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 of 26 Drumsheugh Gardens, Edinburgh and now of Atria One, 144 Morrison Street, Edinburgh

Complainers

against

GLENN JAMES FRASER of Fraser & Co Criminal Defence Ltd, Unit 2, Newyearfield Business Units, Hawk Brae, Ladywell, Livingston

Respondent

1. A Complaint dated 31 October 2017 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Glenn James Fraser of Fraser & Co Criminal Defence Ltd, Unit 2, Newyearfield Business Units, Hawk Brae, Ladywell, Livingston (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were two Secondary Complainers, Ian Bryce and Neil Robertson, both of Central Court Lawyers, 15 Grampian Court, Beveridge Square, Livingston.

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 set down a hearing for 23 February 2018 and notice thereof was duly served on the Respondent.

5. The Fiscal for the Complainers intimated the lack of availability of one of the Secondary Complainers to give evidence on the date fixed for hearing and requested that the hearing be converted to a procedural hearing. Under Rule 56 of the Tribunal Rules 2008, the Chairman granted the request and converted the hearing to a procedural hearing. On 9 February 2018, the Fiscal for the Complainers lodged a motion to adjourn the procedural hearing pending the outcome of a criminal investigation. The solicitor for the Respondent intimated that she had no objection and joined in with the motion. Under Rules 56 and 44 of the Tribunal Rules 2008, the Chairman adjourned the hearing administratively and the Complaint was set down for a procedural hearing on 4 May 2018.

6. At the procedural hearing on 4 May 2018, both parties were represented by the Fiscal for the Complainers, Paul Marshall, Solicitor, Edinburgh. On joint motion, the Tribunal set the Complaint down for a hearing on 13 September 2018.

7. On 7 September 2018, the Respondent lodged a motion with the Tribunal to adjourn the hearing due to the illness of a close family member of the Respondent. This not being opposed by the Complainers, under Rules 56 and 44 of the Tribunal Rules 2008 the Chairman adjourned the hearing administratively and the Complaint was set down for a hearing on 31 January 2019.

8. On 29 January 2019, the Respondent lodged a motion to adjourn the hearing and thereafter to be allowed to amend the Answers. The Complainers intimated that they had no objection to that motion subject to the expenses of the adjourned hearing being awarded in their favour. Under Rule 56 of the Tribunal Rules 2008, the Vice Chair converted the hearing to a procedural hearing.

9. At the procedural hearing on 31 January 2019, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was represented by Nicola Irvine, Solicitor, Glasgow. Ms Irvine confirmed that it was her motion to adjourn the hearing and thereafter to be allowed to amend the Answers. The Fiscal confirmed that he had no objection to the motion on the basis that expenses for the adjourned hearing were awarded to the Complainers. Having heard submissions from both parties, the Tribunal adjourned the hearing to a fresh hearing on 9 April 2019 and 1 May 2019. The Respondent was allowed 14 days to amend his Answers and the Complainers 14 days thereafter to respond to any amendments made. The Fiscal was ordered to lodge a fully

adjusted Record by 8 March 2019. The Tribunal awarded the expenses of the adjourned hearing of 31 January 2019 to the Complainers. The Fiscal lodged a Joint Minute between the parties.

10. On 19 March 2019, Ms Irvine lodged a motion with the Tribunal office requesting that a preliminary hearing be fixed to allow parties to address issues raised within outline submissions attached to that motion. Mr Marshall intimated his objection to the fixing of a preliminary hearing. Both parties having waived the normal *induciae* for the fixing of a hearing, the Tribunal assigned 1 April 2019 as a procedural hearing, with the intent that it would move on to a preliminary hearing that same day dependent upon the parties' submissions.

11. At the procedural hearing on 1 April 2019, the Complainers were represented by their Fiscal, Paul Marshall, Solicitor, Edinburgh. The Respondent was absent but was represented by Nicola Irvine, Solicitor, Glasgow. Ms Irvine asked to be allowed to lodge a Production late explaining that this was necessary for the day's submissions. Additionally, she asked to be allowed to amend the Answers to include: (1) a general plea to the relevancy; and (2) a specific plea of r*es judicata*. Mr Marshall indicated that he had no objection to either of these motions. He formally withdrew his objection to the fixing of a preliminary hearing and invited the Tribunal to hear submissions on the matters raised by the Respondent. The Tribunal heard detailed submissions from both parties in relation to the preliminary pleas and an objection to the admissibility of evidence. Having given careful consideration to these submissions, the Tribunal: (a) repelled the plea of *res judicata*; (b) repelled the plea to the relevancy in relation to the Complainers' averment 3.2; (c) upheld the plea to the relevancy in relation to Complainers' averment 4.4; and (d) repelled the objection to the admissibility of the witness Butler and Complainers' Production 36 *in hoc statu*. Ms Irvine made a motion for expenses which was opposed by Mr Marshall. The Tribunal reserved the question of expenses to the conclusion of the case and continued the Complaint to the previously assigned date of 9 April 2019.

12. Evidence was led and sundry procedure took place on 9 April 2019, 1 May 2019, 27 May 2019, 28 May 2019, 7 June 2019, 17 July 2019 and 14 August 2019. On 15 August 2019, parties lodged written submissions and thereafter made supplementary oral submissions to the Tribunal. The case was continued to 30 August 2019 for the Tribunal to begin its

deliberations and parties were ordered to attend at a venue to be later identified at 3:30pm that date.

13. On 30 August 2019, the Tribunal met to deliberate its findings. Having given careful consideration to all of the oral evidence, Joint Minutes, Productions and submissions, the Tribunal found the following facts established:-

13.1 The Respondent was admitted as a Solicitor on 17 July 1995. The Respondent became a non-equity partner of Central Criminal Lawyers on 1 May 2007. In 2012, Central Criminal Lawyers amalgamated with McGovern Court Lawyers and changed its name to Central Court Lawyers. The Respondent remained a non-equity partner with that firm until his departure on 6 May 2014 when he became a sole practitioner in the firm of Fraser and Company Criminal Law.

13.2 The other partners of Central Criminal Lawyers were Ian Bryce and Neil Robertson, the Secondary Complainers. On amalgamation, Vincent McGovern joined as a partner in Central Court Lawyers. All three were equity partners. At all times, the Respondent was a non-equity partner in receipt of a salary. He had little or nothing to do with the management of the firm. Both Central Criminal Lawyers and Central Court Lawyers were partnerships at will, with no written agreement.

13.3 A number of years before his departure, the Respondent's relationship with the Secondary Complainers began to break down. The Respondent was increasingly unable to cope with his workload and difficult working environment to such an extent that his work/life balance and health were affected and he lost trust and confidence in his partners.

13.4 The Respondent registered the domain name "fraserandco.net" on 17 November 2013. On 11 February 2014, he incorporated a limited company with the name "Fraser and Co Criminal Defence Limited".

13.5 The Respondent attended at the offices of the Council on 2 May 2014 to seek information on the practical steps required to establish a legal practice. On 5 May 2014, the Respondent returned to the Council a document he had

completed and dated 2 May 2014 entitled "Practice Unit Information: Initial Notification" together with a "Criminal Court Undertaking" letter also completed and dated 2 May 2014, which confirmed that his practice "Fraser and Co." would be restricted to criminal court work.

13.6 The Respondent commenced practice as a sole practitioner in the firm Fraser and Co Criminal Defence on 6 May 2014.

13.7 The Respondent resigned from Central Court Lawyers on 6 May 2014. He intimated his resignation to Central Court Lawyers that day by an email to the whole firm and by letter of resignation dated 5 May 2014, addressed to Central Court Lawyers' remaining partners, namely the Secondary Complainers and Vincent McGovern. The letter was written on headed notepaper in the name of the Respondent's new firm, Fraser and Co. The letter bore the domain name "fraserandco.net".

13.8 The Respondent's letter of 5 May 2014 stated:

"Please note that I am leaving Central Court Lawyers, resigning from the partnership, effective immediately.

I am now trading as Fraser and Co. My contact phone number is 07880496518.

If any persons call, email or attend the office asking for me specifically, I would expect them to be told that I have left and would ask that they are given my contact details.

I have taken files where I am the nominated solicitor.

I will contact you again in due course regarding any matters which require further discussion."

13.9 The Respondent's email of 6 May 2014 stated:

"I have left the firm effective immediately. A formal letter is in the office."

13.10 The Respondent did not consult with the Secondary Complainers before removing the client files from Central Court Lawyers' offices. The Respondent did not consult with the clients of Central Court Lawyers before removing the client files from Central Court Lawyers' offices.

13.11 On 7 May 2014, the Respondent estimated to the Secondary Complainers that he had removed around 140 files from Central Court Lawyers' offices. Later that day, the Respondent prepared a list of files he had removed. This list contained 216 files. This was not a complete list of the files removed by the Respondent. The Secondary Complainers arranged for a copy of that list to be prepared and this was produced as Document 4 for the Complainers.

13.12 The Respondent returned the majority of files to Central Court Lawyers between 8 and 14 May 2014. There were approximately 27 files on the Respondent's original list which he failed to return. In addition, there were approximately 39 files which the Respondent did return but which were not on the original list of 216 files. During the period between 8 and 14 May 2014, the Secondary Complainers prepared a number of lists tracking the files not yet returned by the Respondent on given dates. These lists of files were produced as Documents 5, 6 and 7. In addition, the Secondary Complainers made a list of those files which had been returned by the Respondent on 9 May 2014 and 12 May 2014 but which were not on the original list. This was produced as Document 8 for the Complainers. With the exception of the reference to file LD008/22 in Document 8, these lists of files are true and accurate. All files, except those where it was agreed that the Respondent could keep them, were returned to Central Court Lawyers.

