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

D E C I S I O N

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

by

A & R ROBERTSON & BLACK WS and JOHN P GRAY, Solicitors, Bank Street, Blairgowrie, Perthshire

Appellants

against

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

First Respondent

and

Mr A and Miss B

Second Respondents

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 by A & R Robertson & Black WS and John P Gray, Solicitors, Bank Street, Blairgowrie (hereinafter referred to as "the Appellants") against a Finding made by the Council of the Law Society of Scotland (hereinafter referred to as "the First Respondent") dated 28 September 2010, that the Appellants had provided an inadequate professional service in relation to their clients Mr A and Miss B ("the Lay Complainers") and a Direction that (i) that the Appellant's fees for the attorney period and the administration of the estate period combined shall be restricted to £34,388.88 plus VAT, that the

Appellants shall refund any fee paid in excess of £34,388.88 plus VAT to the estate of the late Mr C, that the Appellants will refund to the estate the sum of £13,143.16 for work before the attorney period and not individually costed since 1991, that the Appellants should refund to the estate the sum of £3,007.23 for duplicate charging, that the Appellants shall refund to the estate the sum of £1,169 for tax penalties incurred, that the Appellants shall refund to the estate the sum of £6,160 plus VAT in respect of charges for the Law Accountant's fees, that the Appellant shall refund to the estate the Auditors fee amounting to £4,828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007 and that the Appellants shall pay by way of compensation the sum of £2,000 to the estate of the late Mr C.

2. In accordance with its Rules the Appeal was formally intimated on the Law Society and the Lay Complainers. Answers were lodged on behalf of the Law Society.

3. The case called before the Tribunal on 26 January 2011. The Law Society were represented by their fiscal Sean Lynch, Solicitor, Kilmarnock. The Appellants were represented by Walter Semple, Solicitor, Glasgow. The Lay Complainers were not in attendance. The Appellants moved the Tribunal to allow a Minute of Amendment to the Appeal; there was no objection and this was allowed. Mr Lynch made a number of concessions in relation to preliminary points made by the Appellants but indicated that he would wish the Tribunal to issue a draft Interlocutor which could be seen by the Lay Complainers who would then have an opportunity to object if they wished. As there were a number of issues to be resolved between the parties it was agreed that the case be adjourned to a date to be fixed in the future.

4. The case next called on 31 October 2011. The Appellants were represented by Mr Semple. The Law Society were represented by Mr Lynch. The Lay Complainers were not present but had lodged a letter dated 10 February

2011. The Appellants lodged a Second Minute of Amendment, Mr Lynch indicated he had no objection and this was allowed. A Joint Minute was lodged agreeing certain matters. The Tribunal then heard evidence from Mr Gray and submissions from both parties over a number of days.

5. Having considered the evidence led, the productions lodged, the letter from the Lay Complainers and the submissions made on behalf of the Appellants and the Law Society, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh 20 December 2011. The Tribunal having considered the Appeal under Section 42A of the Solicitors (Scotland) Act 1980 by A & R Robertson & Black WS and John P Gray, Solicitors, Bank Street, Blairgowrie ("the Appellants") in respect of a Finding of Inadequate Professional Service and a Direction that the Appellants' fees for the attorney period and the administration of the estate period combined shall be restricted to £34,388.88 plus VAT, that the Appellants shall refund any fee paid in excess of £34,388.88 plus VAT to the estate of the late Mr C, that the Appellants will refund to the estate the sum of £13,143.16 for work before the attorney period and not individually costed since 1991, that the Appellants should refund to the estate the sum of £3,007.23 for duplicate charging, that the Appellants shall refund to the estate the sum of £1,169 for tax penalties incurred, that the Appellants shall refund to the estate the sum of £6,160 plus VAT in respect of charges for the Law Accountant's fees, that the Appellants shall refund to the estate the Auditors fee amounting to £4,828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007 and that the Appellants shall pay by way of compensation the sum of £2,000 to the estate of the late Mr C; Quash the Determination in respect of the attorney period as set out in the Law Society's Determination paragraphs 1, 2, 5 and 7 (page 35/225); in respect of the administration of the estate paragraphs 1, 2, 3, 5, 6 and 9

(page 36/226); in respect of the administration and sale of Property 1 paragraphs 1, 2, 3, 4 and 6 (pages 36, 37/226, 227); in respect of the administration and sale of Property 2 paragraphs 1, 2, 3, 4, 5, 6, 7 and 9 (page 37/227); in respect of the administration and sale of the Property 3 paragraphs 1, 2, 3 and 5 (page 38/228); in respect of the administration and sale of Property 4 and premises to the rear thereof paragraphs 1, 2, 3, 4, and 6 (page 38/228) and the Determination and Direction (page 39/229) that the appellants refund to the estate the sum of £13,143.16 for work before the attorney period and not individually costed since 1991 and the Determination and Direction that the Appellants refund to the estate the sum of £1169 for tax penalties incurred; Quash the Determination and Direction that the Appellants should refund to the estate the sum of £3007.23 for duplicate charging; Quash the Determination and Direction that the Appellants shall refund to the estate the auditor's fee amounting to £4828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007; Vary the Determination that the Appellants' fees for the attorney period and executry period combined should be restricted to £34,388.88 and that the Appellant should refund anything in excess of this to the executry, and instead Direct that the Appellants repay any fees charged to the extent that these exceed the sum determined by a taxation of new as reasonable remuneration for the actings of the Appellants during the attorney period and the executry period; this taxation of new to be carried out by the Auditor of Glasgow Sheriff Court; it being for the Appellants to determine if they wish the taxation to be on the basis of oral representations or written submissions and the taxation shall be intimated on all parties; the Auditor's fees shall be payable by the Law Society and / or the Appellants as may be determined by the Auditor; in the event that the Auditor determines that the Appellants should make payment of the taxation fee or any part thereof, the Tribunal so order that the Appellants pay within one month of the taxation fee or the part there payable by them being intimated to them; Vary the Determination and Direction that the

Appellants shall pay by way of compensation the sum of £2000 to the estate of the late Mr C and instead Direct that the Appellants shall pay the sum of £500 by way of compensation to the estate of the late Mr C; Confirm the Determination and Direction that the Appellants shall refund to the estate the sum of £6160 plus VAT in respect of charges for the Law Accountant's fees. Of Consent Find the First Respondent liable to the Appellants in the Expenses incurred by the Appellants up to and including the hearing on 26 January 2011 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; Quoad Ultra make no finding of expenses due to or by any party; Direct that publicity will be given to this Decision and that this publicity will include the name of the Appellants.

(signed)

Alistair M Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

At the Procedural Hearing on 26/01/11 Mr Lynch stated that he would require to concede certain aspects of the Appeal but as the Lay Complainers were not present he was going to give an indication of what he intended to concede and he would then ask the Tribunal to issue a draft Interlocutor which could be seen by the Lay Complainers to allow them an opportunity to object.

Mr Semple explained that there was a long history to the case and that he had made three separate submissions on behalf of his client which had involved a huge amount of work with 60 separate issues. He clarified that his client did not agree with any of the IPS Determination but that it would be sensible to take a structured approach and deal with the issues to see if the proceedings could be shortened and this was the purpose of the procedural hearing. It was agreed that it would be necessary to work out which points required to be dealt with by way of a legal debate.

Mr Semple asked the Tribunal to allow the Minute of Amendment amending the Appeal. Mr Lynch indicated that he had no objection and this was allowed. Mr Lynch clarified that his Answers would require adjustment once the issues became clearer.

In relation to the Appellant's submissions, Mr Lynch stated that it was clear that the Law Society Schedule did not reflect the decisions taken by the Law Society Committee and accordingly having regard to the Appellant's submissions in relation to 2, 3, 4 and 5, Mr Lynch proposed to concede the appeal against the IPS findings. In connection with issue 6, Mr Lynch stated that it was accepted that there was an error in the way the matter had been expressed by the Law Society Committee and this required correction rather than being quashed. In connection with issue 7, Mr Lynch stated that it was conceded that this could not be sustained. In connection with issue 8, this was the time bar issue and the whole question of whether the Discipline Tribunal could exercise a function akin to Judicial Review, required to be argued and a debate would require to be fixed on this. In respect of issues 13 and 14, Mr Lynch stated that he was not prepared to make a

concession but there were discussions ongoing and he thought that there would probably be a joint remit to a different Auditor to assess the fees and the Appellants could make representations with regard to the level of the fees. Mr Lynch stated that he envisaged that this audit could take place within a short timeframe.

In connection with issue 15, Mr Lynch stated that there may need to be a proof before answer but this matter may be capable of resolution.

In connection with issue 16, Mr Lynch stated that this was governed by the Accounts Rules and he was prepared to concede this.

Mr Semple explained that he wished to persuade the Tribunal that the decision of the Law Society could be judicially reviewed and that the Tribunal had power to deal with this matter. He indicated that he thought a question of fact arose and the Tribunal would have to deal with it on the basis of proven or agreed facts. Mr Semple stated that if he succeeded in persuading the Tribunal that the Law Society Committee was in error, the question would be what powers the Tribunal had and he thought the most convenient way of dealing with it would be by way of a preliminary hearing. Mr Semple stated that it was hoped that all the facts could be agreed by a Joint Minute.

Mr Lynch advised that the Tribunal had already decided in the case of Ritchie Robertson, that the Tribunal did not have power to review a decision of the Law Society and Mr Lynch indicated that he considered that this was a matter for legal debate. Mr Lynch further stated that the value of the compensation was very low in relation to the expense of this case and that perhaps Mr Semple would wish to take a view with regard to the outcome in light of the concessions made.

The parties asked the Tribunal to fix a further procedural hearing so they can report on progress made and what should be done with regard to a full hearing. Mr Semple stated that the case referred to by Mr Lynch was a complaint in connection with professional misconduct and the issues were not necessarily the same. He also pointed out that the

financial consequences of the IPS award were significant and that his motive was to take out of the account the matters which related to the issues prior to the death of Mr C. In connection with the taxation of fees by the Auditor of the Court of Session, Mr Semple submitted that the only way to get rid of this decision was to take it to the Court of Session or by the Tribunal disregarding it. The Chairman indicated that the disputed fees were part of the IPS finding and were based on the Auditor's findings. Mr Lynch stated that the inadequate professional service was in relation to the overcharge. The Tribunal indicated that if the matter was still a live issue it will have to decide whether it was proper or improper to base the decision on the Auditor's report already available.

An adjournment was then granted to allow the parties to have further discussions.

After the adjournment the parties indicated that they could not resolve all the issues today and moved the Tribunal to continue to a date to be fixed in the future, when they would be able to give a clear indication of the issues to be canvassed. It was agreed that parties would advise the Clerk, within a period of 2 months, what the position was and then another date would be fixed for hearing of this case before the same Tribunal. It was further agreed that Mr Lynch's motion for an Interlocutor detailing the concessions made by him would be intimated to the Lay Complainer who would then have 14 days to intimate any opposition.

The case next called for a hearing on 31 October 2011. Mr Semple advised the Tribunal that the issues in dispute had been narrowed down. He moved his Second Minute of Amendment and Mr Lynch indicated that he had no objection. This was allowed. It was clarified that the Appeal Record which had been lodged detailed all the outstanding issues. Mr Lynch further clarified that he conceded all the other issues which had been in the original Appeal. The Chairman stated that this meant that the Appeal would be allowed in respect of the conceded issues and accordingly the Law Society's Determination in respect of these issues would be quashed.

A Joint Minute was lodged agreeing the Law Society's policy with regard to the time

limit for complaints from April 1998 until 18 April 2007 and confirming that copies of all the documents produced by the Appellants included in the First and Second Inventory of Productions be treated as principals and that the dates of the Productions and the persons to whom they were issued etc were correct.

