part of a sifting process but that had not been done here. He submitted that if the Tribunal chose to engage on narrow points it would create delay and expense. He pointed out that parties were not of equivalent resources and his client would incur the expense of having to argue these matters at this hearing. In connection with the letter, the background to the issue was whether or not the Second Respondent, as agent, had authority of the principal to market the property. He submitted that any such authority was conditional upon the signing of the Minute of Agreement. His position was that the Second Respondent acted without authority and continued to until the intervention of the Glasgow Property Centre. The Second Respondent's position was that authority was not required for marketing the property, only for the conveyancing. Then the Second Respondent said that he had the authority from the March 2013 letter, which was lodged in process. The Law Society decided that the Second Respondent did have such authority based on the correspondence in October 2013. Mr Hutcheson stated that his client produced eight items which included items from himself, the Appellant and the Second Respondent. These items of correspondence should have been enough to establish the position, but they were not. He submitted that the letter of February 2012 is an additional document and the Tribunal should be allowed to look at it. The Tribunal has a regulatory function and had an obligation to protect his client and it was critical that the Tribunal make a well informed decision and have regard to all the information. Mr Hutcheson stated that the evidence was not of a new type and did not raise a new ground of appeal. The letter states that there would be a Minute of Agreement in place and that on that basis the property could be

marketed. The item of correspondence was generated by the Second Respondent and there was no prejudice to the Law Society. The Tribunal should not be deprived of the material.

In connection with the court case, Mr Hutcheson submitted that it was an unfortunate consequence that his client was cross-examined at a proof in the divorce case and his integrity was impugned. Mr Hutcheson stated that he accepted that this was not relevant to the merits of the appeal but was relevant to what the Tribunal may do if it upholds the appeal. Mr Hutcheson stated that the Tribunal could make what it would of the material at that time but it was necessary to mention it now to give fair notice in case it was contested. It would not be founded on in connection with the merits of the appeal. Mr Hutcheson stated that it would be possible to agree this evidence because there could be an extract of the line of questioning in the court case. He stated that he had produced the Second Respondent's written submissions as part of his productions and he would let matters rest on that basis and he referred to his Production 28. He submitted that it was relevant in relation to the effect of the process on the Appellant. He stated that in MacPhail's book on Sheriff Court Practice there were a lot of examples of cases where new matters were produced and allowed prior to the final judgement.

Mr Hutcheson said in response to a question from the Tribunal, that the letter of 12 July 2012 was not put before the Law Society Committee because they thought there was ample evidence put forward to establish the case but it turned out that this was not the case. He submitted that this was not a second bite of the cherry because if the Law Society had interpreted what was before them correctly they would have made a different decision. The letter was supplementary. He indicated that his client was unhappy with the outcome of the process but he had some discontent about the process.

DECISION WITH REGARD TO THE CONSIDERATION OF ADDITIONAL EVIDENCE

The Tribunal did not consider that the evidence with regard to what happened in court in September 2014, which was after the date of the Law Society's decision, was in any way relevant to the complaint which had been made by the Appellant to the Law

Society. It could only be relevant to issues of compensation that would only come into focus if the Tribunal overturned the determination of the Law Society and made a finding of unsatisfactory professional conduct. It could not be relevant to the decision of the Tribunal in considering whether or not to allow the Appellant's appeal. The Tribunal accordingly did not allow inclusion of the reference to this court diet. The matter will be revisited at a later stage in the proceedings if it is appropriate to do so.

In connection with the letter of 12 July 2012, the Tribunal considered that it does have the power to admit evidence which was not before the Law Society Sub Committee at the time of its decision. This power however will be exercised on a case by case basis. The Tribunal did not find Mr Hutcheson's explanation with regard to not producing the letter earlier to be completely satisfactory but do not consider that allowing the letter to be lodged at this stage will cause undue prejudice to the Law Society. It does not raise a new issue and is a letter that had been written by the Second Respondent. The Tribunal will have to come to its own decision with regard to the case and wishes to be able to make a well informed decision having regard to all the relevant information. The Tribunal considered the letter of 12 July 2012 to be relevant and accordingly allows it to be lodged at this stage. The Tribunal would note however that there can be no criticism of the Law Society for not taking account of a letter which was not before them when they made their decision.

The Tribunal then enquired whether or not parties would be leading evidence or proceeding by way of written submissions based on a written agreement in connection with the facts. It was confirmed that the facts would be agreed between the parties and a Joint Minute with regard to the agreed facts would be lodged. Written submissions were required to be provided to the Tribunal by 2 February 2015 and the matter was set down for a substantive hearing on 12 February 2015 at noon.

NOTE OF SUBSTANTIVE HEARING ON 12 FEBRUARY 2015

An Inventory of Productions had been lodged on behalf of the First Respondent and two Inventories of Productions had been lodged on behalf of the Appellant. A Joint Minute of Admissions was lodged agreeing the contents of all three Inventories. Written submissions had been lodged on behalf of both parties.

SUBMISSIONS FOR THE APPELLANT

Mr Hutcheson stated that he wished his written submissions previously lodged to be taken as read into the record. Mr Hutcheson said he would refer to certain parts of his written submissions for emphasis.

Firstly, Mr Hutcheson made reference to head of complaint 1, the question of authority to market property. Mr Hutcheson advised that the Law Society Sub Committee had stated that authority to market the property was subject to certain matters being agreed in the Minute of Agreement being drawn up. He submitted that the matters to be agreed were contained in a draft Minute of Agreement which was to be agreed. Mr Hutcheson stated that the position did not vary thereafter. He advised that by 6 September 2013 parties were still adjusting the draft Minute of Agreement. Mr Hutcheson advised that in his email of 6 September 2009 which is found at Production 6 of the Appellant's First Inventory of Productions, the draft Minute of Agreement had been returned to the Second Respondent after revisal and there is no suggestion that this is a different draft Minute of Agreement as had been produced to the Reporter with Mr Hutcheson's letter of 24 April 2013 which is found at Production 26 of the said Inventory.

Mr Hutcheson then referred the Tribunal to paragraphs 1 and 2 of the letter of 18 September 2013 found at Production 9 of the said Inventory. That letter is from his firm to the Second Respondent and states -

> *"We refer to your letter of today's date. Our client has no further comments upon the schedule in addition to those intimated on 27 August 2013.*
>
> *The matter cannot progress until there is in place a Minute of Agreement executed by our respective clients and in that connection we await hearing from you in response to our email of 6 September 2013.*
>
> *We look forward to receiving your response as soon as possible having regard to the fact that the case calls again on 20 September 2013."*

Mr Hutcheson emphasised that paragraphs 1 and 2 state that the matter could not progress without a Minute of Agreement being in place and stated that the action referred to in the third paragraph is the action of Division and Sale between the parties. Mr Hutcheson stated that the Appellant's position that the matter could not progress was emphatically reasserted in that letter.

