

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

FINDINGS

in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, formerly at 26 Drumsheugh
Gardens, Edinburgh and now at Atria One, 144
Morrison Street, Edinburgh**

Complainers

against

**IAN ROBERT CLARK, Solicitor, Turcan
Connell, Princes Exchange, 1 Earl Grey Street,
Edinburgh**

Respondent

1. A Complaint dated 18 November 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, Ian Robert Clark, Solicitor, Turcan Connell, Princes Exchange, 1 Earl Grey Street, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules the Tribunal appointed the Complaint to be set down for a procedural hearing on 23 April 2015 and notice thereof was duly served upon the Respondent. On this date the case was adjourned on joint motion to a further procedural hearing on 29 May 2015.
5. At the procedural hearing on 29 May 2015, on joint motion the Tribunal allowed a Minute of Amendment to be lodged by 19 June 2015 with any Answers to the Minute to

be lodged by 10 July 2015. Thereafter the Complaint was continued to a further procedural hearing on 23 July 2015.

6. At the procedural hearing on 23 July 2015, the Respondent withdrew the remaining preliminary plea and moved the Tribunal to allow a further period of adjustment. The Tribunal continued the Complaint to a full hearing to take place on 28 and 29 October 2015, with a third day of 4 November 2015 if necessary. The Respondent was allowed a four week period to adjust and the Complainers two weeks to answer any adjustments. Thereafter, the Complainers were to lodge an up to date Record.

7. On 7 September 2015 the Respondent lodged a motion to adjourn the hearing. The Tribunal fixed a procedural hearing for the 17 September 2015 for the Respondent's motion to be argued. At the hearing on 17 September 2015, the Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was represented by Peter Anderson, Solicitor, Edinburgh. Mr Anderson explained to the Tribunal that the Respondent had instructed Heriot Currie, Q.C in relation to this Complaint. Mr Currie was the second Counsel instructed in this case, as the first had become unavailable on his appointment as Advocate General. He confirmed that when the dates for the hearing were fixed no check had been made to confirm the availability of Senior Counsel. On being advised of the dates allocated for the hearing, Mr Anderson had carried out these checks and ascertained that Counsel was not available. He had delayed in lodging his motion to adjourn the hearing in the hope that the other case in which Senior Counsel was involved might settle, which was often the case in such matters. Subsequently it had been confirmed that the other case was unlikely to resolve and Counsel therefore would not be available for the hearing dates fixed in October. The Fiscal confirmed she had no objection to the motion. She additionally reported to the Tribunal that there had been no formal agreement between the parties with regard to the areas that were in dispute and that there remained issues with regard to potential witnesses. In the circumstances, the Tribunal granted the Respondent's motion to adjourn. A Record was lodged by the Fiscal and parties agreed that this was now in its final form. The Complaint was continued to 4 November 2015 as a procedural hearing. The Fiscal moved for an award of expenses for the hearing of 17 September 2015 and the hearings on 28 and 29 October 2015. Given the late notification of Counsel's unavailability and the inconvenience to the Tribunal, which had set aside two dates specifically for the case, the Tribunal granted the Fiscal's motion.

8. At the procedural hearing on 4 November 2015, the Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was absent but was represented by Peter Anderson, Solicitor, Edinburgh. The Fiscal made a formal motion for the amended Record to be received with the consent of the agent for the Respondent. On joint motion, the Complaint was continued to a full hearing on 2 and 3 March 2016 with a third day of 15 March 2016 to be held in reserve. Parties confirmed their availability.
9. At the hearing on 2 March 2016, the Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Edinburgh. The Respondent was present and was represented by Heriot Currie, Q.C instructed by Peter Anderson, Solicitor, Edinburgh. Ms Johnston lodged a Joint Minute between the parties, agreeing the documents item 2 on her Inventory of Productions are to be taken as issued on the date they bear and issued and received by the author and recipient. Ms Johnston confirmed that the Complainers were relying upon the documents lodged and agreed as demonstrating the contemporaneous position as set out within the Complaint. She confirmed that she did not intend to lead any oral evidence and that she renounced further probation. Mr Currie led evidence from the Respondent who was then cross-examined by the Fiscal. The Complaint was continued part-heard to 3 March 2016.
10. On 3 March 2016, the Respondent concluded his own evidence. Evidence was then heard from a witness on behalf of the Respondent and the Respondent thereafter closed his case. Submissions were made on behalf of both parties. Due to the lateness of the hour, the Complaint was continued part-heard to 15 March 2016.
11. The Tribunal held deliberations in the morning of 15 March 2016. The Tribunal came to its decision and made the following findings in fact:-
 - 11.1 The Respondent's date of birth is 7 March 1961. He was enrolled as a solicitor on 30 October 1985. From 1 October 1989 until 15 August 1997 he was an Associate then partner with Dundas & Wilson, Solicitors. On 18 August 1997 he became a partner in Turcan Connell Solicitors.

- 11.2 A client of the Respondent died on 13 March 2010. He left a Will dated 31 October 2006 ("the Will") in terms of which he appointed as his Executors his second wife and widow, his two daughters and the Secondary Complainer. The deceased had enjoyed a liferent over the property held in the Testamentary Trust of his first wife ("the Testamentary Trust"), of which the Secondary Complainer was the sole surviving Trustee. In terms of Clause 8 of the Will his widow was entitled to a liferent of the residue of his estate allowing her to receive the net income from the deceased's estate and the occupation of the main estate house. The property held in the Testamentary Trust vested absolutely in the deceased's daughters upon his death. From an early stage in the administration of the Executry there was, to the knowledge of the Respondent, a question as to whether a number of potentially valuable moveable items, being two paintings, some china and some silver, formed part of the deceased's testamentary estate, and a potential conflict of interest between the widow and the two daughters in connection therewith.
- 11.3 The Respondent acted as agent for the four Executors in winding up the deceased's estate and as agent for the deceased's two daughters, in relation to both the dispute as to the ownership of those moveable items and the negotiations with the deceased's widow in respect of her legal rights. The first meeting of the Executors took place on 13 April 2010. The issue of the widow's legal rights was not raised at that meeting. The Respondent was aware that the widow had her own solicitor, RG. The Respondent reasonably believed that RG would be advising the widow as to her position as executor and as a beneficiary. The Respondent did not advise the Executors at that meeting that he was acting both for them as a body and for the deceased's two daughters as individuals. The widow was aware that the Respondent was solicitor for the daughters. The Respondent believed that the Secondary Complainer was also aware of this. When the Secondary Complainer suggested otherwise the Respondent apologised and confirmed the position. At the meeting on 13 April 2010 the Respondent outlined the role of the executors, explaining that decisions could be reached on the basis of a majority vote but that it was possible there could be deadlock given that four executors had been appointed. The main assets of the estate were discussed and it was agreed that the contents of the main estate house should be valued by a firm in Aberdeen, apart from one or two more

valuable items including some paintings and china which would be valued by Christies. The will provisions were reviewed in detail. The executors confirmed that the Respondent should write to the widow's lawyer, RG, sending him a copy of the will and a draft of the letter of wishes which the Respondent had prepared based on discussions with the deceased. On 19 April 2010 the Respondent spoke with Christies about the valuation of the two paintings. On 19 April 2010 letters of engagement were issued to the executors who were also sent a copy of the Respondent's note of their meeting on 13 April 2010. On 22 April 2010 the Secondary Complainer wrote to the Respondent returning the letter of engagement and confirming that he had no significant comments on the minute of the meeting. He stated that he and the widow had met on a number of occasions since the executors' meeting. He requested that RG be sent a copy of the minutes of the meeting, which the Respondent did on 26 April 2010. On 16 May 2010 Christies wrote to the Respondent confirming the paintings had been removed for storage and that they were insured. Christies enclosed a copy of the letter from the deceased dated 13 November 1998 noting that (in reference to one of the disputed paintings) "The painting does not belong to me. I only give it wall space." On 1 June 2010 the Respondent wrote to the Secondary Complainer indicating that he would discuss legal rights with the executors and RG when matters were progressed and that this should be discussed at a further meeting of the executors when full details of the estate were available. It was agreed that the next executors' meeting would be held on 12 August 2010. On 19 June 2010 the Secondary Complainer wrote to the Respondent noting that it had come to his attention that Christies had a handwritten note from the deceased referring to one of the paintings and that it did not belong to the deceased. The Secondary Complainer noted that this raised the question of ownership of the painting. On 23 June 2010 the Respondent wrote to the widow a letter, copied to the other executors, referring to the handwritten note and confirming that this was something that required to be discussed at the executors' meeting in August. The Respondent had continuing instructions to act for the two daughters in relation to their interests and personal affairs from about 1997 when he began acting for the family as a whole. On 19 June 2010 the Secondary Complainer advised the Respondent that there was an issue with the ownership of a painting. On 28 June 2010 one of the daughters advised the Respondent that the silver and Dresden china belonged to the daughters and did not require valuation.

11.4 The Respondent met with the deceased's daughters at his firm's offices at Princes Exchange, Edinburgh on 30 July 2010. The other two Executors were not advised of or invited to this Meeting. The Respondent's Note of that Meeting was allocated the same Matter No. (F.3162.001) as the deceased's Executry and subsequently was held on the same Executry correspondence file. At the Meeting on 30 July 2010, the Respondent discussed with and advised the daughters in their personal capacities as potential beneficiaries about, *inter alia*, the issue of the ownership of the two paintings and the other moveable items. He referred at the Meeting to the contents of a Note he had prepared "summarising the possible ownership scenarios in relation to these paintings", being that they were: (i) owned by the deceased, (ii) the property of the Testamentary Trust; or (iii) owned by the daughters themselves. The first of those outcomes would operate to the advantage of the widow and the second and third to the advantage of the two daughters. The Note was sent to the daughters in advance of the Meeting on 30 July 2015 as an attachment to an email to them dated 27 July 2010, in which the Respondent advised that "Until we have the chance to discuss this on Friday, I have not copied the note to the other executors." The Summary at the end of the Note had stated that "Further investigations are required as to the provenance of the paintings, particularly into family records, to confirm their present ownership status." The issue of the ownership of these moveable items was at the end of July 2010 potentially contentious and soon was to become actually contentious. In the event, the Respondent did not copy the Note to the widow or the Secondary Complainer. The Respondent issued a First Report to the Executors on 5 August 2010 in advance of a Meeting of the Executors held on 12 August 2010. At the Meeting of the Executors on 12 August 2010 the ownership of the paintings was discussed. They had been valued at date of death as around £1,750,000 for one and £30,000 for the other. The Respondent's expressed view at the Meeting of the Executors on 12 August 2010 was that the more valuable painting was most likely to have belonged to the deceased's first wife at her death and therefore would pass to her Testamentary Trustees. This was the same matter upon which he had advised the daughters, in their personal capacities as potential beneficiaries, in the Note he had emailed to them on 27 July 2010 and at the Meeting on 30 July 2010. The Secondary Complainer queried that position,

advising that as a Trustee of the Testamentary Trust he had never been made aware of the painting's existence. He said that, as an Executor, he needed to know to whom the painting belonged and "did not feel able to rely on a view, however well thought out." If the paintings belonged to the deceased at his death it would have a significant impact on the legal rights claims of the deceased's widow and daughters. In addition, if the paintings formed part of the property of the Testamentary Trust (rather than passing under the Will), they would be exposed to Inheritance Tax on the deceased's death. The Secondary Complainer asserted that there was a conflict between the interests of the deceased's widow and the interests of the deceased's daughters. The Respondent confirmed that it was essential that the deceased's widow obtain independent legal advice on her position. He advised that he acted for the deceased's daughters personally and apologised that this had not been made clear to the Secondary Complainer previously. The Respondent did not consider there to be a conflict in his acting for both the daughters and the Executors.

- 11.5 The Secondary Complainer wrote to the Respondent on 20 August 2010 expressing the view that there was a conflict of interest in the Respondent acting for both the body of executors and the daughters personally and that the daughters' position as executors was untenable. On 24 August 2010 the Respondent emailed the deceased's daughters and indicated that in his view the Secondary Complainer was wrong. He stated that if the Secondary Complainer was correct in saying that the daughters could not act as executors the same would apply to the deceased's widow. He stated that: "So far as the ownership of the (painting) is concerned, I appreciate that (the Secondary Complainer) is looking for certainty as to whom it belongs. However, as I tried to explain from all we have discussed, I do not think there is a clear answer. Were the matter to come before the courts (which, of course, it will not) the courts would have to decide from the best evidence available on balance of probabilities who the owner is. That is what we must do too." On 26 August 2010 the Respondent wrote to the Secondary Complainer to say that he disagreed that the position of the daughters as Executors was untenable. On 1 September 2010 the Secondary Complainer wrote explaining to the Respondent that what he was saying was that the Respondent could not be the lawyer for the Executors if he continued to act for the daughters. The Secondary Complainer took issue with the contents of

the Minute of the Meeting on 12 August 2010 in so far as it recorded that: "it was confirmed that the items in the attic, principally silver and china belong to (the daughters)." He considered that the issue of the ownership of these items fell into the same category as the ownership of the paintings, and he could not accept the conclusion that the paintings might belong to the Testamentary Trust for the reasons he stated therein. In the meantime, the widow took advice from RG. The Secondary Complainer looked to the Respondent to advise on Executory issues. On 1 September 2010 RG wrote to the Respondent and *inter alia* disputed the Respondent's conclusion that the paintings were part of the property of the Testamentary Trust and maintained that, on the balance of probabilities, the conclusion must be, in the absence of documentation reported to the IR/HMRC after the death of the first wife of the deceased, that they had belonged to the deceased and formed part of his moveable estate on death. On 3 September 2010 the Respondent emailed the daughters to advise them in their personal capacity as to the "robust line on the ownership" being taken by RG for the widow, and also that RG was querying the ownership of the china and silver in the attic. He asked them whether they had any documents or papers clarifying the position, "to try to close this particular issue off." He referred in this context to his earlier efforts to identify the source of the more valuable painting. In an email written on behalf of the daughters to the Respondent dated 7 September 2010, it was stated that they were going to have to concede the point that the paintings and the "China" were part of their father's moveable estate as "We think that if we try to hold on to them as being in the "Trust" there is a possibility of there being a court case which would be totally unhelpful - unless you can convince us that we have a water tight case which with the lack of evidence seems unlikely." In that email, it was also stated that the daughters were happy for the Respondent to act for them and the Executors "but if it was untenable because the Secondary Complainer and the widow think there is some conflict of interest it may be sensible for a colleague at Turcan Connell to take on the executory role. . ." On 10 September 2010 the Respondent wrote a letter to RG under the heading of the deceased in which he advanced various arguments as to why the more valuable painting should be treated as the property of the Testamentary Trust. Said letter was written by the Respondent on behalf of his clients, the daughters, as potential beneficiaries.

11.6 The Respondent met with RG on 16 September 2010. At that Meeting RG stated that the Secondary Complainer had expressed concerns to him about his conflict of interest in acting for both the Executors and the deceased's daughters. The Respondent stated that he had advised the Secondary Complainer that he was going to consider the position further after his Meeting with RG. On 24 September 2010 the Respondent emailed the deceased's daughters with the details of the Meeting with RG. The email was not copied to the Secondary Complainer. The Respondent indicated that to avoid the possibility of conflict he proposed to meet the Secondary Complainer's concerns by suggesting that another solicitor be appointed to act for the Executors whilst he continued to act for the daughters. On 28 September 2010 the Respondent copied a set of the joint proposals between the beneficiaries to the Secondary Complainer and advised that he had been reviewing his role as solicitor to the Executors and that: "In order to avoid any further concerns on your part in this concern I suggest that the executors consider appointing another solicitor to advise them on the administration of the estate, whilst I would continue to act for (the daughters)." He indicated that this was something for the Executors to decide. On 7 October 2010 the Secondary Complainer indicated that the proposals seemed sensible as did what the Respondent had stated about his own position. By email dated 20 October 2010, the Respondent explained to the daughters that there would be a considerable overlap of costs if the whole administration of the deceased's estate were to be moved to another firm of solicitors, but that one possibility which they might wish to consider with the other two executors would be for another solicitor to be appointed to provide legal advice to the Executors, "to ensure that they are dealing with the beneficiaries properly and are aware of their own legal exposure, whilst the administration of the estate would remain with Turcan Connell." On 22 October 2010, the Respondent wrote to the Secondary Complainer noting the names of two solicitors he believed would be suitable to advise the executors and suggesting that the Secondary Complainer might meet briefly with the other Executors to discuss this. He emphasised that if the Executors felt that they should have independent advice, it should come from outside Turcan Connell. The Respondent's letter to the Secondary Complainer dated 22 October 2010 bore no heading, but there were now three separate file references under the letterhead, being A.0947.000, F.0800.000 and F.3162.001. All of the executors and RG were copied into the letter of 22 October 2010.

11.7 On 11 November 2010 the Respondent, and the daughters attended a Consultation with James McNeill QC. The Consultation covered issues relating to the personal interests of the daughters and their right of access to papers at the main estate house. Neither the Secondary Complainer nor the widow were advised in advance that such a Consultation was to take place. Pages 181 to 189 of Production 2 for the Complainers is a copy of Counsel's Opinion following said consultation. The consultation was instructed on behalf of the daughters in their personal capacity although Counsel was aware that the Respondent was also solicitor to the executors. On 24 November 2010 the Respondent wrote to the Secondary Complainer to inform him, *inter alia*, that the daughters maintained their position on ownership of the painting, and that they were concerned that the background to the painting should be fully investigated before decisions were taken as to how to deal with the deceased's estate. He confirmed they had asked him to carry out further investigations into old records and files, which would inevitably take a few weeks. He continued by narrating that "(the daughters) recognise that the administration of the estate is effectively on hold. We will continue dealing with day to day matters, although, at present, there are no particular items requiring consideration by the Executors. (The daughters) would like to delay a decision on the appointment of a solicitor to the Executors until the position of the painting has been clarified."

11.8 On 1 December 2010 the Secondary Complainer replied to the Respondent by email accepting what the Respondent had told him in his letter dated 24 November 2010 that further investigation was needed in connection with the more valuable Painting. He noted that the deceased's daughters did not want to have the administration of the Executry passed to another firm of solicitors but stated clearly that he did. He stated that it was exactly the sort of situation which demanded an "an unbiased firm to advise the executors on the ownership of the (painting)". He explained that while it made no difference to him who owned it, as an executor he had to "know about an asset which was possibly worth a great deal of money." He stated that he wished progress quickly. The Respondent replied to the Secondary Complainer by email on 9 December 2010. He stated that a thorough investigation of the ownership of the painting would take time, and that it was important to clearly establish the grounds for ownership in order

to correctly report the estate to HM Revenue & Customs. He related that: "(the daughters) would like to delay the decision on the appointment of a solicitor to the Executors until the investigations into the ownership of the (painting) have been completed. The Executors should have the fullest information available to them to decide how best to proceed with the administration of the estate and this is what we are seeking to achieve."

