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

DECISION

in Appeal under Section 42ZA (9) of the Solicitors (Scotland) Act 1980 as amended

by

FIONA MARIE CAIRNS, Solicitor, FMC Legal Limited, 499 Kilbowie Road, Clydebank

Appellant

against

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

First Respondent

and

HELEN GIFFIN, 26 Kelly Street, Greenock

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Sections 42ZA (9) of the Solicitors (Scotland) Act 1980 by Fiona Marie Cairns, Solicitor, FMC Legal Limited, 499 Kilbowie Road, Clydebank (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") dated 27 August 2015 upholding a complaint of unsatisfactory professional conduct against the Appellant by Helen Giffin, 26 Kelly Street, Greenock (hereinafter referred to as "the Second Respondent").

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First Respondent and the Second Respondent. Answers were lodged for the First Respondent. The Second Respondent did not lodge Answers.

3. Having considered the Appeal with Answers, the Tribunal resolved to set the matter down for a procedural hearing on 10 December 2015 and notice thereof was duly served on all the parties.

4. A procedural hearing took place on 10 December 2015. The First Respondent was represented by Mr Marshall, Solicitor, Edinburgh who also appeared on behalf of Mr McCann, Solicitor, Clydebank for the Appellant. Mr Marshall advised that Counsel had been instructed for the Appellant and he had been requested to make a motion on behalf of the Appellant to fix a further procedural hearing to allow the Appeal to be adjusted. The Second Respondent was not present or represented. The Tribunal set a timetable for adjustments to take place, set a further procedural hearing for 1 February 2016 and reserved the question of expenses.

5. A further procedural hearing took place on 1 February 2016. The Appellant was present and was represented by Helen Watts, Advocate. The First Respondent was represented by Paul Marshall, Solicitor, Edinburgh. Ms Watts advised the Tribunal that it was likely this Appeal could be narrowed down to three issues. She indicated that the narrowed issues could be presented in a written form to the Tribunal and that it was not likely to be necessary to lead evidence. Mr Marshall moved for expenses in relation to the adjustment procedure that had taken place. The Tribunal fixed a full hearing for 22 March 2016 and requested parties to lodge written submissions no later than 14 days prior to the hearing. The question of expenses was reserved until the hearing.

6. The case called on 22 March 2016. The First Respondent was represented by Mr Marshall, Solicitor, Edinburgh, The Appellant was present and represented by Ms Watts, Advocate. The Second Respondent was not present or represented.

7. The shorthand writer booked for the hearing was unable to attend. Audio recording facilities were available. Having heard from the parties that they had no objection to proceeding without the shorthand writer the Tribunal agreed in terms of Rule 46(1) of the Tribunal's Rules to use the audio recording facilities and proceed without the shorthand writer.

8. A Joint Minute of Agreement agreeing the contents of the joint bundles of Productions A1 and A2 was lodged. The Tribunal allowed these productions to be lodged late. The Tribunal heard oral submissions from both parties and had regard

to these, the written submissions by both parties which had been lodged previously and the productions.

9. The Decision of the Tribunal was to confirm the Determination of the First Respondent made on 27 August 2015 in relation to the Complaint by the Second Respondent against the Appellant.

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

> Edinburgh 22 March 2016. The Tribunal in respect of the Appeal under Section 42ZA (9) of the Solicitors (Scotland) Act 1980 by Fiona Marie Cairns, Solicitor, 499 Kilbowie Road, Clydebank ("the Appellant") against the Decision of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondent") dated 27 August 2015, to uphold a complaint of unsatisfactory professional conduct against the Appellant following a complaint by Helen Giffin, 26 Kelly Street, Greenock ("the Second Respondent"); Confirm the Determination of the Law Society; Find the Appellant liable in the expenses of the First Respondent and of the Tribunal including the expenses of adjustment of the Record which expenses include the expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and may but has no need to include the names of anyone other than the Appellant.
>
> **(signed)**
> **Nicholas Whyte**
> **Vice Chairman**

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

IN THE NAME OF THE TRIBUNAL

Nicholas Whyte
Vice Chairman

NOTE

The parties lodged two joint bundles of Productions, bundle A1 containing the key documents from Blair and Bryden's file and A2 containing items from the First Respondent's correspondence with the Appellant's agent, together with a Joint Minute of Agreement agreeing the contents of these bundles. In addition both parties lodged written submissions. The parties each lodged Lists of Authorities.

SUBMISSIONS FOR THE APPELLANT

Ms Watts indicated that she would take the Tribunal through her written submission.

"Section 1 – The absence of a conflict of interest

The findings of the Sub Committee

The Sub Committee found as follows (with emphasis supplied):

"*The Sub Committee was in no doubt that there had been clear breaches by the Solicitor of the 2008 Practice Rules and in particular, Rule 6 (concerning conflicts), 9 (concerning effective communication and to (sic) the comparable 2011 Practice Rules. In addition, in so acting there had been a breach of Rule B1.3 (concerning independence) and Rule B1.4 (concerning the interests of the client)".*

Excerpts from the relevant rules:

The relevant rules have been reproduced below for ease of reference.

Rule 6 of the 2008 Practice Rules

Conflict of Interest

(i) Solicitors must not act for two or more clients in matters where there is a conflict of interest between the clients or any client where there is a conflict between the interest of the client and that of the solicitor or the solicitor's practice

(ii) Even where there is only a potential conflict of interest solicitors must exercise caution. Where the potential for conflict is significant, solicitors must only act for both parties with the full knowledge and consent of the parties.

Comment on the alleged breach of Rule 6 of the 2008 Rules

It is submitted that there was no conflict of interest in the present case. Reference is made to paragraph 5 of the Appeal. Mr A was never a client of the firm, and accordingly the first part of the test set out in Rule 6 could never be met in the present case.

The Law Society attempt to get around this issue, in their answers, by treating this case as falling within the second part of the rule. This distinction is not evident from the Sub Committee's determination, which is characterised by genuine confusion about what a conflict of interest actually is. In any event, it is now said that the firm had decided that it was "*not in its interests*" to act for the complainer in a claim directed at fault on the part of Mr A.

This is not a fair characterization of the situation and is not one which is supported by the evidence. The partners (and critically, not Ms Cairns, who had absolutely nothing to do with this decision) had decided that for reasons of social nicety they would prefer not to be engaged in a claim against Mr A. That is not contrary to any rule or guideline of which Ms Cairns has ever been aware. Even if this situation might amount to a conflict, which is disputed, the conflict does not pertain to Ms Cairns as an individual but rather to the partners and the firm who previously employed her.

It is submitted that for her personally to be left with a career long blemish on her record for acting in a purported conflict of interest situation, in the circumstances of this case, is extremely harsh.

It is reiterated that at the time of the events in question Ms Cairns was a very junior solicitor, and that decisions about whether to act or not act for a particular client were never taken by her, but rather by the partners of the firm whose instructions she implemented. To personally penalise Ms Cairns for a purported conflict of interest in these circumstances is neither proportionate nor appropriate.

Rule 9 of the 2008 Practice Rules

Effective communication

> "Solicitors must communicate effectively with their clients and others. This includes providing clients with any relevant information which the solicitor has and which is

necessary to allow informed decisions to be made by clients. It also includes accounting to clients for funds passing through the solicitor's hands. Information must be clear and comprehensive, and where necessary or appropriate, confirmed in writing.