Mr Hutcheson advised that the Reporter refers to the letter in her report but declines to make any finding regarding it. He stated that in her second report the Reporter says that the letter had a different meaning. Mr Hutcheson stated that the Sub Committee makes no reference to that letter in its judgement. He submitted that this is an example of material which the Sub Committee failed to give consideration to, or if it did consider it, that it has unreasonably failed to give import to it.

Mr Hutcheson then referred the Tribunal to the letter of 22 October 2013 which is found at Production 13 of the said Inventory. This is a letter from Mr Hutcheson to the Second Respondent, paragraph 3 of that letter stated:

> *"If you intend to lodge Defences in the action of division and sale, please let us have these by return. We are unaware of any defence. Even since raising proceedings, matters have been stalled by your client's failure to respond to the revised Minute of Agreement forwarded on 6 September 2013. Obviously if steps are now taken belatedly market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution."*

Mr Hutcheson stated that paragraph 3 above mentioned the division and sale process which was opposed by Mrs A**.** Mr Hutcheson stated that the Sub Committee in their decision said that this letter together with Production 12, the letter from the Second Respondent dated 21 October 2013, bestowed authority to market the property. Mr Hutcheson submitted that the letter of 22 October does not bestow authority it reasserts the position previously taken on behalf of the Appellant that a Minute of Agreement is required. He stated that in the sentence founded on by the Sub Committee i.e.

> *"Obviously if steps are now taken belatedly market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution."*

Reference is made to the Minute of Agreement being required for that purpose. Mr Hutcheson said that he wished to emphasise that in his view it would not be ordinary practice for a property to be marketed when a view is submitted that marketing would be "welcomed". Mr Hutcheson submitted that big firms of estate agents such as Company 1 would require clear instructions to market a property.

Mr Hutcheson submitted that, taking the above quoted sentence in a proper context, what is stated is a reassertion of the position consistently stated before and which has not changed or been referred to differently by any other party i.e. that a Minute of Agreement was required to be entered into before the property could be marketed.

Mr Hutcheson stated that the correspondence in the productions is illustrative of the significant point that at no stage during the correspondence did the Second Respondent state that he had authority to market the property and it is significant that he did not state this prior to marketing the property.

Mr Hutcheson then referred the Tribunal to the first production in the said Inventory, the letter of 12 July 2012 from the Second Respondent to himself. Mr Hutcheson stated that paragraphs 1 and 2 were of relevance:

> *"Further to your letter of 20 June and your Mr Hutchesons (sic) telephone conversation with our Mr Renfrew last Friday, we confirm that we have now met with our client and she is not prepared to accept the increased offer of £38,500 she has confirmed that she is happy to proceed with the marketing of the former matrimonial home subject to a Minute of Agreement being executed by our respective clients.*

> *In the regard I enclose a draft Minute of Agreement for your revisal our (sic) should you find the terms to be in order for your clients(sic) execution in early course to allow the early marketing of the property."*

Mr Hutcheson advised that paragraph 2 of that letter states that the Minute of Agreement will allow marketing. He submitted that the other side of this statement is that without a Minute of Agreement marketing is disallowed.

Mr Hutcheson referred the Tribunal to Production 3 of the said Inventory, a letter dated 17 April 2013 to him from the Second Respondent. He referred the Tribunal to the final paragraph of that letter which states:

> *"We would apologise for the delay on our part and would ask you to revert to us in regard to the aforesaid proposal. If your client is not agreeable to that, we will arrange for the immediate marketing of the property in terms of the agreement reached between your Mr Hutcheson and our Mr Renfrew whereby we will prepare a Minute of Agreement for the immediate execution by our respective clients to allow the marketing of the matrimonial home."*

Mr Hutcheson stated that that paragraph seems to suggest that the agreement in principle requires to be formalised.

Mr Hutcheson referred the Tribunal to Production 5 of the said Inventory, a letter dated 29 August 2013 from the Second Respondent to himself. He referred to the third paragraph of that letter which states:

> *"Further we received your letter requesting that the draft Minute of Agreement to be sent to you. The author has dictated a response referring to the earlier minute of agreement sent to you which we have slightly revised and forwarded for your revisal to allow the marketing and sale of the matrimonial home. We have also advised of the defence that we believe is available to our client put shortly, any delay in marketing of the property has been entirely due to your client in failing to revert to us to approve or adjust the draft schedule of sale. We were not in the position to begin the marketing of the property*

> *until we had your client's approval. Had there been no such delay it is probable that missives would have been concluded by now with the date of sale and of course funds being available to our client to pay your expenses."*

Mr Hutcheson submitted that the third paragraph of that letter shows that both the marketing and sale of the property are predicated on the agreement being in place. Mr Hutcheson stated that there would appear to have been unanimity that the Minute of Agreement was required for marketing. Mr Hutcheson advised that although the Sub Committee reaches the decision that authority is given as explained by them, this is not the position asserted by either himself or the Second Respondent. Mr Hutcheson stated that if it was the Second Respondent's position one would have expected it to be stated in the correspondence following the marketing when he himself (Mr Hutcheson) was protesting about the marketing. Mr Hutcheson advised that it was not stated in that correspondence that the Second Respondent considered that authority to market had been given in earlier correspondence. Mr Hutcheson submitted that the Second Respondent's position was that authority was not required as opposed to it having been given.

Mr Hutcheson referred to the Sub Committee's consideration of the Law Society guidance but stated that it does not take away the requirement that before any agent can act he must have instructions. Mr Hutcheson submitted that you cannot represent someone who does not want to be represented. He stated that it was a condition that there was to be a Minute of Agreement in place. An agent cannot simply ignore that and impose representation on his own terms and Mr Hutcheson submitted that is what happened in this case. Mr Hutcheson stated that it may be that this was the Second Respondent's sincere view regarding what he was entitled to do, but submitted that he was wrong.

Mr Hutcheson submitted that it is reasonable in all the circumstances for formality to be required in such a case especially where it is the case that the parties had tried to agree to market the property for some time and that the Appellant had had to raise an action of division and sale to do that.

Mr Hutcheson explained that Mrs A's position to the court in that action was that the property should not be sold. He stated that she opposed the sale and it went to proof. Mr Hutcheson referred the Tribunal to Production 40 in the Second Inventory of Productions for the Appellant which is the Reporter's report. He referred the Tribunal to paragraph 18 of that report at page 8 where it states –

> *"18. There is a letter from Mr James McCann, the solicitor's legal representative dated 28 February 2014, sent in response to intimation of the conduct complaint, notifying the Law Society of his interest in the matter, and he advised the following :-*
>
> > *"The complaint arises from a stage in time, in March 2013, when the Parties were negotiating and the agents had drafted out a Minute of Agreement, and where it was anticipated that Messrs Renfrew, through GSPC would be instructed in regard to the marketing of the property. We enclose copy letter dated 22 March 2013 from Mr Hood's agents highlighting this, and you will see that Mr Renfrew's membership was proposed to be used for the marketing. Mr Renfrew accepts that he then took some initial steps within the GSPC system, but without any intention of undertaking conveyancing work. That would not have been initiated without ensuring compliance with the Law Society Guidelines that there would require to be a fully completed Minute of Agreement already signed."*

Mr Hutcheson stated that the contents of the letter are largely mitigation however it is stated that in March 2013 the parties anticipated marketing the property. Mr Hutcheson stated that he disagreed with the following statement by Mr McCann in the third paragraph of that letter as referred to in the report :-

> "*Mr Renfrew immediately desisted from any GSPC activity when Mr Hood made it clear that he had changed his position….."*

Mr Hutcheson stated that the Second Respondent did not do as Mr McCann suggested. Mr Hutcheson submitted that in his letter Mr McCann was inferring that

the Second Respondent thought he had authority to market the property. Mr Hutcheson stated that it was apparent from Production 14 of the First Inventory of Productions for the Appellant, a letter from Mr Hutcheson to the Second Respondent dated 13 November 2013, that the Second Respondent had been asked to cease marketing the property.