Evidence for the Appellants

Mr Semple indicated that he wished to lead the witness, Mr John Paterson Gray, through his Affidavit which would be the evidence in chief. Mr Semple read out the Affidavit to the Tribunal and referred the Tribunal to all the Productions referred to in the Affidavit. Mr Gray confirmed on oath that the content of the Affidavit was true. Mr Gray's Affidavit confirmed that Mr C was a long standing client of A & R Robertson & Black WS and was clear and lucid in his mind until a short time before his death. Mr Gray was appointed to act as Mr C's attorney in 1998. Power of Attorney dated 19 April 1998 is at page 203 of the Appellant's First Inventory of Productions. Mr Gray was not asked to start operating the Power of Attorney until April 2000 and he acted as Mr C's attorney from then until his death on 10 September 2004. Mr Gray met with Mr C regularly to discuss his affairs. On 18 April 2000 Mr Gray met Mr C's son Mr A who is a chartered accountant and Mr Gray took specific instructions from Mr C that he could disclose his affairs to his son, Mr A. As a consequence Mr Gray kept Mr A informed particularly as regards to fees charged to Mr C. There was a lot of work involved, Mr Gray wanted to make sure that all the fees charged were independently assessed. He therefore employed Wilkie Law Accountants in Edinburgh to fix all the fees charged by the firm. Each time fees were charged Mr Gray informed Mr A and told him that the fees were being fixed by Wilkie Law Accountants. This way of working was not objected to or questioned by either Mr C or Mr A.

Mr Gray referred to correspondence in the Appellant's First Inventory of Productions being attendance notes and letters showing that Mr A was informed about fees being sent to the Law Accountants, showing ongoing business and showing that there were difficulties with the relationships between the family. The letters kept Mr A informed

with regard to fees being sent to the Law Accountants. Production 61 of the Appellant's First Inventory of Productions enclosed a summary of the fees and Production 62 is a letter of 16 September 2004 with regard to the outstanding fees being sent to the Law Accountants.

When Mr Gray was the attorney for Mr C, Mr A and Miss B were not his clients. Mr C appointed his children Mr A and Miss B as Executors. Mr C's wife was not an Executrix or Beneficiary in his Will but she claimed legal rights. Mr C's relationship with his children was not particularly good. After Mr C's death, Mr A and Miss B acting as Executors decided to appoint Mr Gray's firm to act in the administration of their father's estate. They were new clients and his legal relationship with them was entirely differently from the legal relationship with their father. The inventory of Mr C's estate was signed by Mr A on 13 June 2005. Mr Gray refers to Page 76 of the Appellant's First Inventory of Productions being a letter referring to the Form IHT200 calculations and Mr A stated that he now understood the provenance of the numbers and reasoning behind them. A deduction for legal fees and Law Accountant's fees of £27,031 is shown at Page 4 on the IHT200 Form. Mr Gray refers to a note of meeting on 31 October 2005 at page 138 where his accountant and an office manageress attended and the matter of fees was discussed. The note of meeting explains the fees and refers to production of a copy of the Law Accountant's fees. Mr Gray explained that the family wanted clarification with regard to the detail of the fees. Page 142 was a letter of 9 November 2005 from the Executors asking for a breakdown of fees. Mr Gray replied saying that he would ask for a breakdown from the Law Accountants and wrote to the Law Accountants. Mr Gray refers to Production 127 of the Appellant's Third Inventory of Productions being a letter of reply from the Law Accountants enclosing a breakdown. Mr A was a chartered accountant and Mr Gray understood that he would be skilled in dealing with such matters.

The relationship between Mr Gray and the Executors broke down and he withdrew from acting in November 2006. The Executors appointed Messrs Blackadders to act for them. Mr Gray produced an Executry Account which is Document 2 at Page 8 of the

Appellant's First Inventory of Productions. On 18 April 2007 Blackadders wrote to the Law Society making complaints of professional misconduct and inadequate professional service against Mr Gray. The complaints concerned the administration of the affairs of Mr C for the period April 2000 to 10 September 2004 and also the administration of the estate of Mr C from 10 September 2004 to 27 November 2006. The complaint amounted to 360 pages.

On 29 March 2007 Messrs Blackadders wrote to Mr Gray to say they had been instructed to arrange a Diet of Taxation of his files at the Court of Session. They asked him to agree a Joint Remit. Mr Gray took advice from Walter Semple and replied stating that he felt that he should exclude the fees to which the five year prescription applied. Blackadders were not agreeable to these terms and said they would remit the files to the Auditor of the Court of Session. Mr Gray said it was clear that Blackadders expected the Auditor to contact both parties. He heard nothing more about the matter until he received the Auditor's Certificate dated 17 August 2007 and a note of his fee. Mr Gray referred to Pages 180 and 182 of the Appellant's First Inventory of Productions. Walter Semple wrote to the Auditor on 30 August 2007 and the Auditor replied stating that the taxation was carried out at the request of Mr C and Miss B and they together with the Auditor had the right to determine the procedure to be followed. The Auditor proceeded upon the papers submitted to him. Walter Semple wrote to the Auditor on 20 September 2007 explaining that there had been a fundamental procedural mistake in the Auditor's treatment of the matter and Mr Gray referred to Page 187. The Auditor replied on 9 October 2007 saying that at no stage had there been a request for a Diet of Taxation. Mr Gray referred to the Auditor's Note of Taxation Procedure at Page 185.

Mr Gray clarified that he did not consider himself bound by the Auditor's Decision. He did not have an opportunity to be heard in the taxation process. He had no information as to why the Auditor had made deductions from his accounts. He was accordingly unable to understand why the deductions had been made. Mr Gray's position was that he charged his fees in good faith on the basis of advice from a skilled and reputable law accountant and he kept his clients informed of his way of working. Mr Gray referred to

the correspondence in the Appellant's First Inventory of Productions. Mr Gray's position was that he referred his client's questions to the Law Accountants and provided his clients with information that was available. Mr Gray does not consider himself obliged to pay the fee of the Auditor of the Court of Session as he did not instruct him. Mr Gray referred to the submissions made on his behalf to the Law Society via Walter Semple who he had engaged to help him respond to the complaint. The Law Society intimated the Decision to Mr Gray by letter of 15 October 2010 almost three and a half years after the date of complaint. Mr Gray's view is that the Executors had the possibility to seek a proper review of his legal fees by raising proceedings in Court and having a taxation carried out according to fair and proper procedure. If they had done this prescription would have been interrupted by the Court action. Mr Gray submitted that what remained was in essence a fees dispute. Mr Gray referred to Document 121 on Pages 1 and 2 on the Appellant's Second Inventory of Productions which was a note of all the legal fees which were included in the Executry account. All but a few of the fees are now more than five years old. The fees charged in September 2006 were intimated to Mr A via letter of 21 September 2006, Page 42 of the Appellant's First Inventory of Productions. Mr Gray submitted that the making of the complaint to the Law Society did not interrupt the five year prescription period and neither did the taxation.

Mr Gray advised that the Reporter concluded that there had been duplicate charging in respect of two files but although the two files had the same description they related to separate work and it was correct and proper to seek payment of fees in respect of both files. Mr Gray submitted that there had been no inadequate professional service and accordingly no compensation was due.

In cross examination, Mr Gray confirmed that on 27 March 2000 he met with Mr C's wife and daughter. Mrs C was formidable and was livid about her husband having granted a Power of Attorney. Mr Gray met Mr A on 18 April 2000. He thereafter obtained authority from Mr C to speak to his son about his affairs. Mr Gray explained that Mr C wanted him to get on with organizing his affairs. He did not send a letter because he had known Mr C for a long time. After the meeting in April 2000 he sent all

the correspondence to Mr A. He however saw Mr C regularly. Page 100 was an attendance note in connection with the meeting on 27 October 2000. Mr A did not know that his father has started to implement the Power of Attorney and he was concerned with regard to the procedure. Mr A was an accountant. Mr Gray explained that Mr C did not want to engage, he was interested but he did not want to deal with the day to day issues.

Mr Gray confirmed that at that time Mr C was his client. He explained that he wanted to account to the family to avoid any suspicion. He did not consider that it was necessary to have issued letters. He did account to Mr A in connection with the fees by sending him letters. He gave Mr A the workings, specifically after a letter from Mr A asking for more details. Mr Gray accepted that there was no discussion with Mr A in connection with the rate of charging or what the hourly rate was. He did not know if it was £150 or if it was higher than the last published Law Society's table of fees for a general business. Mr Lynch referred Mr Gray to Page 113 of the Appellant's First Inventory of Production being an attendance note indicating that Mr C had no interest in doing business matters. Mr Gray however confirmed that at every meeting with Mr C they went through all his properties. Even though he was not interested, he wanted to be kept up to date with what was happening. Mr C wanted weekly meetings. Mr Gray said that he was interested in his empire but had no interest in doing anything. Mr Gray said that he did not think that the meetings with Mr C were unnecessary. Mr Gray stated that his dealings with Mr C were prior to letters of engagement becoming compulsory in 2005. He stated that he did not know whether before this it was good practice. He stated that he had read the Code of Conduct 2002 and accepted that it stated that clients should be provided with information with regard to the hourly rate in writing. Mr Gray however stated that he spoke to Mr C about the level of fees.

Mr Gray confirmed that he had a qualified accountant who was his assistant in connection with the executries and who prepared the file to be sent to the Law Accountants. Mr Gray clarified that at the date of Mr C's death there were outstanding fees which were rendered after his death. He did not know if they went back as far as 1975. Mr Gray explained that Mr C did not want fees taken while he was alive. The fees

were brought up to date prior to the activation of the Power of Attorney. The fees however were not paid at this time. The outstanding fees were reflected in the IHT200 Form. Mr Gray confirmed that Mr C saw the fee notes prior to the Power of Attorney being activated on one occasion when he was at the end of the desk. Mr Semple objected to the line of questioning and stated that it was not relevant to the matters under Appeal. Mr Lynch stated that the fees claimed to the date of death were part of the fees that had been taxed and he was referring to a Production lodged by the Appellants. Mr Semple did not pursue the objection.

Mr Gray said that there was a question of whether or not Mr A was truthful with Miss B. He sent fee notes to Mr A in connection with some matters which were rendered and paid as they went along. Mr Gray stated that following the meeting on 31 October 2005 he would have sent a letter to Mr A as he was incensed. Mr Gray referred to his letter of 29 November 2004 at Page 32 and letter of 16 September 2004 at Page 30 where he sent Mr A fee notes for the period prior to the Power of Attorney. He indicated that these may be some of the same fees as referred to in the note of meeting of 31 October 2005 where there were references to fees going back to 1975. Mr Gray stated that when a fee was rendered it was sent to the Auditor of the Court and re-typed and sent out. In response to a question requiring clarification from the Chairman, Mr Gray confirmed that he had done work from 1975 to 1998 when the Power of Attorney was signed and again up until the time when the Power of Attorney was activated and some fees notes were rendered to Mr C but there was a lot more work done than was charged for at that time. At the time that the Power of Attorney was activated any files which had been un-fee'ed were sent for feeing. Mr Gray stated that some could go back as far as 1975. Mr Gray explained that some invoices for fees had been issued for example where assets were sold and a fee note had been rendered by another partner in the firm. Mr Gray explained that he had done notes of fee which were different from fee notes as there was no VAT invoice at this time. These notes of fee were handed to Mr C in 2000. Mr Gray referred to Page 25 of the Appellant's First Inventory of Productions being a letter to Mr A referring to fees in the initial period of the Power of Attorney. Page 45 was a detailed note of fees taken prior to death which went back to 1994. Mr Gray explained that when he took Power of

Attorney he realised that there were funds in the moveable estate. He thought that Mr C had told him lies with regard to having had no money which had led to him giving an undertaking to Mr C that he would not take fees until after Mr C died. That is why he did not take the fees even once he knew that there were funds available. These outstanding fees were included in the IHT200 Form. Mr Gray referred to Page 63 in connection with legal fees due from April 2003 to September 2004 and legal fees due up until April 2000. Mr Gray stated that Mr A said he understood the position. Mr Gray submitted that Wilkie Law Accountants' fee was a debt due by the estate because it had been agreed that Wilkie Law Accountants fee would be deducted from the estate. This had been agreed with Mr A and Miss B. Mr Gray stated that he had written to Mr A and Miss B and told them that fees were being sent to the Law Accountant to assess the fees and that they would be charged for this. Mr Gray had the authority to do this and referred to Page 32, 76 and 143 of the Appellant's First Inventory of Productions. Page 143 was a letter from Mr A which states that he wished clarification from the Law Accountants with regard to how their fees were worked out and did not wish to pay an extra charge in connection with this. Mr Gray said that no objection was taken by Mr A and Miss B to this matter. It was also common practice at the time. Mr Gray stated that he did not issue terms of business letters to Mr A and Miss B because it was continuing business rather than new business.