Solicitors must advise their clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them. In particular solicitors must advise clients in writing when it becomes known that the cost of work will materially exceed any estimate that has been given and must also advise the client when the limit of the original estimate is being approached".

Comment on the alleged breach of Rule 9 of the 2008 rules

1. It is not clear where the specific breach of Rule 9 of the 2008 practice rules relating to effective communication was felt to lie. It is assumed that it relates to a purported failure to keep the complainer advised of Digby Brown's involvement.

2. If this is indeed the basis for this finding, then it is erroneous. The complainer was kept up to date at all times about the involvement of medical witnesses and of Digby Brown. This matter is dealt with in more detail below.

Rule B1.4 of the 2011 Practice Rules

Please note that these rules are dated 27 May 2011 and came into force in November 2011. Accordingly, they were not in force at the relevant time.

B1.4.1 You must act in the best interests of your clients subject to preserving your independent and complying with the law, these rules and the principles of good professional conduct.
B1.4.2 You must not permit your own personal interests or those of the legal profession in general to influence your advice to or actings on behalf of a client.
B1.4.3 You must at all times do, and be seen to do, your best for your client and must be fearless in defending your client's interests, regardless or the consequences to yourself (including, if necessary, incurring the displeasure of the bench) But you must also remember that your client's best interests require you to give honest advice however

unwelcome that advice may be tot eh client and that your duty to your client is only one of several duties which you must strive to reconcile.

3. Insofar as the 2011 rules are concerned, these were not in force at the time of the events in question and accordingly can have no bearing on the outcome. It is accordingly a matter of considerable concern that they (sic) found Ms Cairns to be "in clear breach" of these provisions. It is not accepted that, even if these rules had been in force, Ms Cairns was in breach of them. However, there is no justification whatsoever for even referring to them. It is submitted that the fact that the Law Society appears to have referred to the wrong set of rules is indicative of a lack of care in considering this case, which is evident throughout their analysis.

Section 2 - Failure by the Law Society in relation to treatment of evidence

4. In Cowan v v Scottish Solicitors Discipline Tribunal 2014 CSIH 11 the Inner House of the Court of Session held that it was incumbent on the SSDT to carry out a "*careful, rigorous and focused consideration and analysis of the evidence placed before it and proceed to an equally careful analysis of that evidence in order to determine whether or not the complaint has been established*". It is submitted that this guidance sets the standards which require to be adhered to by any fact finder engaged in disciplinary procedures involving solicitors in this jurisdiction.

5. It is submitted that the consideration given by the Law Society to the factual evidence (or striking lack thereof) in relation to many aspects of this complaint falls far short of meeting the test outlined in the *Cowan* case. This case is characterised by a marked lack of "*careful, rigorous and focused consideration and analysis of the evidence*" by the Law Society.

6. In order to illustrate this, the Sub Committee findings have been broken down into sections below.

Individual aspects of the Sub Committee findings

7. *"per the terms of the email to Digby Brown, as of 13 June 2011 at the very latest, the Solicitor knew that her firm were not prepared to continue to act due to the potential conflict"*

- The Law Society concluded, without the benefit of Ms Cairn's evidence on this critical matter, that this email meant that the firm of Blair and Bryden had already decided to stop acting for the complainer as at 13 June 2011. They also concluded that this email reflected Ms Cairns asking Digby Brown to take over acting for the complainer. In fact, they were wrong in relation to both of those matters.

- As at 13 June 2011, no decision had been taken to withdraw from acting for the complainer. The firm's position was, as it always had been, and as it was throughout their involvement in this case: they would act for the complainer unless and until the action was directed at Mr A.

- It is accepted that the email which Ms Cairns wrote, and which has proved to become the foundation for such serious allegations against her, could be worded far better than it is. At the time of writing, she was a newly qualified solicitor with no possible means of foreseeing the significance which would subsequently be attached to it. However, it did not, and does not, bear the meaning which has subsequently been placed upon it.

- In any event, the Law Society has fundamentally misunderstood the nature of the involvement that was sought from Digby Brown at this stage. Small firms such as Blair and Bryden will commonly seek the involvement of specialist national practices such as Digby Brown to assist them in dealing with complex medical negligence or personal injury cases. It is usually a feature of these arrangements that originating firm remains the principal agent, with a specialist firm such as Digby Brown acting as, for example, the Edinburgh Agent in Court of Session proceedings.

- As at June 2011, this was the input which was sought from Digby Brown. Similar input was sought in other similar cases in which no issues of potential conflict or other difficulty arose. Digby Brown's involvement was <u>not</u> sought because the firm intended to withdraw from acting. Their input would have been sought even if Mr A had not been involved in the case at all.

8. *"at that stage she ought to have advised the complainer that the firm could not act for her. She failed to do so. Instead the solicitor continued to act for the complainer until approximately 2 weeks before the triennium was due to expire when the solicitor decided to withdraw from acting."*

- It is accepted that, were this to have been what had happened, then it would be of serious concern. However, this is not what happened.

- This finding and those that underpin it, are based on the Law Society's own interpretation of this email with no input from the drafter, sender or recipient about what it was meant to mean or was indeed taken to mean. As noted above, the involvement of Digby Brown was sought alongside, rather than in substitution for, Blair and Bryden at this stage. No decision had been taken to withdraw from acting. Had such a decision been taken at that stage they simply would have withdrawn. There would have been no reason whatsoever for them to do otherwise.

9. *"this was only after the second medical report had been obtained (on 25th August 2011) which suggested that Mr A may have been fully at fault and thus an actual conflict existed"*

- The complainer had known from the outset that the firm would not act for her in a claim against Mr A. This is backed up by contemporaneous correspondence.

- In their letter of 21 September 2011 (Item 17 in the Inventory of Key Documents from Blair and Bryden's file) Blair and Bryden reiterate

  "we did however highlight to you at that time that we would not be in a position to act on your behalf if your complaint was regarding Mr A".

- The Law Society make no reference to this letter. Unless they were to conclude that this sentence was deliberately fabricated, then the letter supports Ms Cairns' version of events and undermines the complainer. There is no evidence whatsoever that the Law Society considered or analysed the import of this letter. If they were to conclude that it was deliberately written on the false premise that the complainer had been given information which she had in fact never been

given, then the Law Society would have had to very clearly articulate and justify such a serious conclusion. There is no evidence of any such thought or analysis. The complainer's position is simply said to be that she was not advised prior to 7 September 2011 that the firm would not act in a claim directed at fault on the part of Mr A. Clearly this gives rise to a total divergence in positions between Ms Cairns and the complainer.

- In a situation in which two parties are saying opposite things about a critical factual matter, it is incumbent on the Law Society to meet the test set out in *Cowan* in carefully considering those divergent positions. They failed to do so. There is no explanation whatsoever for why they felt entitled to disregard Ms Cairns' version and the documentation which supported it and to prefer the complainer's version.

10. *"It was noted that again the solicitor did not advise the complainer of this. Instead the solicitor wrote again to Digby Brown requesting that they take on the complainer's case"*

- This finding is simply incorrect and the fact that the Law Society have reached this conclusion confirms that they have failed to properly analyse the evidence relating to this complaint. This in turn undermines all of the conclusions which they reach.