Mr Hutcheson stated that the request to stop marketing the property was met with a refusal and the Second Respondent stated that authority was not required. Mr Hutcheson stated that similar letters had been sent on two occasions in like terms and these are referred to in his written submission. Mr Hutcheson submitted that the Appellant's position was that there was no authority given to market the property and that the property was only withdrawn from sale following the intervention of the Chief Executive of the GSPC.

In summary Mr Hutcheson submitted that upon a careful analysis of the documents and having regard to the established position of the Appellant from the outset that no sub committee acting reasonably could have thought the Appellant had given authority to market the property by the terms of the correspondence referred to when no authority had been given before. Mr Hutcheson submitted that had the Sub Committee given appropriate weight to the letter of 18 September 2013 it would have upheld the complaint.

Mr Hutcheson submitted that the Sub Committee gave undue weight to the Law Society Guidance. He stated that although this guidance was clearly applicable, it did not excuse any agent acting without the authority of his client. Mr Hutcheson stated that the Appellant also emphasised to the Second Respondent that he did not have authority to do what he was doing by marketing the property. Mr Hutcheson stated that the Reporter did mention this in her report and Mr Hutcheson submitted that had the Second Respondent accepted that he erred at that stage and taken the property off the market that would have been an end to the matter.

Mr Hutcheson stated that he was not involved in the complaint to the SLCC at the initial stages and was only brought in when the complaint was investigated.

Mr Hutcheson further stated that in regard to the third head of complaint he had little to add to his written submission. He stated that this was not a case where there was a delay in producing a terms of business letter, it was not produced at all. Mr Hutcheson submitted that the Minute of Agreement was overlooked for over two months and the failure to issue the terms of business letter did make a difference here. He stated that when representation is denied this is a reminder to all just how necessary terms of business letters are.

Mr Hutcheson referred the Tribunal to his written submission which was as follows:

"1. Introduction

This is an Appeal against Decisions of the Council of the Law Society of Scotland ("the Council") dated 29 May 2014, under headings Issue 1, and Issue 3.

In this Submission, the numbers in brackets refer firstly to the Inventory number, and secondly the Production number, of the Productions produced on behalf of the Appellant.

Issue 1

Issue 1 concerns marketing of the property known as Property 1, jointly owned by the Appellant and his wife, Mrs A. The parties had separated. Mrs A was represented in matrimonial matters by William Renfrew, Solicitor, of W. Renfrew & Co. Limited, Glasgow. The Appellant complained that the property had been marketed without his consent or instruction, and in the absence of a written agreement ("Minute of Agreement") concerning the arrangements for sale of the property and division of the net proceeds of sale. The Council determined to take no action in respect of this Complaint, and thus did not uphold it.

The Council, of its own volition, stated that each of the two following sets of correspondence from the Appellant's solicitor to Mr Renfrew comprised authority to Mr Renfrew to market the property, namely:-

1. Letters dated 22 October (1/13) and 13 November (1/14), both 2013; and

2. Letters dated 21 October 2013 (1/12) and 22 October 2013 (1/13).

The Reporter did not refer to such correspondence. On page 12 of her Report (2/40), the Reporter stated that –

> *"...no final Agreement had been signed by the parties but the Complainer had given consent to the Contract of Marketing as early as (his solicitor's letter dated) 22 March 2013 (1/2),...".*

This view was rejected by the Council.

I refer to the above letter dated 21 October 2013. As it was written by Mr Renfrew, it cannot on its own bestow authority. I refer to the Appellant's solicitor's letter dated 22 October 2013 (1/13). Therein it is stated, inter alia:-

> *"If you intend to lodge Defences in the action of division and sale, please let us have these by return. We are unaware of any defence. Even since raising proceedings, matters have been stalled by your client's failure to respond to the revised Minute of Agreement forwarded on 6th September 2013. Obviously if steps are now taken belatedly to market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution."*

Reference is made to the Appellant's solicitor's letter dated 13 November 2013. Therein it is stated inter alia:-

> *"It is necessary for there to be in place a signed Agreement for the property to be marketed. Please revert to us as a matter of urgency in relation to this matter. An earlier Minute of Agreement in draft form was revised and returned to you in early September 2013."*

In each set of correspondence founded upon by the Council, it founded upon the cumulative effect of the two letters.

The only statement which conceivably could have created express authority was contained within the letter of 22 October 2013 (1/13), namely:-

> *"Obviously if steps are now taken belatedly to market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution."*

At this point, it is explained that the Appellant had sought the sale, and therefore by reasonable implication, the marketing of the property since at least April 2012 – c.f. the final paragraph of page 2 of the Appellant's solicitor's dated 24 April 2014 (2/26), which was placed before the Council. By July 2013, the Appellant, following significant delay, had felt it necessary to raise a court action for Division and Sale to obtain a Court Order to procure the sale of the property – c.f. paragraph 2 of the Appellant's letter dated 22 October 2013 (1/13). As confirmed in Mr Renfrew's letter dated 16 October 2013 (1/10), sale was opposed by Mrs A, who had failed to lodge Defences.

The Appellant had accordingly welcomed the marketing and sale of the property since April 2012. It is uncontentious that the Appellant welcomed the marketing of the property. The critical point is whether or not the Appellant instructed Mr Renfrew's firm to market the property in the absence of a Minute of Agreement.

It is respectfully submitted that it would be highly unusual, perhaps unique, for an Estate Agency contract to be formed on the basis of one such sentence in one such letter. It would be highly unusual for a contract to be formed on the basis of the use of the word "welcomed". In that same sentence, and therefore in the context only of the marketing of the property, the Appellant requests "the engrossed Minute of Agreement for execution."

Issue 1 concerns whether or not the Appellant instructed Mr Renfrew to market the property on 22 October, failing which, 13 November, 2013. The Appellant's

position is that any such authority was predicated upon, qualified by, and conditional upon the signature of a Minute of Agreement. It is irrelevant that professional practice requires a Minute of Agreement for subsequent conveyancing, but not initial marketing, of a property.

The core point is that no Estate Agent or other agent may act without the authority of his client (principal).