- 11.9 By letter dated 17 December 2010 RG raised with the Respondent again the issue of the capacity in which the Respondent was acting, whether on behalf of the Executry or the deceased's daughters, when he was carrying out his enquiries into the true ownership of the painting, pointing out that ascertaining its true ownership was a responsibility of the Executors. RG did not raise any concern about the appointment of another firm of solicitors to act for the executors in this letter. In or about December 2010 the Respondent made arrangements to attend at the estate house to look through the deceased's papers. On 22 December 2010 he spoke on the telephone to the widow. In the course of their telephone conversation, she asked the Respondent if he was intending to attend the estate house on behalf of the daughters or on behalf of the Executors as a body. The Respondent replied, according to his own File Note of that conversation, that: "it did not really matter in this instance because the executors and the beneficiaries required to sort out exactly who owned the paintings, and that is all IRC [*i.e.* the Respondent] is trying to achieve." The Respondent met the daughters at the estate house on 6 January 2011, after which he advised RG by letter on 10 January 2011 that investigations into the ownership of the painting were proceeding. The Respondent wrote to RG on 7 February 2011 enclosing a copy of Senior Counsel's Opinion dated 27 January 2011 on the issue of the ownership of the painting and other documentary material pertaining to the ownership of the other moveable items in dispute. The Opinion of Senior Counsel was headed as being "for Turcan Connell" rather than for the daughters in their personal capacities as potential beneficiaries. The letter to RG dated 7 February 2011 was headed under the name of the executry and related that it had taken the Respondent: "longer than I first anticipated to conclude a full investigation into the ownership of the (painting) and to gather more information about the other (Trust) chattels stored at (the estate house)." It recorded that "(the daughters) are satisfied" that his investigations had "covered all possible

avenues", but acknowledged that: "in addition to the interests of the beneficiaries, the Executors and the Trustees of (the) Testamentary Trust must, of course, be satisfied that the assets in question are properly returned and so these further investigations were necessary." It concluded by advancing on behalf of the deceased's daughters a proposal for settlement of the deceased's widow's claim against the deceased's estate and daughters which proceeded upon the basis that the painting formed part of the property of the Testamentary Trust and that the deceased had not obtained ownership of it during his lifetime. The proposal was that a capital payment of £400,000 be made to the widow out of the deceased's estate if she accepted, then renounced, the liferent conferred on her by Clause 8 of the Will and did not claim legal rights. On 10 February 2011 RG in an email to the Respondent queried on whose behalf the Opinion of Senior Counsel dated 27 January 2011 was obtained, who approved the letter of instruction and who attended the Consultation on 11 November 2010. On 15 February 2011, the Respondent confirmed in an email to RG that it was obtained for the deceased's daughters. The Respondent wrote to the Secondary Complainer on 22 February 2011 with what he referred to as "an update on the Estate matters". The Respondent related that: "It has taken me longer than I first anticipated to conclude a full investigation into the ownership of the painting and to gather more information about the other Trust chattels stored at (the estate house)." The Respondent expressed the view that on the basis of that information, it was "clear" that the china and silver, "although stored at (the estate house), did not belong to (the deceased), instead belong to (the daughters) . . ." He proceeded to summarise "the outcome of the investigations carried out" into the ownership of the painting", and to explain that: "In light of the uncertainty of the ownership position, (the daughters) considered that it would be helpful to obtain an Opinion of Senior Counsel as to who, based on the evidence available, a court would consider to be the owner of the (painting). Senior Counsel's Opinion is that, on the basis of the evidence available, and all the other circumstances, a court would consider that the (painting) belonged to (the first wife) personally and, on her death fell into her Testamentary Trust." The Respondent did not copy to the Secondary Complainer either the Opinion of Senior Counsel dated 27 January 2011 or the letter of instruction which preceded it.

- 11.10 In a letter to the Respondent dated 11 March 2011 RG complained about the Respondent's failure to provide an answer to a question previously posed by him regarding the level of yield the Executors should obtain from the deceased's estate. He pointed out that his question had been addressed to the Respondent as agent and solicitor to the Executors on behalf of the widow in her role as an executor as well as a beneficiary and he commented that if such information could not be provided this could only be because a conflict of interest had arisen. RG further stated that "it would now seem appropriate for Turcan Connell to act either for (the daughters), which I understand is your preference, or to act for the Executors but not both." The Respondent emailed the daughters on 25 March 2011, attaching a draft response on their behalf to RG's letter dated 11 March 2011. In the covering email, he contended that: "The conflict of interest to which (RG) refers relates only to the advice that the independent executor requires in order to take a view on the agreement reached between you and (the widow) on how to proceed." On 28 March 2011 the Respondent responded by letter to RG's letter to him of 11 March 2011. In his letter, the Respondent asserted: that "The Executors had agreed that the issues previously raised in relation to the executry administration, conflict of interest etc. would not be considered further until matters had progressed between (the daughters and the widow) and agreement reached on the various proposals summarised from our meeting last September [2010]". The Secondary Complainer was not consulted about or included in this correspondence.
- 11.11 On 13 April 2011 the Respondent sought and received the Secondary Complainer's authority for Christie's to answer some queries raised by RG on behalf of the widow. In so doing, he was acting in his capacity as solicitor to the Executors. By letter dated 5 May 2011 RG advised the Respondent that it was not accepted by his client that the painting was owned by the Trustees of the Testamentary Trust and suggested that given the dubiety relating to ownership, "it would appear that a court decision to put this beyond doubt may be the only way to obtain a suitable title for the painting to be sold at auction." He advanced a counter-proposal on behalf of the widow with a view to achieving a settlement and avoiding "what seems likely to be inevitable litigation", which proposal involved a capital payment of £1.1 million being made to his client, in exchange for which she would, *inter alia*, accept and subsequently renounce her liferent of

the deceased's estate, discharge her legal rights claim and resign as an Executor, leaving the question of the ownership of the painting to be decided by the remaining Executors. On 19 May 2011 the Respondent advised the Secondary Complainer by email that agreement had not yet been reached between the widow and the daughters as to how the Executry administration was to be progressed. On 31 May 2011 the Respondent and the daughters attended a further Consultation with James McNeill QC. On the same day the Secondary Complainer phoned the Respondent for an update on the Executry administration. He indicated once again that he was uncomfortable with the Respondent's position in continuing to act for both the deceased's daughters and the Executors. The Respondent and the Secondary Complainer discussed the ownership of the painting. The Respondent acknowledged that he was advising the daughters and stated that the Executry was "effectively on hold" until a negotiated agreement could be reached between the daughters and the widow as to the capital sum to be paid to the widow in exchange for her renouncing her liferent. The Respondent advised the Secondary Complainer that if "at that stage and before matters are finalised" the Executors considered that they needed to take separate legal advice then he "would understand". He informed the Secondary Complainer that the daughters had asked James McNeill QC to provide further advice on the matters recently raised by RG on behalf of the widow and that he hoped to have this Opinion available in the next week or so. The Secondary Complainer told him that he did not want to wait indefinitely but would allow one month before deciding how to proceed.

- 11.12 On 8 June 2011 the Respondent sent copies of what he characterised as "the principal items of correspondence between myself and RG over the last few months" to the Secondary Complainer "to bring you up to date". He advised that the Executry administration could not progress until the issues between the widow and the daughters had been resolved. On 28 June 2011 the widow contacted the Respondent by telephone. She expressed her concern about the slow progress of the Executry. She told the Respondent that as an Executor she felt she had no one to turn to for advice. She stated he was the executry solicitor but was clearly acting for her step-daughters. The Respondent confirmed his previous advice that as the Executors had agreed as a body to postpone dealing with the Executry until the issue between her, and the daughters had been

resolved, "then there are no particular issues in relation to the executry", but that "If there are particular practical issues to be considered, then IRC [i.e. the Respondent] is, of course, happy to discuss those". When conversation turned to the issue of the ownership of the painting, the Respondent "noted" the advice which James McNeill had provided to the daughters in their personal capacities as potential beneficiaries. In response to the widow's comment that RG had had different advice, stated that he "would be happy to see any Opinion which RG had on this". The Respondent's File Note in respect of this telephone conversation was recorded by him as being as a matter of Executry Administration against Matter No. F.3162.0001. A further Consultation between the daughters and James McNeill QC took place on 31 May 2011 and on 7 July 2011 James McNeill QC issued a "FURTHER OPINION OF COUNSEL regarding THE ESTATE OF THE (DECEASED)" in which he revisited the issue of the ownership of the painting, confirming his view it was an asset of the Testamentary Trust and had not belonged to the deceased personally. He discussed the duties of the Executors in relation thereto and expressed the Opinion both that HMRC would "accept this outcome of the executors' investigations [sic]" and that the Trustees of the Testamentary Trust were on all the information available: "perfectly entitled to rely on my advice on the ownership of the (painting), and therefore have sufficient title to proceed to sell the (painting)." On 11 July 2011 the Secondary Complainer emailed the Respondent indicating that he was not prepared to wait any longer for matters in dispute to be resolved. He asked whether there was going to be an agreement or not, and observed that: "If not, it is obviously time for a judge to decide? Also, if not, are you going to step down as the Executory lawyer?" On 14 July 2011 the Respondent wrote to the Secondary Complainer enclosing a copy letter setting out the latest settlement proposal passing between the beneficiaries and confirming that if agreement could not be reached court actions "may follow." He maintained his position that the Executry administration "has been taken as far as possible at present" and that further progress, as for instance by applying for Confirmation or completing the Inheritance Tax reporting, was dependent on a conclusion being reached *inter alia* with regard to the value of the painting and the potential legal rights claim by the widow. He stated that he was very conscious of the Secondary Complainer's position as an Executor and as Trustee of the Testamentary Trust and re-iterated that once agreement was reached

between the widow and daughters, the Secondary Complainer should have the opportunity to take separate legal advice "on the propriety of (the) estate and the Testamentary Trust being wound up in accordance with that agreement, the costs of that advice being met, of course, from (the) estate." He suggested that in anticipation of agreement shortly being reached, "we now identify the solicitor who should be appointed to take on this role". He went on to relate that the daughters would wish his firm to continue to act as Executry lawyers.

11.13 On 14 July 2011 the Respondent, on behalf of the daughters as individuals, put to RG on behalf of the widow as individual by letter a revised settlement proposal, which the Respondent and RG met to discuss on 28 July 2011. On 2 August 2011 the Respondent sent to RG a letter approved by the daughters containing a further enhanced settlement proposal which was stated to be conditional on the Secondary Complainer as Executor agreeing to the estate being administered on the basis of the proposed settlement. The Secondary Complainer was not consulted on the terms of this letter or provided with advice on its terms or a copy. The Secondary Complainer wrote to the Respondent on 17 August 2011 as he had by then been contacted direct by RG and advised that his agreement to the proposals for dealing with the Executry was needed to conclude the terms of the agreement. The Secondary Complainer indicated that he would have to know what those proposals were, and why and when his agreement was required. The Secondary Complainer was not provided by the Respondent with a copy of the proposed settlement until 23 August 2011, when he received as an email attachment both a copy of the Respondent's letter to RG dated 2 August 2011 and the latter's counter-proposal on behalf of the widow dated 17 August 2011.

11.14 On 5 September 2011 the Secondary Complainer made it clear to the Respondent over the telephone that although he needed to know what was going on he did not wish to be party to any agreement between the beneficiaries. He advised that he intended to resign as an Executor as soon as an agreement had been reached. The way to achieve this was discussed and the Respondent again advised that the Secondary Complainer should take his own legal advice in relation to his acting as Executor to be paid for out of the Executry estate. The Secondary Complainer agreed that he intended to do so and the Respondent

undertook to draft a Minute of Resignation. On 13 September 2011 the Respondent sent the Minute of Resignation for signature by the Secondary Complainer advising that it would be held as undelivered pending the signing of the Agreement between the widow and the daughters which would allow his resignation to take effect at the same time as the signing of the Agreement. He indicated that by doing so the Secondary Complainer did not require to be a party to the Agreement between the widow and the daughters. The Respondent asked the Secondary Complainer if he also intended to resign as Trustee of the Testamentary Trust and reaffirmed that it was appropriate that the Secondary Complainer: "should take independent legal advice on your role as executor and trustee, and your retiral." The Secondary Complainer replied on 20 September 2011 reasserting his belief that the Respondent and his firm had a conflict of interest in dealing with the Executry on the one hand and acting for the deceased's daughters on the other, and confirming that he would be asking an independent solicitor to review the draft Minute of Resignation and to take advice on the possibility of his resigning also as Trustee of the Testamentary Trust.

11.15 The Secondary Complainer subsequently instructed Mr D at Brodies LLP to act for him in his capacities as Executor and as Trustee of the Testamentary Trust.

12. The Tribunal reconvened in the afternoon of 15 March 2016 and issued its oral decision. The Tribunal heard submissions from both parties with regard to expenses and publicity and then pronounced an Interlocutor in the following terms:-

Edinburgh 15 March 2016. The Tribunal having considered the Complaint dated 18 November 2014 at the instance of the Council of the Law Society of Scotland as amended against Ian Robert Clark, Solicitor, Turcan Connell, Princes Exchange, 1 Earl Grey Street, Edinburgh; Find the Respondent not guilty of professional misconduct; Find the Respondent liable in the expenses of the hearing held on 17 September 2015 and any abortive expenses in respect of the hearings scheduled for 28 and 29 October; being the expenses of the Complainers and of the Tribunal including the expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client paying basis in terms of chapter 3 of the last published Law Society's Table of Fees for general business at the unit rate of £14.00;

Find the Complainers liable in respect of, insofar as not already awarded, one half of the expenses of the Respondent, 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; Refuses the Respondent's motion to certify the cause as suitable for senior counsel and refuses the Respondent's motion for certification of Donald Reid as a skilled witness and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and his firm but will not include the names of his clients.

(signed)

Alistair Cockburn
Chairman

13. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

At the hearing on 2 March 2016, the Tribunal had before it the Record, one Inventory of Productions for the Complainers and Four Inventories of Productions for the Respondent.

Ms Johnston lodged a joint minute between the parties, agreeing the documents Item 2 on her Inventory of Productions. She moved to withdraw Item 3 on the basis that she did not intend to lead the witness RG.

She clarified that Item 1 on her Inventory was the files themselves. Having had a discussion with Mr Anderson, it was agreed that these files were required by Counsel for consideration until recently. These files were held by Mr Anderson's firm. She did not anticipate that she would require to bring these to the Tribunal. The purpose of the agreed documents (Item 2), was to avoid the requirement for lodging the files themselves. She indicated that the Law Society would rely on these documents.

The Chairman asked Ms Johnston to clarify that the effect of the joint minute was that the Tribunal could take the documents as what they bore to be. She confirmed that was the case.

She also confirmed that the Respondent's agents had produced an updated index for the documents forming Item 2 on her Inventory.

The Fiscal went on to explain that Mr Currie had indicated that there were documents additional to those that she had originally lodged that he would like included. These documents had been submitted to the Tribunal office late. She moved that the Tribunal allow these documents to be received late and be inserted into the original productions. She confirmed that they were numbered appropriately. Mr Currie concurred in that motion. The motion was granted.

Mr Currie clarified for the Tribunal that, as well as Mr Anderson and his assistant being present, Simon Mackintosh the Chairman of Turcan Connell was also sitting beside Counsel. Mr Currie sought leave from the Tribunal for the Respondent's witness Donald Reid to be present for the Respondent's evidence.

The Chairman indicated to Mr Currie that if the Tribunal was to regard Mr Reid as an expert, then Mr Currie would require to set him up as such. The Chairman emphasised that at the end of the day, the question of professional misconduct was one for the Tribunal. It was, however, open to the

Respondent to lead evidence of normal practice. Ms Johnston confirmed that she was not challenging Mr Reid as a witness in that respect.

Mr Currie confirmed that he wished to lead Mr Reid as a witness and to have him present for the Respondent's evidence. The Chairman confirmed that the Tribunal had no objection to the witness hearing the evidence of fact, assuming that he was going to be set up as an expert.

Mr Currie asked the Tribunal to allow the most recent report from Mr Reid to be lodged in place of the earlier report. The Fiscal had no objection to this motion and the Tribunal granted it.

Donald Reid took his place beside Mr Anderson's assistant.

The Fiscal confirmed that the Complainers were relying on the documents, lodged and agreed as demonstrating the contemporaneous position as set out within the complaint. She did not intend to lead oral evidence and confirmed that she renounced further probation.

Mr Currie proceeded with the case for the Defence and called his first witness.

WITNESS ONE - IAN ROBERT CLARK.

Mr Clark confirmed that he wished to give his evidence under Affirmation. He was born on 7 March 1961, enrolled as a Solicitor on 30 October 1985, and from 1 October 1989 to 15 August 1997 he was an Associate then a Partner at Dundas & Wilson. On 18 August 1997 he became a Partner in the present firm of Turcan Connell. From 1985 he had practised in the area of Private Client work, working in particular in relation to advising families on succession, tax planning and wills etc. He had specialised in these areas since 1990.

Mr Currie referred the witness to Item 3 on Inventory of Productions 2 for the Respondent. He confirmed that this was a typewritten statement of the Respondent. He referred the witness to Production 2 for the Law Society, the agreed volume of documents. Mr Currie indicated that he would use the Respondent's statement as a road map.

The Chairman clarified with the Fiscal that she had no objection to this use of the witness statement and she confirmed that she did not.

The witness confirmed that the issues before the Tribunal arose out of the will of the deceased who died on 30 March 2010. The witness confirmed that the deceased was survived by his second wife, the widow, and his two daughters. Mr Currie took the Tribunal through paragraphs 2, 3 and 4 of Section 1 of the witness statement. The witness confirmed that the principal assets of the estate of the deceased were the main estate house, a number of cottages, woodlands and investments of approximately £700,000.

Mr Currie took the Tribunal through the first two paragraphs of section 2 and paragraph (e) on page 2 of the statement. The witness confirmed that it was his understanding that at the time of death, the widow understood that the Respondent had acted for both daughters since 1997.

Mr Currie took the Tribunal through paragraph 3 of page 2 of the statement. The witness confirmed that he had been aware for some years prior to the deceased's death that his widow had her own solicitor. That solicitor was RG. RG knew that the Respondent acted for the deceased. The widow knew that the Respondent acted for the deceased and the daughters.

Mr Currie took the Tribunal through the last sentence of paragraph (e) of Section 2 of the witness statement. The witness confirmed that throughout his career, he and his partners had acted for families including the parents and the next generation as the family advisors.

The witness indicated that where there was a legal rights claimant, the family solicitor would continue to act for the estate and the family. The Respondent confirmed that even where there is a will, the deceased's widow and children can claim legal rights. It depends on the circumstances, but where both widow and children survive the deceased then the widow can claim one third of the moveable estate. If a beneficiary takes up the claim for legal rights then the beneficiary gives up any entitlement under the will. It is a choice between making a claim for legal rights or accepting the bequest in the will.