- The complainer was kept up to date throughout this period, as is clearly proven by the terms of the file. The report form (sic) Professor B was promptly copied to the complainer upon receipt (see medical report of Professor B at item 11 in the Inventory of Key Documents from Blair and Bryden's file), with a request that the complainer make an urgent appointment with Ms Cairns to discuss next steps in the action. The complainer had already been made aware that the firm would not act in a claim directed at fault on the part of Mr A. The medical report, which was forwarded to the complainer, states in the clearest terms that any possible basis for a claim did not relate to the skin staples or infection but rather to obvious mal-alignment of the fracture. The report states that Mr A clearly had "*considerable problems*" with the surgery (see item 13 in the Inventory of Key Documents from Blair and Bryden's file). It was patently obvious that the report raised the possibility of an action against Mr A. Thereafter there is

contemporaneous file note of a meeting with the complainer and her daughter on 7 September 2011 (see item 13 in the Inventory of Key Documents from Blair and Bryden's file) at which the medical report is noted to have been discussed and at which meeting the complainer is noted to have instructed that the a further opinion of Digby Brown be sought.

- Again, the Law Society appear to have totally disregarded this critical piece of contemporaneous evidence which undermines the complainer's position.

11. *"The Sub Committee was concerned that there appeared to be a large discrepancy between what the solicitor wrote in June and September 2011 in her correspondence to Digby Brown and what she advised the complainer"*

- There is, as a matter of fact, no such discrepancy. The complainer was kept fully informed throughout. The Law Society have concluded that there was, because they have disregarded the contemporaneous evidence.

12. *"No mention was made as to the perceived materiality by the firm of the conflict, nor that Digby Brown had been asked whether it would be prepared to take over the case"*

- The complainer was aware of the firm's position in relation to the potential conflict, which never changed throughout their actings for her. Ms Cairns clearly explained to the complainer that a firm such as Digby Brown might come on board as Edinburgh Agent or in another similar capacity. The complainer was aware of, and instructed, the involvement of Digby Brown. There are several references to the involvement of "medical negligence experts" in correspondence to the complainer. These references are to Digby Brown. They could not be references to anyone else.

13. *"It was noted that, where there was a conflict, crystallizing extremely late such that prejudiced the firm's continued acting, the solicitor potentially could have raised proceedings simply to protect the time bar but making it clear to the complainer that the firm would not be in a position to represent the complainer's interests beyond that. Instead the complainer was left in the very unfortunate position, just prior to the triennium expiring, with no action having been raised and with no representation. The Sub Committee agreed that this was entirely due to the solicitor's conduct."*

- The triennium in the complainer's case was due to expire on 6 October 2011. The firm formally intimated their withdrawal from acting when they wrote to the complainer on 21 September 2011, enclosing her papers and reiterating that any action would time bar on 6 October 2011. It is, of course, accepted that this did not leave the complainer with a great deal of time to take matters forward, should she wish to do so. However, it did leave her with just over two weeks. That was adequate time for an action to be raised and solicitors are regularly instructed with less time than that available to them. There is no suggestion that the complainer did not raise an action because she was not able to do so in time.

- It should also be noted that the delay was not because of inactivity on the part of Ms Cairns. It took some time to obtain the essential medico-legal report. Professor B is now largely retired, but was at that time the pre-eminent orthopaedic surgeon in the Scottish medico-legal sphere. He was therefore an excellent candidate to act as an expert witness in this case. However, he was obviously extremely busy. He was instructed by Blair and Bryden on 20 June 2011 to prepare a medical report. Their letter of instruction (see item 6 in the Inventory of Key Documents from Blair and Bryden's file) to him specifically pointed out that the triennium was due to expire on 7 October 2011 and that time was therefore of the essence. Initially, nothing was heard in response. A chaser letter was sent to Professor B on 29th July 2011 (see Item 7 in the Inventory of Key Documents from Blair and Bryden's file)

- His secretary then telephoned to advise that there was a cancellation on Monday 22nd August (see item 8 in the Inventory of Key Documents from Blair and Bryden's file)

- This was the earliest possible appointment. The report was finally received under cover of a letter dated 25 August 2011 (see item 11 in the Inventory of Key Documents from Blair and Bryden's file), over two months after his instruction.

<u>Conclusions on the Law Society's handing of the factual evidence</u>

14. Significant difficulties inevitably arise where a fact finder is faced with two directly contradictory versions of events. This is something which the Courts have long been mindful of. In *Gray v Nursing and Midwifery Council (2010 SC 75)* the Inner House of the Court of Session held as follows in the context of disciplinary proceedings relating to a nurse:

> *"That is to say, corroboration, while not a legal requirement, is highly desirable. In the absence of such documents, and in the absence of corroboration, the Conduct Committee is faced with one person's word against the other's - that of the person making the allegation against that of the practitioner against whom it is made - a situation which always gives rise to difficulties even where proof is to the civil standard of the balance of probabilities and, as it appears to us, even greater difficulties where the required standard of proof is beyond reasonable doubt"*

15. There is no evidence at all that the Law Society were mindful of the difficulties which arise when faced with one person's word against another. In this case, the Law Society were faced with the word of Ms Cairns against the word of the complainer. The contemporaneous documentation corroborates the position of Ms Cairns in a number of key respects and undermines the complainer by suggesting that perhaps her recollection of events is not accurate. Nonetheless, the Law Society have preferred the complainer's version of events over that of Ms Cairns on every single significant point, ignoring such evidence as is available to corroborate Ms Cairns' position. At no stage has the Law Society set out any justification for taking that approach.

<u>Section 3 – Failure in relation to the treatment of the email of 13 June 2011</u>

16. This matter has already been canvassed in relation to the previous section relating to failures on the treatment of the evidence generally. However, it is sufficiently significant to merit revisiting it in isolation at this stage.

17. The critical point is as follows: the Law Society's findings hinge, in large part, on the interpretation that it has placed upon the critical email. The inescapable inferences arising from the Law Society's findings are, *inter alia*, as follows:

i. Ms Cairns/the firm of Blair and Bryden decided in June 2011 that the firm would no longer on behalf of the complainer.

ii. Ms Cairns then decided to deliberately lie to the complainer about that, allowing her to believe that they would, or even might continue to act for her, despite having already decided that in fact they would not.

iii. Ms Cairns thereafter continued to act for the complainer and in so doing to correspond with Digby Brown, with the complainer, and with Professor B on a wholly false premise.

iv. Finally, Ms Cairns then decided at the last minute to notify the complainer of a decision which had in fact been taken some three months previously.

18. The above might seem somewhat dramatic, but it is the inevitable conclusion which is reached in light of the Law Society's findings. The following points arise as a result:

i. This would be conduct of an extremely serious nature involving the deliberate deceit over a period of three months, of a client. Ms Cairns has a completely unblemished record for the period prior to, and since the present complaint. There is no basis whatsoever to suggest that she is someone who is likely to engage in conduct as serious as the lengthy deceit of her clients.

ii. This conduct would presumably have been carried out for some reason. It would be inexplicable for anyone to conduct themselves in this fashion for no reason. The Law Society make no effort to identify any such reason. The complainer was legally aided. The rates of remuneration are such that, in continuing to act for the complainer during June, July and August 2011 the firm of Blair and Bryden are more likely to have sustained a net loss than to have generated any profit. It would have been in their financial interests to withdraw from acting for her sooner rather

than later. There is no credible reason for Ms Cairns to have embarked on the course of action which has been attributed to her.

iii. The Law Society reached this damning conclusion about the import of the June 2011 email without having any evidence whatsoever from the solicitor in question about what that email was actually meant to mean.

19. To find a solicitor to be guilty of dishonesty is a matter of the gravest severity. The Law Society have, either expressly or by inevitable implication, made that assessment of Ms Cairns. It is submitted that they have done so sloppily, without proper consideration of all of the evidence available to them, and without hearing Ms Cairns (sic) position on critical issues.