In March 2007 Blackadders were instructed and wrote with regard to taxation of the files. Mr Gray stated that he took advice and he was pretty fed up as they were looking back 10 years. His view was that if the taxation had to be carried out then it had to be carried out. He confirmed that he had no experience of how the Law Society complaints system worked. He was aware that at some stage there must be time limits but he did not know what they were. After he took advice he replied saying that prescription applied to some of the fees.

Mr Gray referred to files being Productions 124 and 125 as examples of the working papers and detail provided by Wilkie Law Accountants.

In response to a question in clarification from the Chairman, Mr Gray confirmed that he

had acted for Mr C since 1950 and that he did render fees and had them paid in connection with individual transactions but because he did not think that Mr C had any money to pay he did not take un rendered fees from the balance of the assets. There was accordingly work which was not paid for which continued until the Power of Attorney was activated. Mr Gray confirmed he had not prepared anything until this time. He had a meeting with Mr C when the Power of Attorney was activated and showed him the notes of fee but these were not actual fee notes.

In response to a question from the Tribunal, Mr Gray stated that he spoke with Mr C in 2000 and agreed with him that the fees would be paid after he died. There was nothing in writing with regard to this. Mr Gray said that he did not know what Mr C had told Mr A in connection with this matter.

In re-examination, Mr Gray confirmed that the two files Productions 124 and 125 were both general files but were separate files and he could not understand how the Auditor thought that they were not two different files. He had no comment to make on whether or not the Auditor would be in the best position to judge this matter. Mr Gray accepted that he had declined to allow the files to be subject to a further audit.

The case was adjourned part heard to 14 November 2011 when the Tribunal heard submissions on behalf of the Appellants.

Submissions for the Appellants

Mr Semple referred to his written submissions and lodged a bundle of authorities. Mr Semple clarified that the sanctions that remained under appeal were the decision that the sum of £34,388.88 plus VAT should be refunded to the estate of Mr C, that a duplicate charging of £3,007.23 should be refunded to the estate in respect of double charging, that the Auditor's fee of £4,828.31 inclusive of VAT should be paid by the firm of A & R Robertson & Black, that the fees of law accountants Wilkies of £6,160 plus VAT for preparing the accounts should be refunded to the executors and that two awards of

compensation of £1000 should be made. These were all subject to appeal.

Submissions in respect of Time Bar

Mr Semple submitted that the Law Society had failed to apply its own policy in connection with the time limit for bringing complaints. The decision of the Law Society proceeded on the basis of recognizing the difference between the attorney period and the executry period. Mr Semple submitted that this was correct as a matter of legal analysis but not with regard to sanctions. The legal relationship between the late Mr C and John Gray was a contractual relationship where John Gray was acting as attorney which is a type of agency contract. On the death of Mr C this relationship terminated as a matter of law. The will of the late Mr C appointed his children Mr A and Miss B as executors. They appointed the Appellant's firm of A & R Robertson & Black to do the executry work. John Gray is the sole partner of the firm. The nature of the relationship was entirely separate from that of attorney. As Mr A and Miss B were executors, they took over the right to pursue claims which their father would have had, had he survived. The relationship of Mr C with his children was not particularly good. The decision of the Law Society as regards the allegations of inadequate professional service does not take the difference in the nature of relationships into account.

Mr Semple referred to the Law Society's policy as regards the time limit for making complaints between April 1998 and the date when the complaint was made. This is included in the Joint Minute of Admissions and states that the Law Society will only consider a complaint made either within two years of the business being completed or within two years of the matter causing concern coming to a person's attention. Mr Semple submitted that the complaint in this case was made on 18 April 2007. Mr C died on 10 September 2004. The service of John Gray as attorney ended at the date of death. At that point the only remaining task for John Gray was to quantify and charge any professional fees outstanding at the date of death. Because John Gray provided no services as attorney after the date of death, it was only possible for the executors to seek to establish a complaint of inadequate professional service in respect of the attorney

period before the date of death. The quantification of Mr Gray's account was a consideration of the professional services rendered as attorney prior to Mr C's death. It was separate from assessing the quality of the professional services rendered. Mr Semple submitted that the quality of the solicitor's professional services was not a matter upon which an Auditor of the Court would or should have been asked to adjudicate. As regards to the attorney period any complaint about inadequate professional service required to be made before 10 September 2006 if the Law Society had applied its stated policy in connection with the two year time limit. The Law Society should have considered its time bar policy separately as regards to the attorney period and the executry period. The Appellants accept that as regards to the executry period the complaint was made within the required two year period. The plea of time bar only relates to the attorney period. Despite representations being made to the Law Society on behalf of the Appellants about the effect of the time bar policy, no reference is made to this in the Law Society's Decision. The Law Society accordingly not only failed to apply its own policy but also failed to give any consideration to the application of its own policy. Mr Semple submitted that this is an error of law. Mr Semple referred to the previous Tribunal case of Campbell Riddell Breeze Paterson decided on 28 April 2005. In that case the Tribunal held that head of complaint 1 was time barred. The Chairman pointed out that when the case of Campbell Riddell Breeze Paterson was considered the Tribunal was encouraged by both sides to consider the position as being akin to the Prescription and Limitation (Scotland) Act. The Tribunal also considered the Law Society's time bar policy in the case of Alexander Ritchie Robertson on 23 August 2007. As this was a case concerning professional misconduct it should not necessarily be treated in the same way. The Tribunal in the case of Alexander Ritchie Robertson considered the case of Campbell Riddell Breeze Paterson and considered that it was an entirely different situation. The Tribunal stated that it did have an inherent jurisdiction to find that a case was time barred if it was satisfied that a point had been reached at which justice could not possibly have been done. Mr Semple stated that in his submission this was not the test to be applied in an appeal under Section 42A. Mr Semple submitted that as the Law Society had published a policy, those who may be affected by this policy were entitled to rely on its application by the Law Society. In this case the Law Society by failing to consider its

policy and failing to consider whether there were circumstances which justified the waiving of the two year time limit meant its actings were *ultra vires* and invalid. In response to a question from the Chairman as to whether the Appellants had the opportunity to make submissions to the Law Society with regard to the policy, Mr Semple stated that he was given that opportunity but the Law Society's Decision made no mention of it and seemed to ignore it.

Mr Semple submitted that the Tribunal had the power to deal with judicial review issues without the matter being referred to the Court of Session. Mr Semple referred the Tribunal to Clyde and Edwards on Judicial Review where it is stated :-

"An attempt to enforce by means of the civil law an obligation arising by virtue of the exercise of statutory powers may be defeated on the ground that the act or decision lying behind the obligation is *ultra vires* provided that the point is raised in the pleadings and presented in argument. Such a challenge on the grounds of validity may arise in the Sherriff Court or any inferior court or Tribunal in Scotland and taken to the point of decision whether or not it is appealed to the Court of Session."

Mr Semple referred to the case of SSEB-v-Elder [1978] SC 132. Mr Semple further quoted:-

"So, too, in Scotland, the exclusivity of the judicial review procedure does not preclude judicial review issues arising outside judicial review."

Mr Semple also referred the Tribunal to the case of Vaughan Engineering Limited-v-Hinkins and Frewin Limited OHCS decided on 3 March 2003. Mr Semple quoted from the case where Lord Clarke refers with approval to a passage in Clyde and Edwards:-

"standing the authorship of that passage, I would be slow to reach the conclusion that it requires to be regarded as either misconceived or needs significant qualification." The Judge then goes on to refer to an earlier passage in Clyde and Edwards: "That an act or

decision is *ultra vires* has always been available as a defence in civil and criminal proceedings. Critically, however, in such proceedings the court does not quash the act or decision it finds *ultra vires*; this power is exclusively possessed by the Court of Session in the exercise of its supervisory jurisdiction."

Mr Semple quoted further from the case and referred to the Judge's words being:-

"it does not seem to me that the wording of rule 58.3(1) can, or should, have the effect of curtailing, by imposing additional procedural hurdles, well established rights of defenders to defend actions brought against them which rely on decisions or acts, by challenging the validity of the decision or act in question, without the need to resort to judicial review."

Mr Semple submitted that this was the present state of the law in Scotland.

Mr Semple also referred to West-v-The Secretary of State for Scotland [1992] SC 385 which laid down the scope of the jurisdiction of the court in proceedings for judicial review. Mr Semple referred to the criteria for assessing the competency of applications to the supervisory jurisdiction as set out in the case. Judicial review was available not to review the merits of the decision or for the Court to substitute its own opinion but to ensure that the decision maker did not exceed or abuse its powers or fail to perform its duties. The case also states that the competency of the application did not depend upon a distinction between private law and public law, nor was it confined to those cases which English law had accepted as being amenable to judicial review. Mr Semple submitted that the decision of the Law Society of Scotland issued on 15 October 2010 fell within the definition set out in the case. In this case the Appellants challenged the validity of the way in which the Law Society had failed to apply its policy on time limits in bringing complaints. Mr Semple submitted that this challenge could properly be made without the need to raise proceedings in the Court of Session for judicial review. It is sufficient to show grounds for judicial review to establish that the procedure was *ultra vires* and invalid.

Mr Semple went on to refer to the concept of legitimate expectation. He submitted that the unfair operation of established procedures or policies may be an issue for judicial review if the actions of the decision may breach the legitimate expectation of those who are entitled to rely on the established procedures and policies. Mr Semple then referred to Clyde and Edwards on judicial review which states that:-

"If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it."

Mr Semple referred the Tribunal to a number of cases in this regard. He again referred the Tribunal to Clyde and Edwards on Judicial Review where it is stated:-

"The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice."

Mr Semple referred the Tribunal to the cases of R-v-Board of Inland Revenue ex parte M F K Underwriting Agencies Ltd [1990] 1 AER 91, Preston-v-IRC [1985] 2 AER 327, R-v-Devon County Council ex parte Baker [1995] 1 AER 73, R-v-Liverpool Corporation, ex parte Taxi Fleet [1972] 2 QB 299, R-v-Secretary of State for the Home Department ex parte Khan [1985] 1 AER 40, Rooney-v-Chief Constable, Strathclyde Police [1997] SLT 1261, Lakin-v-Secretary of state for Scotland [1988] SLT 780 and Wheeler-v-Leicester City Council [1985] AC 1054.

Mr Semple submitted that in the present case the Law Society at the time of the Appellant's claim which was made on 18 April 2007 had a published policy which had

been in force for about nine years. In deciding the complaint against the Appellants, the Law Society took no account of the policy. As regards the attorney period, they did not consider it. Mr Semple submitted that on the basis of the authorities it was not necessary for the Appellants to seek an order from the Court of Session to reduce or set aside the decision. The Appellants are entitled to establish that the decision of the Law Society was invalid and could not be relied upon for the purpose of deciding the complaints against the Appellants. If the Law Society had taken into account their published policy, they would have noted that as regards to the attorney period the complaint had been made more than two years after the attorney period came to an end. There was no evidence that they did so or that they considered there were any circumstances which might have caused them to decide that the two year period should be extended. Mr Semple stated that if the Tribunal was satisfied that the Law Society had acted in breach of its own policy the Chairman was bound to quash any decision resulting from that breach. Accordingly any sanctions following on from that should also be quashed.