13.13 The Respondent was not initially sure of the precise number of files he had taken as he had left at short notice and therefore only provided an estimate. He took a large number of files, but principally those where he was the nominated solicitor. He stated that he required to do so to comply with his obligations to clients and to the Scottish Legal Aid Board.

13.14 The Respondent provided signed mandates from 11 clients dated 6 and 7 May 2014, in which those clients confirmed that they wished the Respondent to continue acting for them.

13.15 At the time of the Respondent's removal of client files from Central Court Lawyers' offices, the firm operated an electronic filing system alongside the paper-based physical files. During the period 19 April to 2 May 2014, the Respondent took steps to copy the information held in Central Court Lawyers' electronic filing system. These steps included:-

(a) creating a folder called "client files" which contained 6400 old client files;

(b) copying the contents of the "client files" folder to a USB stick; and

(c) comparing the contents of that USB stick with Central Court Lawyers file server in order that the USB stick contained the most up to date client information held electronically by Central Court Lawyers. The steps taken by the Respondent to copy the contents of Central Court Lawyers' electronic filing system to a USB stick are described in more detail in a report prepared by John Butler dated 20 August 2015.

13.16 At the time of his departure from Central Court Lawyers, it was the Respondent's honest belief that had he given notice of his departure to his former partners they would have deprived him of access to files. The Respondent was nominated solicitor in all bar seven of the files that he removed. His primary reason for taking these files was to allow him as nominated solicitor to provide the standard of service he had previously provided to his clients. It was the Respondent's intention to copy these files and then return them to Central Court Lawyers.

14. Having regard to the established facts and the submissions previously made by both parties, the Tribunal found the Respondent not guilty of professional misconduct. Nor did the Tribunal consider that the conduct established met the test for unsatisfactory

professional conduct and so no order in terms of Section 53ZA of the Solicitors (Scotland) Act 1980 was appropriate.

15. Both parties were invited to make submissions with regard to expenses and publicity. Both parties moved for expenses to be awarded in their favour. The Fiscal invited the Tribunal to give the decision publicity naming only the Respondent. Ms Irvine opposed this and invited the Tribunal to name all of the parties.

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

> Edinburgh 30 August 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Glenn James Fraser of Fraser & Co Criminal Defence Ltd, Unit 2, Newyearfield Business Units, Hawk Brae, Ladywell, Livingston; Find the Respondent not guilty of professional misconduct; Find the Respondent liable in the expenses of the Complainers in relation to the adjourned hearing of 31 January 2019; Find the Complainers otherwise liable in respect of 25% 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; Reserve the question of publicity and invite the parties to lodge written submissions, if so advised, within 28 days of this date.
>
> **(signed)**
>
> **Colin Bell**
>
> **Vice Chair**

17. Both parties lodged written submissions regarding the issue of publicity with the Tribunal. Additionally, the Fiscal invited the Tribunal to issue findings which excluded the issue of publicity and to allow him further time to lodge written submissions on the basis of these interim findings. This request was placed before the Chair of this Tribunal who under Rule 56 of the 2008 Tribunal Rules refused same.

18. On 30 October 2019, the Tribunal considered the question of publicity. Having had careful regard to the written and oral submissions for both parties, the Tribunal concluded

that the appropriate order was to publish the decision without anonymising the Secondary Complainers or other witnesses in the case.

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

> Cupar, 30 October 2019. The Tribunal having considered the submissions of both parties in the Complaint at the instance of the Council of the Law Society of Scotland against Glenn James Fraser of Fraser & Co Criminal Defence Ltd, Unit 2, Newyearfield Business Units, Hawk Brae, Ladywell, Livingston; Direct that publicity will be given to the decisions of the Tribunal of 1 April 2019, 30 August 2019 and 30 October 2019 and that this publicity shall include the names of the Respondent, Secondary Complainers and other witnesses in the case.
>
> **(signed)**
> **Colin Bell**
> **Vice Chair**

20. 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 28 January 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Colin Bell

Vice Chair

NOTE

At the commencement of the hearing on 9 April 2019, the Fiscal made a motion to amend the Record which was not opposed and therefore granted. As a consequence, a further amended Record was lodged with the Tribunal. A second Joint Minute was lodged, the first having been lodged on 31 January 2019.

The Respondent invited the Tribunal to receive an adjusted List of Witnesses for the Respondent late. This was not opposed and was granted.

The Fiscal sought to lodge Additional Productions late, as Inventory Five for the Complainers. This was not opposed and was granted.

Four Inventories of Productions had previously been lodged by the Complainers and two for the Respondent.

On 1 May 2019, the Fiscal invited the Tribunal to receive two further Lists of Productions, Inventories Six and Seven. This was not opposed and so the Tribunal allowed these Productions to be received late. A third Joint Minute was lodged on the same date.

On 7 June 2019, the Respondent lodged a Third Inventory of Productions.

In summary, in the course of the nine days of hearing, the Tribunal had before it:

1. An amended Record dated 9 April 2019.
2. Three Joint Minutes.
3. Seven Inventories of Productions for the Complainers.
4. Three Inventories of Productions for the Respondent.

The Complainers led evidence from four witnesses. The Respondent gave evidence and led evidence from three further witnesses.

SUMMARY OF EVIDENCE

EVIDENCE FOR THE COMPLAINERS

WITNESS ONE: NEIL JAMES ROBERTSON

This witness confirmed he is a partner in the firm of Central Court Lawyers.

In 1997, he and Ian Bryce set up the firm of Central Criminal Lawyers. In approximately 1999 or 2000, they offered the Respondent employment with the firm as an assistant. The Respondent and Ian Bryce had attended university together and were friends. At that time the Respondent was employed as a Public Defender. The Respondent progressed well with the firm, progressing to associate. In approximately 2007 or 2008, he was made a non-profit sharing partner. In August 2012, Central Criminal Lawyers amalgamated with McGovern Court Lawyers and changed its name to Central Court Lawyers (CCL). There were three profit-sharing partners in that firm, the witness, Ian Bryce and Vincent McGovern. The Respondent remained a non-profit-sharing partner and in fact did so until the date of his departure.

When originally offered employment, the Respondent expressed concern at coping with the caseload. For the first couple of years he seemed to struggle but he did adapt and became adept at dealing with summary business. The Respondent told the witness on at least two occasions that he did not particularly enjoy trial work. He was not involved in trials as much as others in the firm. He was considered to be very good with clients and a "safe pair of hands". There were some "blips" along the way of his progression, involving his administration.

The Respondent's desk always looked shambolic, with lots of files, post-it-notes and pieces of paper. It was his impression that the Respondent struggled to organise his time. Dictation and the completion of legal aid applications seemed to be issues. On two occasions, one before the Respondent was a partner and one after he was made a partner, the witness found bags of files containing time barred legal aid accounts. When these were raised with the Respondent, he had been upset and promised that it would not happen again. There were constant issues with single files not being fee'd in time, in addition to these two incidents. The Respondent's difficulties with administration were a constant concern to the witness.

The witness had attempted to help the Respondent by going through the contents of his desk with him. One of the Respondent's strengths was also his weakness. He was always available to speak to clients if they telephoned or attended the office and would spend forever talking to them. This meant that the Respondent could not get on with his work. He had explained to the Respondent that he required to take telephone notes home with him to return the calls. They reached a stage where they felt helpless

and unable to resolve these issues. Eventually they had asked the Respondent to go to a time management consultant. The witness was asked to look at Production 38, a letter from Quantum Coaching. An objection was taken to this on behalf of the Respondent. Ms Irvine submitted that the witness should be allowed to confirm that a referral was made but should not be allowed to discuss the content of a letter from the time management consultants as this raised an issue of confidentiality. On the basis that it was not clear who had obtained the letter, nor on what basis the information within the letter had been obtained, the Tribunal upheld the objection as raising issues of confidentiality.

The firm had facilitated the Respondent's dislike of conducting trials. As a result, it meant that the Respondent conducted courts that were more work intensive.

Prior to the Respondent's departure in 2014, the witness had not seen any warning signs of him being stressed. In fact, the witness himself had been stressed having to deal with a long running trial. Everyone in the office was stressed at that time because of the workload and he did not think anyone had seen any warning signs in relation to the Respondent.

The only possible indication of the Respondent's position was a conversation that Vincent McGovern had with a friend in April 2014. Mr McGovern was told that the friend had been told that a Glenn Fraser in Livingston was intending to leave his firm and set up on his own. The witness had discussed this with the Respondent who had indicated that there was no truth to the matter. The Respondent was told that things would get easier as the witness was no longer engaged in his long running trial and would be able to help with summary matters. Additionally, the Respondent was told he would be financially rewarded for all of his hard work.

The first weekend in May was a holiday weekend. The witness had arranged for leave. Vincent McGovern telephoned him at home to tell him about an email from the Respondent indicating his resignation from the firm. The witness arranged for childcare for his children and then made his way to Livingston Sheriff Court.

He described the scene on his arrival at court as "carnage". There was a great deal of toing and froing of clients between the Respondent and two of the firm's assistants, Hazel McGuiness and Sarah Meechan. This day of the week was a fresh pleas court day and meant that the court was busy with people attending with new cases. The witness believed that the Respondent had deliberately picked that day so that he would have an opportunity of meeting lots of people. The witness had spoken to the Respondent and they provisionally arranged to meet at lunch time.

In the course of the morning, the witness became aware that the Respondent was not only dealing with new cases but had files in his possession for cases that were in CCL's diary.