20. The need for a proper analysis of the evidence in relation to matters such as this was recently canvassed in the Court of Appeal in England, where the long held position was reaffirmed, and is put as follows:

> *"I certainly do not say that the judge was bound to accept their evidence…but in my judgment he ought to have confronted that defence head on. Unless he was able to conclude that he did not believe it (which he did not say) I do not consider that he was entitled to find that they were guilty of dishonesty. A finding of dishonesty, especially against a solicitor, should not be made without the most careful consideration of what the solicitor says in his own defence.* (*Clydesdale Bank plc v Workman and Others [2016] EWCA Civ 73, at paragraph 52)*

Conclusions

21. In conclusion, it is submitted that the finding of unsatisfactory professional conduct which has been made against Ms Cairns in the present case is patently flawed for the following reasons:

i. The rules on conflict of interest have not been properly analysed or applied, despite the efforts of the Law Society to finesse this matter retrospectively in their answers.

ii. Ms Cairns has been found to be in "clear" breach of a number rules which were not even in force at the time of events complained of, a clear indication of the superficial nature of the analysis in this case.

iii. The Law Society has reached a number of factual conclusions which are directly contradicted by the terms of the evidence which was available to them.

iv. The Law Society has accepted the version provided by the complainer above that of Ms Cairns on every single important matter, with no explanation or justification for so doing, and regardless of the evidence which exists to corroborate the position of Ms Cairns.

v. The Law Society has made a number of critical findings relating to the June 2011 email without having the benefit of Ms Cairns' evidence about what that email was actually meant to mean.

vi. The Law Society has failed in the obligation incumbent upon it to treat with the utmost care allegations of dishonesty on the part of solicitors and to ensure that such allegations are only found to be proven where the necessary evidence exists to justify the allegation.

22. It is submitted that, having regard to the above, the procedure which took place before the Law Society and which led to the finding of unsatisfactory professional conduct on the part of Ms Cairns was manifestly flawed and should not be allowed to stand.

23. Reference is made to the well known *dicta* of the Court in *Barrs v British Wool Marketing Board (1957 SC 72, at page 82)*, where the following passage appears:

> *"Although quasi-judicial bodies such as this tribunal are not Courts of law in the full sense, it has always been the law of Scotland that they must conform to certain standards of fair play, and their failure to do so entitles a Court of law to reduce their decisions. Were it not so, such tribunals would soon fall into public disrepute, and confidence in them would evaporate. Fair and equal opportunity afforded to all interests before the tribunal is the fundamental basis upon which the tribunal must operate, and, in the*

absence of such fair play to all, it is right and proper that a Court of law should reduce the tribunal's decision...

It is important to observe the width of this principle. It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not 'Has an unjust result been reached?' but 'Was there an opportunity afforded for injustice to be done?' If there was such an opportunity, the decision cannot stand".

24. It is submitted that the decision of the Law Society in this case cannot stand and should be quashed.

QUESTIONS TO MS WATTS FROM THE TRIBUNAL

In answer to a question from the Tribunal as to the meaning of the words *"would this be a client that your firm would be prepared to take on?"* in the email of 13 June 2011 and whether this meant that the Appellant was intending to transfer agency to Digby Brown, Ms Watts replied that this was not the meaning that the email was intending to convey. She stated that it was intended that Digby Brown would become part of the team and so Mrs Giffin would have been a client of both firms.

In response to a question from the Tribunal as to where the in the email this information was conveyed, Ms Watts advised that it was not stated in the email and the First Respondent needed the evidence of the Appellant regarding this.

The Tribunal referred Ms Watts to the second paragraph of Blair and Bryden's letter of 17 June 2011 to Digby Brown which is found at Production A1/2 -

"We enclose our clients file for your attention. We have not really progressed this file in any way and would be obliged if you could first indicate whether or not there is a possible claim and thereafter whether you would be in a position to take the case forward."

In answer to a question from the Tribunal as to whether this paragraph indicated that the Appellant intended to withdraw from acting and pass the file on to Digby Brown to take it forward. Ms Watts replied that as a matter of fact the Appellant does not accept that. Ms Watts indicated that the Appellant has an alternative view and she does not think that the Tribunal could imply that from the wording of that letter. She advised that Blair and Bryden were looking for Digby Brown to assist them and stressed that Blair and Bryden did not intend to withdraw from acting at this stage. Ms Watts advised that it was a situation where the Appellant's firm intended to appoint Digby Brown as Edinburgh agents.

In response to a question from the Tribunal as to what Ms Watts referred to in her submission as *"contemporaneous documentation",* Ms Watts replied that the Appellant's position was that Mrs Giffin was made aware of the position but this was not put in writing after the initial meeting and that the file was not as clearly documented as it should be.

In response to a question from the Tribunal as to whether Ms Watts was saying that Mrs Giffin was advised of the time bar issue, Ms Watts replied that Ms Giffin had been advised about the time bar issue at the time of her first meeting with the Appellant. However Ms Watts stated that she understood that it was now Mrs Giffin's position is that she was only told of the time bar issue at the eleventh hour.

In response to a question from the Tribunal as to whether this was recorded at all in the file, Ms Watts replied that the only record of the advice given on 10 August and 7 September was as stated in the letter of 21 September 2011 from the Appellant to Mrs Giffin. Ms Watts submitted that either this statement in the letter written by the Appellant is correct or it is a falsehood.

The Tribunal asked Ms Watts for her view regarding whether it was the stage at which the medical report was received which meant that the potential conflict of interest was fulfilled. Ms Watts replied in the affirmative and stated that at that stage the Appellant asked for an urgent meeting with her client. Ms Watts stated that from that stage the reference to Digby Brown taking on the case was on a completely different basis i.e. that they were to be taking over the case fully.

Ms Watts accepted that there was no reference in the note of the subsequent urgent meeting or in the letter to Mrs Giffin regarding the conflict being discussed and stated that the medical report which was sent to the client made that clear. The Chairman asked whether it was then up to Mrs

Giffin to read the medical report and note that this pre-condition (i.e. the potential conflict involving Mr A) was now fulfilled. Ms Watts answered in the affirmative and stated that she accepted that this information was not in the letter or in the file note. Ms Watts submitted that it would have been possible in these circumstances to get a new agent to raise an action since the medical report had already been obtained along with the medical records. Ms Watts submitted that Ms Giffin was not prevented from raising an action.

In response to a question from the Tribunal, Ms Watts confirmed that Ms Giffin was in receipt of Advice and Assistance rather than Legal Aid.

The Tribunal referred Ms Watts to page 12 of her written submission at paragraph 18(iii) and asked her to explain what was meant by the statement-

> *"The Law Society reached this damning conclusion about the import of the June 2011 email without having any evidence whatsoever from the solicitor in question about what that email was actually meant to mean."*

Ms Watts referred the Tribunal to Production A2, the report by the Complaints Investigator. She directed the Tribunal to paragraph 5 at page 11 which stated –

> *"It can be proved beyond reasonable doubt that on 13 June 2011 the solicitor had decided that the firm could not act for Mrs Giffin due to a potential conflict of interest and she asked Digby Brown to take the case..."*

Ms Watts stated that the significance of this finding was missed by the Appellant and Mr McCann her representative. She submitted that Appellant did not realise the import of this finding in fact and did not ever put her position to the First Respondent regarding what the email was actually meant to mean.