Mr Currie then took the Tribunal through Section 3, on page 3 of the witness statement. The witness confirmed that if the widow had accepted the liferent in this case then that meant that she would be entitled to the use of the property i.e. to occupy the main estate house and have the income from the estate. The main estate house is a large country house on a small estate. The estate comprises farms, woodlands and cottages. The farmlands had previously been gifted to one of the daughters. At the time of death the estate incorporated the house, some cottages and woodlands. MA had estimated the cost of running the house at £30,000 per annum. This would have been borne out of the income of the estate.

MA had worked with the deceased in running the estate. The deceased had factored a number of other estates. The deceased was in his eighties and MA had assisted him.

It was clear to the witness that the deceased had wanted the main estate house to remain within the family. That had been his main objective.

Mr Currie then indicated he was moving on to Section 4 of the written statement and asked the witness to look at page 1 of Production 2 for the Complainers. The witness confirmed that this was a file note dated 17 March 2010. The witness confirmed that it was his understanding that the Secondary Complainer knew or at least ought to have known that the witness acted for the family as a whole. One of the things discussed with the Secondary Complainer were the assets held under the Testamentary Trust which had been left to the daughters.

Mr Currie read out the first three sentences of paragraph 2 of Section 4 of the statement and clarified that the discussion in the statement noted as 24 March was page 2 of Production 2 which indicated that the call with the widow took place on 25 March 2010.

Mr Currie then referred to page 6 of Production 2 which he said was a note of the 30 March 2010 of a telephone call with the Secondary Complainer. He read out paragraph 4. He asked the witness to confirm that this was the more valuable painting that was being referred to. The witness confirmed that an issue had arisen as to whether the more valuable painting had belonged to the deceased or not at his death. If it had belonged to the deceased then that would have significantly increased the value of the legal rights claim of the widow. If the deceased had not owned the painting the legal rights claim would be significantly devalued.

Mr Currie referred the witness to page 9 of Production 2 a note of a telephone call of 31 March 2010 and the witness confirmed that at that point the Secondary Complainer was raising the issue of ownership of the painting. The witness confirmed that it was his understanding from what the deceased had told him that the painting had passed to the girls.

Mr Currie then read out paragraph 5 of page 10 of Production 2 – a file note dated 31 March 2010.

Mr Currie then read out paragraphs 1 and 2 at the top of the page 4 of the statement and referred to page 11 of the Production 2 and asked the witness why there was a possibility for friction between the widow and daughters. The witness responded that it was not uncommon for a step-mother and step-

daughters not to see eye to eye. Over the years the widow and one of the daughters had had some disagreements. One of the daughters was concerned about the main house estate. That was what MA was alluding to in the file note of 12 April (page 11 of Production 2).

Mr Currie then referred to page 12 of Production 2 and read out the first sentence of paragraph 1.1. The witness confirmed that confirmation was the legal process that allowed executors to take title to the deceased's assets. Mr Currie read out the first two lines of paragraph (f) on page 15 of Production 2. The witness confirmed that he did not mention the widow's legal rights at this meeting. The witness was concerned that it was shortly after the funeral and given what had been said about the possibility of friction, there was concern that one did not want to raise issues that might involve potentially emotional matters.

Mr Currie read out paragraph 2 of page 17 of Production 2 and the witness confirmed that as soon as he had written to RG, RG would have realised that the widow had a legal rights claim.

Mr Currie read out paragraph 3 of the statement at page 4. The witness confirmed that RG had referred to the widow's legal rights in a letter to him which formed pages 31 and 32 of Production 2.

Mr Currie then indicated he was moving to Section 5 of the witness statement and referred the witness to page 61 of Production 2. The witness confirmed that this was his note of the meeting of the executors held on 12 August 2010.

Mr Currie asked the witness to turn back to page 60 of Production 2 and asked if it was normal practice for solicitors to send a report to executors in advance of a meeting. The witness confirmed that it was his practice.

The witness confirmed that page 67 of Production 2 was MA's note of the same meeting held on 12 August.

Mr Currie then went to page 64 of Production 2. In Section 4.1 he read out paragraph 1 and then read out paragraph 3. He then went to paragraph 3 on page 65. The Respondent confirmed that it was his understanding that the Secondary Complainer already knew prior to this meeting that he acted for the daughters. That was the first indication of the Secondary Complainer's reference to a conflict of interest and the witness's position was noted at that stage.

Mr Currie then turned to page 70 of Production 2 and read out the first two sentences of the second paragraph. It had been the witness's understanding that the Secondary Complainer had wanted the witness to discuss with RG how to deal with the widow's position and to find a way forward for the executry to be administered with minimum exposure to tax and other issues. These issues included the ownership of the more valuable painting. It was the witness's view that at that point, i.e. the 12 August 2010, it was the Secondary Complainer's position that he was in favour of the witness and RG reaching some agreement with regard to that painting.

Mr Currie then read out paragraph 4 of page 70 and asked the witness to return to his witness statement and Mr Currie read out the second paragraph on page 5. The witness confirmed that at that stage it was his understanding that the Secondary Complainer was encouraging the witness to speak to RG to resolve a number of issues including the ownership of the more valuable painting. The witness had not considered it to be a conflict of interest for him to continue to act for the executors and the daughters.

Mr Currie then moved on to Section 6 of the witness's statement and the witness confirmed that from the date of his first meeting with RG on 16 September there were proposals and counter-proposals put forward to attempt to resolve the widow's claims on the estate including the painting.

Mr Currie then referred to the Complainers' Production number 2 and read out the first three paragraphs of page 75 and the first three paragraphs of page 76. The witness confirmed that the Secondary Complainer encouraged the witness to meet with RG to discuss possible agreement. The witness did not accept that at that point the executors required to know who owned the painting. He submitted that there was no issue that the executors had to act on. Until the widow's position with regard to her legal rights claim was known the executors could not progress the administration. The second executors' meeting had in front of it all of the information they required to go forward to confirmation and the only issue outstanding was the ownership of the painting. The question of the painting was a matter being raised between the widow and the daughters. Until the widow's claims on the executry estate could be settled it would not have been possible to submit inventories and lists for confirmation. The witness did not believe that it was necessary for the executors to commission their own investigations or take their own legal advice on the ownership of the painting.

The witness confirmed that at the meeting on 12 August he had apologised in person for not making it clear that he had acted for the daughters and he had followed this up by a written apology which was page 78 of Production 2.

Mr Currie then referred to page 80 of Production 2 and read out paragraphs 1, 2, 3 and 4. The witness confirmed that it was his understanding that the Secondary Complainer's concern was that a conflict arose as a result of the witness acting for the executors and for the daughters.

Mr Currie then referred to page 92 of Production 2 and read out that letter. The witness confirmed that it had been his intention to deal with the matters raised by the Secondary Complainer more fully after his meeting with RG.

Mr Currie referred to page 101 of Production 2 and read out the first two paragraphs of that letter. The witness confirmed that this was an indication that proposals for settling were in outline.

Mr Currie then went on to read out paragraphs 3 and 4 of the letter set out at pages 101 and 102 of Production 2. Mr Currie then returned to the witness's statement at page 6 and read out paragraph 2. The witness confirmed that set out his position with regard to these issues. The witness explained that he was responding to the Secondary Complainer's concerns. They were not the witness's concerns. He did not consider himself conflicted in any way. He had suggested another solicitor as the Secondary Complainer had raised the issue. He therefore thought it was appropriate to raise this with the executors.

Mr Currie then referred to page 84 of Production 2 (a letter to the witness from RG). He read out paragraph 3 of part 3 of that letter and the witness confirmed that this expressed an argument that the painting formed part of the deceased's moveable estate.

The witness was then referred to page 93 of Production 2 and confirmed that this was his minute of the meeting with RG on 16 September. Mr Currie read out part of paragraph 1 of page 93 and the witness confirmed that he had been surprised at the indication that the Secondary Complainer had discussed executry matters with RG. The witness confirmed that he had gone on to note that the widow had no concern about the witness continuing to act for the executors and for the daughters.

Mr Currie then referred the witness to paragraph 5 on page 94 of Production 2 and the witness confirmed that at that stage he had raised the possibility of an agreement being reached between the widow and the daughters as to the basis on which the estate should be wound up.

The witness confirmed that paragraph 11 of that note was the first template of an agreement between the witness and RG.

Mr Currie referred the witness to paragraph 12 of that note and asked if RG had earlier in the meeting raised concern with regard to the witness representing the executors and the daughters. The witness responded that he had only done so in respect of what the Secondary Complainer had said to him previously. RG did not elaborate.

Mr Currie then said to the witness to turn to page 6 of the witness statement and look at paragraph beginning "ABB confirmed". He then asked the witness to look at page 104 of Production 2 which was a letter from the Secondary Complainer to him dated 7 October. Mr Currie read out the letter and then said that we could look back at the letter of 28 September to the Secondary Complainer where the witness had set out that discussions were underway with RG and the proposals were set out and in that letter the witness had suggested to the executors to take their own advice.

Mr Currie then referred the witness to page 108 of Production 2 and asked him to look at page 109 and the witness confirmed that letter contained the names of two possible solicitors.

Mr Currie then referred the witness to page 111 of Production 2 which was The Secondary Complainers' reply to the witness dated 30 October. Mr Currie read out the first two sentences of that letter. The witness confirmed that the Secondary Complainer appeared to be in favour and encouraging of the negotiations. Mr Currie then read out the following paragraph of the letter of 30 October.

Mr Currie then referred to page 113 of Production 2, a letter from RG to the witness. Mr Currie read out paragraph 5 and 6 and the witness confirmed that discussions between him, the Secondary Complainer, and RG were continuing regarding the choice of solicitors for the executors.

The witness then confirmed that page 115 of Production 2 contained the suggestion of another solicitor by the Secondary Complainer.

Mr Currie then referred the witness to item 4 of the Inventory of Productions number 2 for the Respondent. Item 4 included a document headed "Memorial for the Opinion of Counsel". The witness confirmed that he had sought advice from James McNeill, Q.C. He had sought that advice on behalf of the two daughters regarding the negotiations taking place with RG on behalf of the widow. He confirmed that the principle issue was the ownership of the painting. Mr Currie read out question 5 of

the Memorial and then referred the witness to his note of the meeting with Counsel of 11 November. The first paragraph of that note in part 1 was read out by Mr Currie and the witness confirmed that advice was being sought for the daughters.

Mr Currie then directed the witness to Section 5 of the note of that meeting and the witness confirmed that this was the answer to the question 5. Mr Currie read out the first two paragraphs of Section 5 and then the 6th paragraph. The witness was asked if he could put a figure on the likely costs of instructing new solicitors. The witness indicated that he was unable to put a figure on that but could say that it would have been significant.

Mr Clark confirmed that Mr McNeill's advice was that if the executors could not agree on another firm of solicitors to act then the status quo would prevail and it would be appropriate for the decision to appoint another set of solicitors to be postponed. The witness was asked if Mr McNeill had provided any advice that the witness should cease to act for the executors. The witness confirmed that Mr McNeill made no reference to his role in the matter at all.

Mr Currie then referred the witness to Counsel's Opinion dated 27 January 2011 at paragraph 5 and read out that paragraph to the witness. That paragraph suggested that if the dispute on matters continued then the most appropriate course would be for the four executors to obtain legal advice from a separate firm of solicitors. Mr Currie asked the witness if it was the witness's belief at that time that matters were going to resolve.

Mr Currie then said to the witness he would move on to the top of page 7 of his statement and referred the witness to page 120 of Production 2 which he stated was a letter from the witness to the Secondary Complainer dated 24 November 2010. Mr Currie read out paragraph 4 of that letter to the witness. The witness was asked what he meant in that letter when he said the administration of the estate was effectively on hold. The witness responded that the administration had been taken as far as it could by the time of the second executors' meeting. He stated that until a decision had been taken by the widow as to whether or not she was making a legal rights claim then nothing further could be done to advance the administration.

The witness was then referred to page 124 of Production 2 which was an email from the Secondary Complainer dated 1 December 2010. Counsel said that this was the first of the Secondary Complainer being specific about the advice the witness could not give. Mr Currie asked the witness if he had considered it appropriate for the executors to commission their own advice at that stage. The witness

responded that he did not believe so. As far as he was concerned the executry position was that no action could be taken pending the resolution of the issues with the widow. There was nothing for the executors to do.

Counsel then referred the witness to page 127 of Production 2, a letter from RG to him dated 17 November which he said was picked up in the witness's statement in paragraph 2 on the top of page 7.

Mr Currie then indicated that he was moving on to Section 8 of the witness's statement. The witness was referred to page 132 of Production 2, a letter from him to RG dated 7 February 2011. The witness confirmed that Section 4 of that letter on page 134 was a summary of proposals with some comments from the witness. The witness confirmed that letter included an offer from the daughters to make a capital payment to the widow which the witness said was a refinement of the outline proposal previously made.

Counsel then referred to page 136 of Production 2 which he said was an email from RG to the witness and then referred the witness to page 137 of Production 2 and the witness confirmed that this was an email from him to RG in which he confirmed that Counsel's Opinion had been obtained on behalf of the daughters.

The witness was then referred to page 138 of Production 2 and he confirmed that this was a letter from him to the Secondary Complainer in which he was updating the Secondary Complainer on the progress of negotiations. Mr Currie read out the last paragraph of the second page of that letter which was at page 139 of Production 2 and then referred the witness to page 141 of Production 2 and read out that letter from the Secondary Complainer to the witness.

Mr Currie then indicated to the witness that he wanted to turn to the question of yield that had been raised by RG in his letter to the witness and asked the witness to turn to page 7 of his witness statement. Mr Currie then read out part of Section 8 of the witness statement referring to the valuation of the liferent. The witness confirmed that the question in essence was what income the widow might expect to receive from the estate as liferenter. As a matter of law that would depend on the circumstances as the income would depend on the assets involved. The witness confirmed that there was no need for the executors themselves to take any view on the yield. At this time the executors had no power to do anything about the yield until confirmation had been obtained. The executors' role was simply to engather and administer the estate pending further transfer.

Mr Currie then took the witness to the last paragraph on page 7 of his statement and referred the witness to page 149 of Production 2. The witness confirmed that page 149 of Production 2 was a letter from RG to him dated 5 May 2011 which at page 151 contained a counter-proposal from the widow for settlement which significantly upped the ante to £1.1 million.

The witness was then referred to page 154 of Production 2 which he confirmed was a lengthy file note of a telephone call between him and the Secondary Complainer on 31 May 2011. Mr Currie then read out section 4 of that file note and the last two sentences of section 5 and the witness confirmed that it appeared from this note that the Secondary Complainer accepted that litigation was not the way forward at this stage. The witness confirmed that this note included discussion of the issue of the executors taking separate legal advice.

Mr Currie then referred the witness to page 157 of Production 2 which the witness confirmed was a letter from him to the Secondary Complainer dated 8 June 2011 where at page 158 he confirmed that the estate could not progress until the issues between the daughters and the widow had been resolved.

Mr Currie then referred the witness to page 159 of Production 2 and the witness confirmed that this was a note of a telephone call between him and the widow dated 28 June 2011 where he confirmed his view at the time that the executors had decided to postpone dealing with the executry administration until the issues between the widow and the daughters had been resolved.

The witness was then referred to his statement at page 8 and Mr Currie read out paragraph 4 and the beginning of paragraph 5 making reference to an email from the Secondary Complainer to the witness dated 11 July 2011. The witness confirmed at that stage it was his expectation that agreement would be reached. It was clear to him that the widow and the two daughters wanted to avoid litigation.

At this juncture, the Chairman asked the witness to clarify how settlement was to be reached if the gap between the parties was £400,000 on the part of the daughters and £1.1 million on the part of the widow.

The witness responded that he and RG had discussed a number of factors which would involve the value of the capital sum which had included the likelihood of whether the court would decide the painting was part of the estate or not. The factors included the value of the painting and the possible tax consequences for the daughters if the widow had renounced her claims on the estate. It appeared to

the witness that as in all negotiations the parties had begun by setting their stalls out, then they had moved closer together and by this stage parties were reaching the end game.

The Chairman asked the witness if this was too big of a gap to close. The witness indicated that the offer made by the daughters was the bottom line and the offer made by RG was the top line but the factors between the parties were such that the gap would be narrowed.

The witness was asked by Mr Currie if the Secondary Complainer was copied into these negotiations and the witness confirmed that copies had been sent to the Secondary Complainer.

Counsel asked the witness if he accepted the complaint by the Secondary Complainer set out in the email of 11 July that he had not kept the Secondary Complainer advised. The witness said that he did not accept that suggestion. He said he had been keeping the Secondary Complainer advised of progress. There were gaps in the development of negotiations for instance when the witness had been taking advice from Counsel and Counsel had been out of the country. There was also a gap when the widow had been taking advice from RG. The witness however had been keeping the Secondary Complainer advised of progress.

Mr Currie then returned to the witness's statement and read out paragraph 5 on page 8 and Counsel referred to page 167 of Production 2 which he described as a letter to the Secondary Complainer dated 14 July 2011 which had enclosed a copy of a detailed letter to RG setting out the daughter's position. The witness confirmed that the letter to RG confirmed that at that stage the daughters were offering around £720,000 as a payment to the widow which showed that the gap between the two was closing significantly. All of this was copied into the Secondary Complainer.

Counsel referred the witness back to page 167 of Production 2 – which was his letter of 14 July 2011 to the Secondary Complainer. Counsel read out the letter and asked the witness if it was his position that he had anticipated at that stage that agreement would shortly be reached and the witness confirmed that.

Counsel then returned to page 168 of Production 2 which was the second page of the letter to the Secondary Complainer and read out the penultimate paragraph. The witness confirmed that he had contemplated in that letter that agreement was going to be reached between the widow and the daughters so that the executors did not require to take any view on the ownership of the painting. That

letter had also suggested to the Secondary Complainer that independent advice could be taken by the executors at the expense of the executry at the stage when the negotiations had been settled.

Mr Currie then referred to the Second Inventory of Productions for the Respondent, Production 4, a note of a meeting with James McNeill, Q.C on 7 July 2011. Mr Currie read out section 2 of that note and confirmed that his letters of 14 July 2011 had been informed by the Opinion of Senior Counsel.

The witness confirmed that it was Mr McNeill's view that the executry was on hold.

The witness was referred to page 173 of Production 2 for the Complainers and confirmed that this was a letter from him to RG dated 2 August 2011 which confirmed his view that the gap was narrowing had been well-founded.

The witness was referred to the second page of that letter where at item 6 he confirmed that it was a condition of the offer of settlement that the Secondary Complainer as executor agreed.

The witness was referred to page 175 of Production 2, an email from the Secondary Complainer to him dated 17 August which Counsel then read out. Counsel asked the witness if one of the complaints against him was that he had not told the Secondary Complainer on 2 August that one of the conditions in the offer made to RG had related to the Secondary Complainer and the witness agreed.