At all material times, the Appellant required a Minute of Agreement to be signed for the property to be marketed. Reference is made again to the Appellant's solicitor's letter to W. Renfrew & Co. Limited dated 22 March 2013 (1/2), upon which the Reporter founded. Paragraph 3 refers to the marketing and sale of the property. At the end of paragraph 3 it is stated:-

> *"The priority is to make progress and we should therefore be obliged to receive your further draft in early course".*

The reference to a further draft was a reference to a Minute of Agreement, and could only reasonably be interpreted as a reference to a Minute of Agreement. The Appellant does not understand this point to be contentious. Reference is made to the letter from W. Renfrew & Co. Limited to the Appellant's solicitors dated 12 July 2012 (1/1). In paragraph 1, Mr Renfrew had stated inter alia:-

> *"she (Mrs A) has confirmed that she is happy to proceed with the marketing of the former matrimonial home subject to a Minute of Agreement being executed by our respective clients.*
>
> *In the (sic) regard, we enclose a draft Minute of Agreement for your revisal our (sic) should you find the terms to be in order for your client's execution in early course to allow the early marketing of the property."*

In substantive response to said letter dated 22 March 2013 (1/2), W. Renfrew & Co. Limited wrote to the Appellant's solicitor by letter dated 17 April 2013 (1/3). Reference is made to the final paragraph of the letter which reads:-

> *"We would apologise for the delay on our part and would ask you to revert to us in regard to the aforesaid proposal. If your client is not agreeable to that, we will arrange for the immediate marketing of the property in terms of the agreement reached between your Mr Hutcheson and our Mr Renfrew whereby we will prepare a Minute of Agreement for the immediate execution by our respective clients to allow the marketing of the matrimonial home."*

Without the Minute of Agreement, there was no allowance. Without allowance, there was no authority to market the property. This is the key point. It demonstrates that the Council has erred in holding that such authority existed. Mr Renfrew's correspondence demonstrates that the requirement of a Minute of Agreement was not only the position of the Appellant, but also Mr Renfrew.

There is another significant point. At no time prior to, or during, the subsequent marketing of the property did Mr Renfrew assert, or the Appellant concede, that such authority had been provided. During said period, it remained continuously the Appellant's position that such authority was required.

By letter dated 29 August 2013 (1/5), W. Renfrew & Co. Limited forwarded to the Appellant's solicitor a further draft Minute of Agreement. In this letter, Mr Renfrew stated inter alia:-

> *"The author has dictated a response referring to the earlier minute of agreement sent to you which we have slightly revised and forwarded for your revisal to allow the marketing and sale of the matrimonial home."*

Therein Mr Renfrew expressly reasserts that a Minute of Agreement is required, in order to **allow** not only the sale, but the marketing of the property. By email dated 6 September 2013 (1/6), the Appellant's solicitor returned the draft Minute of Agreement, duly revised. The Minute of Agreement is produced as Production (1/27). By email dated 9 September 2013 (1/7), W. Renfrew & Co. Limited undertook to revert as soon as possible. By letter dated 18 September 2013 (1/9) the Appellant's solicitor wrote to W. Renfrew & Co. Limited, and stated inter alia:-

> *"The matter cannot progress until there is in place a Minute of Agreement executed by our respective clients and in that connection we await hearing from you in response to our email of 6 September 2013".*

Therein, the Appellant thus reasserts that a Minute of Agreement is necessary to allow the property to be marketed.

Reference is made to letter dated 16 October 2013 (1/10) from W. Renfrew & Co. Limited to the Appellant's solicitor. The letter primarily concerns a Contempt of Court Hearing in respect of Contempt of Court proceedings raised against Mrs (sic) Renfrew by the Appellant, and offers an explanation of Mrs (sic) Renfrew's conduct. Said letter refers. On the second page of the letter, Mr Renfrew readdresses marketing of the property. He does so again in his company's subsequent letter dated 21 October 2013 (1/12). In neither letter is there asserted any variation of the position that a Minute of Agreement is required. Reference is made again to the Appellant's solicitor's letter dated 22 October 2013 (1/13), and to the final sentence:-

> *"Obviously if steps are now taken belatedly to market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution".*

Therein, the Appellant reasserts the requirement of a Minute of Agreement.

The Council erred in determining that this sentence comprised unconditional authority for Mr Renfrew, via his company, to market the property. Such a view was asserted neither by the Reporter or (sic) by Mr Renfrew. The sentence clearly states that the marketing of the property is linked to the execution of a Minute of Agreement. The letter dated 22 October 2013 supports the position of the Appellant, not the Council.

The Council has omitted to give sufficient consideration to the foregoing materials, all of which (with the exception of Item (1/1)) were before the Council. These

materials clearly establish beyond any doubt that as asserted by the Appellant, any authority provided by him to Mr Renfrew was predicated upon, qualified by, and conditional upon the execution of a Minute of Agreement. No such Minute of Agreement was ever executed.

The subsequent communings during the period of marketing of the property comprise aggravation of the position, and demonstrate also that Mr Renfrew did not claim to have authority for his actings. They are referred to in paragraphs 6.1, 6.2 and 6.7-6.17 inclusive of the Reporter's Report dated 9 April 2014.

By letter dated 13 November 2013 (1/14), the Appellant's solicitor wrote to W. Renfrew & Co. Limited inter alia in the following terms:-

> *"We refer to Lee's telephone call to this office advising that the matrimonial home was now been (sic) marketed at a fixed price of £115,000.*
>
> *It is necessary for there to be in place a signed Agreement for the property to be marketed. Please revert to us as a matter of urgency in relation to this matter. An earlier Minute of Agreement in draft form was revised and returned to you in early September 2013...".*

The letter reasserts the Appellant's requirement that a signed Minute of Agreement be in place before the property could be marketed.

As a matter of record, the Appellant's solicitor had been made aware at 2.35pm on 12 November 2013 that the property had been placed on the market c.f. paragraph 2 of page 1 of the Appellant's solicitor's letter to the Reporter dated 4 February 2014 (1/24) – although this information was not place before the Council.

In paragraph 8 of her Report dated 9 April 2014 the Reporter, records the Appellant's conversation with W. Renfrew & Co. Limited on or before 13 November 2013 advising that he did not want the property marketed and that the firm was not entitled to sell his house. Accordingly, even if there had been any

authority to market the property (which is emphatically denied), any such authority no longer subsisted as at 13 November 2013.

In paragraph 14 of her Report, the Reporter refers to the Appellant's telephone conversation with W. Renfrew & Co. Limited on 14 November 2013, wherein he stated that unless the situation was remedied as a matter of urgency, he would report the company to The Law Society.