In response to a question from the Tribunal, Ms Watts confirmed that the Appellant did have an opportunity to put her side of this matter to the First Respondent and accepted that the opportunity was missed. Ms Watts submitted that the practical result of that was that the First Respondent made a decision regarding this without any input from the Appellant on this important matter. In response to a question from the Tribunal as to what the Sub-Committee should have done, Ms Watts submitted that the Sub-Committee should have noted that they had

not received a response from the solicitor on this important matter and determined a fair way to deal with it. She stated that Mr Marshall would no doubt say that if the solicitor did not make comment on it the Sub-Committee were entitled to rely on it. However she submitted that it is incumbent on the First Respondent to consider all the evidence and stated that that is clear from the above-mentioned case of *Barrs v British Wool Marketing Board***.**

The Tribunal asked Ms Watts whether she was saying that at the investigatory stage the First Respondent should have made a special effort to ask the solicitor about this email because there was no view submitted on it. Ms Watts replied that she was not sure that she could say that the First Respondent should have done that; although she advised that she had seen that done in other cases. She explained that what she was saying was that the First Respondent needed to note that there was no response from the Appellant on the email and taken that into account in relation to what it inferred from it.

In response to a question from the Tribunal regarding the differences between the 2008 and 2011 Practice Rules Ms Watts advised that she was not saying that any differences were relevant to this appeal as the spirit of the rules was the same.

SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Marshall stated that having listened to Ms Watts' submissions it would appear that she was of the view that there was an element of dishonesty in this case. Mr Marshall submitted that in his view the Sub-Committee does not make a finding of dishonesty and stated that there would have been a different outcome if there had been such a finding.

Mr Marshall then stated that he would take the Tribunal through his written submission.

"Appeal against determination of unsatisfactory professional conduct
This is an appeal under section 42ZA(9) of the Solicitors (Scotland) Act 1980 against the decision of the Council of the Law Society that the solicitor is guilty of unsatisfactory professional conduct ('UPC').

Test for UPC
The test for UPC is contained at section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007:-

'Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services'

The standard of proof as applying to UPC decisions is whether the conduct is proved on the balance of probabilities.

Law Society duty to investigate and determine UPC complaint

Section 42ZA (1) sets out the Council's duties in connection with a complaint of UPC. It provides:-

'(1) Where a conduct complaint suggesting unsatisfactory professional conduct by a practitioner who is a solicitor is remitted to the Council under…the 2007 Act, the Council must having –

(a) investigated the complaint under section 47(1) of that Act and made a written report under section 47(2) of that Act;

(b) given the solicitor an opportunity to make representations, determine the complaint.'

Therefore we can see there are four stages:-

(1) Investigate; (2) draft report; (3) send to solicitor for response; and (4) determine complaint.

Solicitor's right of appeal against finding of UPC

Section 42ZA (9) sets out the solicitor's rights of appeal in connection with a finding of UPC. It provides:-

"(9) A solicitor in respect of whom a determination upholding a conduct complaint has been made under subsection (1)…may, before the expiry of the period of 21 days beginning with the day on which the determination or, as the case may be, the direction is intimated to him, appeal to the Tribunal against the –

(a) determination…"

Powers of the Tribunal in UPC appeal

Section 53ZB(1) sets out the Council's powers in connection with an appeal under section 42ZA(9):-

"53ZB Powers of Tribunal on appeal: unsatisfactory professional conduct

(1) On an appeal to the Tribunal under section 42ZA(9) the Tribunal –

(a) may quash or confirm the determination being appealed against…"

The Council invites the Tribunal to confirm the determination in accordance with section 53ZB(1).

In the current matter this Tribunal is sitting as an appellate court. The case of *Cowan* makes clear that there are limited circumstances in which the appellate court will interfere with a fact finder's decision on the evidence – those are (1) the fact finder had misunderstood the evidence or (2) otherwise gone plainly wrong (para 12 of Cowan).
In my submission that assessment sits well with the commentary I have provided from para 2.06 of Smith and Barton where the Tribunal hearing an IPS appeal (same powers of disposal as UPC) approved guidance from Macphail which described the weighing of evidence as a" balancing exercise" and stated that:-

> "*If the court is satisfied that there has been an* ***error in the balancing exercise*** *or that the judge's* ***conclusion is so plainly wrong*** *that there must have been such an error,* ***the court may interfere***."

Therefore in this case I would submit that you should consider whether the Sub Committee has misunderstood the evidence or otherwise gone plainly wrong, before you interfere with any decision on the evidence.

Council's response to the Grounds of Appeal
Ground 1
Solicitor maintains that there was no actual or potential conflict of interest and any decision made on that basis is made in error.

There was a conflict of interest.

The relevant rule in force at time of the conduct was Rule 6(1) of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 which provides:-

> "*Solicitors must not act for two or more clients in matters where there is a conflict of interest between the clients* ***or for any client where there is a conflict between the interest of the client and*** *that of the solicitor or* ***the solicitor's practice.***"

The rule makes clear that solicitors must not act for any client where there is a conflict between the interests of the client and the interests of the solicitor's practice. (It is reproduced as rule B.1.7.1 of the 2011 Practice Rules).

In the current matter there was a conflict between the interest of the client and the interests of the solicitor's practice. It was in the client's best interests for the firm to pursue the claim of medical negligence without restriction or limitation. The firm had come to the view that it was not in the firm's interests to pursue a claim for medical negligence against Mr A. Accordingly there was a conflict of interest between the interests of the client and the interests of the firm.

In the Sub Committee decision:-

> "*It noted that there was one issue which concerned the Solicitor allegedly failing to act in the complainer's best interests by acting in a conflict of interest situation*."

The Sub Committee went on to note:-

> "*The Sub Committee commented that there were two issues to consider here insofar as the Solicitor's conduct was concerned….The second concerned Rule B1.7.1 where a Solicitor could not act where there was a conflict between the interests of the client and the practice unit.*
> *In considering the matter further, the Sub Committee agreed that, per the terms of the e-mail to Digby Brown, as of 13 June 2011 at the very latest, the Solicitor knew that her firm were not prepared to act due to the potential conflict.*
>
> *The Sub Committee agreed that at that stage she ought to have advised the complainer that the firm could not act for her….*"

Therefore we can see that the Sub Committee have correctly identified the element of the practice rule which states that a solicitor should not act where there is a conflict between the interests of the client and the interests of the firm.

The Sub Committee has gone on to note that the solicitor in this case **had** identified a potential conflict between the interests of the client and the interests of the firm.

On that basis I invite you to reject the first appeal ground that there was no actual or potential conflict.

Response to Ground 2

The solicitor argues that there is a dispute over **when** she advised her client that the firm would not be prepared to bring a claim against the consultant, Mr A. The solicitor explains that she advised her client of this at a meeting "in about April 2009". Her client, Mrs Giffen (sic) has explained that the solicitor did not advise her "until the eleventh hour" that the firm would be unable to pursue a claim against Mr A.

The solicitor complains that these are diverging positions and claims that these are **critical to the determination of the complaint**. The solicitor complains that there is no proper analysis of these two positions or indeed of which of the two positions is preferred and why.

In my submission the solicitor is wrong to argue that this issue is critical to the determination of the complaint. The Sub Committee's decision does **not** rely on when Mrs Giffen (sic) was first made aware that the firm would not be prepared to act in any claim against Mr A.