The witness was referred to page 176 of Production 2 which he confirmed was an email from himself to the Secondary Complainer and in the first paragraph he explained why he had not copied the Secondary Complainer into the letter of 2 August as this was an ongoing negotiation. Counsel then read through the last two paragraphs of that email and suggested that showed how the witness had dealt with the matter raised by the Secondary Complainer in his earlier email.

The witness was then referred to page 177 of Production 2, a file note dated 5 September 2011 of a telephone conversation between the witness and the Secondary Complainer. In item 1 of that email the witness confirmed that the Secondary Complainer appeared content to leave the negotiation of an agreement to the parties involved. Counsel then read out paragraphs 3 and 4 of that file note and the witness agreed that that was his conversation on that day.

Counsel took the witness back to his witness statement. Counsel read out the last paragraph of page 8 and the first paragraph of page 9 of the statement and then referred to page 177a of Production 2 for

the Complainers. This was a letter dated 8 September from RG to the witness and the witness confirmed that the second paragraph of that letter disclosed that there had been discussions between the widow and the Secondary Complainer as executors. The witness agreed that by the time of the letter at page 177a an agreement in principal had been reached between him and RG on all the main items. This had included the capital sum to be paid to the widow. There were only some minor items that had to be finalised but these were all ultimately resolved in the final documents.

Counsel then returned to the witness's statement and read out the second paragraph on page 9. He then referred the witness to page 199 of Production 2 for the Complainers. This was a file note dated 23 November 2011 of a telephone conversation with a solicitor from Brodies. The witness confirmed that page 199 was a discussion with the solicitor as to how the Secondary Complainer's position could be regularised in the light of the settlement reached.

Counsel read out page 201 of Production 2 for the Complainers which was an email from the solicitor for the Secondary Complainer and the witness confirmed that by this stage matters had already progressed.

Mr Currie then returned to the witness's statement and read out part 9. The witness confirmed that it was his view that it was not necessary for the executors to take a position on the ownership of the painting. The witness insisted that he had not been acting in a conflict of interest at any stage or in any potential conflict of interest situation. The witness confirmed that he believed that he communicated properly with the parties throughout the process.

CROSS EXAMINATION

The witness agreed that the records produced at the hearing were from his contemporaneous files. He confirmed that some of the letters might have been written by his assistant but they would have been agreed by him. He was aware and in control of all the steps taken.

He was asked how an executry could be put on hold. The witness said that the process of an executry was an ongoing administration process for the most part. When the executors cannot take it on any further then effectively it is on hold. Whilst it is unusual for any executry to be on hold, in this case there was nothing to be done. The role of executors was to identify the assets, sign off on lists of the property including the estate, obtain confirmation and then transfer the assets.

It was the witness's position that as early as the second executors' meeting everything that could be done had been done so far as possible by the executors. The issue of the widow's potential legal rights claim on the estate required to be resolved. The witness accepted that he had not agreed at the second executors' meeting that the executry was to be put on hold. The outstanding issues had been identified at that meeting and he had subsequently had a meeting with RG as had been agreed at the second executors' meeting in August.

The witness confirmed that he had not had a meeting in order to agree to put the executry on hold. It had been mentioned in correspondence which took place after the meeting with RG. He had written to each of the executors. He had told the executors in specific terms that the executry was on hold, he thought in November 2010 when he had written to the executors telling them that the executry was on hold pending negotiations with RG. When asked if he had obtained the agreement from the executors for the executry to be put on hold, the witness responded that *defacto* there were no further steps that the executry could take. It was made clear to the Secondary Complainer that there was nothing that required to be done.

The witness was asked whether or not he agreed that the tone of correspondence from the Secondary Complainer with regard to the issue of the delay in the executry was vitriolic or pointed. The witness explained that there was correspondence in about September or October after he had had his meeting with RG and he had explained to the executors where they stood on that. From memory he thought there was some correspondence between himself and the Secondary Complainer in November/December when he accepted that the executry was not going to be taken forward until the negotiations on the widow's position were resolved. From memory for the first few months of 2011 he had kept the Secondary Complainer advised of the progress in negotiations. In June/July 2011 the correspondence became more agitated. That was the time when they were in the final stages of negotiations.

The witness indicated that conflicts can arise in any number of situations. Specifically if there are two parties on either side of a transaction. The Fiscal asked him to consider the question in relation to the sort of situation of families in executries. The witness suggested as an example of a conflict of interest, where there was a clear issue between two parties and the advice that required to be given may be different to each. The witness confirmed that there was clearly a conflict of interest between the widow and the daughters. He could not have acted for the widow and the executors. Anyone seeking to make a legal rights claim would be directed to seek separate legal advice. He had not known the widow was going to claim her legal rights until RG raised that matter. The Fiscal asked him if there must have

been a potential for that to happen and the witness responded that he did not act for the widow so he did not have to consider that. He thought that hostility was the wrong word to use to describe the issues between the widow and the daughters. It was a difficult relationship over several years in relation to personal issues between the second wife and the daughters of the first wife. It was a relationship based on personal concerns. In all family situations around death and succession there is a need for careful handling.

The witness was asked how he managed the risk as a solicitor dealing with a contentious executry and potential pitfalls. The witness responded that he had a number of years of experience and had a number of partners who dealt with executry work. He said he had consulted a colleague in this case. He also confirmed that in this case he had taken advice from James McNeill, Q.C.

He accepted that it was important when dealing with lay people that he kept them informed of the progress being made.

The Fiscal referred the witness to Productions 9 and 10 on the Fourth Inventory of Productions for the Respondent. The witness agreed these were notes of meetings he had had with the deceased in 2006 and 2008. The Fiscal asked the witness if item 8 showed difficulties between the deceased and one of his daughters in regard to her spending time at the estate house. The witness confirmed that the daughter lived between London and the estate house until she had taken over the cottage that the deceased had gifted to her. The witness confirmed that this note showed the difficulties between the deceased and his widow and the daughter and that this information was with the witness. He also agreed that concerns were expressed by the deceased at the meeting which was documented at Production 9.

The Fiscal asked the witness to explain the significance of a draft letter of wishes. The witness explained that the will had left the residue of his estate in a discretionary trust. The trustees had discretionary powers to decide how the assets would be dealt with on death. The letter of wishes was for the deceased to set out what he would wish the trustees to do. The meeting of 2006 showed that the deceased was considering what to do with the estate house. The discretionary trust gave a degree of flexibility and the letter of wishes was to guide the trustees. He was the daughter's solicitor at the time of these discussions with the deceased.

The Fiscal asked the witness how he would draw a line in questions of confidentiality in situations like this where he was representing several members of the family. Mr Currie objected to this line of

questioning as raising the issues of an earlier breach of client confidentiality which was not part of the Complaint before the Tribunal. The Fiscal indicated that she was raising this issue only in generalised terms to ascertain the Respondent's approach to conflicts of interest. The Fiscal explained to the witness that she found it difficult to understand how he would manage questions of confidentiality in such situations. The witness indicated that different families approached things differently. Some families sit down with all the generations together round the table and talk about family plans. Others decide to do it privately and take advice from their own lawyers. Without the deceased's consent the witness would not have discussed his affairs with anyone.

The witness was referred to page 6 of Production 2, a file note dated 30 March 2010. He was asked if he was aware that there was difficulty in the widow accepting the liferent. The witness responded that the difficulty was not in accepting the liferent itself but in remaining in the estate house. He said that it was never envisaged that the widow would be able to afford to live at the estate house. The widow had thought that also. It had been discussed in that meeting in 2006 that she would not live there for any length of time. The witness had no idea of the widow's own financial position. The witness accepted that the widow and the Secondary Complainer had had discussions during the executry as the Secondary Complainer had asked the witness questions on the widow's behalf.

The witness confirmed that he was acting as the solicitor for the trustees of the Testamentary Trust also. That was dealt with separately to the executry. The trust was a separate entity that came to an end on the deceased's death and then had to be wound up.

The witness was referred to page 9 of Production 2 – a note of conversation between him and the Secondary Complainer. He was asked at that stage if he thought that he was going to be dealing with the painting as part of the executry. The witness responded that he had understood that the painting belonged to the girls and that was what the deceased had told him. The witness was referred to the fact that he had not said anything in the correspondence about being told by the deceased that the painting belonged to the girls. The witness indicated that he may not have remembered that at the time. The witness was referred to page 10 of Production 2, a file note which recorded the position of one of the daughters with regard to the painting.

The witness acknowledged that page 11 of Production 2 for the Complainers was a telephone conversation between him and MA prior to the executors' meeting in April that disclosed potential difficulties between the widow and the daughters.

He confirmed that the minute of the meeting of the executors on 13 April discussed the possibility of deadlock between the executors. It was also included in that note that the items that were disputed were to be valued with regard to the administration of the executy.

The minute referred to some of the house contents being excluded from the executy inventories but no detail was given there. The witness explained that this had been a lengthy meeting lasting several hours. That meeting had acknowledged that there was likely to be a large tax bill and there were a number of options on how to fund that. One was that the painting might be sold; another was that it might be lent to a museum in lieu of tax.

The witness had not thought it appropriate in the course of the meeting on 13 April to say that he also acted for the daughters. He had not thought there was any doubt about that. If he had thought there was any doubt about him acting for the daughters in their own right he would have told them at that meeting for their own information. It would have been simply for their own information and not because he had two hats on his head. He thought that it was understood that he also represented two of the executors in their own right.

At this juncture the Chairman asked the witness, if he had not identified an issue of a conflict, why he would have thought it necessary to disclose to the executors that he was also acting for the two daughters. The witness responded that had he thought there was confusion in the minds of the executors then he would have explained that as he would not have wanted their confusion to continue. However, he was of the belief that the executors were aware of these matters. The Chairman asked the witness if he had thought there was a conflict and the witness had answered that he did not consider that there was a conflict.

The Chairman went on to ask the witness that, if he was not conflicted, why there would be a need for him as a solicitor to tell another client that he acted for the two daughters. The witness responded that he did not understand the question. The Chairman explained that the witness was representing two daughters and also the body of executors as clients. He asked the witness what the compulsitor was to tell one client (the body of executors) that he was acting for the two daughters as beneficiaries and whether or not this raised a question of confidentiality. The witness responded that he did not consider that there was an issue in the executors knowing that he acted for the two daughters. His belief was that the individuals were aware of the situation and so there was no confidentiality issue. With regard to the compulsitor in giving the information, the witness explained he would have thought it

appropriate that they all knew he represented the executors and the two daughters so that they were fully informed of the position.

The Fiscal then asked the witness to look at pages 23, 25, 26 and 28 of the Production 2 on the Complainers' Inventory of Productions. She explained that these were all letters dated 19 April to both daughters, the Secondary Complainer and the widow. They all sent out terms of business letters. She asked if there was any difference in the content of these letters and in particular pointed to paragraph 1 of the letters. In particular this referred to a subsequent meeting with the daughters as two individuals. The witness confirmed that the separate meeting with the daughters was in their capacity as beneficiaries. The witness could not recall whether this meeting with the two daughters had taken place before or after the meeting with the executors in April. He accepted that the note of the meeting with the daughters would be kept on the daughters' files. The tone of these letters was that he was taking forward the executry at this stage.

The Fiscal referred the witness to page 30 of Production 2, a letter from the Secondary Complainer to the witness and the witness confirmed that it was again raised in the letter that the author had concern for the future of the widow.

The Fiscal referred to page 31 of Production 2, the letter from RG of 10 May 2010 as raising the issue of legal rights. The Fiscal referred to Production 2 at page 33, a letter from the Secondary Complainer to the witness dated 14 May 2010 and the witness confirmed that it was fair to say that the Secondary Complainer was accepting that there had been enough to discuss at the meeting of the executors without raising the question of legal rights.

The Fiscal referred to page 36 of Production 2, the letter from Christies regarding the paintings. She asked the witness if this contained significant information relevant to the question of ownership and the witness agreed. When asked if he had passed this information on to the executors, he responded that the information had been incorporated in his report for the executors' next meeting in August.

The Fiscal went on to ask the witness why he had not mentioned the letter from Christies in his letter to the Secondary Complainer at page 39 of Production 2 – a letter dated 1 June 2010. Mr Currie objected to this question on the basis that this was not a part of the Complaint before the Tribunal. The Fiscal explained that this was relevant to the way the Respondent had communicated with the Secondary Complainer from the outset. The Chairman indicated that he would allow the question and asked the witness why he had not disclosed a piece of information that had supported his other clients?

The witness responded that he did not recall exactly why. He had been compiling a lot of information for the estate. There had been no reason not to mention it.

The Fiscal pointed the witness to page 43 of Production 2 and the witness accepted that this was a letter from the Secondary Complainer to him mentioning the letter from Christies. The witness accepted that he had subsequently on 23 June (page 44 of Production 2) written to the widow and mentioned the information received from Christies.

The Fiscal referred the witness to page 46 of Production 2 and he confirmed that this was an email from one of the daughters to him and that it raised in the second paragraph the issue of the silver in the attic and the Dresden china. He did not accept that he was being alerted to a possible area of dispute. He did not think he had considered that this was an issue of dispute at that stage.

He was referred to page 47 of Production 2 and clarified that this was the note of a telephone conversation between his assistant and the Secondary Complainer. He was asked if executors have any duties or responsibilities regarding obtaining confirmation. The witness responded that the executors had a duty to make a complete return of the deceased's estate to the State. That would have included both the paintings if they had belonged to the deceased. He accepted that page 47 at paragraph 2 referred to the potential for a falling out between the widow and daughters.

The witness was referred to page 49 of Production 2, a file note of a telephone call with the widow. The Fiscal asked if the issues raised in paragraph 1 of that file note were not unusual in this type of case. The witness responded that he could not say if they were usual or unusual but they had happened here.

The witness agreed that page 51 of Production 2 was a telephone call between him and one of the daughters discussing arranging a meeting between him and the two daughters prior to the next executry meeting. This was him acting as solicitor to the two girls as beneficiaries. He agreed that there was no point in him holding a pre-executry meeting with the other two executors. He was asked if that included the Secondary Complainer as trustee for the Testamentary Trust. He indicated that there would have been no point in a pre-executry meeting meeting with him as any issues were on the agenda for the meeting anyway.

The witness accepted page 52 of Production 2 was an email from him to the two daughters enclosing a draft note that he had prepared in relation to the ownership of the paintings ahead of the executors'

meeting. He accepted that this was not copied to the widow or the Secondary Complainer. He explained that the daughters had personal knowledge and he wanted to discuss this personal knowledge of the ownership of the two paintings with the girls before the executors' meeting. He did not accept that this was with a view to assisting the girls' claim. This was simply because his note would not have been complete without input from the two daughters. He stated that it had been substantially the same notes that were eventually sent to all of the executors. The Fiscal drew the witness's attention to the conclusion in his draft report to the daughters compared to the conclusion in the final report produced to the executors (page 60(vv) of Production 2) the conclusion in the draft report was that further investigations were required whereas the conclusion in the final report indicated a conclusion that the paintings belonged to the first wife. The witness explained that the version to the two girls had been a draft. The witness was asked if the one to the executors was based upon information that the witness had received from his clients in their personal capacities. The witness indicated that he could not recall exactly what was said at the meeting with the two daughters. He accepted that the meeting on 30 July 2010 was a meeting with the two daughters in their capacity as beneficiaries. He accepted that the report to the executors was prepared on the basis of these discussions. He accepted that he had not disclosed the meeting with the two daughters to the two executors. He explained that the advice he was giving to the executors was based on information that he had gathered together on behalf of the executors. He did not consider that there was a conflict between the executors and the two daughters at that time. His position was that the painting was, based on the evidence available to him at that time, owned by the testamentary trust. The executors did not need to make any decision about the paintings at that time. The information that the widow thought that the paintings belonged to the deceased came later.

The witness accepted that the meeting of the executors in August where he had made his apology for not explaining that he acted for the two daughters personally was five months after the death of the deceased. The witness explained that until then he had assumed that the executors understood that he had acted for the daughters.

The Fiscal asked the witness if it was not the case that The Secondary Complainer began from this point on to express concerns. She referred the witness to page 75 of Production 2, the letter from the Secondary Complainer dated 20 August. The witness confirmed that he did not consider that there was any conflict of interest at that time.

The witness was asked in what capacity he had written the email to the two daughters on 24 August 2010 reproduced at page 77 of Production 2. Was he acting as solicitor for the beneficiaries or as

solicitor for the executors? The witness responded that he could not recall turning his mind to that issue. He was writing with regard to the estate administration.

With regard to page 78 of Production 2, a letter to the Secondary Complainer dated 26 August 2010. The witness said he wrote that letter in his capacity as solicitor to the executors.

The witness was asked if he had taken the complaint letter of 1 September 2010 from the Secondary Complainer (page 80 of Production 2) seriously as solicitor for the executors and the witness responded that he had. He was asked if he had replied to the Secondary Complainer alleviating his concerns. The witness indicated that he had replied on 14 September (page 92 of Production 2). The Fiscal asked him if this was not simply a bald response and asked the witness if he gave the Secondary Complainer any advice about his role as executor. The witness explained that he had told the Secondary Complainer that full enquiry required to be made. He had explained in his letter of 14 September that he was having a meeting with RG. He accepted that he did not say anything at that stage about the executry being on hold. He had considered that the meeting with RG would determine how the executry would progress. He was asked if at this point he considered that the executry was on hold and he answered that he was waiting for the meeting with RG.

The witness was referred to page 96 of Production 2 where at item 12 RG had suggested that *“IRC should consider his position as advisor to both (the daughters) and the executors”* and was asked what the witness thought RG meant by that. The witness indicated that it was recollection that RG was referring back to the concerns raised by the Secondary Complainer. He took it as an outstanding issue. *“One wouldn’t not have regard to such a comment.”* The witness had spoken to one of his colleague and he had agreed that it was not a conflict. The witness had considered it himself but he did say to the Secondary Complainer and the other executors that they could take advice from another firm. He accepted that the matter of conflict was a matter for him to consider as a solicitor. His view was that there was an issue between the widow and the daughters. That issue was going to be resolved by negotiation. He accepted that there was no dispute, it was a conflict between the widow and the daughters as beneficiaries but they were going to negotiate a settlement. That conflict was addressed by RG representing the widow. The resolution of that was going to be negotiated and once that negotiation had been completed then the issues that were troubling the executors such as the ownership of the painting would no longer be an issue as the only real issue was to do with the ownership of the painting was being raised by RG on behalf of his client.

The Fiscal challenged the witness in this regard and suggested to him that the ownership of the painting was also a concern of the Secondary Complainer. The witness agreed that it was his concern at the time. As the witness had said in correspondence they required to try to identify evidence to satisfy the executors that was presented correctly to the executors so that ultimately they were confident in signing off the executry. But that was not an issue that the executors had to address at that particular point. The witness was pointed to page 88 of Production 2 – a note indicating that RG was raising issues with regard to the information from Christies. The Fiscal asked if it was the witness's position that this was not a matter for the executors but one for the girls and the widow. The witness indicated that the facts that had been drawn together to be put to RG were also germane to the executors. He had told the Secondary Complainer that he would be making further investigations.