Reference is made to the fax transmission from W. Renfrew & Co. Limited to the Appellant's solicitors dated 14 November 2013, referred to in paragraph 9 of the Reporter's said Report, albeit erroneously referred to as dated 14 November 2011. This document is produced by the Appellant as document 1/15, and therein the company states:-

> *"Dear Sirs,*
>
> *Agreement only needs to be in place before accepting any offer not for marketing. Given your client's action, we would have thought he would be pleased @ property being marketed. We did write about agreement but you have not responded. We trust we can now get that in place but in meantime assure you no offer will be accepted until then".*

In its fax transmission, Mr Renfrew's company refers to the requirement for an Agreement to be signed before an Offer was accepted. In paragraph 5 of her Report, the Reporter refers to Guidance contained at page F202.2 of the Solicitor's Professional Handbook 2012 – 2013. The Guidance reaffirms the requirement that there be in place a written Agreement for the sale of a jointly owned property by separated spouses (partners). It states that a property may be marketed in advance of signature of a Minute of Agreement, providing that the solicitor is instructed to do so. This is uncontentious, and is designed to avoid difficulties such as one spouse seeking to arrest the other's share of the proceeds of sale.

The Guidance, and said statement of Mr Renfrew's company, does not address the Appellant's Complaint. To the extent that the Council has placed reliance on such

Guidance in its Decision, it has taken account of irrelevant material. The Complainer's Complaint is of a fundamental nature, and applies irrespective of the nature of the subject matter. It is this. No agent may represent his client (principal) without the consent, or instruction, or against the wishes of that person. In the instant case, any such consent and instruction was conditional upon the signing of a Minute of Agreement. It is a client's absolute right to make representation conditional upon such a point. The agent is not bound to accept instruction on such a basis. An agent in those circumstances has no right to force representation upon a client simply because he does not accept the condition upon which the client allows representation. There was accordingly no instruction as set out in Rule B4.

In the present case, it must be remembered that it was the view also of Mr Renfrew that a Minute of Agreement was required before such representation could start. His position clearly changed at some point between his acceptance of this in his letter of 29 August 2013 (1/5), and the subsequent fax transmission of 13 November 2013 (1/15). That did not entitle him to assume representation on his own terms (at variance with those allowed by the Appellant), and did not entitle him to refuse to stop acting.

Mr Renfrew's company did not withdraw the property from the market, despite being told to do so by the Appellant, and despite the fact that Mr Renfrew had no subsisting authority from him to market the property.

It is therefore clear that upon receipt of the Appellant's solicitor's letter dated 22 October 2013, Mr Renfrew did not labour under the misapprehension that he had received authority to market the property. This is so because:-

1. The Appellant never withdrew **his** requirement that a Minute of Agreement was required.

2. The Appellant's views were clearly of no interest to Mr Renfrew as he continued to market the property in the face of vociferous protests that he had no right to do so.

3. At no time prior to or during the period of marketing of the property did Mr Renfrew claim that he had received such authority.

4. The company expressly stated that no authority was required.

Even if there had been a sincere erroneous belief that authority had been provided, it would not have justified marketing the property without authority. It is clear, however, that there was no sincere misapprehension on Mr Renfrew's part.

In paragraph 6.1 of her Report, the Reporter refers to an email from the Appellant to Mr Renfrew dated 15 November 2013 wherein he states inter alia:-

> *"...I have not in any way sanctioned the use of your firm in the marketing for sale of my property. I have asked that you stop marketing it forthwith. I have signed no agreement with your firm, or indeed your client... I see that you acting in both ways for Mrs A...is currently to my detriment, by exclusion and ignoring of my wishes. Let me remind you, you have NO Mandate, NO authority to market said property for me at ANY price OR timescale. This situation will no (sic) change unless and until your client and I have a signed Minute of Agreement. I expect the immediate withdrawal of my property from the selling market until authority is given by both parties. I further expect a full explanation as to why your firm thinks that it could just go ahead and market my property without a signed agreement with your firm signed by both parties existing. I further expect a full written apology from your firm...".*

By letter dated 18 November 2013 (1/16), W. Renfrew & Co. Limited wrote to the Appellant's solicitor inter alia in the following terms:-

> *"It is not necessary for a Minute of Agreement to be in place before the property is marketed, but that it is in place before any offer is negotiated."*

In paragraph 3, the firm persists in its error that the draft Minute of Agreement had not been returned to it, notwithstanding that it was so returned on 6 September 2013 (1/6) and (1/7).

By faxed letter dated 19 November 2013 (1/17), the Appellant's solicitor wrote inter alia in the following terms:-

> *"There are two distinct services one of estate agency, and one of conveyancing. We agree that the Minute of Agreement in relation to conveyancing should be signed by parties before any formal Acceptance or Qualified Acceptance is issued.*
>
> *As with any other contract, estate agency services may only be provided with the authority of clients, none has been provided by our client, and he is distressed that you are continuing to market the property in the absence of such authority.*
>
> *Regarding documentation, we returned the Minute of Agreement to you by email on 6 September 2013. There is no document awaiting revisal by us either in relation to estate agency or conveyancing. Please revert to us on this matter by return....".*

These further communings are self explanatory. Mr Renfrew did not withdraw the property from the market.

Notwithstanding the above communings, the Reporter in paragraph 7 of her Report – "Facts Found" found that Mr Renfrew had notice of the absence of authority only on 19 November, and made no finding in respect of earlier communications. It is respectfully submitted that this was an error on her part.

By fax transmission dated 21 November 2013 (1/18), W. Renfrew & Co. Limited stated in response to the Appellant's solicitor's letter dated 19 November 2013 (1/17) as follows:-

> *"We understand your client's position. A full response is being sent to you together with M of A with 2 minor revisals."*

The property was not withdrawn from the market.

Reference is made to email from Ms B of W. Renfrew & Co. Limited to the Appellant's solicitor dated 22 November 2013 (1/21) wherein she states:-

"*Dear Sirs,*

We refer to your fax of today and attach herewith the Minute of Agreement as revised by you on 6th September, as requested.

We are unable to confirm your request to confirm by close of business today that the property has been taken off the market. Our Mr Renfrew, who is the Solicitor dealing with this matter is out of the office today and will not return until Monday next week."

The property was withdrawn from the market only on 26 November 2013, and only following intervention of Mr C, Chief Executive of the Glasgow Solicitors Property Centre, to whom the Appellant had complained. Reference to this email is made in paragraph 6.2 of the Reporter's Report dated 9 April 2014 (2/40). The email is produced as item 1/22. Reference is made to paragraph 8 of the Appellant's solicitor's letter dated 24 April 2014 to the Reporter (1/26), which was placed before the Council. Therein, it is asserted that the Appellant advised that he had contacted GSPC on several occasions in desperation following the refusal to withdraw the property, and that GSPC intervened following his statement that otherwise they would require to be brought into the Complaint.

It is repeated that at no time during this process did Mr Renfrew claim that he had the authority of the Appellant to market the property. He claimed that such authority was not required. He refused to remove the property from the market, despite being called upon to do so by the Appellant.