The witness and the Respondent met over lunch time. The Respondent explained that his wife had forced him into this decision and the Respondent referred to having to work really hard. The witness repeated that things would be easier now that he was able to help with summary business. The Respondent indicated that the damage might not be irrevocable, and he referred to his wife's expectations of him being a profit-sharing partner. The Respondent had not raised this issue with the witness before. The Respondent had stated that he did not think that the witness would ever have made him a profit-sharing partner anyway. He had confirmed to the Respondent that he was wrong in that view and that the other partners had actively been discussing taking that step as the Respondent had been doing so well. The Respondent agreed that he was happy to have a discussion about returning to the firm but confirmed that he needed to speak to his wife first. The Respondent indicated that one of the catalysts to him leaving was that he had gone home and found an internet search for properties on the computer and that had made him believe that his wife was going to leave him if he did not leave the firm.

In a later conversation with the Respondent, it was agreed that the witness, the other partners of the firm and the Respondent would meet in a nearby restaurant at 5pm.

During the day the witness had a meeting with Sheriff Craig confirming what the Respondent had done and explaining that the parties would try to minimise disruption to court.

A meeting took place at 5pm attended by the Respondent, the witness and Vincent McGovern. At that meeting the Respondent had mentioned a heavy workload. The Respondent gave the clear impression that the decision to leave had not been his. Vincent McGovern suggested that all of the partners could meet at the Respondent's home to discuss everything. The Respondent indicated that was not a good idea and that he would himself discuss these issues with his wife. He confirmed that he would telephone the witness with his decision. In fact, the witness had to contact the Respondent. The Respondent seemed upset and intimated that his wife was having none of it and that his resignation stood.

The witness found the Respondent's resignation letter, Production 1 for the Complainers, on his chair when he returned to the office in the course of the afternoon. He noted that it was written on Fraser &

Co headed notepaper. He remembered asking the Respondent about that and the Respondent had answered that things can happen very quickly. The firm was at that time developing a virtual file system, but it was somewhat haphazard. Paper files were the main centre for information. He had been surprised that the Respondent had taken files from the office. He believed that he had asked the Respondent how many files he had removed from the office on 7 May and the Respondent had indicated about 120. He asked the Respondent to return the files. The Respondent denied removing any data. The witness believed he asked the Respondent to return his firm phone, iPad and laptop.

People in the office were trying to identify how many legal aid certificates were in the Respondent's name. The Respondent had indicated that he had only taken files where legal aid was in his name. This was incorrect. The witness could recall numerous examples of the Respondent taking all of the files for a particular client, even in circumstances where legal aid certificates were not all in the Respondent's name. He would guess that the Respondent had taken files in excess of 20 clients in these circumstances. The witness recollected there being some delay in the return of the Respondent's work telephone, laptop and iPad. All of the items had been professionally wiped. The phone and iPad were reset to factory settings.

The remaining partners of the firm had a meeting to discuss their next steps. Clients were telling them that the Respondent was telephoning them to advise them that he had left the firm.

As a result of checks, it appeared that almost twice the number of files stated by the Respondent initially were in fact taken by him. The witness recalled speaking to the Respondent in the first week following his departure and the Respondent had advised that he did not know exactly how many files he had taken as he had not kept a note.

The firm took legal advice regarding obtaining an interdict against the Respondent and for securing the return of the files. He did not know if it was the threat of legal action that caused files to be returned or whether it was because the Respondent had finished photocopying them, but files began to be returned in dribs and drabs. He could recall two boxes of files being returned on what he thought was the Friday of the first week. These boxes had contained loose papers and signed legal aid papers. He could recall the box containing papers for a client KD. He believed KD had appeared from custody on Monday and had been remanded. His mother had telephoned the office at the end of the week and the witness had gone to see him. He recalled the office trainee arranging for a prison visit for the Friday afternoon. He believed therefore that KD's mother must have phoned before the Friday. When he saw the papers in

the box, he put two and two together. KD said he had instructed the Respondent to mark a bail appeal. The Respondent later denied that to be the case.

The witness did not personally see all of the other files being returned. An inventory of files indicated that the Respondent had taken twice as many files as he had originally indicated.

Between the date of his departure and the return of the two boxes, the period had been spent appearing at court and trying to ensure that the court was not inconvenienced, the firm did not lose any more business and in fact recovered what business it could. He believed that interactions between him and the Respondent had been professional. Dialogue continued throughout that week. He believed the Respondent was delaying in returning files although everyone had tried to do things amicably.

He confirmed that the firm had instructed a website company to find out when the domain name Fraser & Co had been taken. They had also instructed an IT expert who confirmed that a vast amount of information had been taken from the firm's servers in the days leading up to the 6 May. The Respondent had specifically told him that he had not taken any data.

Apart from a period from March 2013 to December 2013 when the firm had a large number of High Court and solemn cases, he did not recall people working exceptionally long hours. He believed the staff to be collegiate and friendly without being overly friendly. He believed people had bought into the work ethics of the firm. He had believed that the Respondent was a friend.

At the time he was made a partner, the Respondent indicated he wanted to be part of the decision-making process. In the build-up to the merger with Vincent McGovern, that interest decreased and if given the option of doing management work or going to court, the Respondent would choose going to court.

The witness spoke to Production 26, a chain of text messages between him and the Respondent. He identified Production 28 as a chain of emails between him and the Respondent. He confirmed that he was managing partner. He identified Production 42 as a chain of text messages between himself and Hazel McGuiness. Production 44 was a chain of text messages between him and Sarah Meechan.

Within weeks of the Respondent's departure, a meeting took place between the remaining partners of the firm, the Respondent, the Respondent's representative at the lawyer's office for CCL. The meeting seemed constructive and removed the need for any interdict proceedings. The witness recollected all

files being returned, he thought only after this meeting. He believed that agreement in principle was reached.

No explanation was given by the Respondent for taking the files the way he did until after the complaint was made to the Law Society. It was the witness's opinion that the Respondent was forced out of the firm by his wife.

He took the view that he and the Respondent had worked professionally together following the Respondent's departure. If the Respondent had given notice to the firm before his departure, the witness believed he would have tried to persuade the Respondent to remain in the firm. When asked if the firm would have handed files over to the Respondent when requested, he indicated that it was difficult to tell.

CROSS-EXAMINATION OF NEIL JAMES ROBERTSON

The witness confirmed that he was now the sole principal of CCL and that Ian Bryce was a consultant. Michael Bell works for the firm but is not employed.

He confirmed that the layout of the office in Livingston means that there are two rooms on the top floor used by the legal staff. One room was shared by him and Ian Bryce and the other room was used by all remaining qualified staff.

He agreed that CCL was an extremely busy firm and that following the merger, it became even busier.

He agreed that secretarial staff were under pressure at times and that there was typically a backlog of typing. The firm had considered outsourcing the work but due to the secretaries working overtime, and their commitment, the work got done.

He confirmed that summary work was the mainstay of the Respondent's workload but not the only workload. He agreed that the Respondent had been referred to as "the summary workhorse" but explained that it was not him who had used that term. He had understood that it was not used in a pejorative way but was meant to mean that the Respondent had a heavy burden to carry. He described the nature of summary business on a daily basis. He confirmed that custodies would be a feature every day. He explained that intermediate diets required preparatory work. Once the intermediate diet court was finished, the solicitor covering that court would be expected to cover the custodies. He explained

that after the completion of court, the solicitor would require to do work to finish up the cases that had been in the intermediate diet court and for custodies legal aid applications and the like would be required to be completed.

It was the firm's practice to make client appointments for 4 and 4:30pm after the completion of court business. When solicitors had completed their day at court, they required to see clients in the office. He did not accept that he and Ian Bryce spent more time in the office than any of the other solicitors. He explained that he was aware that this was to be raised from witness statements and as a result he had gone back through his timesheets and it was his position that he was at court at least in the morning on 85 to 90% of days. He did not accept that the Respondent saw most of the client appointments. He accepted that it was fair to say that the Respondent dealt with a lot of client phone calls. Everyone in the office had a heavy workload.

He confirmed that his working hours were 8:30am to 5pm. He tried not to be in the office late as he had children. If he had work to do, he often took that home. That was an option open to all of the others. Whilst he accepted that the others were often still in the office after he left, he had not had any concerns that the others were working late into the evening, say until 7pm, 8pm or 9pm. In fact, he knew from police statements that this was not happening.

When asked if he could recall anyone suggesting having a structured diary meeting to improve workflow, he said he could not recall. He was referred to Production 59/2 for the Complainers and confirmed that this was an email from Robin White dated 21 April 2013. The witness could not remember seeing that email but accepted that he must have. Staff had been asked to provide suggestions on how to improve business. This email was probably in response to that request. The email did suggest taking on more staff. The witness confirmed that at around this time, two trainees were employed but he insisted that was not as a result of the suggestion in this email.

The witness denied that it was the firm's practice to allocate business to solicitors on the morning of court. He explained that they tried their hardest to have a Thursday or Friday meeting every week to allocate the next week's business. Sometimes last-minute "hitches" did happen, a last-minute custody or a client indicating a preference for a particular solicitor. The witness stated he had been told that the witness Sarah Meechan was going to say that she was given a jury trial to do with only a day's notice and he insisted that this was not true. He explained that if a solicitor had particular knowledge about a case or a client then that was taken into account when he allocated business. The court diary was managed by him and the Respondent. Ian Bryce was not involved.

He did not accept that the Respondent had asked for time in the office to catch up. He explained that there were numerous texts in the Productions before the Tribunal showing that he had offered the Respondent help at court which had been turned down. He said that he had often told the Respondent that he would be better to do the trials court because he could get back to the office quicker. He insisted that the Respondent was offered time in the office on a regular basis, but the Respondent usually refused that offer. He insisted that the Respondent at no stage asked him for time in the office. He confirmed that he would regularly ask the Respondent why he was not coping with his administration. He could remember there being issues with the Respondent's admin as far back as he could remember. He had come across a note of a meeting in 2002 where it was noted that the Respondent was staying too long in the office in the evening and that there was no need for that.