The witness was asked by the Fiscal whether or not at this point in the executry (September 2010) he had thought it important that the executors have independent and impartial advice regarding the ownership of a disputed asset of the estate rather than have the investigations carried out on behalf of two beneficiaries in order to enhance their claims. The witness responded that at that time the executors did not have to take any decision or take any action in respect of this issue. The investigations the witness was carrying out had to reflect the whole of the background. So the investigations into the ownership of the painting were the same for the negotiations with RG as they would have been for the executors to the estate carrying out their enquiries regarding the assets of the estate.

The Fiscal asked then if the investigations were effectively joint investigations being undertaken on behalf of the executry as well as the daughters. The witness responded that the executors did not require advice with regard to the ownership of the painting at that stage as they did not have to take any action in respect of that. They did not have to take any action until the widow's position with regard to the estate had been resolved. The Fiscal asked if the executors were entitled to impartial advice if at the end of the day they had to sign (stopped the question there). The witness responded "*Yes of course.*" The executors would be fully advised when they were signing their executry forms and the confirmation applications that they were doing so correctly. They were not in a position to do these things at that stage.

The Chairman indicated to the witness that it could be understood that there was a delay while there was a negotiation on the payment of the settlement. However, there was a question of whether or not there should be communication of evidence on which the conclusions of settlement were reached

rather than what seemed to happen here as simply putting to the executors that this was what was agreed and they should just sign off.

The witness responded that Mr McNeill's opinion had been obtained that on the information that was available the painting was part of the Testamentary Trust. And in the end of the day those opinions were made available to Mr Dalglish, the solicitor for the Secondary Complainer. On the basis of all of the opinions obtained the Secondary Complainer signed off on all of the inventories and the testamentary trust showing that the paintings belonged to the trustees and he did that on advice.

The witness's attention was drawn to page 107 of Production 2, an email from him to the two girls. In that email he had made reference to the executors obtaining advice separately, whilst the administration of the estate would remain with Turcan Connell. The witness was asked whether or not he had provided this information to the other executors. He responded that he did so. The Fiscal referred to a letter from the witness to the Secondary Complainer dated 22 October 2010 and reproduced at page 108 of Production 2. She indicated to the witness that in that letter he had referred to the executors receiving separate advice. She asked the witness whether or not he had given any advice to the Secondary Complainer as to whether or not he needed to move solicitors. The witness responded that he had advised that he did not consider that there was a conflict of interest but did advise that if the body of executors thought that there was a need for separate advice then they should do so. The witness did not think it was for him to advise the Secondary Complainer either to do it or not.

The Fiscal referred to page 111, a letter from the Secondary Complainer to the Respondent dated 30 October and indicated that this was the time when consideration of identification of other solicitors starts – but did not ask any question of the witness.

The Fiscal referred the witness to page 117 of Production 2, a letter from him to the Secondary Complainer dated 8 November where he referred to the administration continuing to progress. The Fiscal asked the witness what he meant by that given that he previously stated to the Tribunal that he thought that everything that could have been had been done. The witness indicated in that letter he was talking about the larger picture.

The witness confirmed that he had written the letter of 24 November 2010 RG reproduced at page 118 of Production 2 on behalf of the daughters.

The witness was asked in what capacity he wrote the letter to the Secondary Complainer dated 24 November 2010, reproduced at page 120 of Production 2. The witness responded that he wrote that letter in respect of the Secondary Complainer's position as executor. The Fiscal pointed out that the letter was full of references to his clients the daughters and asked whether or not this was in fact a letter written to the Secondary Complainer in the witness's capacity as solicitor for the girls personally. The witness considered that he was telling the Secondary Complainer what the position was with regard to the executry estate. The executry was being managed. If two of the executors had decided they were taking a certain view opposed to the other two executors then that would be deadlock. The Fiscal asked the witness if he had had a meeting with the executors to break the deadlock or to explain to the executors why this additional expense was unnecessary. He indicated that he did not have another meeting with the executors and denied it was because he was representing the interests of his clients the daughters who would continue to be his clients.

The witness was pointed to page 127 of Production 2, a letter from RG to him dated 17 December 2010. In the penultimate paragraph of that letter, RG questioned whether or not the investigations regarding the ownership of the painting were being carried out on behalf of the executry or on behalf of the daughters. The witness responded that he was acting in relation to both the executry and the daughters as the same information was required for both. He accepted that his instructions for the Opinion of Counsel were purely for the beneficiaries.

The witness was referred to his letter to The Secondary Complainer dated 22 February 2011 and reproduced at page 138 of Production 2. In page 139 of Production 2 the witness referred to Senior Counsel's Opinion. The witness was asked in what capacity he was providing that information to the Secondary Complainer. The witness confirmed he was providing this information in his capacity as solicitor to the executors. He could not see any difficulty with him providing reference to that Opinion, which he had obtained for the benefit of the beneficiaries. He indicated that the investigations he had carried out had been for the negotiations between RG and the two daughters. He was updating the Secondary Complainer and the executors at that stage and they did not require to take a decision.

He was asked if he had the daughters' permission to disclose this information to the executors and the witness responded that he had.

The witness was referred to page 146 of Production 2, a letter from him to RG dated 28 March 2011. He confirmed that he had not had a further meeting with the executors to come to an agreement that issues previously raised in relation to the executry administration would not be considered further

until matters had progressed between the daughters and the widow. The Fiscal asked the witness whether when he referred to an agreement with the executors in that letter that resulted as an assumption on his part about the Secondary Complainer and the widow. The witness responded that he had written to all of the executors advising them that the executry could not be taken forward at that stage pending resolution of the negotiations. The Secondary Complainer had agreed that he should continue with the negotiations with the widow.

The witness was asked whether or not he had sat down with the executors and advised them as to how long the negotiations might take and what might be involved and how they might affect the Secondary Complainer's duties as executor. The witness responded that he had spoken to the Secondary Complainer on several occasions during the negotiations. The Fiscal put it to the witness that in fact what was happening was that he was presenting this to the Secondary Complainer as a *fait accompli* that this was what the daughters thought and this would take precedence. In other words he was just being told and not advised. The witness stated that he did not agree with that assertion.

The witness was referred to page 154 of Production 2, which was the note of a telephone conversation between him and the Secondary Complainer on 31 May 2011. He confirmed that this telephone call was made in the capacity of him being the solicitor to the executors. He confirmed that in paragraph A the Secondary Complainer was still not agreeing with his assessment regarding the painting. That did not present a difficulty at that point as there was no requirement for a decision or signing of any documents at that stage. The Fiscal asked the witness if it was not important that he be given independent and impartial advice about his duties as an executor. The witness responded that he had advised the Secondary Complainer about his duties.

The witness agreed that at page 156 of Production 2 he had said he would update the Secondary Complainer with regard to the negotiations and he did that at page 157 of Production 2 in his letter of 8 June. The witness was asked whether or not he had considered if he had any obligation to give this information given that he was acting for the daughters in their own capacity. He was asked if he had any problem with giving that information. He said he did not.

The witness was referred to page 159 of Production 2, a note of a telephone conversation between him and the widow on 28 June 2011 in which he had told the widow that he could not discuss the widow's own position. The Fiscal asked the witness if that made it difficult for him to speak to her or give her any advice in relation to the executry where he was also acting for two of the beneficiaries in their own

right. He said that he did discuss the executry with her and did not discuss anything that they were negotiating about. He was happy to discuss these things and could see the distinction between them.

The Fiscal asked the witness to consider the letter from the widow to him dated 30 June 2011 at page 161, where she indicated her unhappiness. The witness indicated that he had not seen the difficulty. He did not think there was anything that he had required to advise her on as an executor. She was aware of the content of the negotiations. The Fiscal referred to pages 165 and 167 of Production 2, which were letters to the widow and the Secondary Complainer dated 14 July 2011 advising that the executry was effectively on hold. The witness confirmed that.

The witness was referred to the penultimate paragraph on page 168 of Production 2 and he confirmed that he had previously discussed with the Secondary Complainer that the Secondary Complainer should take his own legal advice with regard to the agreement regarding the painting and how it should be signed off.

The Fiscal asked the witness to consider page 175 of Production 2, an email from the Secondary Complainer to the witness asking what he was required to do as a result of the agreement. The witness was asked whether or not he had responded to this email and he indicated that he had at page 176 of Production 2, an email dated 23 August 2011. When asked whether or not that email actually answered the questions asked by the Secondary Complainer, the witness explained that the email said that he would discuss matters with the Secondary Complainer. The witness then indicated that he had spoken to the Secondary Complainer on 5 September 2011. When the negotiations with RG came to a conclusion, the Secondary Complainer made arrangements for independent advice. The witness had explained to the Secondary Complainer that the executry would pay for that advice. The witness was asked whether or not this was the first time that he had pushed the Secondary Complainer out of the group of executors to take independent legal advice. The witness indicated that he had previously said to the executors that depending on how the negotiations proceeded, advice might require to be taken.

It was put to the witness that he had failed to identify potential conflict right from the start. It was suggested to him that he had adopted the position that favoured his existing and continuing clients the daughters and that that coloured his advice to the executry. The witness did not agree with that assessment. It was then put to the witness that he failed to recognise the actual conflict of interest when it crystallised when issues arose regarding the ownership of the paintings and items in the attic and that he had failed to recognise that the executors should have objective and independent advice.

At this stage Mr Currie asked if the Fiscal would clarify the exact point at which she was suggesting the conflict of interest had crystallised. She responded that this was at the point when the ownership of the paintings, china and silver were subject of dispute between the daughters and the other two executors and the witness had taken instructions from the daughters on 30 April 2010 on ownership. She then corrected herself and said that it was before the meeting of 5 August 2010 and preparation of the item at 60a. At that point where there was a meeting with the two daughters in their individual capacity in advance of the second executors' meeting which lead to a change between the summary and the draft note of ownership and the conclusion in the final report.

There was an exchange between Mr Currie, the Fiscal and the Chairman and the Chairman asked the Fiscal to break down her question and ask the witness if he agreed to each part and then put to the witness whether or not he recognised a conflict.

The Fiscal then went on to ask the witness whether he accepted that the conflict of interest had crystallised at the meeting with the two daughters on 30 July 2010, in advance of the second executors' meeting, where the information provided by them was being used to formulate a report to the executors, which was different to the draft note produced in advance of the meeting on 30 July. The witness responded that this was not correct.

The Fiscal concluded her cross examination and the case was adjourned to the following day.

3 MARCH 2016

RE-EXAMINATION OF IAN CLARK

Mr Currie asked if it was correct that early on in his cross-examination the witness had indicated that it would not be right for him to act for both the widow and the executors. The witness responded that in general where a legal rights claimant makes their claim on the estate then they have to be separately advised to the executors. In this case, the widow already had her own solicitor, RG. The witness was asked why the same solicitor could not act in these circumstances. The witness explained that there was clearly a difference of interests between the legal rights claimant and the estate. The legal rights claimant was seeking to claim from the estate and seeking to maximise the amount claimed. The witness did not think that it was directly to do with the fact that the legal rights claimant was seeking to do something contrary to a provision in the will.

Mr Currie reminded the witness that it had been put to him in cross-examination that he had allowed the daughters' views to colour what he put in the report to the executors. He asked the witness to look at page 10 of Production 2 which was a file note of a telephone call between the witness and one of the daughters on 31 March 2010. At paragraph 5 of that file note the witness agreed that it was suggested that she recalled that the daughters had been gifted this painting by their mother some years ago. Mr Currie then put three possible conclusions to the witness, 1. That the painting was gifted to the daughters. 2. That the painting was part of the Testamentary Trust. 3. That the painting belonged to the deceased. The witness confirmed that the most favourable conclusion was the first, that the paintings had been gifted to the daughters. If that was the case then the painting would not be included in the deceased's estate and would not increase the value of the moveable estate for the purposes of the widow's legal rights claim. If the painting belonged to the deceased then it would increase the value of his moveable estate. That would also have had significant tax consequences. Potentially the painting would have been subject to tax on either the deceased or the widow's death. If the painting was part of the Testamentary Trust then it would mean that there was a substantial inheritance tax liability on the value of the painting at a tax rate of 40%. In other words, the position put forward by the daughter in her telephone call of 31 March was the most favourable outcome for the daughters rather than the one that was concluded upon in the report for the executors in October 2010.

The witness confirmed that he had received the letter from Christies on 16 May 2010 and that the letter from the Secondary Complainer regarding this issue at page 43 of Production 2 was dated 19 June. He also then confirmed that he had written to the widow on 23 June saying that ownership of the painting was something to discuss when the executors met in August.

The witness confirmed that page 47 of Production 2 was a file note of a conversation with the Secondary Complainer on 12 July 2010 when the witness advised the Secondary Complainer that there would be a note regarding the ownership of the painting circulated in advance of the executors' meeting.

Page 49 of Production 2 was a telephone call between his assistant and the widow and paragraph 2 stated that there was an issue of ownership.

Page 52 of Production 2 was an email from the witness to the daughters attaching the draft note which was at page 53. The purpose of the note at page 53 was to ascertain the ownership status of the paintings. The note summarises the possibilities of ownership but does not include any reference to evidence supplied by the daughters. The witness had wanted to obtain further information from the

daughters in order to convert the draft into the actual note for the meeting on 12 August. He had wanted to clarify what their positions were with regard to their ownership and what their personal knowledge was.

The witness was referred to section 2 of page 56 of Production 2 – a file note of the meeting between the witness and the two daughters on 30 July. That file note described in section 2 the conclusions reached with regard to ownership. It made no conclusion as a result of what the daughter had said in her telephone call of 31 March 2010 at page 10 of Production 2 i.e. that her mother had gifted the daughters the painting. As a result of discussions on 30 July, it had been ascertained that this was not correct. The conclusion that the painting was part of the Testamentary Trust was less favourable to the daughters.

The witness was asked to look at the report to the executors at page 60uu, section 3 and confirmed that included information that was not in the draft. It had included at paragraph 3a information that was not favourable to the daughters. The witness indicated that the conclusion at page 60vv was not influenced by the fact that he acted for the daughters. He had given the same advice to both executors and daughters regarding the ownership of the paintings. At the meeting of the executors itself there was considerable discussion about the ownership of the history of the painting as recorded in paragraph 4.1 of the minute of that meeting (page 64 Production 2). It had always been intended to discuss the question of ownership at the meeting. At the foot of page 64 of Production 2 the witness was explaining to the executors that there was not a clear answer. He was saying that the likely answer was that the paintings belonged to the first wife and therefore became part of her trust. The executry were aware that there was not a clear answer but that this was the witness's considered view.

At the meeting of the executors in August the Secondary Complainer suggested that a compromise might be explored (see page 76 of Production 2). It was agreed by the executors that the witness would speak to RG. There was no question at the meeting on 12 August of any of the executors having to take a decision on whether or not to include the painting in the estate. There was no occasion when that decision had to be taken.

Mr Currie concluded his re-examination.

The Chairman asked the witness if there was anything in his witness statement lodged with the Tribunal that he would not want the Tribunal to regard as his evidence. The witness confirmed that was his evidence.

A member of the Tribunal asked for clarification regarding the will and noted no copy of the will had been produced. It was pointed out to the witness that in his statement he included the widow in the pool of beneficiaries but this was not included in the Memorial for the Opinion of Counsel. The witness confirmed that the pool of beneficiaries included the widow, the two daughters and the children of one of the daughters. This was an open-ended discretionary trust with the choice of beneficiaries as previously stated.

A member of the Tribunal asked the witness whether it was wrong to say that the daughters were actual beneficiaries as they were only potential beneficiaries. The witness agreed that the daughters were simply in the class of potential beneficiaries. The witness confirmed that the executors would also be trustees under the trust.

A member of the Tribunal asked the witness to clarify if in fact the dispute was between the executry and the widow, as any potential legal rights claim would be against the estate. The witness confirmed that the claim would be against the executry but that the negotiations were carried out between the widow and the daughters. Although they were only potential beneficiaries, it was recognised that they were the intended beneficiaries. There were two parties to the negotiations – the widow and then the two daughters.

A member of the Tribunal asked the witness if the Secondary Complainer was expecting separate advice as an executor. The witness confirmed that he was in fact at some times providing such advice.

The witness confirmed that the settlement agreement was between the widow and the daughters. The agreement was to be executed by the executors. A member of the Tribunal asked the witness whether or not the settlement must have been between the executors and the legal rights claimant. The witness confirmed that the widow gave up her legal rights claim, accepted her liferent under the will and then gave that up. Separately the daughters made a capital payment to the widow.

During the course of negotiations, no decision had been taken with regard to ownership. After the settlement of negotiations, then tax returns and inventories were completed. The executors were satisfied as to ownership and the Secondary Complainer signed off the inventories having taken legal advice.

A member of the Tribunal asked the witness to clarify if executors have to sign a declaration. The witness confirmed that the executors and the trustees accepted that the paintings were part of the Testamentary Trust. They had to be satisfied with regard to ownership before they could sign the papers for confirmation. The executors had to be satisfied that that was the correct conclusion.

A member of the Tribunal asked the witness if he was satisfied that matters had been handled the right way round. The witness indicated that it was part of the negotiations that it was put forward by the widow that the painting was owned by the deceased. In the course of negotiations she withdrew that claim.

A member of the Tribunal asked the witness whether there were any time limits for the executors submitting returns. The witness confirmed that there are time limits but there are no substantial penalties for late returns. The fact was that the return could not be made until these matters were resolved.

Mr Currie was allowed to ask the witness a further question and the witness confirmed that when settlement was reached it was arranged that the Secondary Complainer could consult a separate solicitor.

In response to a question from a member of the Tribunal, the witness confirmed that the widow did not actually make a formal claim for legal rights. He confirmed that the widow having withdrawn her claim as a result of negotiations the only option was that the paintings were part of the Testamentary Trust.

The Chairman asked the witness why he thought the Secondary Complainer considered it necessary to take separate legal advice. The witness answered that he could not talk to the Secondary Complainer's thoughts.

The Chairman asked the witness why he thought it necessary to recommend that the Secondary Complainer take independent legal advice. The witness responded that he thought that on his own part and it was the advice of James McNeill.

The Chairman asked if that was because the witness considered that it was thought that his advice was not wholly independent. The witness responded that the Secondary Complainer had already expressed

concern. The Secondary Complainer was the only executor not involved in the negotiations. The widow was getting her own legal advice.

The Chairman asked the witness if it could be concluded as a fact that the Secondary Complainer was concerned with regard to the advice that the witness was giving. The witness agreed that the Secondary Complainer was concerned.

In response to a question from the Chairman, the witness agreed that he would not act for both the executry and a legal rights claimant where the claim was being made. The Chairman asked the witness if in reality it was only the daughters who were resisting the claim. The witness responded that that was correct as they were the residuary beneficiaries.