Mr Renfrew's position is asserted in a letter from his representative, James McCann, dated 28 February 2014, and referred to in paragraph 6.18 of the Reporter's Report dated 9 April 2014, wherein his letter is quoted:-

> *"The Complaint arises from a stage in time, in March 2013, when the Parties were negotiating and the agents had drafted out a Minute of Agreement, and where it was anticipated that Messrs Renfrew, through GSPC would be instructed in regard to the marketing of the property... Mr Renfrew accepts that he then took some initial steps within the GSPC system... Mr Renfrew immediately desisted from any GSPC activity when Mr Hood made it clear that he had changed his position..."*

It is clear that in the letter Mr Renfrew himself does not assert that he acted with Mr Hood's authority. Mr Renfrew therefore does not support the position of the Reporter or the Council. Mr Renfrew's position appears to be that in anticipation of the signature of a Minute of Agreement, he took certain initial steps, but immediately desisted from any GSPC activity upon receiving intimation that the Appellant had "changed" his position.

The assertions on behalf of Mr Renfrew are an incomplete and inaccurate description of the position in that:-

1. With regard to "initial steps", the property was marketed for two weeks. Mr Renfrew's company arranged viewings and communicated their outcomes to the Appellant c.f. paragraph 11 of the Appellant's solicitor's letter dated 24 April 2014 to the Reporter, which was placed before the Council.

2. Whilst Mr McCann refers to a "change" in the Appellant's position, his narrative shows that the only change was the failure to proceed with the Minute of Agreement.

3. The statement "*Mr Renfrew immediately desisted from any GSPC activity*" upon protest by the Appellant is incorrect. It is clear that for 13 days from 13 November 2013 the Appellant and his solicitor called upon Mr Renfrew to withdraw the property from the market, but that this was met with rejection. The email from the Chief Executive of GSPC dated 26 November 2013 makes it clear that it was following his (and not the Appellant's) intervention on 26 November 2013 that the property was to be removed from the market. The Council was not assisted by the erroneous statement on page 14 of the Reporter's Report dated 9 April 2014 that as

soon as the Appellant's position was "*brought to the solicitor's attention the property was withdrawn from the market.*"

It is respectfully submitted that it cannot be the case that any agent may act without authority and against the wishes of his principal. It is clear that this has occurred in the instant case, and that the Council has erred in the following respects. It has reached a decision which no Council acting reasonably would have made. It has excluded, or at least failed adequately to consider, relevant material, namely the communications referred to in this Submission and all (with one exception previously indicated – document 1/1) before the Council at the time of its decision. It had place reliance upon irrelevant material, namely Law Society of Scotland Guidance F2022, which does not bear upon the Appellant's Complaint – namely the marketing of the property without consent or instruction.

Finally, the Appellant was entirely right to insist that the marketing should not proceed in an informal, and it is submitted, irregular way. The Minute of Agreement was never signed by Mr Renfrew, she refused to sell the property, and the Action for Division and Sale proceeded to Proof in 2014.

It is submitted that in all of the foregoing circumstances, the conduct of Mr Renfrew amounts to Professional Misconduct, failing which, Unsatisfactory Professional Conduct. These circumstances are that clearly relations between Mr and Mrs A were already stressful standing the unresolved financial issues between them arising from their separation, and the delay and difficulty in concluding arrangements to market the matrimonial home, which had resulted in proceedings for Division and Sale. In basic terms, it was entirely understandable that the Appellant should wish there to be in place proper, professional sale arrangements, when progress was finally made at a point when Mrs A was facing an imminent Contempt of Court Hearing (document 1/10).

There was no basis whatever for any belief that the Appellant had withdrawn his requirement of a formal agreement for the marketing of the property. The decision to place the property on the market in the absence of such arrangements was clearly an improper step.

It is of the utmost importance that the reckless disregard of the absence of instruction subsisted in the face of repeated and increasingly vociferous protests on the part of the Appellant. The matter was only resolved upon the intervention of the Glasgow Solicitors Property Centre by its Chief Executive. The stress and distress caused to the Appellant is plain from scrutiny of the communications by him and on his behalf. It is abundantly clearly that the conduct displayed by Mr Renfrew failed to meet the conduct to be expected of a competent and reputable solicitor.

Issue 3

This is an ancillary Appeal point. This is because the conduct of Mr Renfrew which had greatest impact on the Appellant is that described within Issue 1. It is also accepted that in certain cases a failure to send out a Terms of Business letter "at the earliest practical opportunity" will not amount to Professional Misconduct or Unsatisfactory Professional Conduct.

It is also the case that this Appeal point derives from the Council's determination of Issue 1, wherein it held that Mr Renfrew was a duly engaged and authorised solicitor for Mr Hood.

If the Appellant's appeal on Issue 1 is successful, then the Appellant was not the client of Mr Renfrew and this Appeal in relation to Issue 3 need not be determined.

There are several aspects in which the failure to comply with the obligation to issue a Terms of Business letter "at the earliest practical opportunity" in this case differs from and is more serious than many other cases. The reasons are as follows:-

1. In this case no Terms of Business letter was issued at all.

2. This failure forms part of a continuing pattern and climate of inadequate communication regarding Mr Renfrew's purported representation of the Appellant.

3. Greater care was required where the solicitor in question was acting in a related matter (matrimonial proceedings) for the Appellant's wife, and where in that matter there was a clear conflicting interest.

4. The purpose of such a letter is to achieve clarity and avoid contention between solicitor and client. In this case, the Appellant repeatedly asserted that Mr Renfrew was not his representative. It was therefore urgent and critical that a Terms of Business letter was prepared which would serve as a basis upon which this issue might have been resolved without repeated refusal on the part of Mr Renfrew to cease acting, and subsequent intervention of the Chief Executive of GSPC, and these proceedings.

5. The repeated denials of agency, and the strength of view asserted by and on behalf of the Appellant ought to have reminded Mr Renfrew in the strongest possible terms of his need to implement his obligation to produce the Letter of Engagement. It was therefore particularly important that such a letter should be prepared in the circumstances of this case. It was not, and the above contention and absence of clarity on the part of the Appellant's solicitor has arisen in grave form in the instant case.

In these circumstances, it is submitted that the admitted failure on the part of Mr Renfrew is not of the standard which could reasonably be expected of a competent and reputable solicitor, and is accordingly Unsatisfactory professional conduct.

Footnote by Appellant's solicitor

Reference by Council to Unhelpful materials

On page 2 of the Schedule comprising the Council's decision, it is stated that a vast amount of material was produced by the Appellant's solicitor which was not "particularly helpful". As reference was made to such material at the Preliminary and Procedural Hearing of 18 December 2014, production of it should be explained. Under cover of her letter of 1 May 2014 (2/30), the Reporter copied to me her email exchange of 28 and 30 April 2014 with Mr Renfrew's representative, James McCann. In his email dated 30 April 2014, Mr McCann innocently

transmitted untruthful views of Mr Renfrew. As these concerned what might be regarded as a peripheral matter, I invited the Reporter to afford Mr Renfrew the opportunity of removing them, and produced to her documents supportive of untruthfulness. These views which I regarded as untruthful concerned the events at a Proof Hearing at which I was personally present, and I make my statement about truthfulness in this Footnote as an Officer of the Court, and conscious of the gravity of potentially misleading any party. Whilst the Reporter copied my letter to her to Mr McCann, she declined to undertake further enquiry regarding this matter and declined to communicate with the witness named by me, to avoid prolongation of the process. In her subsequent letter to me dated 12 May 2014 (2/34), she stated that the Society was entitled to assert its own view in relation to the version events it preferred, i.e. credibility and/ or reliability. The Reporter proceeded to adopt the untruthful statements advanced on behalf of Mr Renfrew in her Second Supplementary Report dated 7 May 2014, thus preferred the credibility and reliability of Mr Renfrew for reasons which have never been explained, and did so following insufficient, and therefore inadequate, enquiry.