He did not accept that meetings between the Respondent and him were aggressive. He denied saying to the Respondent that a five-year-old could do his job. He said he would be surprised if it was suggested to him that the Respondent was working until 9 or 10pm. He insisted that the Respondent had stated in his police statement that he did not work until these times. The Respondent had not spoken to him about working late or having too much work to do. In retrospect, he could see that this had been a problem, but the Respondent had not come to him at any time with these issues.

The witness confirmed that the firm had a rota for out of hours calls. All legally qualified members of staff, apart from three profit-sharing partners, were on this rota. Ian Bryce and the witness came off the rota at the time of the merger. He did not accept that the telephone lines for the Wishaw office were diverted out of hours to Mr McGovern's home and drew Ms Irvine's attention to emails from staff to Vincent McGovern saying that they had received a call on the out of hours number regarding Wishaw business. He accepted that he had discussed with Vincent McGovern that Mr Bryce was reluctant to help with busy court dates but then went on to explain that this was not unwillingness as such, but that Mr Bryce was busy with "other stuff". He did not discuss with Vincent McGovern ways that the workload could be better shared to lighten the Respondent's load.

The witness confirmed that he had had concerns about the Respondent's ability to cope with administration even before he was assumed as a partner. To manage that, he had had regular meetings with the Respondent and had described to him ways the witness thought the Respondent could stop making more work for himself.

He insisted that the Respondent never once complained that his workload was unachievable. He considered it difficult to manage a problem if the Respondent did not say anything about it. He had noticed there was a problem when the first bag of unfee'd files was discovered but the Respondent's position had been that it would not happen again. The Respondent did not say to the witness that he could not process his workload. He did not accept that this was a "red light" indicating that the Respondent was not coping but explained that this was simply the Respondent not dictating on the files when he got back to the office. Often, if the Respondent had a day off, he would come back into the office having dictated 10 or 12 tapes. However, it was not unusual for people to bring in 8 tapes on a Monday as everyone worked at the weekends.

He accepted that the workload was not shared equally between the partners in the lead up to the Respondent leaving the firm. This was because the witness had been involved in a complicated long running fraud trial which had taken up a disproportionate amount of his time. The Respondent had shouldered the load. He had spoken to the Respondent just after the trial had finished and had told him that he would be back to help with summary business and that he would be financially rewarded. In fact, the Respondent left the firm three weeks after the conversation before he could be financially rewarded.

After the merger, there was still no partnership agreement.

He explained that the Respondent was assumed as a salaried partner in 2007 rather than as a profit-sharing partner because that was the normal path of progression for a solicitor at that time and also because of concerns about the Respondent's administration.

The witness was asked if the Respondent had been given any indemnity against losses. He could not remember whether he had or not. He conceded that legally the Respondent could have been exposed to the firm's losses but insisted that the Respondent would not have been asked to contribute and that the firm had professional indemnity insurance. He said he was not understanding the question.

The witness was asked how the Respondent's role changed on being assumed as a partner. He explained that the Respondent would have been more involved in discussions regarding the business. He would come to the accountants with the witness and Mr Bryce.

He did not think the Respondent had much input into the merger discussions. He believed that the Respondent was spoken to him by him and Ian Bryce and he thought also by Vincent McGovern.

Whilst he could not remember personally if Vincent McGovern had spoken to the Respondent, he understood that Vincent McGovern said in his statement that he had done so. He accepted that the Respondent was not included in any of the email threads relating to the merger and believed that was because the Respondent did not show much inclination to be involved and in any case, he was not a profit-sharing partner. He could not remember if the Respondent had seen the accounts of McGovern Court Lawyers before the merger. Vincent McGovern never raised any concerns regarding going into partnership with the Respondent. The Respondent did not give any indication that he had any issue with it. The Respondent had not been exposed to any potential loss, the firm's accountants had done due diligence and in any case the firm had professional indemnity insurance.

He could not remember whether any legal advice was taken prior to the merger. He personally had not.

He accepted that when Vincent McGovern came to Livingston for partnership meetings the office door was closed but explained that this was simply a physical barrier for privacy and was not something done to exclude the Respondent. The Respondent indicated on a number of occasions that he was not interested in being involved.

He confirmed that even after the Respondent was assumed as a partner, he continued to share the office used by all of the other legal staff. He explained that there was not room in the office used by him and Ian Bryce for the Respondent as well.

The witness confirmed that he, Ian Bryce and Vincent McGovern had a partners' meeting in the south of France in April 2013. He could not remember why the Respondent was not invited.

Management meetings were usually attended by him, Ian Bryce and Vincent McGovern. Sometimes Lynn Bryce attended to take minutes. She was the office manageress and reported secretarial issues to the partners. He accepted that the Respondent's role was in the mechanics of the day to day business. The Respondent had never asked to be more involved in the management of the firm.

With regard to the firm encouraging the Respondent's development as a lawyer, the Respondent had completed CPD and had attended the Law Society partnership course. The firm tried to encourage him to do jury trials. The Respondent did not want to apply for extended rights of audience. He was offered the opportunity of going on a trial advocacy course. This was also offered to Sarah Meechan and Hazel McGuiness. He had referred the Respondent to the time management consultant.

The witness was asked what efforts were made to develop the Respondent as a partner and responded that he understood that the Respondent was trying to say that he was bullied and side-lined but that was not the witness's memory. He believed the Respondent could have approached him. The office was a place where people could become good court lawyers. The witness had asked the Respondent to become more involved in management of the firm and to come to the accountants. The Respondent did not want to do so.

He confirmed that he was aware that the Respondent suffered from Crohn's Disease but denied that he had made any degrading comments about that himself. He accepted that a secretary had spoken to him on one occasion about the Respondent's use of the toilet and he had had to speak to the Respondent about that.

The witness accepted that the Respondent was asked on at least two occasions to cut short booked holidays. One of these was in 2009 when the Respondent insisted on taking paternity leave just a short time before he had booked his summer holiday and he was asked to cut the summer holiday short. The second of these was in 2013. This was the fourth time the Respondent had booked a holiday without first checking with the firm that it was ok. He denied that he and Ian Bryce's holidays took precedence. It had nothing to do with the holiday booked by the Respondent being at the same time as holidays taken by the witness. He conceded that sometimes his and Ian Bryce's holidays could overlap.

He indicated that it was always difficult to try to arrange people's holidays. He could not remember an incident in January 2011 of Sarah Meechan asking for a holiday and him telling her he did not have time to deal with her request. This did not fit with the office procedure for asking for holidays in writing. He did not recall agreeing to Sarah Meechan having three days' leave prior to her wedding and then changing his mind only some two or three weeks prior to the leave taking place.

He denied being insensitive to staff. He could not recall speaking to Sarah Meechan's father at her wedding and asking him when Sarah was coming back to work. He could not recall the background to Production 43/16. He denied being awkward about time off for the Respondent when the Respondent's father died.

He accepted that the Respondent did not always take his full leave and said that no one in the firm did. He was not concerned about that. The Respondent was never told he could not take leave. The circumstances where he was asked to cut his holiday short were different.

The witness insisted that there was delay in the Respondent returning his iPad, iPhone etc. His attention was drawn to the IT report, Production 36/2 and the witness agreed that indicated that the electronic equipment was delivered to the author of the report on 10 May. He reluctantly accepted that he could not be right about the delay.

At the time the witness had suggested the Respondent could return to the firm, he had not been aware that the Respondent had downloaded files, taken files from the office and set up his website etc.

In the first week there was not a specific agreement about who would deal with what case but rather it was agreed on an *ad hoc* basis.

The witness was referred to a list of files taken by the Respondent where he was not nominated solicitor. He could not recall the specifics of any of these files and in particular whether any of them were inactive.

He was unable to say what would have happened if the Respondent had given notice of his departure. He believed that he and the Respondent had handled the matter in a professional manner with very little disruption to the court. He believed that they could have got to the same stage without "a nuclear bomb being exploded".

He accepted that the tone of emails within the firm after the split suggested that this was now a battle. These emails were not written for external consumption. There was a clear and present danger to all of their livelihoods. They fought back hard but within the rules. The Respondent also fought, constantly phoning clients. It appeared that telephone numbers on Central Court Lawyers' files were not always correct but the Respondent had the correct telephone numbers.

He was asked if staff were instructed to position themselves at the front desk of Livingston Sheriff Court to intercept clients. He explained that this was standing instructions but went on to say that he was not sure if specific instructions to this effect were given. Both Hazel McGuiness and Sarah Meechan were open to that approach as they understood that their livelihoods were at stake.

He recollected that Sheriff Craig had told him that she wanted the heat taken out of the matter.

The witness accepted that he referred in emails to "snaring a client" and "spiriting away" a client but explained that these were coloquisms and not accurate terminology. He explained that the initials "GTF" within the emails referred to "get to fuck" mandates. He denied using that language himself.

The witness had told the Respondent that he would not accept mandates at court and that they had to be sent to the office. Someone in the office, he did not know whom, had been advised by the Law Society that mandates could not be emailed. Posting them had caused issues. They therefore began to hand deliver mandates to the Respondent's home. The Respondent's home was his business address. The Respondent had indicated at some stage that he was not going to accept mandates personally.

He agreed that the firm knew the Respondent's address, it being in the letter from the Respondent. He did not know if his secretary had seen that letter and therefore was aware of the address. Clients were advised that the Respondent had left the firm and it was entirely up to the client who they instructed. He personally did not tell the clients anything else although he was not aware of what other people were saying.

He agreed that Ian Bryce had taken the Respondent's resignation more personally than he did.

He denied that the terminology within the emails were an indication that CCL put their commercial interests before their clients' interests.