Overcharging of work done as found in the audit of 17 August 2007

Mr Semple stated that his second ground of attack on the order of the Law Society to refund the sum of £34,388.88 plus VAT to the estate of Mr C was that the procedure followed by the Auditor of the Court of Session breached the rules of natural justice. The Law Society treated the executors' request for taxation as one which arose from a court process and fell to be dealt with under the Rules of Court. That was an error. The reference to the Auditor was a contractual reference. The Auditor was bound to hear the Appellants before reaching his decision. He did not do this. Mr Semple accordingly submitted that his decision was void and unenforceable. Mr Semple referred the Tribunal to Page 235 of the Appellants First Inventory of Productions being Blackadders letter of 29 March 2007 asking for a joint remit to taxation. A reminder was sent on 5 April 2007 stating that if no response was forthcoming this would be taken as a refusal. The Appellants wrote to Blackadders on 19 April 2007 agreeing to sign a joint remit with the exception of those to which the five year prescription applied. Blackadders replied on 27 April 2007 refusing to agree to the terms of the Appellant's letter. (Page 178 and 179 of

the Appellants' First Inventory). The next that the Appellants heard was when the purported audit had been completed and they received the Auditor's Decision dated 17 August 2007 with a note of his fee. (Page 180 of the Appellants' First Inventory). The Law Society Committee dealt with this at paragraph 3 of the Sanctions section of their decision at paragraph 2 on Page 34. They stated that the Appellants had ample opportunity to lodge a Note of Objections in Court. This is a mistake, Rule of Court 42 applies only where there has been a court process and there was no court process in this case. The only way that the matter could have been referred to the Auditor was by consent normally by way of joint remit. Mr Semple referred the Tribunal to the procedure set out in the Auditor's Note on Taxation Procedure (Page 185 of the Appellants' First Inventory). The procedure specifies that the Auditor should receive from the solicitors their whole records of the work involved. The solicitors whose files were being taxed were the Appellants. The Appellants were not involved in the process. The note states that all parties always have the right to make their respective views known to the Auditor. A third course which the parties are at liberty to choose is for the Auditor to proceed upon the whole material he obtains from the solicitors. The Auditor failed to invite the Appellants to participate in the process. As a result the Appellants were denied the opportunity to participate. Mr Semple submitted that this was a clear breach of the Auditor's Procedural Rules and of the rules of natural justice. Mr Semple referred to Clyde and Edwards on Judicial Review where it is stated:-

"where there is no statutory requirement for any hearing it has to be a matter of circumstances whether any obligation lies on the decision maker to hear the parties whether orally or in any other form. The guiding principle is that of fairness."

In this case what happened was manifestly unfair to the Appellants. It was a clear breach of procedural fairness. The Law Society Committee was presented by the complainers with the Auditor's certificate as evidence. The Appellants in submissions to the Law Society pointed out the procedural error of the Auditor of the Court of Session. The Committee should have rejected the evidence but they refused to do so and accordingly misdirected themselves on the law. Mr Semple asked the Tribunal to now correct that

error and decide that the decision of the Auditor of the Court of Session was void and unenforceable. Mr Semple submitted that inferior courts and Tribunals have the power to disregard a decision made *ultra vires* where a defence depends on the validity of that decision and he referred to the authorities already referred to. Mr Semple also submitted that neither the decision of the Auditor or the Committee made any distinction between the attorney period and the executry period and accordingly there was no evidence before the Tribunal upon which it could rely in order to vary the decision of the Committee. Mr Semple submitted that accordingly the Committee's Determination should be quashed.

Effect of 5 year prescription on the purported Certificate by the Auditor of the Court of Session dated 17 August 2007

Mr Semple stated that his third ground of attack on the decision of the Committee in connection with the sum of £34,388.88 was the effect of the law of prescription. In this case John Gray acted as solicitor appointed by Mr C for a number of years before 2000. In the course of the year of 2000 Mr C asked John Gray to put in to operation a Power of Attorney which he signed in 1998. John Gray acted as attorney until the death of Mr C on 10 September 2004. In 2000, John Gray and Mr C arranged with Mr A, Mr C's son that Mr A would be kept informed about his father's business affairs. Each time John Gray proposed to charge a legal fee in relation to his work as attorney he informed Mr A about this and that he was having his fee fixed by Wilkie Law Accountants, an independent firm of law accountants in Edinburgh. Mr A and Miss B were executors and accepted office and decided to appoint the Appellants to act in the administration of their father's estate. Mr A signed the inventory of the estate of Mr C on 13 June 2005 (Page 70 of the Appellants' First Inventory). By letter of 13 June 2005 Mr A wrote to John Gray (Page 76 of the Appellants' First Inventory) thanking John Gray for sending details of the inheritance tax calculations and specifically the IHT200. (IHT200 Page 61 of the Appellants' First Inventory) this included deductions in respect of fees of John Gray charged while he was acting as attorney prior to the date of death. These deductions were deductions for the purpose of calculating the executors' liability to inheritance tax. The executors made a complaint to the Law Society for inadequate professional service by the

Appellants. The complaint included 69 separate issues. The Law Society required to examine the Appellants' files for the whole of the period when John Gray acted as attorney and when the Appellants acted in the administration of the estate. The estate was large and the task involved the review of almost seven years' work by the solicitors. The Law Society intimated their decision on 15 October 2010. All the work took approximately three years six months. Mr Semple referred to the law of prescription of obligations in Scotland included in the Prescription and Limitation (Scotland) Act 1973. Mr Semple pointed out this part of the appeal related to an order for a refund of legal fees which are said to have been overcharged. The legal fees in question were intimated to the executors at the time they were charged. Detailed Notes of Fees were issued to the executors and were properly debited to the account of the executors in the books of the Appellants at that time. This was correctly done in accordance with the Solicitors Accounts Rules. The obligation upon which the executors must rely to claim a refund of fees must be an obligation to recompense the amount of fees which are found to be excessive. The period for prescription for an obligation of this kind is stated to be five years under Section 6 and Schedule 1 of the 1973 Act and Mr Semple referred to Page 194 of the authorities.

Mr Semple submitted that Section 6 stated that:-

"if after the appropriate date an obligation to which this section applies has subsisted for a continuous period of five years (a) without any relevant claim having been made in relation to the obligation, and (b) without the subsistence of the obligation having been relevantly acknowledged, then as from the expiration of that period the obligation shall be extinguished…"

Mr Semple referred to Johnston on Prescription. Mr Semple stated that the procedure which the executors decided to adopt was to provide evidence to the Law Society by seeking taxation of the Appellant's fees by the Auditor of the Court of Session. The effect of the taxation procedure is to quantify fees charged by a solicitor to his client following a joint remit or reference or in the course of a court process. The procedure is silent as to

the liability of the client to pay those fees. Mr Semple referred to the letter of 19 April 2007 to Blackadders which expressly reserved the position of those files to which the five year prescription applied. (Page 178 of the Appellants' First Inventory). The taxation procedure does not interrupt the prescriptive period. Accordingly alleged subsisting obligations of the Appellants to make restitution of the alleged overcharging of fees rendered was extinguished after five years by virtue of the Prescription and Limitation (Scotland) Act 1973. Mr Semple submitted that Sections 9 and 10 of the Act did not apply in this case. No court proceedings were raised which would have interrupted the period. Some of the fees of the Appellants for the attorney period were not paid at the date of death. They were included in the inventory of the deceased's estate signed by Mr A signed on 13 June 2005. Any obligation to make restitution of any part of those fees had prescribed after five years by 13 June 2010.

As regards to the executry period, a Note is produced which extracts information from the executry account. (Page 1 of the Appellants' Second Inventory). Prescriptive periods in respect of each obligation continue to run until each obligation is extinguished. As at 15 October 2010 which was the date of the issue of the Law Society decision in the current case, the five year cut off date is 15 October 2005. As regards all the invoices rendered before the date, the five year prescription had by then extinguished any claim for recompense. Mr Semple stated that the obligations were not imprescriptible. When John Gray was acting as attorney he was not acting as trustee. When the Appellants were acting as solicitors for the executors they were not acting as trustees. However where the Appellants held funds for Mr C or for the executors they did so in a fiduciary capacity until such time as they paid to the clients all sums due to them but at that time the fiduciary relationship ceased. The Appellants rendered a bill which created a relationship of debtor and creditor which overrode any argument that the fiduciary nature was the dominant relationship therefore it was not an imprescriptive obligation.

Mr Semple then referred the Tribunal to Johnston on Prescription and Limitation at paragraph 3.4 and submitted that this type of relationship is regarded by the law as that of debtor and creditor and not that of trustee and beneficiary. Mr Semple referred to

Schedule 3 which sets out the imprescriptive obligations and Mr Semple submitted that this did not apply in this case.

Schedule 3(e) applies to any obligation of a trustee:

- to produce accounts etc
- to restore a fraudulent benefit etc, or
- to make forthcoming to any person entitled thereto any trust property or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use.

Mr Semple stated that it was only the last of these three that could come into this case. However, for the Appellants obligations to be imprescriptible, the executors would require to show that the Appellants have held clients funds in trust for the executors and that they had appropriated them for their own use. The evidence in this case is not that the Appellants had appropriated clients' funds for their own use. The Appellants provided legal services to the executors and prepared and charged for those services and they have in a proper manner debited sums required for payment of those accounts to the ledger account of the executors in their books. This created the relationship of creditor and debtor. Accordingly the obligation of recompense prescribes in 5 years.

Mr Semple stated that when the Law Society relied on the certificate of the Auditor of the Court of Session, they were relying on a purported certificate of the amounts of taxed accounts dated 17 August 2007. That certificate purported to tax at £91,671.89 plus VAT. The certificate took no account of the fact that the Appellants had no liability to make recompense to the executors in respect of those accounts for the services which had prescribed. At the date of the purported certificate of 17 August 2007 any accounts which were more than five years old i.e. rendered before 17 August 2002 would have prescribed. Mr Semple referred to letters at Pages 24, 25, 107 and 109 of the Appellants' First Inventory being examples of such fees. By 15 October 2010 when the Law Society Determination was issued, all claims relating to fee invoices before 15 October 2005 had

prescribed. Accordingly the certificate of the Auditor which purported to tax accounts for which the liability to make recompense had been extinguished was in error. This was a matter which the Appellants would have put before the Auditor if they had been given the opportunity to do so. Mr Semple submitted that the Tribunal should not confirm the part of the Law Society's decision which is based on this error.

Mr Semple further submitted that as the Auditor's certificate and Law Society's Decision made no distinction between accounts which have been prescribed and accounts which have not, the Tribunal has no evidence upon which it can properly vary that part of the Law Society's decision and accordingly this should not be done and the Tribunal should quash that part of the award made by the Law Society against the Appellants which is based on the certificate of the Auditor of the Court of Session dated 17 August 2007 and accordingly the Tribunal should quash the order that the sum of £34,388.88 plus VAT should be refunded to the estate of the late Mr C.

Failure to respond to the requests for an explanation of the basis of fee charging including a letter from the complainers dated 23 May 2004

Mr Semple stated that it is not correct to say that Mr Gray had failed to comply with the requests for information relating to the basis on which the fees were charged. Each time A & R Robertson & Black proposed to charge fees Mr Gray wrote to Mr A and said that they will ask Wilkie Law Accountants to prepare the fees. Mr Semple referred to a number of letters as examples. The letter of 16 October 2000 at Page 24 of the Appellants' First Inventory of Productions refers to papers being passed to the law accountants, letter of 25 October 2000 at Page 25 included copies of the accounts and listed the fees charged, the letter of 12 April 2001 at Page 107 enclosed notes of fees and printouts, the letter of 2 April 2002 at Page 109 enclosed two interim accounts, the letter of 3 October 2004 at Page 116 enclosed interim fees and a statement, the letter of 7 April 2004 at Page 28 encloses interim fee notes for the period of 6 October 2003 to 4 October 2004 and says matters are being sent to the law accountants, the letter of 29 November 2004 at Page 32 provides a list of assets and fees required to be assessed to 10 September

2004 and states that the cost of the independent assessment by the law accountants would be a deduction, the letter of 16 September 2004 at Page 30 enclosed fee notes. Mr Semple also referred to the meeting of 31 October 2005 at Page 139 which refers to a breakdown by the law accountants being provided as the family wanted more detail.