The Reporter did, however, decide to forward to the Council the above supporting papers which were produced, which it is repeated were peripheral to the main issue, and which may accordingly be described accurately as not "particularly helpful". Although it is unfortunate that my professional reputation was impugned wrongly and following inadequate process, I resolved not to take the matter further, but now explain the position to avoid any inference adverse to the Appellant's Appeal. In particular, I submit that no reliance should be placed upon the views of the Reporter contained within paragraphs 2 and 3 of the Second Supplementary Report quoad the action of Division and Sale."

SUBMISSIONS FOR THE FIRST RESPONDENT

Ms Motion stated that she wished her written submissions to be read into the record. She stated that she wished to emphasise a couple of points. Firstly, she stated that reference was made by Mr Hutcheson regarding reliance on the Reporter's view. She submitted that the Reporter's view is not under challenge, it is the Sub Committee's decision which is challenged and the view of the Reporter should be put aside. Ms

Motion stated that where the Sub Committee has varied from the Reporter's view in its decision this is explained in its decision. Ms Motion stated that Mr Hutcheson had not said much about the Sub Committee's decision.

Ms Motion submitted that the decision which is appealed in this case is one which a reasonable Sub Committee could have made. Ms Motion stated that it may not be a perfect decision but stressed that for it to be overturned it has to be such an unreasonable decision that a reasonable Sub Committee would not have reached it. Ms Motion stated that the Tribunal's powers in this Appeal were either to confirm the decision or overturn it.

Ms Motion submitted that it is not necessary for the Sub Committee to narrate every piece of correspondence which they considered. She stated that the Sub Committee made it clear that looking at everything in the round, and all three letters referred to, authority had been given to market the property. She submitted that if one looks at the letter of 22 October 2013, which is found at Production 13 of the Respondent's First Inventory of Productions, that given its plain reading there can be nothing clearer than that authority was given to market the property. Ms Motion referred the Tribunal to the last sentence of that letter:

> *"Obviously if steps are now taken belatedly to market the property, this will be welcomed and we look forward to receiving the engrossed Minute of Agreement for execution."*

She stated that the words *"for the purposes of marketing the property"* are not included at the end of that sentence.

Ms Motion submitted that this letter supports the Sub Committee's decision. Ms Motion stated that whilst there was nothing in her written submission in relation to this, she submitted that if there is any ambiguity in a letter it should be read against the writer. She stated that this was the doctrine of *contra proferentem* which is a long established legal doctrine and stated that she had case law to confirm this if the Tribunal wished to have regard to it.

Ms Motion submitted that the Sub Committee looked at the letter independently. She stated that it is possible neither Mr Hutcheson or the Second Respondent was right in their arguments about what it meant, but she submitted that the Sub Committee had approached their decision making correctly and she submitted that there have been no documents lodged which make any difference to that.

Ms Motion stated that the Tribunal should disregard Mr Hutcheson's view on what was normal practice and stated that he cannot give evidence regarding that.

In relation to the letter of 12 July 2012, Ms Motion stated that this was written some months before. She submitted that a lot of water had gone under the bridge since then and stated that things do change in that time. She advised that the Sub Committee took that into account and submitted that they were entitled to. Ms Motion stated that Mr Hutcheson had mentioned what happened after the property was marketed and she submitted that that was not part of the complaint. She stated that the complaint was very tightly drawn and it was that the Second Respondent had no authority to market the property.

In relation to the third head of complaint, Ms Motion stated that she had very little to add to her written submission. She stated that her submission extends to a marketing agreement as well as letter of engagement. She submitted that even if a letter of engagement required to be issued, it is accepted that a one off failure to issue such a letter is excusable and not sufficient to amount to unsatisfactory professional conduct.

Ms Motion moved the Tribunal to refuse the Appeal and find the Law Society entitled to their expenses in their defence of the Sub Committee's decision.

Ms Motion referred the Tribunal to her written submissions which were as follows:

1. Invite the SSDT to refuse the Appeal as adjusted and to find the Appellant liable in the expenses on the usual basis.

2. <u>Basis</u>

(1) General comment. It is generally accepted that different minds may reach widely different decisions, any one of which may reasonably be thought to be the best, and any one of which, may be made without being held to be wrong or so unreasonable that no Sub-Committee could have reached the same decision in all the circumstances.

(2) The decision of the Sub-Committee on all parts of the Complaint as appealed fell within the range of reasonable decisions and nothing put forward on behalf of the Appellant either individually or cumulatively meets the threshold required.

In short:-

(1) There has been no identified error of law.
(2) There is no identified failure to take into account material that was made available for the Sub-Committee.
(3) There is no identified failure that the Sub-Committee took into account an irrelevant factor.
(4) This is not a situation where it has been shown that too much weight has been given to one or other item resulting in the decision being so unreasonable as to be interfered with.
(5) There is no material before you to suggest that there has been a change of circumstances entitling interference.

Address each part of the Complaint as appealed.

3. Complaint 1

As detailed in the Answers, the Complaint before the Sub-Committee was:-

"*Mr Renfrew and the firm of W. Renfrew & Co Limited commenced marketing Property 1 for sale without obtaining my consent or instructions as a joint owner of the property and in the absence of any*

Minute of Agreement between me and their client, Mrs A, concerning the arrangements for sale of the property and division of the net proceeds of sale".

The Sub-Committee made it clear in it's decision that the starting point was correspondence dating back to 22 March 2013. It is equally clear that it took into account all the information provided in the report to it, the supplementary reports and correspondence from the Appellant's representative. Indeed it commented on the volume of material provided on behalf of the complainer.

The Sub-Committee looked at the chain of correspondence and the whole circumstances.

The Sub-Committee was entitled to take into account, as part of the whole circumstances, the Appellant's solicitor's comments in his letter of 22 October 2013.

Indeed the Sub-Committee made it clear that it was considering all the correspondence and circumstances, including but not limited to the three letters of 21 October, 22 October and 13 November, all 2013.

It concluded, as it was entitled to do, that authorization/consent had been given on behalf of the Appellant to market the property.

It was entitled to reach that conclusion.

It did not fail to consider properly all the relevant and material facts.

It did not exclude relevant materials. It is of note that no specific material has been identified as having been excluded. There has simply been a general averment it failed to take into account correspondence.