The Sub Committee relies on the solicitor's failure to advise her client when the point had been reached that **she knew that her firm would require to withdraw**. Instead the solicitor continued to act and then withdrew at a much later stage when the triennium was approaching. That is clear from the Sub Committee decision which notes:-

> "*…the Sub Committee agreed that, per the terms of the e-mail to Digby Brown, as of 13 June 2011 at the very latest,* ***the Solicitor knew that her firm were not prepared to continue to act*** *due to the potential conflict. The Sub Committee agreed that at that stage she ought to have advised the complainer that the firm could not act for her. She failed to do so. Instead the Solicitor continued to act for the complainer until approximately 2 weeks before the triennium was due to expire when the Solicitor decided to withdraw from acting*".

We can see that the finding of UPC turns on the finding that as at 13 June 2011 the solicitor knew that her firm was not prepared to continue to act and did not confirm the position to her client.

That is completely separate from the question of when the solicitor first advised her client that her firm would not be prepared to bring a claim against Mr A. That issue is not critical to the determination of the complaint. The critical point for the determination is that when the solicitor knew her firm would not continue she did not confirm the position to her client and withdraw. This ground of appeal should be refused.

Response to Ground 3

The third ground of appeal centres on the reliance placed on the 13 June 2011 e-mail which the solicitor sends to Digby Brown. The Sub Committee considered that e-mail to demonstrate that, by that date, the solicitor knew that her firm would require to withdraw from acting.

There are two parts to this ground of appeal.

Part one – error in interpretation and reliance on e-mail

The first argument made by the solicitor is that the Sub Committee has misinterpreted the e-mail of 13 June and has reached a view on that e-mail without the benefit of evidence from others, including the solicitor, on what was intended. In response the Law Society submits that the e-mail speaks for itself and there was no error in the Sub Committee's approach.

The solicitor claims that no decision had been made to withdraw by the time the e-mail was sent. Instead the solicitor now claims that the real reason for getting in touch with Digby Brown was to instruct them as a specialist firm as you would an "*Edinburgh agent in a Court of Session action or as a Local agent in a Sheriff Court action*."

The solicitor now claims that "*The firm sought expert input from Digby Brown but intended to remain in place as the principal agents in the action*".

In my submission that explanation is completely at odds with what the 13 June e-mail actually says. (Document A1/1).

In the 13 June e-mail the solicitor explains to Digby Brown "*We have a potential conflict in terms of the consultant who was treating her. While he may not be at fault* ***we feel it is not appropriate to deal with the case.***"

There is no mention at all of the solicitor's firm retaining responsibility as principal agent. The solicitor states clearly that her firm's view is that it is not appropriate for them to deal with the case.

The e-mail goes on:-

> "*I am extremely conscious that the triennium is looming.* ***Would this be a client that your firm would be prepared to take on****? We have not really progressed this at all*."

Again there is no suggestion that the solicitor's firm is retaining responsibility as principal agent. The e-mail does not say to Digby Brown "*We would like to instruct you to assist us with this matter" or "Can you assist us with this case*". It states "*Would this be a **client** that your firm would be prepared to take on?*"

The Sub Committee was clearly of the view that the solicitor's firm had decided to withdraw and that that was the reason for contacting Digby Brown. In my submission the Sub Committee carefully considered the e-mail of 13 June in making their decision. They decided that the e-mail demonstrated that the solicitor knew that her firm required to withdraw. In my submission that was an entirely reasonable conclusion to reach based on the content of the e-mail, and there is no reason to interfere with that conclusion.

In my submission the argument now presented, that the real intention was to instruct Digby Brown in the same was as you would Edinburgh or Local agents, is entirely inconsistent with the terms of the e-mail where the solicitor states that her firm "*feel it is not appropriate to deal with the case*" and ask Digby Brown "*Would this be a client that your firm would be prepared to take on*."

For these reasons I would ask you to reject the argument that the Sub Committee in some way misinterpreted the 13 June e-mail. Separately, I would ask you to reject any argument that too much weight was placed on the 13 June e-mail by the Sub Committee. In my submission the e-mail speaks for itself and the new argument brought by the solicitor is not supported by the evidence. I ask you to refuse part one of appeal ground 3.

<u>Part two – procedural unfairness</u>

The second argument made out in appeal ground 3 is that the solicitor was unaware that there was a possibility that the Sub Committee would interpret and rely on the 13 June e-mail in the way that they did. The solicitor goes on to say that the e-mail was not previously raised with her and there was no opportunity to provide comment on this critical issue.

In my submission that argument is manifestly wrong.

The relevance of the 13 June e-mail **was** highlighted to the solicitor in advance of the Sub Committee decision. The solicitor **was** given the opportunity to comment on the e-mail.

I have previously referred to section 42ZA (1) which sets out the Law Society's procedure for dealing with a UPC complaint.

A Complaints Investigator carries out an investigation and then prepares a written report. **That report is sent to the solicitor to allow the solicitor to make representations before the matter is referred to the Sub Committee for determination**. The representations received are then noted in a supplementary report and the report together with the supplementary report are placed before the Sub Committee at the time of the consideration of the complaint. That process was followed in this case.
The solicitor's argument here gives rise to two questions.

Question (a): Was the Complaints Investigator's understanding of the 13 June 2011 e-mail brought to the solicitor's attention in advance of the Sub Committee deciding the matter?

Answer: Yes.

The report dated 13 May 2015 was sent to the solicitor by letter of 14 May 2015.

The report made specific and explicit reference to the 13 June 2011 e-mail to Digby Brown and the reliance placed on it by the Complaints Investigator.

1. The e-mail of 13 June 2011 is set out at length at para A6 of the report. (Page 5).

2. Under a heading of **Facts found**, the report notes "*5. It can be proved beyond reasonable doubt that on 13 June 2011 the solicitor had decided that the firm could not act for Mrs Giffin due to a potential conflict of interest and she asked Digby Brown to take on the case*". (Page 11).

3. Under a heading of **June 2011**, the report notes "*It has been established beyond reasonable doubt that in June 2011 the solicitor had correctly identified a potential conflict of interest, as seen in the correspondence to Digby Brown, at Facts found 5*". (Page 15).

In my submission on a plain reading of the Complaints Investigator's report it is clear what interpretation and reliance was placed on the 13 June e-mail.

Question (b): Was the solicitor provided with the opportunity to make representations about the 13 June 2011 e-mail as contained in the report before the complaint was determined?

Answer: Yes.

The solicitor was provided with a copy of the report by letter of 14 May 2015 and the letter sending the report specifically explained that the solicitor had the opportunity to make comments on the report, and that these would be reflected in a supplementary report. Mr McCann was instructed by the solicitor and having considered the report with the solicitor he provided a submission in response under cover of letter of 26 May 2015. That response did not address the relevance of the 13 June e-mail.

A supplementary report dated 30 July 2015 was prepared by the Complaints Investigator which captured Mr McCann's submission on behalf of the solicitor. That supplementary report was sent to the solicitor for consideration.

A further letter was sent by Mr McCann on behalf of the solicitor on 4 August 2015 making further submissions about the complaint. Again the letter made no reference to the 13 June e-mail. The Complaints Investigator considered the further submission of Mr McCann on behalf of the solicitor and produced a second supplementary report dated 18 August 2015 which captured his further submissions.

In summary:-

(a) The report made clear what interpretation and reliance was being placed on the 13 June e-mail; and
(b) The solicitor had the opportunity to respond in advance of the matter proceeding to the Sub Committee.