The Chairman asked the witness why it was permissible for the him to act for the executry and for the daughters but not for the executry and the widow. The witness explained that there were a collection of claims made by the widow to establish a capital sum which at the end of the day was going to be funded by the daughters. The negotiations were with the daughters. The executors had no interest in these negotiations.

The Chairman asked the witness, if the executry was on hold, why did he say he could not act for the widow and the executors but he could act for the defenders to the widow's claim and the executors. The witness indicated that he did not consider there was a conflict of interest between the executors and the daughters.

The Chairman asked the witness if he could see a conflict between the widow and the executors and the witness said he did.

The Chairman asked the witness if he thought that his seeking advice from a colleague with regard to the question of conflict raised the issue that another might perceive that there was a conflict. The witness did not accept that. He said that it was his practice to take advice from a colleague where there was something unusual or not straightforward.

The Chairman asked the witness if the very fact of consulting a colleague was acceptance of the risk that someone might hold a different view. The witness responded that he was concerned to ensure that he was acting properly and that it was not just his view that there was no conflict so he had consulted with his colleague and with James McNeill and they had both confirmed his view.

In answer to a question from a member of the Tribunal, the witness confirmed that there was no written note of his consultation with the colleague. When asked to explain why, the witness responded that he just did not take a note of it.

The Chairman asked the witness if he accepted that he had fiduciary duties to his clients and he answered that he did. The Chairman asked the witness what would happen if the information he had gathered about the paintings had been against the interests of his clients the daughters. Would he have told the executors or kept it quiet. The witness responded that he thought the actual factual situation gave the answer to that question as information that was not favourable to the daughters was disclosed i.e. that there was no evidence that the paintings had been gifted to the daughters.

The Chairman asked the witness whether earlier in his statement he accepted that there was a risk of conflict in this type of situation. After a brief adjournment that question was withdrawn. The Chairman rephrased the question and asked the witness whether whenever a solicitor acted for two clients there must always be a potential for conflict. The witness agreed and explained that a conflict did not crystallise at any time.

A member of the Tribunal asked the witness to explain what he meant when he said that the executry was on hold. It was suggested to the witness that some administration must have continued for the engathering of information for the inventory e.g. investment information or tax matters.

The witness responded that by the second meeting of the executors they had identified all of the executry assets. The estate investments were being managed on a discretionary basis. Until the executors were in a position to apply for confirmation there were no decisions to take. RG had asked at one stage if he could speak to Christies with regard to the valuations and the witness had written to the executors to get their agreement for that. Otherwise, there was nothing substantive that required to be done.

When asked if he thought that it needed to be on hold, the witness responded that it could not be anything else but on hold.

The witness was asked if the fact that the executry administration was on hold was a factor in his decision that he could act for the daughters and the executors. The witness was asked whether it was his position that there was no conflict because the administration was on hold. The witness responded

that the executors did not need to take a decision on anything until the conflict between the daughters and the widow had been resolved. Nothing could be done by the executors pending that.

WITNESS TWO – DONALD BREMNER REID

The witness gave evidence under oath that he was 65 and was a partner in Mitchells Robertson. The witness confirmed that he was content to adopt his report of 24 February 2016 as his evidence subject to exclusion of the last sentence on page 5. The witness agreed that he was confident to give expert evidence on the issues of practice raised in this case although he did not market himself as an expert.

The witness agreed that he set out the issues to do with the widow at the top of page 4. The witness agreed that it was his assessment that if there was an agreement between the widow and the daughters then there was no interest the executors required to protect. That was the context in which the Respondent's conduct had to be viewed.

The witness confirmed at the last paragraph of page 5 where he indicated "*This happens all the time.*" This was expressed as a view as a result entirely from his own experience. It was something that he had encountered throughout his years in executry work. There was nothing that he had heard in evidence in regard to this particular case that took the case out of the practice to which he had referred.

The witness confirmed that it was his position that there was no conflict between the daughters and the executors when negotiating the settlement. The witness was asked whether he considered anything had occurred between 27 July and 12 August which changed his view that a conflict of interest had crystallised. The witness responded that from his reading of the papers and files, nothing had given him anything to answer that question positively and nothing he had heard in the evidence did either.

Mr Currie asked the witness if the difference between the draft report for the executors' meeting and the final report for the executors' meeting indicated a conflict. The witness responded that the draft report was not the Respondent's advice. He had adjusted the draft in relation to information he had obtained. Once adjusted, the report became his advice. To this witness that was all that had happened and he was not sure what to say about conflict as such.

The witness was referred the second paragraph of page 12 of his report and the witness confirmed that the term "*A solicitor of ordinary skill acting with ordinary care*" was a phrase he was used to using in his reports but that could be rephrased as "*A solicitor of reasonable competence.*"

The witness agreed that it could have been expressed as a solicitor of reasonable competence could have exercised their judgment with regard to the conflict of interest in the way the Respondent had.

The witness was then referred to page 13 of his statement. The witness was asked if it was his understanding of the Sharp case that it called for an assessment of the conduct by a hypothetical peer and the witness responded that was his understanding.

CROSS-EXAMINATION

The Fiscal pointed the witness to the penultimate paragraph on page 7 of his report where he stated "*The executors would be spectators only*". She asked the witness if that was what executors were i.e. just spectators. The witness explained that was not what he was saying in his report. This was a situation where the executors had gone as far as they could. The executry was on hold pending negotiations taking place between those affected by the outcome of the negotiations. The executors had no part to play in the negotiations themselves and that was what he meant by referring to them as spectators. The executors did not have a role to play until the negotiations were concluded.

The Fiscal referred the witness to page 8 of his report where he made reference in the second paragraph to the executry being effectively on hold. He was asked what that meant. The witness explained that nothing else could happen until the contingency in play could be resolved. He thought the phrase on hold was a descriptive term rather than a prescriptive term. It described a factual position and not a formal decision like a stay in a court action. It did not matter whether the lay person who was the executor knew it or not. The fact was that matters had been taken as far as they could and no one was unaware of what the facts were.

He was asked whether or not the Secondary Complainer as a non-solicitor would be expected to understand this. The witness responded that the Secondary Complainer was kept advised. Eventually the term "*On hold*" was used. The phrase however only describes the facts. In his experience the phrase would only be used after some water had gone under the bridge. The witness accepted that giving information from time to time was effectively acting on behalf of the executors. The witness was asked how he could reconcile continuing to act for the executry at the same time as representing the individuals in the disputed issue. The witness said he was trying to think of an example by way of an analogy. He then described a situation of his caravan being out of use for the month of February because of rules of the caravan site. Someone would still require to check that the water pipes did not

burst etc. He did not know what had happened here specifically but as an example, say a date came up where an investment had reached an end and needed to be reinvested. That matter could be routinely dealt with without involving the issues being negotiated. Determining the issue of ownership was important for the executors but it was not necessary until negotiations were completed and the proposed outcome was put to the executors. It would have been open to them to ask if this outcome was consistent with their duties. They had a duty to ensure that they could with a clear conscience sign the inventory as containing the whole estate.

The Fiscal asked if it was not appropriate to identify the contents of the inventory first and whether the question of ownership should have been ascertained before entering into discussions. The witness responded that this had been done in the form of the draft inventory with the report for the August meeting. Everything proposed to be included in the inventory of the estate was in the report at the meeting.

Mr Currie confirmed that he had no re-examination.

The Chairman asked the witness if he was called upon by the profession to give opinions in the questions of trust and executries. The witness confirmed that there was a case last week where he had given an opinion in Edinburgh Sheriff Court. The Chairman asked him to confirm whether or not it was a case about the winding up and administering of an estate or whether his opinion was more related to the property based in the estate. The witness indicated that the case was more to do with the interpretation of the will. The witness said that he offered this as an example but in general he is called upon to give opinions in this area. The Chairman asked if that was with some frequency and the witness responded “no”. He would have to review some 675 cases where he had provided an opinion as a number of them would have an overlap with estate matters.

The witness confirmed that he had not written any books or articles on the subject although he may have given some seminars.

The witness confirmed to the Tribunal that the executors do not have as long as they like to obtain confirmation. They are under a duty to act with reasonable despatch. The witness was asked by the Chairman if he had any knowledge of the number of cases where practitioners were the subject of claims for losses sustained after the 2008 crash as a result of delay in giving advice regarding portfolios of investments. The witness confirmed he only had an academic knowledge of this subject.

The Chairman asked the witness if it was not possible that in this case where an independent executor allowed matters to be delayed because three other executors wanted to resolve a personal dispute, the independent executor was at risk from the delay. The witness said that there was no such risk in the slightest in this case although it would have been possible if there had been another beneficiary.

The Chairman pointed out to the witness that there were children in this case who could have been elected as beneficiaries and the Tribunal had not heard anything about the children's interests. The Chairman asked if their potential benefit was put at risk. The witness responded that there was no risk to their potential benefit as the delay had been necessary. There was no way round this delay. Matters needed to be resolved.

The Chairman put it to the witness that delay in seeking confirmation could have been avoided and instead delay could have been in dispersal. The witness responded that in order for that to have worked there would have needed to have been agreement on the draft inventory. The executors would have required to have been satisfied that nothing needed to be added to the inventory. The negotiations here could potentially have had different outcomes affecting the tax return for the executry. Good faith is important in this area. There are plenty of cases where confirmation has been granted in good faith but then something else has been discovered.

The Chairman asked the witness if in this case where quite early on three scenarios had been known, if the executors had signed off on something would it not have been difficult to argue otherwise. The witness responded that it needed to be known whether or not the liferent was going to be accepted as that affected the tax exemption. Proceeding to confirmation would not have been sensible. Even in hindsight, a year is not that much of a delay from his experience.

A member of the Tribunal asked the witness if executors have duties to the whole beneficiary pool. The witness agreed that was the case. The witness was asked whether or not there were complications where the beneficiary pool has not been identified. The witness answered that in this case they had been identified. He did however agree that an actual selection of beneficiaries had not taken place.

A member of the Tribunal asked the witness to consider if there was an alternative to what had happened here. Here negotiations had taken place between the agents for the potential beneficiaries. The alternative was that agents for the executors would negotiate with an agent for the potential legal rights claimant. The witness responded that if the only thing that was in play is if a legal rights claimant is going to claim then the negotiation of that would take place between the solicitor for the

executors and the solicitor for the legal rights claimant. The difference with this case was that there was no actual claim for legal rights. This case involved a different set of circumstances for negotiation where the only thing in play was whether there would be a claim for legal rights.

The witness was asked by the Tribunal to comment on the circumstances in this case where the agent for the executors did not advise the independent executor on the terms of the settlement so as to confirm its accuracy for the inventory for confirmation but suggested that they executor took independent advice. The witness responded that he believed that the suggestion of taking independent advice was in response to the strident expressions of concerns by the Secondary Complainer. It was sensible that he gain full reassurance from an independent advisor. If he had not been expressing these strident points then it was this witness's experience that the settlement would simply have been signed up to. The reporting of the outcome of negotiations would have been made to the executors confirming that the content of the draft inventory they had already seen was in fact correct.

A member of the Tribunal asked the witness to comment on whether this was an independent executor wanting reassurance from a solicitor not involved in the negotiations that the conclusions were correct. The witness confirmed that this was the independent executor's prerogative and that it appeared sensible in the terms of man management for that step to be taken.

A member of the Tribunal asked the witness if he saw any possibility of conflict where a solicitor involved in the actual negotiations was also advising the executors who were separate people as to the propriety of the conclusion of the negotiations. The witness said he saw no difficulty with that.

The Chairman confirmed with both parties that there were no further issues arising and Mr Currie confirmed that he was closing the case for the Respondent.

SUBMISSIONS FOR THE COMPLAINERS

This matter is presented by the Law Society on the basis that the conduct of Ian Clark on the basis of the facts stated and admitted and on consideration of the file of documents created as the contemporaneous record breached the Duties arising from the 2008 Code of Conduct as specified in the Record at Article 5.2. The Tribunal is asked to find on that basis that he has been guilty of professional misconduct.

In Sharp-v-The Law Society of Scotland 1984 SC 129, the Lord President (Emslie) held, in construing the corresponding provision at the time to Rule 4 of the 2008 Practice Rules, that:

"Section 20 (3) means precisely what it says. A failure on the part of a solicitor to comply with a relevant rule may be treated as professional misconduct . . . whether such a failure should be treated as professional misconduct must depend on the gravity of the failure and a consideration of the whole circumstances in which the failure occurred including the part played by the individual solicitor in question."

In the case of Sandeman-v-The Council of the Law Society of Scotland [2011] CSIH 24, an appeal following upon the Decision in the Complaint by the Law Society of Scotland-v-Sandeman, Lord Reid at paragraph 14 stated:

"14 Whether the petitioner's conduct amounted to professional misconduct appears to us to be less clear-cut. In the case of Sharp, the court emphasised at pages 134 and 135 that whether a failure to comply with a relevant rule should be treated as professional misconduct must depend upon the gravity of the failure and a consideration of the whole circumstances in which the failure occurred, including the part played by the individual solicitor in question. Although the court's reference at page 135 to a departure from expected standards which "would be regarded by competent and reputable solicitors as serious and reprehensible" is not to be treated as if it were a statutory definition, it draws attention to the importance of the gravity of the misconduct and the degree of culpability of the solicitor in question, as they would be regarded by competent and reputable solicitors. It also makes clear that the assessment is based on standards held by the profession itself. It follows that, as Lord Clyde observed in Roylance-v-General Medical Council (No. 2) [2000] 1 AC 311 at pages 330–331, a professional disciplinary committee is well placed in the light of its own experience, whether lay or professional, to decide where precisely the line falls to be drawn in the circumstances of particular cases, and their skill and knowledge require to be respected."

When the Tribunal look at the whole circumstances here, even with the evidence of Mr Reid, it is for the Tribunal to decide if the conduct discloses that this is a grave failure.

From the start it was in his interests and those of his firm to keep the daughters as ongoing clients and that is what coloured his whole approach to the other executors. From the start he failed to recognize the potential conflict although well aware of the issues within the family from his previous involvement. When a real conflict arose in which he could not properly advise the executors on an

independent basis he ignored the duties he had to the executors as a body as is illustrated in the middle of file references and the ambiguity in relation to the capacity in which he was writing letters.

The persons who required to decide what action to take in the face of an apparent dispute as to whether the picture formed part of the deceased's estate were the Executors, they would be responsible for submitting the application for Confirmation, and in relation to that decision they were entitled to look to the Respondent for independent and impartial legal advice. Their interest in the deceased's estate was not proprietary, but rather administrative. They stood in the shoes of the deceased and their duties were to ingather his estate and distribute it to those entitled in terms of his will.

If the parties were able to agree amongst themselves when the question of ownership of the picture first arose, that it either did or did not form part of the deceased's testamentary estate, then the potential for conflict would have abated. However, the question of ownership went on unsettled for many, many months. RG on behalf of the deceased's widow argued with the Respondent that it did form part of the deceased's testamentary estate, while the Respondent carried out investigations and consulted with Senior Counsel on behalf of the deceased's daughters with a view to fortifying the case that the picture formed part of the property of the deceased's first wife's Testamentary Trust. That was a position he had decided upon a long time previously at the undisclosed meeting with the daughters and the Draft Note on Ownership on 30.7.10.

No-one seems to have been advising the Executors as a body as to what, if anything, they should be doing in the face of this ongoing dispute. There do not seem to be many actual meetings of the Executors during this period. There is certainly no record of a meeting at which any decision was taken to put the administration of the Executry "*on hold*". The Respondent admits in Answer 4.6 that the Secondary Complainer looked to him to advise on Executry issues, and one of those issues was that of the ownership of the picture. The Respondent could not provide the Executors as a body, of which the Secondary Complainer was a member, with unconflicted advice about that issue whilst he was actively advising the deceased's daughters, in their capacity as beneficiaries.

The concept of conflict of interest is not defined in the 2008 Practice Rules, and nor is a definition attempted in the 2011 Practice Rules which succeeded them (in the Guidance Notes to Rule B2.1 (Conflict of Interest) of the 2011 Practice Rules it is observed of conflict of interest that "*it has been said that it is hard to define but you know it when you see it*"), but one familiar formulation of the concept quoted in the Guidance Notes is that a conflict exists: "*if you would give different advice to different clients about the same matter.*"

In the *Decision of the SSDT on the Complaint by the Council of the Law Society of Scotland against C.D.R. Whittle, Solicitor*, in which an Interlocutor sustaining the Respondent's plea to the relevancy and dismissing the Complaint was issued on 21 May 2014, the SSDT in the circumstances of that case expressed the view that:

"when acting for two clients a conflict of interest situation occurs when a solicitor either withholds giving advice which he would give if he were acting on behalf of an individual client or gives advice to one client to the prejudice of the other client [at page 29]."

There is a short discussion of the topic of conflict of interest in the context of Executries and Trusts which appears in *Law, Practice and Conduct for Solicitors (2nd Ed.; 2014)* by Bruce Ritchie and Alan Paterson at paragraph 7.18.02 with the broad statement, for which no authority is cited, that:

"Any beneficiary, including one who is also an executor or trustee, who seeks advice about their personal interest in the estate should be referred to another firm of solicitors."

In the *Decision of the SSDT on the Complaint by the Council of the Law Society of Scotland against A.D. Mackie, Solicitor*, issued on 8 October 2014, the respondent pled guilty to a complaint relating to conflict of interest in which he acted for the Secondary Complainer who was: (a) a beneficiary of an estate of which the respondent was himself one of the executors, and provided legal advice to the executry, and (b) had been the tenant of commercial premises of which the executors were the landlords. The SSDT found at paragraph 8.14 that:

"it was difficult to see how legal advice could have been provided by the Respondent to the Secondary Complainer in an independent form. A review of the file maintained by the Respondent reveals that he negotiated with other executors on behalf of the Secondary Complainer. Email communication was sent from the firm and correspondence was sent by the Respondent on his firm's headed notepaper. It is clear that he was acting in his capacity as her solicitor and the Secondary Complainer was entitled to understand that he replied to her enquiries in that capacity. He acted in this fashion at a time when he, as an executor himself, was providing legal advice to the executry. The Respondent's duty in that capacity was to administer the estate and to advise the executors. There was a direct conflict of interest between the estate and the Secondary Complainer. There was a direct conflict of interest for the Respondent to provide advice to the Secondary Complainer and to negotiate on her behalf."

Jane Ryder, in *Professional Conduct for Scottish Solicitors* (1995) suggests at page 61 that, in relation to conflict of interest, "*The critical test is whether the solicitor can adequately discharge all duties to his or her respective clients equally.*" The argument here is that the Respondent placed himself in a situation where he could not.

The Respondent, in his Answers, argues that whilst the deceased's widow and daughters were engaged in attempting, through their respective legal advisers, to negotiate an agreement which would resolve not only the issue of the ownership of the picture but also settle their respective claims on the deceased's estate, "the administration of the Executry was effectively on hold." Who decided that? Who discussed it with the two executors who were not personally clients of the firm or openly with the full set of executors? That was not done. It was the unilateral decision of the two daughters, a *fait accompli*.