The Sub-Committee was also entitled to rely on the Law Society Guideline on Acting for Separated Spouses/Civil Partners and Cohabiting Couples 2006 (no 4 in first Inventory Law Society).

In reaching its decision it took account of the development of the correspondence over time as it was entitled to do in reaching its decision. It also took into account that an action of division and sale had been commenced by the Appellant sometime in the summer of 2013 and therefore after the correspondence in March 2013 that the Appellant is founding on in this Appeal.

It is averred in paragraph 8 of the Appeal that the Sub-Committee made an erroneous specific finding that "Mr Renfrew interpreted the letter of 22 October as authority to market property". Can see no such finding.

It is worthy of note that the terms of this head of complaint are limited to commencing marketing and nothing beyond that. Accordingly any averments or submissions in relation to post marketing are not relevant for complaint 1.

Finally on this point the "new material" introduced, e.g. the letter of 12 July 2013 in the adjusted Appeal paragraph 4 does not alter the factual matrix in any way at all and therefore does allow interference with the decision.

Complaint 2

It has been clarified by the Appellant in the Appeal as adjusted that this has not been appealed and therefore no submissions will be made.

Complaint 3

"*Mr Renfrew purported to act for me in the marketing of Property 1 for sale without issuing a terms of engagement letter or marketing agreement*

to me and in a situation where there was an actual or potential conflict of interest in him acting for both Mrs A and me."

The Sub-Committee made clear the basis of reaching its view that there was no actual or potential conflict in the jointly marketing of the property with the Appellant's interest being protected by Mr Hutchison (sic). The reasoning is clear; concise and reasonable – top paragraph of the last page of the decision.

In relation to the issue of the Terms of Business Letter the Sub-Committee considered it questionable whether in the circumstances a Terms of Business Letter required to be sent to the Appellant or indeed his Solicitor at all.

It rightly took the view that even if it did, such a letter need only be issued at the earliest practical opportunity – with reference to the 2011 Practice Rules, Rule B4 at B4.2 (no 9 second Inventory for Law Society).

Very quickly after marketing the Appellant made it clear that he did not wish the property marketed by Mr Renfrew and it was withdrawn.

The Sub-Committee reached the view that in the whole circumstances it was not convinced that a failure to do so would amount to professional (sic) Submit clearly correct and refer to the Lord President Emslie's observations in *Sharp v The Law Society of Scotland* -"gravity of the failure and consideration of the whole circumstances in which the failure occurred, including the part played by the individual Solicitor in question". It was entitled to and did reach the view that this did not amount to professional misconduct.

It then went on to consider whether or not it would amount to unsatisfactory professional conduct as defined as "conduct by a Solicitor which is not of the standard which could reasonably be expected of a competent and reputable Solicitor but which does not amount to

professional misconduct and which does not comprise merely inadequate professional services".

In the whole circumstances it found and was entitled to so find that the behaviour of the Solicitor did not meet this test either.

Its approach cannot be justifiably criticized.

Conclusion

Renew motion to refuse the Appeal and find the Appellant liable to the Society in the expenses of the Appeal on the usual basis."

FURTHER SUBMISSIONS FOR THE APPELLANT

Mr Hutcheson stated that he disagreed with Ms Motion's view that a one off failure to issue a terms of business letter can always be excused. Mr Hutcheson submitted the Tribunal must consider the individual circumstances of each case and he referred the Tribunal to the terms of the correspondence contained in the productions. Mr Hutcheson submitted that there was one continuous process of marketing the property from 12 to 22 November and the Tribunal should have regard to that and the fact that he had advised the Second Respondent on 13 November that he had no authority to market the property.

Mr Hutcheson stated that he disagreed with Ms Motion's view regarding the *contra proferentum* rule. He said that his view was that the primary approach is to have regard to the whole circumstances and submitted that if you do that the meaning is clear and there is no ambiguity.

DECISION

The Tribunal had regard to the oral and written submissions by both parties, the Joint Minute of Admissions and the productions lodged. The Tribunal agreed with the Fiscal that in considering this Appeal against a decision made by a Law Society Sub

Committee the function of the Tribunal was not to review the decision and reach its own conclusion. The Tribunal noted that in the light of the Joint Minute of Admissions there was no dispute about the facts and no evidence required to be heard. The Tribunal considered that in the circumstances it required to examine the decision and decide if it was a decision which a reasonable sub committee would have made.

In relation to the first head of complaint the Tribunal was of the view that the terms of letter dated 12 July 2012 were not significant. It was clear from the 2013 correspondence that there was an initial expectation that a Minute of Agreement be drawn up and signed by the parties prior to the marketing of the property. However, the Tribunal considered that it could be inferred from the correspondence in October and November that by that time matters had moved on and it was no longer necessary for the document to be signed prior to the commencement of marketing. The Tribunal was of the view that the correspondence relied upon by the sub committee in deciding that authority had been given to market the property was capable of more than one interpretation. However, the Tribunal was satisfied that the sub committee had applied the correct test and that it was reasonable to come to the view that authority to market the property was provided by the correspondence when considered as a whole. The Tribunal noted that on behalf of the Appellant Mr Hutcheson put forward a different interpretation of the correspondence but considered that this is not sufficient to determine that the Law Society's decision was unreasonable. In this case the Tribunal found nothing in Mr Hutcheson's submissions which convinced them to think other than that the decision was a reasonable one. The Tribunal was satisfied that the sub committee had taken the correct approach and had applied the correct test in making its decision. The Tribunal accordingly considered that the decision made on issue 1 was a decision which could reasonably have been made by the sub committee based on the information before it.

In relation to the third head of complaint the Tribunal was again of the view that the sub committee took the correct approach in making its decision on this matter. It considered the relevant guidance and applied the correct test. It was not unreasonable of the sub committee to reach the conclusion that in all the circumstances, including the short period that the property was marketed for before it was withdrawn from the market, a single failure to issue a terms of business letter did not amount to

unsatisfactory professional conduct. In relation to the issue of a potential conflict the Tribunal again considered that the Sub Committee had approached their decision making correctly and had given clear reasons for their decision which was that it was clear from the correspondence at the time the property was marketed both parties wished the property to be sold and there was therefore no conflict of interest.

The decision of the Tribunal was therefore to confirm the determination of the Law Society in respect of the two heads of complaint which had been appealed against.

The Tribunal noted that Ms Motion had moved for expenses on behalf of the First Respondents. Mr Hutcheson asked the Tribunal not to hold the Appellant liable for the expenses of the Appeal stating that there were very disquieting aspects of this case. He advised that the Appellant had been put to considerable expense by the Second Respondent's failure to immediately remove the property from the market and submitted that the expenses incurred had been extraordinary.

The Tribunal was of the view that expenses should be awarded in favour of the successful party in the Appeal and it found the Appellant liable for the expenses of both the First Respondents and the Tribunal in respect of this Appeal and made the usual order in respect of publicity.

Alan McDonald
Vice Chairman