At this stage the Chairman asked whether there was anything that confirmed what the hourly rate was to be, Mr Semple referred the Tribunal to the Appellants' Second Inventory of Productions, Page 4 which referred to £15 per unit but page 7 referred to £12 per unit as does Page 10. The Chairman asked on what basis he thought the cost of preparing the fees notes could be charged to the client, Mr Semple stated that the work was a necessary part of the service provided to the client. The Chairman stated that the client was not necessarily required to pay for work done to work out the fees. Mr Semple stated that this was frequently done especially in this type of work. The Chairman suggested that if a fee note was issued and there was no detail of the work, the client had a right to ask for a breakdown to be done at the solicitor's expense but if the client wanted a law accountant to prepare a time and line account, the client would have to pay. Mr Semple confirmed that this was his understanding. He referred to Page 198 of Paterson and Ritchie on Law Practice and Conduct for Solicitors which confirmed this. The Chairman queried whether the information given by Wilkie Law Accountants was anything more than a breakdown, Mr Semple stated that this was a fair interpretation. The Chairman asked at what time the Appellants produced Wilkie Law Accountants' breakdown to Mr A. Mr Semple clarified that when the law accountants produce a breakdown they did it as in the format in Production 121 of the Appellants' Second Inventory of Productions. Mr Semple accepted that it did not give detail of the work done as would be expected by an Auditor. The Chairman read out the file note in respect of the meeting on 31 October 2005 and stated that this suggested that Mr A had not had the information contained in the breakdown from Wilkie Law Accountants by this time. Mr Lynch referred to the Appellants' First Inventory of Productions being a letter of 11 January 2006 which purported to enclose this information. Mr Semple stated that he would have to leave it to the Tribunal to decide when Mr A received the breakdown.

In response to a question from the Chairman, Mr Semple accepted that although it was indicated to the client that it was intended to remit the matter to the law accountant and charge for it, there was no guidance for the client beyond the Law Society's guidance which was included as a Production. Mr Semple however pointed out that the Law Society's guidance was issued a year after the death of Mr A.

Mr Semple then went on to refer to the letters of 16 December 2005 at Pages 38, 147 and 149 which referred to asking the law accountants for more information without a further charge. He further referred to the letter of 11 January 2006 and 21 September 2006 at Pages 40 and 42 which refer to enclosing business accounts and calculations.

Mr Semple clarified that Wilkie Law Accountants did provide the information, they are an independent firm of law accountants and Mr Gray relied upon their expertise. According to the Law Society guidance, a solicitor must give his client on request a summary of the work done and how the charges are worked out, without extra charge. He must also on request provide, at the client's expense, a detailed breakdown of the fee describing each item of work done. John Gray provided the executors with the workings of Wilkie Law Accountants which set out how the charges were worked out. He did not provide a detailed breakdown of the fees in any other form. Mr A wrote to John Gray on 9 November 2005 (Page 142 of the Appellants' First Inventory) and referred to the question of fees in the letter. He stated that he was not prepared to pay any additional charge for further information. Accordingly John Gray provided Mr A with the information that he was entitled to on the basis that Mr A was not prepared to pay for any additional information.

Failure to ensure that a fair and reasonable fee was charged to Mr C for the service under the Power of Attorney

Mr Semple stated that his earlier submissions had already addressed this matter.

The Determination that the solicitors shall refund to the estate the sum of £3,007.23

for duplicate charging

Mr Semple stated that the Appellants had produced the two files in question and it was clear from looking at these files that the charges in respect of each file related to different work. There was accordingly no duplicate charging and the Tribunal should quash this finding.

The Committee's Determination that the solicitors shall refund to the estate the sum of £6,160 plus VAT in respect of the charges for the law accountants' fees

Mr Semple submitted that it was either the case that the law accountants' fees were incurred by the Appellants as agents for their clients in which case the liability belongs to the clients or the appellants incurred the law accountants' fees on their own behalf in which case they are liable. Mr Semple submitted that the evidence shows that during the executry period the law accountants' fees were charged to the executors. He referred to evidence that the executors agreed to this situation. The letter from John Gray to Mr A dated 29 November 2004 (Page 32 of the Appellants' First Inventory) refers to bringing matters up to date and refers to the cost of having the fees independently assessed being similarly reflected for taxation purposes and shown as a deduction in the final statements. The letter from Mr A to John Gray dated 13 June 2005 (Page 76 of the Appellants' First Inventory) refers to papers being approved by Mr A and the papers referred to included deductions for the law accountants' fees as set out in the estate inventory for the purposes of reducing inheritance tax. The letter from the executors to John Gray dated 9 November 2005 (Page 143 of the Appellants' First Inventory) is further evidence of this. Mr Semple stated that the contractual arrangement was that the law accountants' fees were the liability of the clients. Objection was only taken at the time the complaint was made. An objection during a complaints process cannot change a contractual arrangement. Nor can any alleged rule of professional practice change a contractual arrangement. In any event no evidence of any such rule of professional practice has been produced. Accordingly the Law Society made an error of law when it decided that liability for the law accountants' fees belong to the Appellants and accordingly the Tribunal should quash this part of the

decision.

Mr Semple referred to the definition of inadequate professional service:-

"professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor, and cognate expressions shall be construed accordingly; and references to the provision of inadequate professional service shall be construed as including references to not providing professional services which such a solicitor ought to have provided."

The law accountants' fees were expenses properly incurred in the course of the work of the Appellants. The Appellants gave clear information to the executors that the liability for the law accountants' fees was that of the client. The executors accepted that situation during the period when the work was being carried out and the fees were charged. The actions by the Appellants cannot be treated as inadequate professional service as defined in the 1980 Act. The decision accordingly should be quashed.

The Determination that the solicitors should refund to the estate the Auditors fee amounting to £4,828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007

The decision of the Auditor of the Court of Session as expressed in his purported certificate of 2007 was procedurally flawed, *ultra vires* and unenforceable. Accordingly the decision that the Appellants have to pay the Auditor's fee should be disregarded and quashed.

The need to establish that inadequate professional service has taken place in order to apply sanctions

Mr Semple again, referred to the definition of inadequate professional service. Mr Semple stated that originally there were 69 complaints some were not upheld and others

had been conceded by the Law Society Fiscal. All that was left was a fee dispute. A dispute about the amount of fees charged by a solicitor for services rendered to his client is not a dispute about the quality of the services provided. It is a dispute about the charge or consideration for those services. Disputes about the amount of legal fees are customarily referred to an Auditor of the Court. An Auditor of the Court has no role in adjudicating on the quality of legal services provided. A complaint about the amount of legal fees cannot properly be treated as a complaint of inadequate professional service according to the statutory definition. Mr Semple submitted that on appeal to the Tribunal if it becomes clear that no inadequate professional service as defined in the statute has been established, there is no power to impose a sanction.

The Order of payment of compensation of £2,000 to the estate of the late Mr C

Mr Semple submitted as inadequate professional service has not been established, the awards of compensation should be quashed.

At this point the case was again adjourned part-heard until 30 November 2011 when the Tribunal heard submissions from the Law Society.

Submissions for the Law Society

Mr Lynch referred the Tribunal to his written submissions. He submitted that the Appellant's argument based on time bar was misconceived. Mr Lynch stated that the Tribunal did not have the power to entertain a judicial review and referred to the case of the Law Society-v-Alexander Ritchie Robertson 23 August 2007. Mr Lynch further submitted that the passages in Clyde & Edwards referred to by the Appellants in the cases of Mallock and SEBB-v-Elder, did not support the propositions in respect of which they were cited. My Lynch stated that the Law Society did not dispute that an inferior Tribunal can take notice of the fact that an act has been done *ultra vires* of the actor. It cannot however be maintained in this case that there is any question of *vires* arising. The Law Society have a statutory obligation to investigate complaints. Mr Lynch stated that

it might be argued that by refusing to investigate a stale complaint the Law Society could be accused of acting *ultra vires*. Mr Lynch stated there were cases where the remedy of judicial review is available which are also capable of being resolved, on the same grounds as an application for judicial review might proceed, in an ordinary process. Those grounds might be, for example that a party had acted *ultra vires* or that an arbiter or adjudicator had failed to exhaust his jurisdiction. Mr Lynch referred to the case of Vaughan Engineering, already referred to by the Appellants, as a good example of such a case. In response to a question from the Chairman about what would happen if the Law Society decided to entertain a complaint more than 2 years old and the Tribunal thought that they had not used their discretion reasonably, was the Law Society's position that the Tribunal would have no power to deal with the matter? Mr Lynch stated that the Law Society operated under a statutory framework and that the Tribunal had no jurisdiction to review a decision of the Law Society in connection with whether or not to deal with a complaint. Mr Lynch submitted that if the Law Society, acting under powers conferred on them by Section 42A of the 1980 Act purported to impose a fine in an inadequate professional service case, their actings in doing so would be *ultra vires* and the Tribunal would have no hesitation in allowing an appeal against any such purported decision. In this case what the Appellants seek to bring under review is not a decision of the Respondents that there was an inadequate professional service but the decision of the Respondents to entertain the complaint at all. That would be the only basis upon which the concept of legitimate expectation raised by the Appellants could arise. Mr Lynch submitted that all the cases cited by the Appellants were what he would call "judicial review proper". Mr Semple could not point to a case where the issue of legitimate expectation was raised other than by "judicial review proper". Mr Lynch stated that there was a difficulty for the Appellants because Mr Gray admitted in evidence that he had no idea that there was a policy on time limits until he took advice and accordingly Mr Gray did not have any expectation at all far less what could be called a legitimate expectation. The Appellant's real complaint was that the Law Society entertained the complaint at all. The Tribunal has no jurisdiction to entertain an appeal on that ground. Mr Lynch referred to Clyde and Edwards at Footnote 34 at Page 6 – it is thought that a reduction *ope exceptionis* is not competent in the Sheriff Court if it would amount to an exercise of the

supervisory jurisdiction. It would accordingly not be competent in the Tribunal. The supervisory jurisdiction is defined in West-v-The Secretary of State for Scotland [1992] SLT 636. This jurisdiction vests only in the Court of Session. Mr Lynch accordingly submitted that if the Appellants wanted to continue to challenge the Law Society's decision to investigate the complaint, they should seek to have it reduced in a judicial review process in that forum.

Mr Lynch submitted that the rendering of professional fees, the basis of charging such fees and information concerning such fees, all fell within the definition of professional services contained in Section 65 of the 1980 Act and have frequently been the subject of inadequate professional service findings and appeals to the Tribunal. Mr Lynch referred the Tribunal to a Tribunal case 860/93 quoted in Smith and Barton: Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal at Page 59. Mr Lynch submitted that this established that matters relating to fee charging are included in the definition of inadequate professional service.