As a result the second part of appeal ground 3 should be refused.

Conclusion – the appeal should be refused

Ground 1 – there was a conflict of interest as between the interests of the client and the interests of the firm which was identified by the solicitor. This appeal ground should be refused.

Ground 2 – the Sub Committee did not fail in its treatment of the conflicting positions of the solicitor and her client. The Sub Committee decision did not turn on when Mrs Giffen (sic) was first made aware that the firm would not bring a claim against the consultant. The decision turned on the fact that by June 2011 the solicitor knew that her firm required to withdraw and

she did not do so. Instead she continued to act, only finally withdrawing in September 2011 when the triennium was approaching. This appeal ground should be refused.

Ground 3 – Part one error – the Sub Committee did not fail in its treatment of the e-mail of 13 June 2011. It did not misinterpret the meaning of the email. It did not place too much reliance on it. It was correct to rely on that e-mail to find that the solicitor knew that her firm required to withdraw. This appeal ground should be refused.

Ground 3 – Part two procedural unfairness – (a) the Law Society's interpretation of the 13 June e-mail was made clear to the solicitor; and (b) she was given the opportunity to make representations about the e-mail in advance of the matter being referred to the Sub Committee for a determination. This appeal ground should be refused.

QUESTIONS TO MR MARSHALL FROM THE TRIBUNAL

The Tribunal asked Mr Marshall whether in his view there was a responsibility on the First Respondent to ask for particular comments on the email of 13 June 2011 as suggested by Ms Watts. In response Mr Marshall stated that he believed that to be an error. He advised that in his view the First Respondent does not have an enhanced duty to ask for a response to all points in their report. Mr Marshall submitted that a fair process is guaranteed by the procedure which gives an opportunity for the Solicitor to give comments on the facts found and the First Respondent should not have to second guess what is important to the solicitor.

The Tribunal asked Mr Marshall whether he thought that Ms Watts was right to say that the Sub-Committee took a decision on the email without having a view from the Appellant and asked Mr Marshall whether he thought that the First Respondent should have done that. Mr Marshall made reference to the above mentioned Barrs case and stated that there was no opportunity for injustice to be done in the First Respondent's procedures as there was an opportunity for comments to be submitted by the Appellant. He stated that the Sub-Committee went as far as offering the Appellant two such opportunities and this ensured that a fair process was in place and submitted that if the solicitor, having been legally represented, does not respond that does not make the process unfair.

In response to a question from the Tribunal regarding Ms Watts' comments about competing versions of the facts being balanced Mr Marshall stated that as there was no alternative position

regarding the meaning of the email of 13 June 2011 put forward for the Sub-Committee to consider there were no competing versions to be balanced. Mr Marshall submitted that the Sub-Committee made the correct assessment of the email based on the evidence before it.

ADDITIONAL SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Marshall asked the Tribunal to look at the process regarding the First Respondent sending the report to the solicitor and the issue of the 13 June email. He asked if the First Respondent should have done more. He referred the Tribunal to the Barrs case and stated that he would look in more detail at that to show how the Barrs decision is of limited assistance in this case. In the Barrs case the Board was the appeal body and the valuer was present at the private deliberations when the Board was considering the appeal from his decision. Mr Marshall referred to Ms Watts' written submission at page 14 where she quoted from the case. He stated that the point of the Barrs case was that there was an opportunity for injustice which arose from the valuer being the room with the Board when it was making its appeal decision. He submitted that in that case the process itself created the opportunity for injustice.

He stated that in this case the opposite is true and the statutory procedure for the process is set out in Section 42ZA(1) of the 1980 Act. He contrasted the Barrs case with the decision maker sitting with the Appeal Board with this case where the statutory procedure has been followed by the First Respondent. He submitted there was no risk of injustice created by the First Respondent; it gave the solicitor the opportunity to respond. He stated that the Tribunal can now take account of the new information which was not before the Sub-Committee regarding the meaning of 13 June email. But he submitted that notwithstanding the claims of the solicitor the Tribunal should not depart from the Sub-Committee's view of the email, which was in his view the most natural meaning of the words in that email.

Mr Marshall referred the Tribunal again to the Cowan case which he submitted makes clear that there are limited circumstances in which the Tribunal should interfere in the decision by the Law Society. These are if the decision maker misunderstood the evidence or went plainly wrong in its procedure.

He advised it is not the case that the First Respondent's Sub-Committee either followed the wrong procedure or misunderstood the email therefore he submitted that there is no reason why the Sub-Committee's decision should be overturned.

In response to a question from the Tribunal, Mr Marshall submitted that there was no issue about the wrong reference to the 2011 Rules. He submitted that Sub-Committee based their decision on the relevant part of the Rules which had not changed.

In response to a question from the Tribunal as to when the conflict became real, Mr Marshall stated that was not the issue because as at 13 June 2011 the solicitor knew that her firm was not able to act.

In response to a question from the Tribunal as to where the evidence of that came from, Mr Marshall stated that this was contained in the email of 13 June 2011 which states

> "*We have a potential conflict in terms of the consultant who was treating her. While he may not be at fault we feel it is not appropriate to deal with the case*."

Mr Marshall submitted that the problem for the solicitor is that once she understands that her firm were no longer going to act she does not tell the client that, instead she carries on and only withdraws from acting in September. Mr Marshall submitted that it is clear from the email of 13 June 2011 that the decision has already been made that the firm will not continue to act and the Appellant she knows that as she writes that email. Mr Marshall stated that the Sub-Committee is relying on that email for evidence that the decision to withdraw was made by 13 June.

He submitted that there is no criticism of the solicitor regarding her decision making regarding the conflict. He stated that the interpretation taken by the First Respondent of the crucial email was that it indicated that the decision to withdraw had been made by that stage. Mr Marshall submitted that this was a natural interpretation of the wording of the email. Mr Marshall submitted that the Sub-Committee was looking at the plain meaning of the words and were not looking into the mind of the solicitor and wondering what her view was on the conflict. He submitted that they were looking only at the wording of the email.

ADDITIONAL SUBMISSIONS FOR THE APPELLANT

Ms Watts accepted that the Appellant did not comment on the finding in fact regarding the email of 13 June 2011 but that she had been given an opportunity to comment. Ms Watts submitted that the First Respondent had to go further than it did and this is laid down in case law. She said

that the other duties were illustrated by case law and she referred the Tribunal again to the case of Gray-v-NMC and referred to paragraph 14 of her submission. She submitted that that case is authority for the proposition that the obligation to balance competing accounts applies to all factual information and submitted that the letters and file notes are able to corroborate what the Appellant said. She submitted that there is no evidence at all that the First Respondent considered this. She stated that there is a duty to weigh competing versions of events. She advised that there are lots of instances in this case where there are competing versions of events and there is a duty on the First Respondent to weigh these and stated that they failed to do that in every respect. She submitted she was not saying there is an inquisitorial duty on the First Respondent but it does have to weigh up competing accounts; it has the email but nothing from the Appellant as to what it should mean. She stated that it is incumbent on the First Respondent to explain why it reached the conclusion it did.

Ms Watts referred the Tribunal to the email found at Production A/1 and to the reply to that email sent on 14 June 2011 to the Appellant. She stated that the reference to "network" in the second line is the network which Digby Brown run called the Compensate **N**etwork. She stated that the network it does not involve withdrawal of the first solicitor, it involves both sets of solicitors. She stated that what one can take from this is that Mr C, the writer of the second email, has not interpreted the Appellant's email as a request that Digby Brown is to take over agency. Instead he responds asking if the network is of interest.