He denied that the Respondent was undermined and overworked.

He agreed that overall agreement was reached between Central Court Lawyers and the Respondent on the 10 June, one month after his departure.

He agreed that Ian Bryce reported the Respondent to the police in respect of data offences.

He agreed that he had made a complaint to the SLCC. He could not remember if this had been dismissed without merit.

He accepted that the emails within the firm after the Respondent's departure contained colourful language. He felt CCL's response was timid compared to what it might have been in other offices and had not been any more than what was needed to protect the business. It was not vengeful.

RE-EXAMINATION OF NEIL JAMES ROBERTSON

The witness did not accept that CCL was understaffed.

The possibility that cases could only be allocated on the morning of court was not general practice and was not markedly differently in other firms.

CCL's approach with regard to progression to being a partner was the normal course. As a salaried partner, the Respondent had less involvement in management but was involved in day to day management.

Solicitors were rewarded for being on the out of hours rota.

He himself had had to alter holiday arrangements because of problems with the Respondent not following firm practice with regard to booking holidays.

When the witness spoke to clients at court, it became apparent that the clients had new telephone numbers which were not on the firm's file. The witness would learn that the Respondent had already telephoned the clients and so must have been aware of their new telephone numbers.

He did not know whose idea it was to instruct the IT expert to examine the Respondent's firm iPad, etc. It was not him.

The witness was referred to Production 66/2, an email from Vincent McGovern which stated "He should be made to feel as uncomfortable as possible." The witness was asked if this was an agreed way forward for the firm. His response was that the other solicitors of the firm were not made privy to the content of that email.

In response to a question from a member of the Tribunal, the witness explained that the Respondent would never have been expected to cover any business loss of the firm.

The witness was asked if there had been any discussions with regard to the Respondent being moved to equity partner. He indicated that this was discussed in generality but no one sat down and discussed this step with the Respondent.

The witness agreed that there was a staff review procedure. He was asked why he was not aware of the Respondent's workload. He responded that the Respondent had never told him he was working until 10pm at night. He had not been aware of any other evidence of that and did not think that in fact the Respondent had worked those hours from 2007 to 2012. He agreed that the Respondent was in the office before him in the morning and after him at night. He believed the Respondent hated being in traffic jams and wanted to avoid the rush hour.

The witness was asked what financial information was shared with the Respondent. He confirmed that other people's salaries and the costs of the business were never discussed although sometimes at the weekly meetings turnover was discussed. He was asked if the Respondent was in fact a partner in name only and responded that the Respondent was a salaried partner.

The witness clarified that when he had referred to having seen other people's statements, he was referring to statements or precognitions his own solicitor had taken him through in regard to the criminal matter.

The witness was asked to clarify his evidence regarding the Respondent having no interest in management of the firm. He explained that the Respondent's interest came in "fits and bursts". It seemed to him that the Respondent had wanted more of a role in management prior to the merger than after. It was possible that the merger had made the change although he could not explain why it would have that effect. The witness was asked if there was not an apparent inconsistency in his evidence with his description of the expansion of the firm etc but him not being aware that the Respondent was so busy. He responded that everyone was really busy. He had no doubt that people worked late but he did not think that was until 10pm. Everybody had to work at the weekends.

Although the Respondent was disorganised, he could not be criticised for his results or his client care. Repeat business was a significant matter for any criminal firm.

WITNESS TWO: ANGELA ROBERTSON

The witness confirmed that she had worked for the firm for more than 17 years. She continued to be employed by Central Court Lawyers as a senior secretary.

She considered that she got on with all of the partners of the firm, including the Respondent. She was of the opinion that the Respondent was good to work with and apart from his dictation, she did not have any grumbles with him.

She found Neil Robertson to be approachable. She did type for Ian Bryce, but he did not spend as much time in the office.

She could recall the Respondent's desk being messy and full.

She did not spend any length of time upstairs in the office in order to experience the atmosphere between the solicitors. She would not know if there was any concern about someone's behaviour, if an issue arose with any of the employees, either Neil Robertson or Ian Bryce would take them into the office and close the door. She was aware that the Respondent was Ian Bryce's best friend. The Respondent was the godfather to Ian Bryce's son. She did not think that there were any issues that might have led to the Respondent leaving but she did not sit upstairs so she could not say what happened there.

CROSS EXAMINATION OF ANGELA ROBERTSON

She agreed that the Respondent often came into the office at all hours.

She thought all of the solicitors were under pressure. The firm was an extremely busy one.

The Respondent was always willing to take clients' calls or speak to clients who came into the office off the street. Clients liked the Respondent. She agreed that the Respondent dealt with the majority of client appointments.

She could not say if the Respondent was stressed or not. She was unable to comment on whether other members of staff got on with Neil Robertson and Ian Bryce. She was unable to say if there were any tensions in the office. She explained that she worked downstairs and the other solicitors worked upstairs.

She indicated that she was not given any specific instructions regarding the Respondent's forwarding address. She had simply told clients that the Respondent no longer worked for the firm, that he now

worked for Fraser & Co and that she did not have his telephone number or address. She said that she still did not know where the Respondent's firm is based.

She indicated that she was not aware of an email chain headed "scores on the doors". She was referred to Production 55/18 and accepted that she had seen the chain of emails but explained that she did not set it up. She was referred to Production 55/9 an email dated 15 May 2014 addressed to CCL all. She did not remember seeing that email but accepted that reading the email now, it was "quite bad". She did not remember any song or dance. She did not open the majority of these emails but accepted they did not look very nice.

She thought all of the solicitors were getting on. When all of the solicitors were in and working, she was working downstairs.

WITNESS THREE: MICHAEL JOHN BELL

This witness confirmed that he had been a solicitor for nearly 40 years and was a solicitor advocate with extended rights for criminal law. He retired from Crown Office in September 2012. He met Ian Bryce who had invited him to do some defence work for his firm. He was self-employed and not employed by the firm. His current status is as "consultant". The formalisation of his relationship with the firm as consultant occurred in 2016.

Between 2012 and 2014, the bulk of the work he did for the firm was summary trials in Livingston Sheriff Court. He had the impression that the firm looked at the work for the next week to identify if there were any gaps in which case, he received a phone call. Sometimes his instructions were as short notice as being called at lunchtime to appear at 2pm. Generally, however, he received 24 hours' notice. He did not consider this to be unusual.

If he was working in Livingston Sheriff Court, he would go to the firm's office first. Sometimes he knew in advance what work he was covering; at other times he would get papers when he arrived at the office. It was difficult to quantify the regularity of his instructions. Overall it was reasonably frequent. Sometimes there could be two or three weeks with no instructions and sometimes he could have work three or four days a week. He got the impression that work had been divided up before he arrived and he would be handed what he needed to deal with. He got the impression that summary work was allocated on the morning. He was allocated work by Neil Robertson and by the Respondent.

He had a good relationship with Neil Robertson. Sometimes Neil Robertson was not present in the office. Neil Robertson had been working on a long running fraud case with volumes of disclosed material. He took a lot of time going through these papers and would often sit in the office to go through them.

Ian Bryce had become a good friend of the witness. He was good to work with and the witness respected him.

The witness had not worked as closely with the Respondent as he had with Ian Bryce. He had no personal issues with the Respondent. The Respondent was always in the office before the witness. The office was always very busy first thing in the morning. Papers were being distributed. The Respondent sorted it all out and headed to court. Even if the Respondent was running about too much, the Respondent never lost his temper.

Hazel McGuiness was pleasant and easy to deal with. He had been aware of Sarah Meechan before he started work with CCL. She always struck him as being relaxed and capable.

It was his impression that the office was physically a bit of a mess with papers everywhere, getting ready in the morning. There was nothing wrong with the atmosphere. The witness was not aware of any undercurrents or any difficulties. He was not there every day. When he finished his court business, he went home.

There was nothing remarkable about the working practices of the office. He did not see anything that troubled him.

It was Sarah Meechan who had shown him an email from the Respondent noting his resignation. He had been surprised by this but did not think it was something he could get involved in. He had not seen anything to suggest that the Respondent was unhappy. Sarah Meechan appeared to be surprised by the email.

The witness had been involved in discussions with Ian Bryce and Neil Robertson along general lines. A lot of the focus was on what to do next, to find out what the Respondent's plans were, to find out if he had made contact with clients. One of the secretaries indicated that she had been instructed to change the locks. The witness took the view that this was none of his business.

He believed that Neil Robertson was on holiday at the time of the Respondent's departure. When told what had happened, Neil Robertson came into the office. He instructed a check of the files to be carried out. The witness was not involved because he was at the High Court. He was given information later about files and that the virtual files on the database were also checked. He was not involved in this and was aware of it from others.

He believed that a round robin letter was sent to clients to ascertain their position and to ask if they wanted CCL to continue to act. Each day's business was printed out from the electronic diary. The firm had responsibilities to appear in each case listed so long as the client wished them to do so. If a mandate was delivered, then the firm would withdraw. Steps were taken to ensure that no client appeared on their own.

He had heard someone say that the Respondent was unhappy with his status as salaried partner, but this was simply something the witness had overheard.

WITNESS FOUR: IAN GEORGE BRYCE

The witness confirmed that he resigned as a partner at Central Court Lawyers on 31 July 2018 and became a consultant. He is a solicitor-advocate, Legal Vice Chair of the Parole Board and a convenor on the Mental Health Tribunal. From 2006 to 2012, he worked for the Law Society firstly as a Council member then as a member of the Management Board.

He met the Respondent at university and they became friends. Neil Robertson was introduced to the Respondent by him and they both persuaded the Respondent to leave the Public Defence Solicitors Office and join them in Central Criminal Lawyers in 2000. The Respondent was made a partner in 2007. It was the witness's view that the Respondent's administration skills were not great. Nor did he think the Respondent was great in court. The Respondent was hard working and clients liked him, although he would spend an inordinate amount of time with clients.