Mr Lynch stated that the Appellants' argument that because John Gray provided no services as attorney after the date of death it was not possible for the executors to establish a complaint of inadequate professional services in respect of the attorney period after the date of death and that the quantification of the Appellants' professional account was a consideration for professional services he had rendered as attorney and as such was separate from assessing the quality of the professional services rendered, was misconceived. Section 42A(1)(a) of the 1980 Act empowers the Law Society to take certain steps where they receive a complaint "from any person having an interest" and that manifestly includes executors in respect of services provided to a deceased person during the person's lifetime, particularly where the services were provided by an attorney and not scrutinized by the deceased. The rights of the deceased including the right himself to have made a Section 42A complaint passed to the executors on the death of the deceased. In so far as they were persons having an interest, the executors could not reasonably have been expected to have known that they had grounds for a complaint in respect of the attorney period until, as executors, they received a proper account of the

estate of the deceased including the intromissions of the Appellants with that estate as attorney. The Appellants accept that the complaint in respect of the executry period is not time barred. Mr Lynch submitted that it cannot as a matter of fact be maintained that the complaint so far as the attorney period was time barred. The Appellants state that Mr A signed in the inventory of estate on 13 June 2005. If that is taken to be the date by which the executors knew about the extent of the Appellants' fees, it falls well within the two year period ending with the making of the complaint in April 2007. Even if it were open to the Tribunal to consider the reasonableness of the decision by the Respondents to entertain the complaint, as the Appellants' claim, outwith the two year period by reference to their general policy, it could not be said to have been unreasonable for the Law Society to have elected to do so, standing that the services provided were not to complaining clients but to their deceased father. Mr Lynch pointed out that the wording of the policy refers to the word "may". He submitted that this would clearly leave it open for the Respondents to investigate the complaint.

In response to a question from the Chairman, Mr Lynch stated that the rights were transmittable on death. Mr Lynch stated that the right of the deceased to claim compensation transmits to the executors. The Chairman pointed out that the executors could not be in a better position than the deceased at the time of death. The Chairman put it to Mr Lynch that an executor has whatever interest the deceased had. Mr Lynch said that the relevant date was when the executors got the necessary information with regard to the deceased's affairs. Mr Lynch stated that the executors were not a different interested person but may represent different interests. Mr Lynch after enquiries from the Chairman stated that it may be that an executor had a different interest from the deceased.

Mr Lynch stated that the information provided by the Appellants, namely that the files would be feed up by Wilkies Law Accountants did not amount to the provision of proper information about the basis of fee charging. It was essential that the Appellants provided a unit rate of charge which they did not do. The Appellants did not issue a terms of business letter upon which they were entitled to found. There was no strict requirement for this at the time but it was good practice. Mr Lynch pointed out that in case 860/93 a

lack of information was held to constitute inadequate professional service. The rate of charge adopted by Wilkies was significantly higher than the rate provided for in the now defunct table of fees published by the Law Society.

In response to a question from the Chairman in connection with the executors eventually being provided with information from Wilkies, Mr Lynch stated that this information should have been provided at the start. In response to further enquiries from the Chairman, Mr Lynch referred the Tribunal to the Law Society's decision, issues 4 and 7. Mr Lynch stated that he accepted that the information was eventually supplied. He referred the Tribunal to Page 41 of the Appellants' First Inventory of Productions being a letter of 11 January 2006 providing details from Wilkies Law Accountants. Mr Lynch also referred to the letter of 21 September 2006 which gives all the workings. Mr Lynch stated that he took from this that the Appellants were instructed since 2004 in the executry and it was only in 2006 that they supplied the information with regard to the rate of charge which applied in connection with the fees. It was shortly after this that the Appellants and the executors parted company. Mr Lynch pointed out that it was still not known how the charge rate was arrived at.

In response to a question from the Chairman, Mr Lynch stated that the first request for information from the executors was in a letter dated 23 May 2004 which pre-dated the death of Mr C. After Mr C died in September 2004 the executors instructed the Appellants to deal with the executry but the Appellants failed to provide the proper information to the executors until September 2006. The Chairman referred Mr Lynch to the meeting in October 2005 where there were discussions about the fees.

Mr Lynch submitted that the certificate issued by the Auditor was prima facie evidence of an overcharge by the Appellants. The Law Society were entitled to proceed on the basis that the certificate was correct and that there was an overcharge. Given that the Appellants maintain that their obligation to submit their accounts to taxation is extinguished by prescription, the refusal of the Appellants to submit these accounts to further taxation left the Law Society with no reasonable alternative but to proceed on the

basis that the conclusion which the Auditor came to was correct whether or not questions arise about the procedure by which it was reached. Mr Lynch stated that the situation whereby the audit proceeded other than by a joint remit arose only because the Appellants insisted that certain fees notes were to be excluded from the taxation because of the advice they had received about prescription. Mr Lynch stated that it was significant that the files contained business entries which related to meetings which were in the nature of an informal chat where no matters of substance were discussed. Mr Lynch submitted that the Auditor may well have decided that such charges were not appropriate.

Whether or not any obligation the Appellants had to make restitution of alleged overcharging of fees rendered was extinguished after five years by virtue of the Prescription and Limitation (Scotland) Act 1973 Mr Lynch submitted had no bearing on the liability of the Appellants to make payment in terms of the finding made by the Law Society under Section 42A of the 1980 Act, which in the event of the present appeal being unsuccessful will be enforced by the mechanism set out in Section 53C of the Act. Mr Lynch also submitted that the ability of the Law Society to make a Direction about repayment of fees was not affected by the application of the 1973 Act. If the Appellants' argument about this was correct the Law Society would have had the power to order repayment of the fees when they decided to investigate the complaint but would have lost it by the time they came to determine it. So far as the Auditor is concerned, it is said that he should have declined to tax any fees which were dated on or before 17 August 2002 because of the operation of prescription. Mr Lynch however submitted that no evidence had been led to show when these fees became payable and Mr Lynch also referred the Tribunal to Section 6(4) of the 1973 Act. Mr Lynch stated it was possible that words could have been induced by error and there was also a possible question of legal disability as it was not known exactly what Mr C's state of mind was at the time. Mr Lynch submitted that if the deceased was not properly informed about the extent of the method of fee charging by his attorney and the executors were unaware of the need to investigate the position about a possible overcharge until the date after the inventory was signed in June 2005, the executors would not find prescription running against them until that date at the earliest. By insisting on the exclusion of certain fee notes from the audit

on the view that these were already time barred the Appellants were in breach of their obligations to submit those fees to taxation. Mr Lynch stated that it could be said that until they saw the Auditor's Determination in 2007, the executors were not in possession of all of the material facts and the five year period has still not come to an end even now. Mr Lynch stated that Mr Semple did not propose an appropriate date in terms of the 1973 Act. Mr Lynch referred to Section 11 of the 1973 Act which states that the date should be when the creditor first became aware or could with reasonable diligence have become so aware. Mr Lynch said that in the absence of a judicial decision reducing the Auditor's decision of 17 August 2007, the beneficiaries would be entitled to found upon it in an action of payment brought against the Appellants.

In response to a question from the Chairman in connection with what had prescribed, Mr Lynch stated that his understanding was that Mr Semple was saying that the executors lost the right to an accounting and the right to claim taxation and that in connection with the attorney period this had prescribed by the 2007 audit. The Chairman pointed out that in respect of the right to an accounting, Schedule 1 set out a variance between trustees and others. An attorney is a trustee. The Chairman questioned whether it was a right to payment because notes of fee rather than fees notes were in the file but were never paid and was it the right to demand payment that would prescribe? The Chairman pointed out that if there was agreement between Mr Gray and Mr C that the fees would be paid on death, when Mr C died on 10 September 2004 fees could only be accounted for once the estate was intromitted with. The preparation of fee notes was neutral. It was a continuing service with the date of payment occurring at the date of death. The Chairman accordingly questioned whether the five year period could start earlier than the date of death. As there had been no intromission with the money, there was no obligation to account until the date of death or later. Mr Lynch stated that he agreed with this proposition. Mr Lynch stated that the executors had the right to challenge and this had not prescribed by August 2007. Mr Lynch stated that the executors could not have known until 2005 or 2006 what the true position was. There was a request for information in 2005 which was the beginning of using due diligence to get the necessary information. The submission by the Appellants that by 2007 some of the matters had prescribed was

misconceived.

Mr Lynch submitted that the Appellants frustrated the joint remit by stating that some fees should be left out of it due to having prescribed. Mr Lynch stated that the Law Society had to deal with the information that they had and the Auditor's certificate was the best evidence and they were accordingly entitled to make the Determination that they did. The Chairman pointed out that if the matter had come to the Tribunal as an inadequate professional service case the Tribunal would have the power to remit the fees for taxation. However the Tribunal's powers in respect of an Appeal under Section 42A did not specifically include this power. Mr Lynch after researching the matter agreed that the Tribunal unfortunately did not have a specific equivalent power to order taxation under these particular provisions.

In respect of the duplicate charging Mr Lynch submitted that this should be properly determined by the Auditor and in refusing to consent to a new audit the Appellants had acted unreasonably and accordingly the Law Society could not be criticized for proceeding in the way that they did. In response to a question from the Chairman as to whether or not the Tribunal could vary the decision if it was satisfied that there had been no double charging, Mr Lynch stated that he did not think that the Tribunal would be able to be so satisfied.

Mr Lynch submitted that in the ordinary course of things a solicitor rather than his client is responsible for payment of the law accountants' fee. None of the exceptions to that rule are applicable in this case. There was no terms of business letter which entitled the Appellants to bill their clients for the law accountants' fee. The practice note in respect of this replicated what had previously been in the Law Society's table of fees. In the circumstances the Appellants are bound to refund the law accountants' fees to the estate.

Mr Lynch stated that the audit fee for the Auditor's opinion should be payable by the Appellants. Mr Lynch submitted that the Auditor normally has a discretion in such matters. Given the extent to which the Auditor abated the Appellants' fees, Mr Lynch

submitted that it was not surprising that he took the view that the Appellants should be responsible for the audit fee. The Law Society's decision to enforce that was entirely reasonable and in the circumstances Mr Lynch asked the Tribunal not to disturb it. Mr Lynch referred to Section 42A (2)(c) which allows the Law Society "to direct the solicitor to take, at his own expense, such other action in the interests of the client as the Council may specify."

In respect of the suggestion that a dispute about the amount of fees is not a dispute about the quality of services, Mr Lynch again referred to SSDT case reference 860/93. Mr Lynch submitted that the information provided by the Appellants namely that the files would be feed up by Wilkies Law Accountants does not amount to the provision of proper information about the basis of fee charging. It is essential that the Appellants provided a unit or rate of charge which they did not do. Mr Lynch submitted that having regard to the extent of the Appellants' failings and inadequacy of the services provided, the compensation awarded is within the range which the Law Society were entitled to award and there is no basis for interfering with that. Mr Lynch referred to the Law Society's decision as contained in the disposal schedule comprising 39 pages at page numbers 191 – 229 of the Respondents' Inventory of Productions. Mr Lynch clarified that the Law Society had conceded certain aspects of the Appeal and suggested that an Interlocutor in the following terms be issued by the Tribunal:

The Respondents consent to this appeal being allowed to the extent of the quashing of the Determination in respect of the attorney period paragraphs 1, 2, 5 and 7 (page 35/225); in respect of the administration and sale of Property 1 paragraphs 1, 2, 3, 4 and 6 (pages 36, 37/226, 227); in respect of the administration and sale of Property 2 paragraphs 1, 2, 3, 4, 5, 6, 7 and 9 (page 37/227); in respect of the administration and sale of Property 3 paragraphs 1, 2, 3 and 5 (page 38/228); in respect of the administration and sale of Property 4 and premises to the rear thereof paragraphs 1, 2, 3, 4 and 6 (page 38/228); the Determination and Direction (page 39/229) that the Appellants refund to the estate the sum of £13,143.16 for the work before the attorney period and not individually costed since 1991 and the Determination and Direction that the Appellants refund to the estate

the sum of £1,169 for tax penalties incurred.

Mr Lynch asked the Tribunal to refuse the Appeal in respect of all the other matters.