A member of the Tribunal referred Ms Watts to the letter dated 22 June 2011 from Sue Grant of Digby Brown to the Appellant which is found at Production A1/3(i) and asked her for her view on this. Ms Watts replied that the contents of that letter do not undermine her argument and as at 13 June 2011 there is no evidence that the firm should have withdrawn from acting at that time.

The Tribunal asked Ms Watts how she could say that standing the wording of the 13 June 2011 email which stated that Blair & Bryden were of the view that whether or not Mr A was at fault it was not appropriate for the firm to deal with the case. In response Ms Watts acknowledged that she accepted the email was not well drafted but advised that she was saying that as a matter of fact the firm had not withdrawn from acting at that stage. She explained that it is only later when the medical report comes at the end of August this prompts the firm to withdraw from acting.

The Tribunal asked for Ms Watts' view on whether it was correct for her client to continue acting knowing that circumstances might arise close to the triennium when she might have to

withdraw from acting. Ms Watts replied that it was her client's position that now she is a more experienced solicitor she would not have acted for the client but it was not her decision; the firm made the decision regarding the withdrawal from acting. In response to a question from the Tribunal, Ms Watts confirmed the Appellant was the nominated solicitor.

Ms Watts referred the Tribunal to the abovementioned Barrs case and stated that there was an opportunity for injustice here which related to the failure of the First Respondent to explain why it preferred one position over the other. She stated that where the First Respondent does not explain its reasons there will always be scope for injustice. She stated that this was a trite principal of public law and referred the Tribunal to the case of English v Emery Reinbold and Strick [2002] 1WLR 2409. She referred to the judgement of Lord Philips at paragraph 16 -

> *"We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."*

She stated that in her submission it was not possible to decern why the First Respondent preferred the account of the Second Respondent over the Appellant and why they failed to look at the contemporaneous file notes and correspondence. There must have been a possibility of injustice being done.

DECISION

The Tribunal had regard to the oral and written submissions by parties, the Joint Minute and the productions and authorities lodged. The Tribunal noted that in the light of the Joint Minute there was no dispute about the facts and no evidence required to be heard.

The Tribunal noted that the grounds of appeal had been narrowed by Counsel for the Appellant to three grounds. The first ground of appeal argued on behalf of the Appellant was that there was no conflict of interest. The Tribunal noted the submissions made by both parties and the fact that both agreed that the reference by the Sub-Committee to the 2011 Rules instead of the 2008 Rules was irrelevant in this case as the key wording is the same.

The Tribunal agreed with Mr Marshall that the relevant rule makes it clear that solicitors must not act for any client where there is a conflict of interest between the clients or for any client where there is a conflict between the interest of the client and that of the solicitor or the

solicitor's practice. The Tribunal considered that the second part of the rule applied in this case. The Tribunal considered that it was clear from the submissions made by Ms Watts and the productions that the firm of Blair and Bryden did not want to become involved in any action raised against Mr A. It was suggested by Ms Watts that the reason for this was due to social nicety and that this was not the same as a conflict of interest. The Tribunal was of the view that the reason given was a conflict of interest as envisaged by the rules and that this is evidenced by the fact that the firm did withdraw from acting. The Tribunal concluded that the firm's interests did conflict with those of the client, the Second Respondent, who wished her medical negligence claim to be pursued.

The second ground of appeal was that the Sub-Committee failed in its treatment of the conflicting positions of the solicitor and her client. The Tribunal noted Counsel's submissions that the Sub-Committee reached a conclusion on the meaning of the email of 13 June 2011 without the benefit of the Appellant's evidence on this critical matter. However, the Tribunal was of the view that the First Respondent had followed the statutory process and had given the Appellant and her representative two opportunities to comment on the Complaint Investigator's report. The Tribunal considered that it was clear from that report that the interpretation of the above mentioned email was an important finding in fact. The Tribunal considered that the email was clear in its terms making reference to the potential conflict and advising that "we feel it is not appropriate to deal with the case".

The Tribunal agreed with Mr Marshall that the Sub-Committee's decision regarding unsatisfactory professional conduct was based on the Appellant's failure to advise her client when the point was reached that she knew that her firm would require to withdraw from acting and that this is clear from the wording of the decision. The Tribunal noted Counsel's submissions that there was an inescapable inference from the Sub-Committee's decision that the Appellant had been dishonest. The Tribunal was of the view that there was nothing in the decision which implied any element of dishonesty as that would have undoubtedly led to a unanimous conclusion that the solicitor's conduct met the test for professional misconduct and the matter being referred to a Fiscal for prosecution before the Tribunal.

The third ground of appeal was that the Sub-Committee failed in its treatment of the email of 13 June 2011. The Tribunal noted that the Appellant's position is that the email was not well written and did not mean that a decision had been taken by June 2011 that Blair and Bryden would require to withdraw from acting regardless of whether Mr A was at fault. However, the

Tribunal was of the view that the conclusion reached by the Complaints Investigator was based on the plain meaning of the words used and was detailed in the findings in fact in the his report which the Appellant had been given two opportunities to comment on. The Tribunal noted that the terms of the report regarding the meaning of the email were clear and were not contradicted by the Appellant or her representative in their two responses to the report. In these circumstances the Tribunal considered that it was not necessary for the Sub-Committee to look beyond the obvious meaning of the email. The Tribunal was not satisfied that there was a failure to analyse divergent positions as no there were no different positions regarding the wording of this email for the Sub-Committee to consider. The Appellant's argument that the email should be construed differently from its plain meaning was not one which the Sub-Committee had been made aware of when it made its determination as the Appellant and her representative had failed to comment on the finding in fact regarding the possible alternative meaning of the email. The Tribunal also concluded that even after considering the alternative meaning now put forward by the Appellant that the Sub-Committee had interpreted it correctly. The terms of the email were clear and the Tribunal did not consider the interpretation now put forward by the Appellant was reasonable considering its clear terms and was not consistent with the other correspondence.

The Tribunal considered that the decision was one which could reasonably have been made by the Sub-Committee based on the information before it. The Tribunal were of the view that the Sub-Committee's decision could have been a little clearer in its reasoning but were satisfied that the correct procedure was followed and the Sub-Committee considered all the relevant matters and produced a decision with sufficient reasons. The Tribunal considered that for these reasons there was no breach of natural justice. The decision of the Tribunal was therefore to confirm the determination of the First Respondent.

The Tribunal noted that Mr Marshall had made a motion for expenses on behalf of the First Respondent and that this motion was opposed by Ms Watts. Ms Watts argued that expenses should not be awarded against the Appellant on the basis that as the Appeal raised genuine issues and had arisen from a genuine failure of the First Respondent to give reasons for its decision, it would be unduly harsh for the Appellant to bear the costs.

The Tribunal was of the view that expenses including the expenses of adjusting the Appeal should be awarded in favour of the successful party in the Appeal as the reasons for the First Respondent's decision were adequate. The Tribunal accordingly found the Appellant liable for the expenses of both the First Respondent and the Tribunal in respect of this Appeal.

The Tribunal noted that Mr Marshall had a made a motion that an order for publicity be made and that this was not opposed. The Tribunal was of the view that in terms of Paragraph 14A of Schedule 4 of the Solicitors (Scotland) Act 1980 it was required to order publicity as no reasons for refraining from doing so had been advanced and made the usual order for publicity.

Nicholas Whyte
Vice Chairman