He could not remember if the Respondent was ever an associate.

He was asked what the rationale had been for making the Respondent a partner. He described his experience as a trainee of an older solicitor remaining an associate while others were promoted above him and he stated "I did not want him to be the shuffling middle-aged associate while other people

were coming up through the ranks". He said there was also a business element to the decision, as clients would often consider someone who was not a partner as an "understudy".

From 2005, the witness's main interests were High Court work. The day to day summary work was done by the Respondent and Neil Robertson. The Respondent had no other management responsibilities.

There had been discussions about the Respondent becoming a profit-sharing partner, but the witness told the Respondent he needed to do more management. The Respondent's wife had spoken to the witness's sister on more than one occasion asking her to speak to her brother about when the Respondent was going to be made a profit-sharing partner.

He was asked if he did not think it was a bit strange to have a partner with no management responsibilities and he answered that, when he had worked for another firm, he was aware that there were some partners who appeared to be partners in name only. He could remember having a conversation with the Respondent after the merger where it was discussed that the Respondent should take on more management responsibilities and that, if the firm took off, then there would be discussions around him becoming a profit-sharing partner.

In describing the Respondent's problems with administration, the witness explained that the Respondent was often late in submitting his advice and assistance and legal aid applications. The Respondent would always have a deluge of tapes for the secretaries at one time. The Respondent often submitted accounts late.

In relation to the Respondent's advocacy skills, the witness said he was not here in order to "bad mouth" the Respondent. In his view, the Respondent was not the worst lawyer he had ever seen. The Respondent had expressed a dislike for trials and solemn work and generally concentrated on doing summary work. This type of work was high in volume but was not as complicated. The witness had thought the Respondent had it under control. If the Respondent had not left the firm in the middle of the night and stolen files, the witness would have learned to live with the Respondent's poor administration. The witness had spoken to the Respondent on a number of occasions to try to encourage him but latterly the witness had become remote from summary business in Livingston. He was aware that Neil Robertson had arranged for the Respondent to see a time management consultant.

He had asked both the Respondent and Neil Robertson to do the solicitors advocates course but neither wanted to. The Respondent had completed the NITA day course on advocacy and had enjoyed it.

When allocating business, if it was possible, then the Respondent was given the non-trial summary courts. He was not suggesting that the Respondent refused to do trials. He did in fact sometimes do trials and sheriff and jury trials.

He described how he had been told by Vincent McGovern that there was a suggestion that the Respondent was going to leave the firm and set up on his own. He had discussed this with the Respondent on the phone and the Respondent gave his word that this was not true.

He described that he had been unaware that the Respondent was unhappy. He emailed the Respondent on 5 May to confirm that there was enough cover for court on 6 May. The Respondent had answered saying that there was and there was no suggestion of his departure.

The witness was appearing in a case in the High Court when he was contacted by telephone. His wife told him that the Respondent had sent an email of resignation. There was a limit to what the witness could do as he was involved in the High Court trial. He believed that the trial commenced and lasted for about the following four days.

He saw the formal letter of resignation in the office later on in the day. It struck him that it was written on professionally printed notepaper including a new business phone number, email address and a domain name.

The witness confirmed that the firm had been setting up a system for electronic files but that in 2014 this was still in the early stages. The paper file was needed for a complete picture of the case.

The principal point of contact between the firm and the Respondent after his departure was Neil Robertson. Neil Robertson had told the witness that the Respondent had given the reason for his departure as that his wife had threatened him with divorce if he did not.

He had been told that the Respondent had removed files from the office where he was nominated solicitor. He was aware that the office carried out steps to identify what files were taken by the Respondent.

The Respondent had been the front face for the summary business of the firm. This was the "bread and butter" of the firm and kept everything moving. The Respondent had tried to take the summary business and if he succeeded the firm would have come to an end. The firm's strategy was to communicate with their clients. They tried to identify clients as quickly as possible and speak to them before court. The Respondent clearly had an advantage having forward planned. The firm did a mailshot and contacted clients in advance of court appearances.

The witness was referred to an email from Vincent McGovern, Production 66. That email had set out a suggested response. He confirmed that the partners had a discussion about an interdict and instructed a firm of solicitors. He confirmed that an IT expert was instructed to examine the Respondent's laptop, iPad and iPhone. He personally did not contact clients to ask if the Respondent had told them he was leaving before 6 May. He and Vincent McGovern had both gone through to the Scottish Legal Aid Board to discuss the problem. As far as the Board were concerned it depended who the nominated solicitor was, and any disciplinary issues were not for them. He agreed that Central Court Lawyers spoke to all of their clients. He accepted that the whole situation was unpleasant at the time although he said there was no deliberate intent to make it unpleasant. Neil Robertson was the one who spoke to the Respondent on a day to day basis. He could not remember if the emergency meeting set out within these proposals actually took place. He did remember that everyone came into the office on the Saturday.

The firm was speaking to clients all of the time. Legal Aid certificates were transferred back and forth. The damage was mitigated and so the firm was still there. He pulled out of a case due to be heard in Shetland so that he could be present in Livingston Sheriff Court. Diaries had to be reorganised. Discussions took place with the clients at court to ascertain who they were going to instruct.

The firm engaged a system that all mandates were given to the Respondent as soon as possible. If the Respondent was at court, they were handed to him there. If he was not there, then there was a delivery once a day to his house which was also his office. The firm kept a register of mandates.

He was aware that a client of his had come into the office upset because of a letter he had received from the Respondent. The witness believed that this letter did not comply with the Law Society guidance and so he had included this in the complaint to the SLCC. The SLCC had accepted the Respondent's explanation and did not proceed with this complaint. The witness identified Production 10 as the letter handed into the office by the client. He confirmed that someone from the office

thereafter took a statement from this client, but he did not know who the person was. He believed that this letter was part of a mailshot sent by the Respondent.

Prior to the Respondent's departure, although the witness was not a part of the day to day summary business, he attended the office regularly. When he was appearing in the High Court, he kept in touch by email, text and phone. He thought that the working environment was good. Although people were busy and could be stressed, the firm did fun things. He was busy and so had not socialised with the Respondent for a while. As far as he could see, the Respondent and Neil Robertson were getting on fine.

The firm had no rules about working hours. People were expected to do their work unless they came and said they could not. On the days when he attended the Livingston office in the morning, the Respondent would already be in the office. They would joke about who was in first. He would leave the office around 5:30 – 6pm and had no idea who was still in the office thereafter. He did not think it was a good thing that people would work really long hours and if he had been aware of it, he would have tried to stop it. If people asked for time in the office to do preparation work, they would normally ask Neil Robertson. He did not think that it was general working practice for people to work late at night. He thought he and the Respondent would be in the office by 7:30am and the rest between 8 – 8:30am.

People in the firm communicated by both texts and emails regarding business and non-business things. He identified Production 39 for the Complainers as a chain of texts between him and Sarah Meechan. He identified Production 40 as text exchanges between himself and Hazel McGuiness. He identified Production 60 as a blog entry written by Hazel McGuiness.

He had encouraged Sarah Meechan to complete the solicitor advocate course. The firm had nominated her for young solicitor of the year. Neil Robertson was nominated for managing partner of the year.

He could not remember if the firm carried on with social events after the departure of the Respondent. He thought things disintegrated over a period of months. The firm did not have the same atmosphere. It was a "blitz" atmosphere.

He confirmed that an email dated 25 April 2014 from Neil Robertson, which was part of Production 28, was an email congratulating the Respondent for his results in a sheriff and jury matter.

He recalled a meeting taking place that involved the partners of CCL, their lawyer, the Respondent and his lawyer. He remembered that there was a draft agreement produced but he did not believe that it had been taken any further. He had gone on holiday in the middle of it. A lot of the initial fire had gone out of the situation. He could not remember the Respondent giving any explanation for his departure during that meeting.

The witness was asked what he would have done if the Respondent had given him notice that he wanted to leave, set up his own firm and take files. He responded that he would have been devastated but they would have had to deal with it. He thought they would have tried to make out a way forward to get on with it.

CROSS EXAMINATION OF IAN GEORGE BRYCE

The witness did not accept that the Respondent undertook the majority of summary business for the firm. He agreed that he had called the Respondent "the summary workhorse" and explained that he had used the term at a meeting as a compliment. He was unable to say whether the Respondent saw most of the client appointments as he was not necessarily in the office at that point.

He confirmed that it depended which court he was appearing in whether or not he went into the Livingston office first. He tried to leave the office between 5:30 – 6pm. He did not know if others worked on late in the office. When asked if it was possible that he was unaware of that, he responded that there was a subsequent issue of people saying in their timesheets that they were working when everyone may not have been doing that. The witness stated that he understood that the Respondent had changed his defence. He went on to explain that he did not know what hours people were working in the office and what work they took home. He did not think that either of these issues were significant.

He said he did not remember an email from April 2013 where a trainee had remarked on the firm being short staffed. He accepted that this was a response to an email he had sent out to all members of the firm asking for suggestions for improvement and innovation. He stated that the firm had gone on to employ two trainees and an assistant. He confirmed that they had reacted to that email by taking on more staff.

Allocation of work was carried out Neil Robertson and the Respondent on a daily basis. Weekly meetings were held to check that they had enough cover for the following week but allocation of work did not take place at these meetings unless it was a particularly difficult case.

He insisted that the Respondent had not asked for more time in the office.

He was aware that the Respondent was in the office early but did not know what time he worked to at night. Neil Robertson was the managing partner. He could not recollect Vincent McGovern raising issues with regard to workload. He accepted that he and Neil Robertson came off the out of hours call rota.