Further submissions from the Appellants

Mr Semple lodged further written submissions with the Tribunal in response to the Law Society's submissions. Mr Semple clarified that the Appellants do not claim that the Tribunal has power to entertain a judicial review but do claim that any ground of judicial review can be pled as a defence in civil proceedings. Mr Semple further clarified that the position was that the decision of the Law Society to entertain the complaint at all was *ultra vires* due to the doctrine of legitimate expectation. Mr Semple said that there was no authority for the concept, which the Law Society put forward, of "judicial review proper". In response to a question from the Chairman, Mr Semple stated that the issue of the Tribunal deciding whether there were reasonable grounds to allow the complaint to be considered even if it was more than two years old had not been explored in the evidence. The Chairman stated that there were a number of undisputed facts and asked Mr Semple whether he argued against the position that the Tribunal could take a decision on the reasonableness of the Law Society considering a complaint made after more than two years. Mr Semple stated that he did not want to say any more about this and that the Tribunal had a wide discretion.

Mr Semple stated that Mr Gray's knowledge about the time limits policy of the Law Society is irrelevant to the point about whether or not the Law Society was bound to adhere to its policy. Mr Semple stated that the Tribunal has jurisdiction to entertain an appeal on the grounds that the Law Society made an error in law by acting *ultra vires* when they failed to adhere to their time limits policy.

Mr Semple submitted that the Appellants accepted that the reduction of a document *ope exceptionis* is not competent in the Sheriff Court if it would amount to an exercise of the supervisory jurisdiction. Mr Semple stated that the Appellants did not seek to reduce a

document in relation to their submission that the Law Society had failed to adhere to the time limit policy.

In connection with the Respondents being in error when they relied on the audit certificate issued by the Auditor of the Court of Session without giving the Appellants the right to be heard as was required by the Auditor's procedural rules and natural justice, Mr Semple stated that the Appellants did not require to establish that the Law Society acted *ultra vires*. The Appellants' submission is that the Law Society's decision relied on evidence, i.e. the Auditor's certificate, which because of a fundamental procedural defect had no evidential value.

Mr Semple stated that the case of 860/93 decided by the Discipline Tribunal concerned failing to explain the situation to the complainer properly and there was reference to the Appellants' firm not advising the client properly. Mr Semple submitted that this case was not in point with the current case. In the current case the Appellants clearly advised the client that the law accountants' fees were to be charged to the clients. Mr Semple submitted that there is nothing in case 860/93 to indicate that a claim that a fee charged is excessive can be dealt with as a claim of inadequate professional service.

Mr Semple said that the Respondents' position that it would not have been unreasonable for them to have elected to entertain the complaint outwith the two year period had not been considered by the Respondents. Mr Semple referred to Production 121 which gave the information the Appellants provided to the complainers in relation to the method of fee charging. In most instances the unit charge was £12 and this was a normal and reasonable rate. Mr Semple stated that he felt he had to clarify the position with regards to fees during the attorney period. He explained that Mr Gray prior to acting as attorney for Mr C had an agreement with Mr C that fees would not be charged until after Mr C's death. However after the attorney period began Mr Gray charged fees on a six monthly basis and these were rendered and paid and were intimated to Mr A. When Mr C died there were fees for the period between when the last fees had been rendered and the date of death and there were also fees which had been incurred for work done prior to the

attorney period and these were included in the inventory and this led to a dispute between the executors and Mr Gray because the executors did not know of the agreement that Mr Gray had had with Mr C. Then in June 2005 Mr A said that he was satisfied with the information given. Mr Semple clarified that the Law Society had now conceded the Appeal in respect of any fees incurred prior to the attorney period. Mr Lynch clarified that this was correct but was not due to any acceptance by the Law Society that prescription applied.

Mr Semple submitted that the evidence showed that the complainers did not say why they refused to proceed on the basis of a joint remit to the Auditor of the Court of Session. They simply said that they were not agreeable to the terms of the Appellants' letter. Mr Semple submitted that the Respondents' submissions with regard to possible reasons for taxing off of approximately £30,000 from the Appellants' fee invoices were speculation and not founded in evidence. Mr Semple stated that it was an error of law for the Respondents to rely on an audit certificate which related in part to obligations which had prescribed.

The Chairman pointed out that the Auditor of the Court of Session ought to be impartial. The Chairman then raised an issue with the parties in connection with whether or not the parties would wish the accounts to be taxed by a different Auditor. Mr Semple stated that as a result of prescription the obligation was extinguished. The Chairman queried as to whether or not this would preclude the Law Society giving redress to a complainer. Mr Semple stated that if an obligation had prescribed it no longer existed and that was the end of it. They were precluded from that because the remedy before the Court was no longer open to the client. Mr Semple stated that the Auditor's document was not sound in law and the Law Society should not have made the order. Mr Semple clarified that what he was saying was that the Law Society had no power to determine the matter because the obligation in law had gone. Mr Semple stated that the scheme in connection with inadequate professional services could not be set up in such a way that it allowed the Respondents to reconvert prescribed obligations into enforceable obligations. Mr Semple clarified that the fee date in respect of prescription was the date of decision being October

2010.

In response to a question from the Chairman as to was it not the case that the rendering of fees was part of the provision of the professional service, Mr Semple referred to the definition in Section 65 of the 1980 Act and stated that the charging of fee was not part of the service. Mr Semple stated that the way to deal with a fee dispute was to have a proper audit in a Court procedure. Mr Lynch stated that the rendering of the fee was part of the overall service and this had been the practice followed by the Law Society.

Mr Semple stated that the Appellants had submitted evidence as to when their fee notes were intimated to the complainers. They did so in a number of letters to the complainers which were produced and referred to. Mr Semple stated that this was sufficient evidence of when the relative obligations became enforceable.

In connection with Section 11 of the 1973 Act, Mr Semple said that this was not considered by the Respondents in relation to prescription. Mr Semple also submitted that the Respondents make no specification about why Section 6(4) had any relevance to the Appeal.

In connection with the duplicate charging, Mr Semple stated that this was a matter that the Tribunal was entitled to fully decide upon. Mr Semple stated that there was no legal authority for the statement that in the ordinary course of things a solicitor rather than his client is responsible for payment of a law accountants' fees.

At this point the Chairman asked parties to consider, in view of the fact the Tribunal did not have the specific power to order a taxation, parties would consent to a taxation being carried out. Mr Lynch stated that he was happy to consent on behalf of the Law Society but could not consent on behalf of Mr A and Miss B. Mr Semple stated that because the lay complainers were not present anything that was provisionally agreed could lead to further controversy and accordingly suggested that the Tribunal proceeded to deal with matters in such a way as it thought fit. The Chairman indicated that the Tribunal would

retire to consider its decision which may take some time and that a draft decision would be issued in due course when parties would be invited to submit written submissions on publicity and expenses and the Tribunal would then issue a final Decision.

DECISION

The Tribunal noted that the Law Society had conceded the Appeal in respect of all the fees incurred prior to the attorney period and accordingly there was no need for the Tribunal to consider this aspect of the Appeal. However the Tribunal would comment that in its view the fee arrangement between Mr Gray and Mr C re fees not being payable until after C's date of death which resulted in fees going back as far as 1975 being deducted from the executry, was a very strange and not very satisfactory way of working.

In considering this Appeal, the Tribunal had regard to the previous Decisions of the Tribunal in respect of Appeals under Section 42A. In the Appeal under Section 42A by Messrs Campbell Riddell Breeze Paterson decided by the Tribunal on 28 April 2005 the Tribunal did consider that it had the power to consider a matter to be time barred. It is clear from the previous Tribunal 42A Appeal case of Messrs MacRoberts and Ritchie Barrie dated 19 September 2005 that the Tribunal has the power in Appeals under Section 42A to conduct a re-hearing of the case while having due regard to the Law Society's decision. This is what the Tribunal has done in this case and evidence was led before the Tribunal. The Tribunal's powers under the 1980 Act are:

> "to quash, confirm or vary the Determination or Direction being appealed against."

The Tribunal however previously held in the case of MacRoberts and Ritchie Barrie that it is not for the Tribunal to expand or vary the charge of which the Appellants have been given notice. The Tribunal has also previously held in the Appeal under Section 42A by Malcolm Keith Macaulay Cameron dated 30 January 2008 that in considering a Section 42A Appeal the Tribunal is able to look at whether or not the Law Society's decision is

flawed. With this in mind the Tribunal proceeded to consider the various aspects of this Appeal.

Duplication of Fees

It was apparent from the evidence that although the Law Society had decided that both files were duplicate this had not been considered by the Auditor of the Court of Session. It is clear from the Auditor's certificate that this only covers fees from April 2000 and not anything before this. The Appellants lodged the two files with the Tribunal and from having had a look at the files there is no indication on the basis of what was in the files to suggest that any duplicate charging has taken place. The Tribunal randomly checked to see if letters were repeated in both files and found no evidence of this. The Tribunal accordingly upheld the Appeal in respect of this matter and quashed the Law Society's Determination that the Appellants should refund to the estate the sum of £3,007.23 for duplicate charging. The Tribunal however is not in a position to make any comment about the extent of any fees charged in relation to these matters.

The Taxation by the Auditor of the Court of Session

The Tribunal had concerns with regard to the procedure followed in respect of the taxation carried out on the Appellants' files by the Auditor of the Court of Session. This was not a joint remit. It is clear from the productions lodged that Blackadders on behalf of the executors suggested that the fees be taxed. Mr Gray wrote back stating that any fees which were prescribed should be excluded from the taxation. Blackadders then wrote back on behalf of the executors stating that the executors were not agreeable to the terms of the Appellants' letter and accordingly the files would be remitted to the Auditor of the Court of Session and that both parties would hear from the Auditor in due course. The next thing the Appellants knew was when they received the certificate from the Auditor of the Court of Session which substantially reduced the Appellants' fee and does not give an explanation as to why. The Auditor's note on taxation procedure states that taxation takes place either by way of oral representation, by representations in writing or a third

course is to ask the Auditor to proceed on the papers. The taxation however in this case was instructed by Blackadders on behalf of the executors and Blackadders sent the Appellants' files to the Auditor. It was not the Appellants who sent the files in. The Tribunal can accordingly understand the Appellants' concern with regard to the taxation. It appears from the Auditor's letter of 19 September 2007 that the taxation proceeded on the whole papers submitted to the Auditor. It is not clear from the evidence however exactly which papers were submitted. The Auditor's letter of 19 September 2007 makes it clear that the executors were the party paying for the audit. The Law Society submit that given the vast reduction in the Appellants' fees made by the Auditor of the Court of Session it is reasonable that the Appellants pay the Auditor's fee and Mr Lynch referred to the Auditor's similar general comments at the end of his taxation notification of 17 August 2007. The Law Society has not adequately explained in its Decision why it only based its Decision on the certificate from the Auditor of the Court of Session. Given that the Tribunal does not consider that what was done by the Auditor was a proper taxation on joint instructions but was merely an assessment of fees, this was the same task that was carried out by the law accountants and even if the Auditor of the Court of Session's opinion carries greater weight, the Law Society failed to take account of the extent to which any representations made by the Appellants could have materially affected the fee assessment. The Tribunal is also concerned to note that the Law Society state in their Determination that an attorney has to have fees taxed by the Auditor of the Court of Session. This is not correct.

It is not possible for the Tribunal to ascertain on the basis of the evidence before it, why the Auditor of the Court of Session reduced the Appellants' fees by such a significant amount. It does not appear to be an issue with the unit rate because if this had been the case all the fees would have been reduced by a similar amount and this does not appear to be what happened. The Law Society Fiscal has speculated that it may be because some of the entries in the files related more to social chats between Mr Gray and Mr C on an informal basis rather than in connection with discussing business matters. However according to Mr Gray's evidence he had regular meetings with Mr C because this is what his client wanted him to do. Time was expended on what might be regarded as social

rather than business matters but this was at Mr C's request and it may be that an Auditor could be persuaded that the entries were accordingly a proper charge. The Tribunal considered that it had to ask itself whether or not it was reasonable of the Law Society to determine that the excess above what was taxed in the Auditor's certificate should be refunded by the Appellants. The Tribunal does not feel able to say that the Law Society's Decision was not reasonable but the Tribunal is looking at matters afresh and has disquiet with regard to the Auditor's certificate given that it was not a joint remit. It is not clear to the Tribunal whether or not the Law Society was fully aware of this when they made their Decision.