I do understand that if the deceased's widow and daughters, all being fully *capax*, were to agree *inter se* a post-death variation of the division of that part of the deceased's estate to which they were entitled from that contemplated in his will, the deceased's Executors as a body would have no standing to object thereto.

The matter of the ownership of the paintings, plus the issue of the china and silverware was, however, one in which the Executors as a body, and the Secondary Complainer as one of their number, had a very direct interest as the persons responsible for identifying the extent of and ingathering the deceased's estate, and this is where a conflict of interest situation arose.

The Respondent was acting for the deceased's daughters alone when he investigated and took the advice of Senior Counsel in relation to the issue of the ownership of the picture and entered into negotiations with RG on behalf of the deceased's widow in connection with that. The Secondary Complainer, in his capacity as one of the body of Executors, had no entitlement to insist on being consulted about what passed between the Respondent and his clients, the daughters as beneficiaries, and between the Respondent, on behalf of his clients, the daughters as beneficiaries, and RG, on behalf of the deceased's widow as beneficiary. But it is precisely because the Respondent was so acting on the daughters' behalf that there exist grounds for pursuing the Complaint that the Respondent acted in a situation of conflict of interest.

In the *Whittle* case the fact that the Secondary Complainer had been advised by the respondent to take independent advice from a matrimonial solicitor and that she had acknowledged that she had taken

such advice, was considered by the SSDT to be a factor which made it: "*impossible to declare the [respondent's] conduct serious and reprehensible, even if it had been of the view that there had indeed been a conflict of interest in the [conveyancing] matter in which the [r]espondent was instructed [at page 29].*"

That did not happen in the circumstances of this case. The advice from Mr D came after the event, and in particular long after the Secondary Complainer was sidelined without proper consultation or advice about his position as executor. Without having any advice about the executry being on hold, the consequences of that and the effect on him in his capacity of executor. It was also in the face of his repeated objections which he was led to believe were being taken on board and acted upon when the respondent indicated he was prepared to step down as solicitor for the executors.

Solicitors as agents have a loyalty obligation to represent their clients to the best of their abilities, and, from their fiduciary obligations, not to abuse the trust and confidence of their clients. The client has to be able to look to the solicitor for independent and impartial advice which is seen to be such. A solicitor cannot act for a client and withhold any information that he has. If a solicitor persists in acting when a conflict of interests arises he displays a disregard for his responsibilities to at least one of his clients. That is what I say was done by the Respondent.

It is true that on the legal rights issue the conflict lay as between the beneficiaries and with the widow having separate advice that conflict between the beneficiaries was answered. It was not so with independent and impartial representation given to the group of executors as a body. It is on that basis that I ask the Tribunal to consider that the Sharp test has been met.

The Fiscal accepted that there were other questions raised by the Tribunal regarding other issues. The pool of beneficiaries included the children of one of the daughters and this was clearly a relevant issue. The facts of the case were all before the Tribunal.

The matter of the gravity of the conduct was a matter which the Tribunal with the experience it had required to decide upon.

The Chairman asked the Fiscal what her position was with regard to the evidence of Mr Reid.

The Fiscal accepted that the witness's expertise came from his experience and involved practice he had undertaken himself. She did not accept that he was in any position superior to any other practitioner in

this field. This was not his speciality. He purely had 40 years of experience. She found it difficult to understand some of the evidence he had given in particular his description of the executors as spectators and the suggestion that executors stand aside whilst beneficiaries decided on the value of some of the elements of the estate. The witness accepted that executors had their own duties. The Fiscal was not confident that the witness's evidence was acceptable. She certainly did not accept him as an expert witness.

The Chairman asked the Fiscal if she could point to any evidence that the Respondent had provided partial advice to the executors. The Fiscal responded that she was not suggesting that the Respondent had acted in any way in a dishonest fashion or that he had tried to misrepresent the situation in any way. She had no evidence that the Respondent had provided partial advice to one client to the detriment of another.

The Chairman asked the Fiscal if she was submitting, whether or not she had any evidence that the Respondent had favoured one client over the other, if that could be perceived then that would be sufficient for a finding of misconduct. The Fiscal said she could not say that.

The Chairman asked whether or not the fact that the Secondary Complainer expressed difficulty in accepting that the Respondent could give impartial advice was enough as a finding for professional misconduct. The Fiscal explained that was not and that the Tribunal require to look at the whole context where he was then not given any advice.

The Chairman asked the Fiscal in a situation where it was a breach of fiduciary duty to not give impartial advice, did it become a matter of misconduct if he did not give advice at all? The Fiscal responded she thought it was if a person was continually raising a question regarding a conflict and it is not fully explained or advised upon. The main valuable asset in this estate would have an impact on the way that the executry was going to be managed. The word she would use was "*side-lined*". It would appear that the Respondent had a preference for the ongoing clients compared to this individual raising objections and raising the existence of the dispute.

The Chairman asked if this was not more a question of IPS with a solicitor failing to keep a client advised rather than providing advice that was in favour of another. The Chairman asked the Fiscal if there did not have to be an actual conflict before this impinged upon the Respondent's professional duties. The Fiscal submitted that the crystallisation of the conflict occurred at the end of July/beginning of August 2010.

The Chairman asked the Fiscal what the Respondent had actually done at that point in time that breached his duty to the executors. The Fiscal responded that he had proceeded down the line of carrying out investigations that had an impact upon the executors and exercise of their duties, on behalf of only one side.

The Chairman asked the Fiscal to consider whether if the Respondent had not acted personally for the two daughters, he would have required to speak to them in any case in order to ascertain which of the three options applied with regard to the ownership of the paintings. She responded that he would have to speak to all of them, not just the two girls. The Secondary Complainer was a family friend who had been responsible for the trust. The widow had been the deceased's wife for a period of time. The daughters would have been included in that.

The Fiscal accepted that The Secondary Complainer gave information to the Respondent by way of a note and that the Respondent had taken that into consideration.

A member of the Tribunal asked the Fiscal if she was suggesting that a solicitor could breach the rules of conflict of interest by omission. The Fiscal responded that this required a conscious decision. She submitted that the Respondent never thought about it sufficiently well at the time to discharge his duty to the executors because he had taken the decision that he was going to act for the two daughters.

A member of the Tribunal asked the Fiscal whether or not if she was saying the failure to give advice was misconduct then she was arguing that misconduct was founded by omission. The Fiscal responded that this was not a passive matter. This had been a positive decision by the Respondent that he was going to put that duty to one side. It was the Fiscal's position that his decision to put aside the issue of giving advice to the executor was sufficient. The Respondent had been in a potential conflict situation and by not taking any steps over that period of time to deal with the concerns raised by The Secondary Complainer he was effectively omitting to act.

The Chairman asked the Fiscal how it could be a conflict of interest if as here the Respondent identifies the least favourable option to his other clients and advances that to the executors. The Chairman suggested to the Fiscal that she required to assist in demonstrating the passage from a potential conflict to something demonstratively representing an actual conflict. The Tribunal adjourned for lunch and to allow the Fiscal to consider this question.

On reconvening, the Fiscal submitted that a conflict of interest was not a situation of inaction or action. It was a situation where duties require to be reconciled. By failing to address the conflict duties misconduct could happen.

A dispute had arisen within the body of executors. There were four people as executors and the Respondent was in the capacity of their solicitor as a body of executors. The usual duties flow from that. In the very early days there was a potential for dispute within that group with potential significant consequences for each of them within that body, not just as executors and as beneficiaries but as far as the Secondary Complainer was concerned he was also the sole trustee for the Testamentary Trust. That potential for dispute became a live issue. There were different positions for the executors. The two girls were two beneficiaries of the trust and of the will. The widow was a beneficiary of the will but also had her potential legal rights claim. The Secondary Complainer was an executor under the will and also a trustee for the Testamentary Trust. The Tribunal require to look at the whole circumstances to identify exactly what the Respondent did. He did not initially disclose that he held separate instructions. It had been raised that he placed information in the report to the executors which was not the best position for his clients. She submitted that the conclusion at the end of the report to the executors was not suggestive of there requiring to be further investigation. The benefits of that to his actual clients were that if the asset was part of the Testamentary Trust then they would not be subject to the claim for legal rights by the widow. This was the position that had been agreed in the meeting with the two daughters on 30 June 2010. The Fiscal asked the Tribunal to look at the records/minutes of the executors' meeting – the one reproduced at page 64 of Production 2 was the minute kept by the Respondent. There the issue of the painting being part of the trust is noted as being queried by The Secondary Complainer. In MA's note of the meeting that is reproduced at pages 69-70 of Production 2 this is recorded in more detail and a much more emphatic position is put forward by the Secondary Complainer. In paragraphs 2 and 3 of page 70, the Secondary Complainer is clearly disputing that conclusion. At that point as executor and trustee for the Testamentary Trust the Secondary Complainer was not accepting the position put forward and was expressing that there was a conflict of interest and that he did not think that the Respondent could give objective and independent advice to the executors.

The Respondent did not pay heed to this line of conflict. The Respondent recognised the conflict between the widow and daughters but did not recognise the conflict with the independent executor and trustee of the Testamentary Trust. The Respondent continued to act as agent for the executry at the same time as being objected to by the Secondary Complainer. He continued to make enquiries to advance the position of the daughters at the point that they entered into negotiations. Right through to the very end the Secondary Complainer maintained his position. He was not actually afforded

independent advice until the end of negotiations. He was not actually given a copy of Counsel's Opinion.

Throughout that period, whilst still being solicitor to the executry, the Respondent could not fulfil his duty to the Secondary Complainer because of the ongoing conflict. The Fiscal invited the Tribunal to look at the exchange of correspondence with the widow. In that for instance the widow questions the capacity in which the Respondent was looking at the deceased's papers in the estate house. The Respondent answered that it did not matter because all interests were the same when in fact they were not.

SUBMISSIONS FOR THE RESPONDENT

Mr Currie lodged a list of authorities for the Respondent. He invited the Tribunal to hold that the Respondent did not breach either Rule 6 or Rule 9. If there had been a breach, that breach did not constitute professional misconduct and at worst, was an error of judgement on what different views could be held.

Mr Currie submitted the Fiscal had made no submissions with regard to Rule 9 and so he invited the Tribunal to dismiss that ground of the complaint. No motion being made by the Fiscal in relation to a breach of Rule 9, the Tribunal should dismiss that part of the complaint now.

He invited the Tribunal to hold that the Respondent had given his evidence clearly and candidly and had attempted to help the Tribunal. He invited the Tribunal to accept the Respondent's evidence.

He invited the Tribunal to hold that Mr Reid was qualified to give the Tribunal evidence about practice in the areas of executries. He invited the Tribunal to entertain his evidence in two areas:-

1) He was a solicitor experienced in Executry matters. No witness had been led by the Law Society to contradict Mr Reid's evidence of practice. If a solicitor with his experience would have made the same judgement as the Respondent, then the Tribunal should be slow to hold that there was a conflict of interest.

2) If there had been a breach of any rule here, then the Tribunal require to consider if that breach was serious and reprehensible. The Tribunal requires to put itself in the position of a peer of the Respondent. The evidence of Mr Reid was relevant in that regard.

Mr Currie wished to begin his submissions in relation to the question of conflict of interest. He required to address a number of preliminary issues. Firstly, the complaint does not allege delay. There had been no unreasonable delay, and what delay there was, occurred because the executry could not be concluded until it was confirmed whether the widow was insisting on her claim for legal rights.

The later generations of beneficiaries were not part of the complaint before the Tribunal. No part of the complaint is directed to a conflict of interest with the future generations – there was no suggestion in the complaint that future generations were being improperly treated.

It was no part of the complaint that the widow, her solicitor and the solicitor for the Executors had had discussions.

Mr Currie was concerned to hear the Fiscal suggest that the Respondent may have been motivated by financial interests of the firm. It was not part of the complaint and was not put to the Respondent. He invited the Tribunal to disregard that comment.

It was not part of the complaint that the Secondary Complainer was the Trustee of the Testamentary Trust and so the Tribunal should disregard that.

No submissions were made regarding Rule 9 and it was his motion that the Tribunal should disregard that.

Mr Currie suggested that there was a lack of how the question of conflict of interest was raised in the Record. There was no averment anywhere in the complaint of any potential conflict. It only referred to actual conflict of interest.

Mr Currie drew the Tribunal's attention to what he described as the two most pertinent areas of guidance regarding conflict of interest. Firstly, he suggested that the Stair Memorial was a useful template and asked whether the Respondent had found himself in a position where he had to give different advice to different clients. Mr Currie submitted that he had not. Mr Currie submitted that the Fiscal had not applied her mind to this test at all.

The second area of guidance he pointed to, was in the case of Whittle previously referred to by the Fiscal. There was no basis to hold that the Respondent had withheld advice that he would have given

if he had only been acting for one of the parties. Nor was there evidence that he gave advice to one client in preference of the other.

He submitted that the cases referred to of Mackie and Sandeman were no assistance to the question of where a conflict may occur. Sandeman was relevant to the question of serious and reprehensible misconduct. The references to Ryder and Patterson and Ritchie were too widely stated and were stated without any reference to authority.

No conflict ever rose out of the Respondent acting for both the executors and the daughters. At no stage did the executors require to take a decision on ownership of the painting until formal matters needed to be attended to towards the end of 2011. At that point, the Secondary Complainer took advice from Mr D of Brodies.

The issue of who owns the painting was taken out of the executors hands when the executors, including the Secondary Complainer, agreed that the Respondent should endeavour to come to an agreement with RG about the matters. It seemed that the advice that the Secondary Complainer did or did not get was the focus of the case. Mr Currie referred to page 75 of production 2 for the Complainers where actually at page 76 the Secondary Complainer refers to there being a possible compromise. He submitted that The Secondary Complainer was a prime mover in instructing the Respondent to seek to resolve the issue of ownership of the painting. That which he encouraged bore some fruit about a year after negotiations began with RG. Mr Currie referred to page 167 of Production 2 for the Complainers and submitted that as had always been intended, the Secondary Complainer was advised to take advice that the arrangements agreed were in order. It was important to note that the Secondary Complainer had been a prime mover of these negotiations. The suggestion seems to be that the Respondent imposed upon the executry the position of it being on hold. In fact the situation arose entirely out of what the Secondary Complainer had suggested, i.e. that there had been negotiations for settlement.

In these circumstances, there was not just no actual conflict, but no potential conflict. That was because matters progressed from the second executors' meeting to settlement with settlement being reached in 2011.

Mr Currie referred the Tribunal to page 28 of the Record and rule 6 of the practice rules. If there was a potential conflict here, the evidence discloses the Respondent exercised caution, spoke to a colleague, took advice from Mr McNeill, QC, arranged for the Secondary Complainer to take advice from his

own lawyer. Throughout proceedings he was entirely transparent on what he was doing and reported on a regular basis to the Secondary Complainer, the widow and the other two executors. This was not a case where the Respondent kept his views on conflict secret. The Respondent was quite open in the way that he dealt with the Secondary Complainer's assertions that there was a conflict. There was no suggestion in evidence that the Respondent would have continued to act for the executors if the negotiations had failed and a court action had proved necessary to determine ownership of the painting.

The Fiscal had referred to the Respondent telling the daughters one thing in the draft report to the executors, but then telling the executors something else in the report dated 5th August 2012. The starting point was, in fact, March 2010 in page 10 of Production 2 where one of daughters asserted that the painting was owned by her and her sister. Then in document page 43 of production 2 for the Complainers, the Secondary Complainer mentions the handwritten note from the deceased and asks who owned the painting. At page 45 of production 2, the Respondent mentions the painting to the widow. At page 47, there is a telephone discussion with the Secondary Complainer where he expresses the desire to be clear about ownership of the painting. It was clearly in contemplation that the Respondent would provide a report and that the matter would be discussed at the executors' meeting. The Secondary Complainer wanting to be clear on ownership of the painting, was predicated on the possibility that ownership was going to be clear. The Respondent in evidence stated that it was never going to be a clear view on ownership and that was confirmed in the advice from Counsel. If the matter could not be concluded by negotiation, then the only other option was litigation. Counsel would be surprised if anyone considered litigation of ownership of the painting in these circumstances to be preferable to negotiation.

In page 49 of production 2 for the Complainers, the widow made mention of the painting. On page 52 of the productions the Respondent sent his draft to the daughters. The conclusion of the draft was that further investigations were required. The Fiscal seeks to draw sinister connotations from the meeting the Respondent held with the daughters in July. The two daughters had previously asserted ownership of the painting. It was an essential part of his enquiries to meet with them. The Respondent had had discussions with both the Secondary Complainer and the widow and here he was on 31 July meeting the daughters. That resulted in a conclusion that the previously asserted view of the daughters was not the case and a conclusion which was much less advantageous to the daughters.

Information that was adverse to the daughters' interests was used by the Respondent in that report. Mr Currie referred to pages 60tt and 60uu of the Inventory of Productions for the Complainers. He

submitted that the conclusion reached by the Respondent was by no means the most favourable to the daughters as substantial tax would be payable.

He submitted that the details of this case were a million miles away from the situation envisaged in either Stair or the Whittle case.

Mr Currie submitted that what was being struck at in these cases is a client not being given information because that information is adverse to the other client being represented by the solicitor.

There was no question of it being contemplated that the executors required to make a decision at the meeting in August of whether to include the painting in the inventory or not. It was fully discussed. The executors were all provided with the opportunity of making their views known. It was decided the Respondent would meet with RG to investigate a compromise.

Page 77 of production 2 for the Complainers was an email from the Respondent to the daughters. This showed the Respondent's thinking at the time and demonstrates that this was not a situation of the Respondent trying to impose a view on the executors. The Respondent's view was contrary to the view expressed by the daughters previously. The Respondent had not reached a concluded view but indicated that enquiries were needed to be carried out in order to reach a view on the balance of probabilities.

The proposition on which this complaint now hinges is wholly unsubstantiated by the evidence.

The written complaint that the Secondary Complainer has detailed at page 70 of production 2 discloses that his complaint was that the Respondent was acting for the executors and for the daughters. This was an ill-founded complaint at that stage. It does not constitute a conflict of interest to act for two different clients. The Tribunal should look at Stair and Whittle where what is struck at is something distorting the advice given to one client when acting for two.

At page 76 production 2, the Secondary Complainer was positively encouraging compromise. The Secondary Complainer was plain wrong in suggesting that the executors needed to know to whom the painting belonged in the context of the situation where negotiations were being encouraged. The executors only needed to know if negotiations failed as they needed to know whether to include the painting in the inventory of the estate.