The witness was asked if he ever formed the view that the Respondent's workload was unrealistic. He responded that he formed the view that the Respondent was not dealing with his workload as well as he could. He was aware that Neil Robertson had arranged for the Respondent to see a time management consultant. The witness spoke to the Respondent every day and the Respondent never said anything about his workload to him. Any evidence to the contrary was untrue.

He confirmed that he had had no plans to make the Respondent an equity partner. With regard to his role in management, the witness thought that the Respondent had come to the firm's accountants on a couple of occasions. The Respondent had had little to do with the nuts and bolts of the merger although he remembered speaking to the Respondent while it was still an idea and the Respondent had seemed really enthusiastic about it. He was aware that the Respondent met Vincent McGovern before the merger of the witness's 40th birthday party. The Respondent did not see the accounts of McGovern Court Lawyers before the merger took place.

He recalled Vincent McGovern questioning the Respondent's role within the firm and questioning whether he should be a partner in the new firm. The witness spoke to the Respondent and asked him if he still wanted to be a partner after the merger and the Respondent said he did.

He did not dispute that the Respondent was not included in the email threads relating to the merger.

He accepted that the Respondent was not invited to partners meetings with him and Neil Robertson and later, Vincent McGovern. The Respondent was not an equity partner and on occasion the equity partners had matters they wanted to discuss outwith the Respondent's presence.

When asked if the Respondent may have felt isolated or marginalised, he responded that he could not know that if the Respondent did not say something. The Respondent had never said to the witness that

he felt excluded. He accepted that the Respondent was not invited to a partners meeting held in the south of France.

Some management meetings included all of the solicitors within the firm. Finances were discussed at the Friday meetings. People were encouraged to put in suggestions for change at the training day.

He was not aware of degrading comments being made to the Respondent about him suffering from Crohn's Disease. The witness would have done something to stop that because it would not have been acceptable.

The witness identified Production 27/1 for the Complainers as an email relating to criminal quality assurance review of the Respondent's work disclosing positives.

He did not attend the meeting with the Respondent, Neil Robertson and Vincent McGovern that took place after work on 6 May. He thought that Neil Robertson and Vincent McGovern took the pragmatic decision that it was better to take the Respondent back. He himself would have been a bit more reluctant but thought he could have been talked round. He was not aware of parties at the meeting reaching any agreement to do with who would deal with which cases.

The witness was asked what explanation he had given to clients and said that in the course of discussions he told clients that the Respondent had stolen files out of the office over the weekend, set up business in his own house and that they had reported him to the police. He denied telling clients that the Respondent had mental health problems. He was referred to Production 69/9 for the Complainers and could not explain why a client had referred to the mental health of the Respondent. He confirmed that the email chain with a subject matter of "scores on the doors" was used to keep track of mandates coming in and was also an internal team building tool. Everyone had been devastated by the Respondent's departure and there was "a blitz spirit". He denied that there was a targeted approach to make things worse for the Respondent but explained that they had commercial interests to protect.

He explained that where he said in his email Production 69/21 "A few more days like this please" he was referring to clients wanting to instruct CCL and not referring to the Respondent being "nervy and ill".

He explained that the remark "team performing brilliantly, is equivalent of carpet bombing. Glenn looks totally at sixes and sevens" made in an email of his of 14 May was referring to CCL covering courts and speaking to clients.

The witness was asked how long he had had concerns about the Respondent's mental health and stated that these were raised by the way that the Respondent acted when he left the firm. He was at "sixes and sevens" and looked "nervy and ill".

He confirmed that he reported the Respondent to the police regarding data misuse and added that he had reported the Respondent for theft.

The witness was referred to an email from him dated 15 May 2014, Production 55/9 for the Complainers and was asked if the firm had a culture of performing "a song and dance" when pieces of work came in. The witness was also referred to Production 52/2 and explained that reference to a murder dance was meant as a joke.

He agreed that he took the Respondent's resignation as a personal betrayal. He denied that he had said to Hazel McGuiness, when she indicated she wanted to leave the firm, that he would not make things easy for her.

If the Respondent had given the firm notice of his departure, matters could have been discussed. The Respondent had made things impossible. The Respondent was lying. The whole thing involved pre-planning, theft and deception.

The Respondent was not over worked although he worked hard. The Respondent was not criticised unduly. People were praised.

He could not give the specific date of the meeting between them and their lawyers. He confirmed that the nuts and bolts of some matters were agreed but not all matters. The agreement was not signed off. He agreed that he wanted to continue with his complaints to the police and the SLCC.

He did not accept that the firm's reaction to the Respondent's departure went beyond protecting its commercial interests. He accepted that his impression of the happy atmosphere in the office might be a subjective one and agreed that others may have thought that it was in fact an unhappy atmosphere.

RE-EXAMINATION OF IAN GEORGE BRYCE

The witness could recall on two or three occasions telephoning the Respondent from the office and asking him if he wanted help to cover custodies. The Respondent had refused help.

In response to a question from a member of the Tribunal, the witness explained that the firm's electronic time recording systems did not reflect the number of hours being worked by the staff at the time.

He was asked by a member of the Tribunal why he had asked the Respondent if he was interested in continuing to be a partner. He said that he did not think the Respondent enjoyed being a partner and had no interest in the management side. When the Respondent had said he wanted to remain a partner, the witness did not try to persuade him otherwise. He thought that as he and the Respondent were friends they could have that sort of conversation without the Respondent being concerned.

The witness was asked if the Respondent was in fact a partner in name only. He responded that the Respondent was given more place than the assistants but he was not an equity partner.

He agreed that all partners of a firm were equally liable for a firm's overdraft. As a matter of practice, no one asked the Respondent for a share of the overdraft. Neil Robertson and the witness had paid it down. The cause of the overdraft he said was the refurbishing of the office in Wishaw, employing more staff, and putting in place a new computer system after the merger. Whilst Vincent McGovern did not put money into the firm, he transferred work in progress.

He explained that getting a trainee to deliver mandates to the Respondent's home on his way home seemed the easiest way to deal with the situation at the time.

With regard to the meeting that had taken place in June between the parties and their solicitors, he said that he had gone on holiday after the meeting. He believed issues had arisen that had not been dealt with.

He confirmed that ultimately each party was paid what they were due with regard to legal aid fees by agreement. No monies had been paid with regard to goodwill. He explained that the firm still had £3000 that had been deducted from the Respondent's drawings in relation to pension contributions. This has never been repaid to the Respondent. The costs of the Respondent's departure to CCL far

exceeded this sum. They had never agreed compensation. The question of compensation was now time barred.

EVIDENCE FOR THE RESPONDENT

WITNESS ONE: GLENN JAMES FRASER

The witness confirmed that he was now the sole principal in his firm.

He confirmed that he had been a friend of Ian Bryce. Ian Bryce and Neil Robertson had approached him at a time when he was working for the Public Defenders Office and offered him a job with Central Criminal Lawyers. He accepted. At the time, the firm was not that busy but it was expected to grow. He liked both Neil Robertson and Ian Bryce and there was an appeal to working with friends. To begin with, it was fun. Sometimes only one person was needed at court and they would have a competition to see who that would be. As the firm got bigger, they employed more people.

There was little discussion when he was made a partner in 2007. He thought it had occurred at the same time as he received a wage increase. Apart from an increase in his salary and a different means of payment, nothing really changed. He did not get any of the other perks of being a partner. There was no written agreement. There were no discussions regarding any potential losses. There was no change to his workload.

His workload included processing the court work he had concluded, which included taking calls from clients, answering emails, prison visits etc. He accepted that he sometimes gave the secretaries a lot of dictation at once. He denied speaking to clients for too long. All he did was answer their questions and give them adequate advice. He did not agree with style letters and considered it appropriate to dictate extra detail in order to tailor his letters appropriately. He had trained with a well-respected criminal firm and was used to putting all necessary information on the file.

CCL had been one of the first firms to be peer reviewed by Criminal Quality Assurance Committee of the Scottish Legal Aid Board. As a result, the Respondent had been invited to be a mentor.

He originally started coming to the office early in morning so that he could put in a list of his cases to court as early as possible. He tried to get to court by 7am. He discovered that it was easier to get work done at that time and so even if he was not going to court, he would still get in early. Between 2012 and 2014, he was working late most nights and if he did not, he took work home. He would try to leave

the office between 7 and 7:30pm. Sometimes he would just stay in the office to complete work until 10, 10:30pm or even as late as midnight. He was working long hours to try and process all of his work. Because of the type of court work he did, he received many calls from clients.

He explained that it was mainly his administration that was criticised by Neil Robertson and Ian Bryce. They considered that his desk was always messy, although he knew what was in different piles. They would often say he was not managing his work properly and on occasion, Neil Robertson would say "A five-year-old can do your job". He was accused of being on the phone with clients too much, but these were sometimes new clients. He had tried to explain to them that he was in early and working late in order to get through his work. He would ask for time in the office and he would be told that he had to go to court. His requests for office time were only occasionally granted. He considered that a lot of the time when he was refused time in the office it was because Ian Bryce was preparing something, or Neil Robertson was doing some sort of management work. He could not remember either Neil Robertson or Ian Bryce ever saying to him that they would go to court, and he could stay behind.

When Ian Bryce and Neil Robertson started up the firm, they both said they did not want it to affect their family life. They did not work late and would not see him working in the office.

Work was normally allocated on the morning of court apart from sheriff and jury cases or particularly complicated summary cases. It was usually Neil Robertson who allocated the business. If both Neil Robertson and Ian Bryce were out of the office, then the Respondent allocated the work.