The Tribunal does not consider that it has sufficient evidence or expertise to be able to decide what the Appellants' fees for the attorney period and executry period should be. The Tribunal has no ability to determine what the appropriate fee should be as this would involve a detailed look at the work which was done and the Tribunal do not know if any particular rate of charge was agreed, or whether for example as many visits to the care home were required. In the circumstances the Tribunal consider that the best way to deal with the matter is to Vary the Law Society Determination that the Appellants' fees for the attorney period and the executry period combined should be restricted to £34,388.88 and that the Appellants should refund anything in excess of this to the executry. Instead the Tribunal Determined that the Appellants be ordered to repay any fees charged to the extent that these exceed the sum determined by a taxation of new as reasonable remuneration for the actings of the Appellants during the attorney period and the executry period. This fresh taxation shall be carried out by the Auditor of Glasgow Sheriff Court and it will be for the Appellants to determine if they wish the taxation to be on the basis of oral representations or written submissions. The taxation shall be intimated on all parties. The Auditor's fees shall be paid by the Law Society and / or the Appellants as may be determined by the Auditor. In the event that the Auditor determines that the Appellants should make payment of the taxation fee or part of it, the Tribunal so order that the Appellants pay within one month of the taxation fee or part of it being intimated to them as requiring to be paid by them.

In respect of the payment by the Appellants of the Auditor's fee in respect of the taxation already done by the Auditor of the Court of Session, for the reasons already stated, the Tribunal do not consider that the Appellants should have to pay for this as it was not a joint remit and it was instructed by the executors and the Tribunal accordingly Allow the Appeal in respect of this matter.

The Law Accountants' Fee

The Tribunal considers that in normal circumstances where a fee is charged by a lawyer and time is expended by the lawyer working out what the fee shall be, the solicitor would not charge for his time in doing this. In this case, the Appellants charged the cost of the law accountants' work in preparing the Appellants' fees to the executors. The Tribunal accept, on the basis of productions lodged and Mr Gray's evidence, that the Appellants did advise the executors that this was happening. The Tribunal however consider that it was not fair of the Appellants to give the executors the impression that this was established practice. The Tribunal consider that it is unreasonable without the greatest clarity to expect a client to pay for such an outlay which may have been needlessly incurred because the client might just have accepted the solicitor's fee in the first place. It looks to the Tribunal as if the law accountants' fee was quite high some 4% and the Tribunal did not consider that it was good enough for the Appellants just to intimate this to the executors who had not given informed consent. The Tribunal do not consider that the executors had agreed to something that had been properly explained to them. The Appellants appear to have given the executors the impression that this is what is always done and this is not the case. The Tribunal accordingly refused the Appellants' Appeal in respect of the liability to repay the law accountants' fees of £6,160 plus VAT to the executry.

Failure to respond to requests for an explanation of the basis of fee charging including a letter from the complainers dated 23 May 2004 and failure to respond to requests for an explanation of the basis of fee charging including letters from the complainers dated 9 November 2005, 13 November 2006, 24 November 2006 and at

a meeting on 31 October 2005

The Tribunal's view is that provided that the client has a note of the hourly rate, all the client is entitled to free of charge is to know the amount chargeable in connection with individual phone calls, letters and meetings etc. Mr Semple referred the Tribunal to a number of letters sent by the Appellants to Mr A purporting to enclose interim fees etc but as the letters did not include copies of the enclosures it is difficult for the Tribunal to know how much detail was included in these letters. It is clear that by time of the meeting of 31 October 2005 limited information had been given to the executors but information was still missing and it wasn't until the letter of 11 January 2006 that detailed workings are clearly sent to the executors.

The Tribunal reconvened to continue with its deliberations on 20 December 2011. The letter of 11 January 2006 encloses details of calculations and for the first time states what the unit rate is but provides no detail as to what a unit is. The letter of 21 September 2006 provides the same information but there is still no detail of what a unit is. At the meeting in October 2005 Mr A and Miss B were not provided with any detail in connection with what the unit rate was. The Tribunal find the accounts produced at Production 121 for the Appellants difficult to interpret. There is no explanation for the different unit rates used. There was no evidence to show that the Mr A and Miss B had been told what the charge out rate was to be or who was to be doing the work. The Tribunal consider that the Mr A and Miss B were entitled to know how the charges were made up. The Appellants palmed this off on Wilkies Law Accountants and this was wholly insufficient.

There does not seem to be any dispute that there were requests made by the executors for more information with regard to fee charging. The Tribunal do not consider that the Appellants gave the executors sufficient information so as to allow them to know exactly how the fees were worked out.

In connection with the letter from the executors dated 23 May 2004, the Tribunal unfortunately was not provided with a copy of this and accordingly do not know exactly

what request was made in the letter of 23 May 2004. In the circumstances having not seen this letter and noting that Mr A indicates in his letter of 13 June 2005 that he is now happy and understands the provenance of the numbers and the meaning behind them, the Tribunal cannot be satisfied on the balance of probabilities that the Appellants failed to provide a response to the letter of 23 May 2004. The Tribunal accordingly uphold the Appeal in respect of the failure to respond to the request for information in response to the letter of 23 May 2004.

However in connection with the letters of 9 November 2005, 13 November 2006, 24 November 2006 and the meeting on 31 October 2005, the Tribunal was satisfied on the balance of probabilities that the Mr A and Miss B specifically asked for more information with regard to detail of the fee charging, and were not provided with adequate information with regard to the rate of charge, what the unit was, how the rate of charge was worked out and what the charge out rate was for each person who was doing the work. In relation to Production 121, there appears to have been two different unit rates used being £15 and £12 and no explanation as to why there were two different rates used. The Tribunal however accept that the Appellants did provide some response to the enquires but they did not provide all the necessary information. The Tribunal Vary the Determination in respect of this to a failure to adequately respond. The Tribunal were very concerned that the Appellants' purported to charge for something that their professional body states should be provided without charge. It is only if the client asks for a detailed time and line account that there is a justification to charge the client for this. A solicitor is required to give a proper and justified explanation for fee charging without charging the client for this.

Although terms of business letters were not mandatory at that time, it would have been good practice to issue one and would have avoided a situation like this arising.

Prescription

The Prescription and Limitation Act 1973 sets out a number of different circumstances of

fact in which prescription will apply and sets different periods. The Act makes no mention of inadequate professional service. Although the debt which may have been owed to the executors may be covered by the terms of the Act, neither the Law Society or the Tribunal are determining whether or not the executors can claim the money. The fact that the debt may have prescribed does not stop the professional body from dealing with it as a matter of inadequate professional service. Even if the right to recover fees has prescribed, the professional body is not prohibited from pronouncing an order which enables the offended party to obtain redress through from the professional body. The Tribunal accordingly find that as inadequate professional service falls outwith the Act, it is not covered by the Act and accordingly a complaint of IPS cannot prescribe. The Tribunal accordingly find it unnecessary to decide what may or may not have prescribed in terms of the debt. The Tribunal would however indicate that the agreement between the Appellants and the deceased in respect of fees for the pre-attorney period of acting involved the deferred right to payment with the right to pay accruing at the date of death of Mr C and the right to demand repayment therefore could not have expired until the expiry of five years from the date of death.

Time Bar

The Law Society do not say in their Determination whether or not they decided that the complaint was within the two year period or whether they considered that it was outwith the two year period but allowed it because the executors could not reasonably have known about the fact that there were grounds of complaint until a later date. It is unfortunate that the Law Society do not seem to have considered this issue at all, the Tribunal accordingly consider that the matter is at large before it and it is for the Tribunal to consider whether or not it was reasonable for the Law Society to consider the complaint made by the executors in respect of the attorney period. In considering whether or not the executors' complaint in respect of the attorney period was time barred in terms of the Law Society's policy, the Tribunal has to decide on what date the two year period started running. Until such time as the right to payment occurred, the time could not start running. The fees for the pre-attorney period and the attorney period which had

not already been paid became due at the date of death. The executors could not reasonably have been expected to have known that they had grounds for a complaint in respect of the attorney period and pre attorney period until, as executors, they received a proper account of the estate of the deceased including the intromissions of the Appellants with that estate as attorney. The Tribunal note from the evidence, that Mr A was receiving fee notes in respect of the attorney period during the attorney period and prior to the date of death but these were intimated to him for information and he may not have taken a huge interest in them at the time given that his father was still alive. The Tribunal do not consider that Mr A would have had sufficient information on the attorney period fees immediately on the death of Mr C. It is also clear that Mr A was asking for more information even prior to the date of death. The Tribunal consider that Mr A did have ongoing concerns in connection with the fee charging at the date of death but did not have sufficient information at this time to know that he may have a concern with regard to a possible overcharge. Given the lack of information provided by the Appellants in connection with the fees charged and in particular the lack of a unit rate, the Tribunal consider that the earliest time when Mr A could be said to have had sufficient information to realise that there may have been an overcharge would be when he sent the letter of 13 June 2005 in which he states that he understands the provenance of the numbers and the reasoning behind them in respect of the IHT200 Form. It could have been even later than this because he still had not been given a charging rate at this time.

The Tribunal had to consider the point in time when Mr A had the appropriate information to enable him to consider that he may have a complaint in connection with overcharging. To do this he would require to have had sufficient information to enable him to have an understanding of the work done and the rate of charge. During the course of the attorney period fee notes were issued and intimated to Mr A but he was devoid of detail with regard to what was being charged and the rate of charge. The Tribunal is unable to determine the exact point in time at which the rate was supplied. In such circumstances the Tribunal cannot determine that Mr A was provided with sufficient information to understand his cause of complaint before the expiry of the two year period ending with his complaint to the Law Society. In such circumstances the Tribunal cannot

find the Law Society in breach of its policy. However the Tribunal find it surprising in the extreme that the Law Society did not deal with this issue in making its Determination.

Given that the Tribunal has not found the Law Society in breach of their policy in connection with time bar, it is unnecessary for the Tribunal to deal with the issues of *ultra vires,* judicial review or legitimate expectation.

Compensation of £1,000 awarded in connection with the attorney period

It is clear from the Law Society's Determination that compensation was awarded due to stress and inconvenience to Mr C. The Tribunal however heard no evidence with regard to Mr C being stressed and inconvenienced while the Appellants were acting for him. The Tribunal do not consider that there is anything left in the Law Society's Determination, that has not been conceded or overturned by the Tribunal which would make it appropriate for an award of compensation to be made. The Tribunal accordingly Quashed this £1,000 compensation award in connection with the attorney period.

Compensation in respect of the executry period

In connection with the £1,000 compensation awarded by the Law Society in respect of the executry period, the Law Society's decision indicates that £1,000 was awarded in respect of stress and inconvenience caused to the executors. The Tribunal accept that the executors would have been caused stress and inconvenience in connection with the number of letters that they had to write over a lengthy period of time. However a number of the inadequate professional service matters contained in the original Determination by the Law Society have been quashed and accordingly the Tribunal consider that the compensation should be restricted to £500.

Finding in respect of publicity and expenses

The Tribunal issued it draft Decision to the Appellants and the First Respondent and invited written submissions on publicity and expenses. After receiving the written

submissions the Tribunal reconvened its consider its Decision on publicity and expenses. The Tribunal declined to entertain the additional submissions made by the Appellants in respect of the merits of the Decision, it being inappropriate to make such submissions at this stage of the procedure. The Tribunal noted that both parties agreed that it was appropriate that publicity be given to the Decision in the usual manner and this was so ordered.

In connection with expenses, the Tribunal noted that both parties agreed that it was appropriate that the Law Society be found liable to the Appellants in respect of the expenses up to and including the hearing on 26 January 2011 given the concessions made by the Law Society on this date. In respect of the remainder of the expenses, having regard to the submissions made and to the Determination made by the Tribunal, the Tribunal considered that a finding of no expenses due to or by either party was appropriate in this case.

Chairman