At page 124 of production 2, an email from the Secondary Complainer to the Respondent, the Secondary Complainer stated that this was the sort of situation that demanded an unbiased firm to advise the executors on ownership of the painting. Mr Currie submitted that the Secondary Complainer was wrong. He stated that it was unnecessary and wholly wrong for the executors to take the initiative and reach a view when negotiations were ongoing. Mr Currie submitted that in his email of 11 July 2011 where he suggested that it was time for a judge to decide on ownership, the Secondary Complainer was becoming plainly unreasonable. Mr Currie submitted that at that stage it was wholly irresponsible to bring about a situation where a judge required to decide the question of ownership. He submitted that it could only be regarded as the last resort and not an attractive alternative to negotiations proceeding constructively.

Mr Currie submitted that the complaint by the Secondary Complainer, which had then been taken on by the Law Society, was wholly misconceived. The Respondent had been encouraged to speak to RG. From September 2010 RG and the Respondent had been attempting to reach a settlement to resolve the position of the painting. It was not necessary or appropriate for the executors to carry out their own enquiries. In his submission, it was wholly inappropriate to push the parties into litigation as suggested in the email reproduced at page 164 of productions. Even further, Mr Currie submitted, the executors had no interest in determining the ownership of the painting, whilst negotiations were ongoing with a reasonable prospect of success. The Secondary Complainer's position was based on a false premise that the question was capable of easy resolution. It was clear that this was not clear cut. The Secondary Complainer's position was not proportional. Mr Currie referred to the unreasonable time limit suggested in page 154 of production 2. He also referred to the time referred to in production 2 page 164.

The Respondent did not withhold any advice. In no way was any of the advice that he did give coloured by the fact that he acted also for the daughters. If another solicitor of ordinary competence had been acting exclusively for the executors, in circumstances where there could be a negotiated settlement, he would not have advised that the executors should be carrying out their own investigations into ownership of the painting. When agreement was reached arrangements were made for the Secondary Complainer to take independent advice. The independent solicitor gave The Secondary Complainer advice and the Secondary Complainer's position was properly protected.

Mr Currie invited the Tribunal to reject the Law Society's complaint.

He submitted even if the Tribunal found that there was a breach of rule 6, that the breach did not fall into the category of serious and reprehensible. The Respondent had been completely transparent and had taken advice. If he had taken the wrong decision, then this was a misjudgement rather than misconduct.

It was Mr Currie's submission that the correspondence etc demonstrated that the Respondent had patiently and carefully explained the state of play to the Secondary Complainer. The Respondent had kept the Secondary Complainer fully informed on all progress. The issue of conflict, which was sometimes raised in strident tones, was dealt with openly, transparently and patiently.

At this juncture, the Tribunal asked the Fiscal to confirm what her position was with regard to the averred breach of rule 9 within the complaint. The Fiscal indicated that she had thought that her earlier submissions also covered the question of rule 9. She indicated that she was insisting on the averments of misconduct relating to a breach of rule 9.

She indicated that she was not insisting in averment 6.1.4 which related to a failure to consult on the proposed settlement.

With regard to 6.1.3 and delay, she maintained that the Respondent had delayed or failed to properly consult with the Secondary Complainer or take appropriate instructions from him in his capacity as executor in relation to discussions and investigations into the ownership of the disputed items. She submitted that the Secondary Complainer was sidelined and not consulted. That had been the case because the steps that were taken by the Respondent were taken on behalf of the daughters.

The Fiscal also confirmed that she was insisting in averment 6.1.5 which specified the particular elements in relation to his previously mentioned failure to disclose that he had acted for the two daughters.

Mr Currie invited in the Tribunal to look at the terms of the Record in relation to 5.3 (i) the Respondent thought that the executors knew that he also acted for the daughters. When it was brought to his attention that the Secondary Complainer did not, then he confirmed that he did and then apologised, both in person and in writing. In fact the Respondent had behaved properly. Misunderstandings do occur. Mr Currie submitted that so long as misunderstandings are rectified then they are not misconduct. This was an innocent mistake corrected by the Respondent as soon as it came to light. This could not be a breach of rule 9 or misconduct.

He submitted that averment 5.3 (ii) (a) was wholly misconceived. This presupposes that this was a matter on which the Secondary Complainer needed advice and that he was not aware that the Respondent was not going to provide him with that advice.

On no occasion between the first meeting of the executors and the conclusion of agreement, did the Secondary Complainer have any unmet need for advice as executor. The only matter the Secondary Complainer complained of not getting advice about was ownership of the painting. This would have been wholly inappropriate as previously indicated. The Secondary Complainer knew that the Respondent had made it clear that he would not give advice until the matter had been resolved in negotiations.

Mr Currie submitted that averment 5.3(ii)(b) was an odd charge. The entire thrust of the Respondent's answers to the Secondary Complainer was that the executry could not proceed to conclusion until that matter had been resolved.

Averment 5.3(ii)(c) he submitted lacked any essential specification. There needed to be specification of the actual letters. There was no fair notice in this averment and there was no substance to it as there never was an ambiguity.

His submissions covered the averments at 6.1.3 and 6.1.5. 6.1.4 was departed from by the Fiscal.

He submitted that there had been no breaches of rule 9 but if there had been, they did not constitute, and it would be disproportionate to consider that they amounted to, misconduct.

The Chairman asked Mr Currie if he could explain why it was that the Respondent could not act for the widow and the executors but he could act for the opponent of the widow and the executors.

Mr Currie responded that he thought this was rooted in accepted executry practice that an individual seeking to claim legal rights required separate representation. He submitted that there was no evidence before the Tribunal to contradict that that was regular practice.

The Chairman questioned whether reliability might be an issue.

Mr Currie responded that the Respondent had presented this as a matter of practice and the witness Mr Reid had raised the same view. Mr Currie submitted that the Tribunal did not need to get to the bottom of this question to decide the Respondent's case.

The Fiscal indicated that she had no comment to make in reply.

A member of the Tribunal asked Mr Currie to clarify whether there was a difference between conflict and conflict of interest. Mr Currie responded that conflict of interest is all that the Tribunal should be concerned with and this was as interpreted in his references to Stair and Whittle.

The Tribunal asked Mr Currie if he accepted that it was the normal duty of a solicitor to executors to advise the executors as to the contents of the estate. Mr Currie accepted that. Mr Currie went on to confirm that the Respondent had not done that as it had been agreed that the matter would be resolved by negotiations taking place.

Mr Currie was asked by the Tribunal whether he accepted that the Respondent had a duty to advise the executors at the stage where negotiations had been concluded as to the propriety of that conclusion. Mr Currie responded that in this case the Respondent had adopted an ultra conscientious step of arranging for independent advice.

The Tribunal questioned whether someone needed to advise the executors what required to be included or not included in the deceased's estate and in particular advise the executors that the agreement reached was acceptable.

Mr Currie responded that when the widow had removed her claim to the painting, then there was only one possible conclusion. The solicitor had no difficulty in concluding the issue fairly. Advice was sought by the Secondary Complainer as to whether he could go along with what was agreed and he had been advised that he could.

One of the members of the Tribunal asked Mr Currie whether the executors should have been advised on whether they should delay pending negotiations, how long the negotiations would take and whether there was a risk of penalties for late returns. Mr Currie responded that this was not part of the pleadings in this case. He submitted that whilst negotiations were proceeding, it was wholly inappropriate for the executors to commission their own investigations or take their own advice into ownership of the painting.

The hearing was continued to 15 March 2016 – a date already fixed. The Tribunal members will meet at 10.30am to continue deliberations. Parties are to be present for 2pm.

DECISION

The information upon which the Tribunal made its findings in fact came in three forms: admissions in the Record; the documents forming Production 2 for the Complainers, which had been agreed by the parties; and the parole evidence. The standard of proof for the Tribunal is one of “*beyond reasonable doubt*”. The Tribunal found both witnesses to be credible and reliable.

One of the first considerations for the Tribunal was how to approach the evidence of Mr Reid and whether the Respondent had placed sufficient information before the Tribunal to allow it to hold him as an expert witness. Within his own report, the witness had conceded that this field was not his speciality. Whilst there was information before the Tribunal that the witness was a recognised expert in the area of property law, the only information before the Tribunal as far as the area of practice of executries goes was that the witness was a solicitor with a number of years practise. The Tribunal concluded that this was not sufficient to allow it to hold the witness as an expert and therefore approached his evidence as that of a competent and respectable solicitor outlining how he as an experienced practitioner would have dealt with these matters.

Little of the factual background of the case appeared to be in dispute. The Respondent accepted that he had acted for both the executors of the estate and at the same time the two daughters as individuals. The two daughters were both executors and potential beneficiaries. There was no dispute that there was a clear conflict of interest between the widow and the two daughters. The deceased had bequeathed his estate to a discretionary trust subject to his widow exercising a liferent thereon. The two daughters were members of the pool of potential eventual beneficiaries. An issue arose as to whether the widow would accept the liferent or alternatively make a claim of her legal right to one third of the deceased’s moveable estate. A question arose as to the ownership of various items of moveable property, but in particular one extremely valuable painting. These items appeared to have belonged to the first wife of the deceased and it was not clear whether they had formed part of the deceased’s estate or not. If they had been part of the estate then this would have significantly increased the value of any legal rights claim.

The evidence before the Tribunal from both witnesses was that in normal executry practice where an executor was also a beneficiary under the will with a potential legal rights claim, that individual would be advised by the solicitor for the executors to take independent legal advice with regard to the legal rights claim. That appeared to be normal practice and given that any legal rights claim would be against the estate being administered by the executors seems a logical approach.

The crux of the matter here was essentially the ownership of these valuable items of moveable estate. If they belonged to the deceased, then the executors required to include them in an inventory for confirmation and an inheritance tax return.

Against this background the Tribunal require to consider three averments of professional misconduct broadly speaking, the first of these involves the allegation of a breach of rule 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 in relation to conflict of interest and the remaining averments both relate to an alleged breach of rule 9 of the same Practice Rules.

The first allegation is that the Respondent acted in the face of a recognised conflict of interest. The Tribunal required to identify what actual conflict of interest arose that would place the Respondent in breach of rule 6. It has been accepted that there was a clear conflict of interest between the widow and the daughters. The widow was represented separately in relation to the issues in dispute and so this was not a matter in breach of rule 6. The Tribunal considered it important to identify who the clients were that were represented by the Respondent. Firstly, he represented the executors. This amounted to a body of people where decisions would be taken by majority. Secondly, he represented the two daughters in their own personal capacities. The daughters were both subject to the legal obligations and duties that flow from being executors, and were also potential beneficiaries among the pool of beneficiaries of the testamentary trust. What were the interests of the executors as a body that were so divergent to the interests of the daughters as individuals that prevented the Respondent for acting for both?

Various definitions of a conflict of interest were put to the Tribunal. The Tribunal did not consider it necessary or helpful to attempt to give an exhaustive formulation to the concept of conflict of interest. The Tribunal's view was that whether a conflict arises in any given situation is very much a matter of the facts and circumstances of each case.

In her submissions the Fiscal had referred to a formulation quoted in the Law Society's Guidance Notes – *"If you would give different advice to different clients about the same matter"*. In her

submissions the Fiscal conceded that she had no evidence that the Respondent had provided partial advice to one client to the detriment of another or indeed that he had tried to misrepresent the situation in any way.

Both parties referred to the case of the Council of the Law Society of Scotland-v-Whittle wherein it was said “*When acting for two clients a conflict of interest situation occurs when a solicitor either withholds giving advice which he would give if he were acting on behalf of an individual client or gives advice to one client to the prejudice of the other client.*” There is no evidence in this case that the Respondent withheld giving any advice. Much has been made of the reference to the executry administration being “*on hold*”. It appeared to the Tribunal that this was a description of the factual position of the administration of the executry, rather than a formal decision. It appeared that little progress could be made with the administration until a decision had been taken with regard to the ownership of the disputed property.

Both parties made reference to Paterson & Ritchie “*Law, Practice and Conduct for Solicitors*”. Therein the authors posed four questions they describe as identifying an actual conflict of interest.

“*1. Would a solicitor give different advice to two or more clients about the same matter?*” In this case the answer appears to be no. The daughters were both executors and potential beneficiaries. The interests of the executry and the interests of the daughters as individuals were quite different.

“*2. Would what is to be done for client A have an adverse impact on something the same firm was doing for client B?*” Again, for the same reasons, the answer in this case would appear to be no.

“*3. Does the firm’s duty of confidentiality to client A prevent them from disclosing relevant information to client B because A is unwilling to consent to disclosure?*” Again, the answer to this question is no. The daughters quite clearly consented to information being passed on to the executors.

“*4. Client A having previously agreed terms in the matter with client B now has a change of mind and wishes to depart from the agreed terms.*” This does not apply to the circumstances of the current case.

The conclusion of the Tribunal was that in the circumstances of this particular case no actual conflict, to use the Fiscal’s terminology, crystallised. It should perhaps be noted however that the Respondent should consider himself fortunate that matters proceeded as they did.

Furthermore, the Tribunal considered that even if a conflict of interest may have existed here, given the particular circumstances of this case, the conduct would not have met the high test of the case of Sharp as it could not be described as serious and reprehensible.

Rule 6(2) of the 2008 Practice Rules raises the issue of a potential conflict of interest. There was some debate before the Tribunal as to whether or not the issue of a potential conflict of interest was properly before it. The Tribunal concluded that it did not require to consider that issue as it held that whilst there may have been a potential conflict in this case it could not be described as significant and the Respondent had acted with the full knowledge and consent of the clients. The Fiscal had placed significance on the failure of the Respondent to state in bald terms at the first meeting of the executors that he acted also for the two daughters in their personal capacities. In that respect, the Tribunal accepted the Respondent's explanation that he believed all four executors understood the position. It was clear from the evidence that the Respondent had been the family solicitor for a number of years. The Secondary Complainer was a family friend and was also a trustee of the first wife's testamentary trust. It was a reasonable assumption for the Respondent to make that the Secondary Complainer was aware of the situation. Additionally, it was clear from the evidence that the Respondent had exercised caution in continuing to act. He had taken advice from a colleague and from Senior Counsel.

With regard to the averment of misconduct in Article 6.1.3 the Tribunal concluded that this was not supported by the evidence. Three of the four executors, which incidentally would have been a majority, were parties to the ongoing negotiations. The fourth executor had encouraged these negotiations to take place. Additionally, the Respondent facilitated the Secondary Complainer taking independent advice with regard to the compatibility of the settlement terms with the Secondary Complainer's duties as an executor.

Finally, averment 6.1.5 raises the issues of failing to communicate with the Secondary Complainer. It raises the issue of the Respondent failing to inform the Secondary Complainer from the outset that he had accepted instructions to act also for the daughters in their personal capacities. As previously stated, the Tribunal considered that the Respondent had reasonable grounds on which to believe that all four executors were aware of the circumstances. When the matter was drawn to his attention by the Secondary Complainer he acted appropriately by setting out the full circumstances and tendering an apology. This averment also raises the issue of the executry administration being on hold. As previously stated, the Tribunal concluded that the use of this term was descriptive of the factual situation rather than a formal decision taken by the Respondent or executors. The last part of averment 6.1.5 raises an issue of the capacity in which the Respondent was acting at the time he wrote to the Secondary Complainer. Given the lack of detail provided and the concession by the Fiscal that the Respondent had not tried to misrepresent the situation in any way, the Tribunal found no support for this contention.

Taking into account all of the above, the Tribunal unanimously found the Respondent not guilty of professional misconduct.

The Tribunal determined that the conduct complained of did not meet the definition of unsatisfactory professional conduct in Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 and so it was not appropriate to refer the Complaint back to the Council of the Law Society.

The parties were invited to address the Tribunal with regard to expenses.

SUBMISSIONS FOR THE RESPONDENT

Mr Currie moved for an award of expenses from the outset of proceedings to be made in favour of the Respondent. He submitted that the Respondent's position was set out fully from the outset of proceedings and in the original report that was lodged. He submitted that this was an unwarranted complaint.

He asked the Tribunal to sanction the case as suitable for the instruction of Senior Counsel. The integrity of the Respondent had been subject to criticism. The reputation of the Respondent, and his firm, had been called into question and this was an extremely important matter for him.

He also asked the Tribunal to certify Mr Reid as an expert witness.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal opposed the motion for expenses. She referred the Tribunal the case of Baxendale-Walker v-The Law Society [2007] WL 711499, a copy of which she produced. She submitted the case of Baxendale-Walker described the dilemma of the Law Society being able to exercise its regulatory responsibility in the public interest and the maintenance of proper professional standards by bringing cases before the Tribunal requiring to be balanced with the interest of the individual. She submitted that it was proper that this matter should have been raised before the Tribunal and that it was not appropriate that the expenses be borne by the members of the Society.

She argued that there were clear indications from early on in this executry that the Secondary Complainer was unhappy. The dual role of the Respondent was not made clear from the outset. The

Respondent was made aware of the issue of conflict in particular by RG at page 93 of Production 2. RG mentioned to the Respondent that the Secondary Complainer was thinking of making a complaint.

She submitted that there was an error of professional judgment in this case albeit it did not meet the Sharp test.

The Fiscal went on to oppose the motion for sanction for Senior Counsel. She submitted that the case was not sufficiently complex on either fact or law. She accepted that there were significant reputational issues but argued that these were not complex enough to merit the cost of instructing Senior Counsel.

She opposed the motion to certify Mr Reid as an expert witness. She argued that he did not have sufficient expertise in this area of law to be called an expert.

She drew the Tribunal's attention to the previous award of expenses made against the Respondent on 17 September.

DECISION

Given the Tribunal's approach to the evidence of Mr Reid, it held that it was not appropriate to certify him as an expert witness. Whilst the Tribunal was happy to accept that he was an expert in another area, in this area of law he was only an experienced practitioner.

The only ground put forward by Mr Currie to support sanction for Senior Counsel was the defence of the reputation of the Respondent. He had not suggested any complex issue of law. Given that the Fiscal had not led any witnesses it did not appear that there was any complex question of evidence. In these circumstances the Tribunal concluded that it was not necessary or reasonable to instruct Senior Counsel other than at the Respondent's own expense.

With regard to the motion for expenses, whilst the Tribunal was not bound by the case of Baxendale-Walker, it did not ignore it. The Respondent himself appeared to acknowledge that he was at risk in continuing to act for both parties. He took advice from a colleague and from Senior Counsel. He continued to act and chose to accept the risks he faced. Accordingly, the Tribunal concluded that it was the Respondent's own behaviour which had in part brought him before the Tribunal. Taking this into account, the Tribunal concluded that fairness dictated that an award of expenses, insofar as not already

awarded, should be made in favour of the Respondent with a modification of 50% to take into account the Respondent's acceptance of the risks he faced.

With regard to publicity, Mr Currie invited the Tribunal to order that publicity of this case should not include the identities of the Respondent's clients or anything that might identify them. The Fiscal made no objection to this motion. Given the amount of detail regarding the personal financial details of the individuals concerned, and having regard to the fact that these details had no relevance to the question of misconduct before the Tribunal, the Tribunal agreed that it was appropriate in the circumstances of this case that the publicity need only include the name of the Respondent and his firm.

Alistair Cockburn
Chairman