The nature of the weekly meeting changed after the merger. Before the merger, they would discuss what had happened in the cases that had been dealt with that week. After the merger, more emphasis was placed on the projections of fees sent to the Scottish Legal Aid Board (SLAB).

It was not the case that he refused to do management work. They did not tell him what it was they wanted him to do or explain how he was to do it. It was his impression that they did not want him to get involved. He did not consider that he could have imposed himself as there were two of them and they always agreed. Even when they upgraded the IT system and they knew that he had fairly good IT skills, he was not included in any of the decision-making. He later criticised the amount spent on the system and that did not go down well.

He was not privy to any management information. They did not hold formal partners' meetings or take minutes. He was not involved in any email chain and did not know what was going on. Even when he

attended the firm's accountants with them, he was only given the draft accounts in the car on the way to the accountant's office.

He considered that he had had no say in the decision to merge. There had been a brief discussion prior to the merger when he was asked his thoughts on the matter. He had explained that he knew Vincent McGovern from Hamilton Sheriff Court and that he thought he did not get on particularly well with him. He was told that Vincent McGovern would be based in Wishaw and so that did not matter. Both Neil Robertson and Ian Bryce had tried to persuade him not to be a partner in the new merged firm. There had been a problem in the firm's procedure in paying his pension contributions which meant that he owed the firm some £6,700. He was told that this had to be repaid before the merger and at the same time they suggested to him it might be easier for him not to be a partner in the new firm but simply an associate. By that point in the relationship it was very rare that the Respondent would confront them with anything. However, on this occasion, he stood his ground.

Nothing much about the management of the firm changed after the merger. The Respondent was even more side-lined, no longer being invited to meetings with the accountants. A new office was bought for Wishaw. He had understood that the three equity partners had obtained a mortgage to buy the office. It was only during this hearing that he had learned that the firm had taken out an overdraft.

The equity partners had a partners' meeting in the south of France. He was not invited. He was not surprised by that as he had not been included in the pre-merger discussions.

The Respondent was diagnosed with Crohn's Disease before he began work with Central Criminal Lawyers. He tried not to let it have an impact on his work and did not take days off. He would sometimes ask to be allowed to stay in the office but would be instructed to go to court and finish quickly. One of the Complainers' Productions shows an example of this, when the Respondent was sent to Falkirk for a trial and the trial was adjourned because of his illness. He was instructed to return to the office after court and to do the custodies in Livingston.

The firm was not sympathetic to people taking sick leave. When he had taken time off to be with his father who was in hospital and dying, he remembered being put under pressure to get back to work.

For the last two years of his time with the firm, the Respondent had started to take panic attacks. He had not told Neil Robertson or Ian Bryce about these as he did not expect to receive support but rather would have expected to be pulled into the office by them for more criticism. By this time, the

atmosphere had become terrible. The atmosphere changed over the 14 years that he worked there. If it had been like that at the beginning, he would not have stayed as long as he did.

He could not confide in one of them without the other being told. He remembered an occasion when he had attended a party held by family members of Ian Bryce. Ian Bryce did not speak to his family. The Respondent had told Neil Robertson about attending this party. The next day the Respondent was hauled into the office by Ian Bryce who ranted at him and told him his "coat was on a shaky peg as far as the job was concerned". These meetings were not a conversation. It was like a child being hauled in front of two teachers.

He remembered a conversation around the time of the merger where they had asked him what he would do if he was not working at CCL, given his age. The implication of the conversation was that he would not be able to get work elsewhere. He had felt trapped.

The system for holidays was that people had to put in a request. It was understood that Ian Bryce and Neil Robertson would get first pick of the summer holidays. The difficulty was that until they decided what time they wanted off, there was no scope for others to book time off. There was an issue in 2013 when the Respondent had booked a holiday with his wife and children having checked the diary to confirm that neither Neil Robertson nor Ian Bryce were off. It later transpired that both Neil Robertson and Ian Bryce had booked holiday for the same time overlapping his leave. The respondent had been forced to return from his holiday one week early. He referred to the text message, Production 43/5, showing that he had given these dates to Neil Robertson and no issue was raised. There was another issue in 2009. The Respondent had booked two weeks off having given a year's notice. His wife became pregnant. His holiday was booked from 23 May into June. He requested paternity leave to run from 29 April to 12 May. His daughter was born on 1 May. The Respondent required to take paternity leave at that time because there were issues surrounding the birth. Ian Bryce and Neil Robertson complained that he could not have four weeks off as no one had ever had four weeks off. After some negotiation, the only option given to him was to take half of the holiday and come home early.

Between 2012 and 2014, his work life balance was terrible. The hours he worked affected his health. By 2012 he had two young children and had competing demands on his time. Neil Robertson's ethos had been that the job should not affect his family life. That was not reflected in his approach to the Respondent. His working hours gave him a lack of time at home. He also received out of hours calls on the hotline. Ian Bryce and Neil Robertson came off the hotline meaning that the others were on it more regularly.

His work pressures were affecting his Crohn's Disease. His wife warned him of the possible consequences to him. She graphically explained that if he did not make the necessary changes then he faced an early grave. She also complained about him not being there enough for the children.

The witness said that him being made an equity partner was not a genuinely realistic prospect.

It did not take much to register the domain name. He only required to fill an online form and pay a fee of £17 or £18. At the time he did this, he was massively unhappy at work. He found it difficult to explain but it was not always relentlessly bad. Sometimes it was possible to still have a laugh and he thought that there was still some hope that things could go back to the way they were. Thinking back, even now, he found it deeply unpleasant to realise that as a 44-year-old, he had let himself get into the position of being bullied. He had been conflicted and thought that if he worked hard enough, it would go back to the way it was. He did not do anything to act upon the registration of the domain name. He had no self-confidence and did not feel secure.

It was a similar situation when he set up the limited company in February 2014. It only involved the completion of an online form and payment of a fee of £15. He had not confided in anyone apart from his wife. He did not in fact do anything with the limited company until 2016.

He felt he was suffering from a kind of paralysis. He had not taken the actual decision to leave. He had anticipated their reaction if he had suggested to them that he was leaving. He was not sure he could deal with that and the easier option was to stay and try to work harder.

It all had a cumulative effect – long hours, his health, his wife getting vocal and the firm getting busier.

He considered that they must have seen how bad things were becoming for him. They walked past his desk on a daily basis. The obvious solution would have been to give him a day in the office to sort things out. Rather they would take him into their room and yell at him. He was shouted at and demeaned. Insulting comments were made to him, such as "A five year can do your job". Everyone tried to please or appease them not just the Respondent. People walked on eggshells trying not to do anything that might trigger them.

The eventual decision to leave was as a result of his wife telling him that she was going to leave him if he did not. It was an immediate decision taken in the first week of May 2014. He did not tell his

partners because he believed that they would have gone "ballistic". He believed that he would have been dismissed from the partnership, the locks changed, and he would have had no access to any files. No one had managed to leave the firm previously on good terms. He described what he called as a solicitor leaving on a non-controversial basis and yet the remaining staff being instructed not to talk to him. They saw all clients as theirs and were very possessive of them.

The only person the Respondent told about his departure was his wife. He did not tell any clients.

His wife had arranged the headed notepaper. He thought it was a simple matter for her to do.

On the Friday before his departure, he went through to Edinburgh to meet with the Law Society, the Scottish Legal Aid Board and Marsh. He was surprised that they were able to see him without an appointment.

He believed he removed the files from the office on the Saturday. It was his daughter's birthday on the Sunday. He went through the files in the office to identify those where he was the nominated solicitor or was identified as the fee earner. SLAB have strict views of responsibility for the running of a case which include the running of a paper file. Various audits take place to ensure files comply with these requirements. The responsibilities rest with the nominated solicitor. Without the paper files, the Respondent would not have been able to represent his clients adequately. Central Court Lawyers had retained the court diaries and had virtual files, although the virtual files were not an identical copy of the paper file, they were very close to it. He had always intended to return the files once he had finished copying them. A large number were returned in the first week after his departure.

He did not believe that any client was put at risk. He did not copy the files before leaving the firm as he considered that would be misuse of firm property.

He typed letters to the clients where he was nominated solicitor on 6 May and posted them on 7 May. Literally everything took place the week before 6 May. If he had been planning to leave to the extent described by the Secondary Complainers, then he would haven taken more steps.

He left his office equipment in the office on 6 May. He reset the phone and iPad to factory settings. These things had contained personal information including personal messages, texts etc. He recalled after another solicitor left the firm, that Neil Robertson and Ian Bryce had gone through the solicitor's

personal messages to have a laugh. He did not want them to be able to do the same to his phone and iPad.

Clients were asked to chose who they wanted to represent them. He told clients that they were free to choose and if anyone from CCL wanted to speak to clients then they did. On the Wednesday he had had a meeting with Neil Robertson to try to decide on splitting files and they had sat down and managed to agree who would deal with what.

He agreed that he had had a meeting with Vincent McGovern and Neil Robertson on the evening of the day of his departure where it was discussed that he might return to the firm. He went home and discussed it with his wife who had clear reservations. After discussing matters with her, he concluded that she was right and telephoned them to advise that he was not coming back. He accepted that he does not like confrontation and therefore was tempted by the suggestion that things could return to normal. His wife had been the voice of reason.

In the first week matters proceeded with CCL having access to all the clients in the normal way. Matters were dealt with on the basis of client choice. After the first week, things changed. CCL started to produce mandates that concluded "I do not want Glenn Fraser to contact me or represent me." The Respondent had been contacted by security at the custodies suite in Livingston Sheriff Court advising him that Neil Robertson had come into the cells asking to see any clients in the cells who had asked for the Respondent. These mandates prevented the Respondent from speaking to clients. The cordiality from their side lasted for one week. A transfer of legal aid usually followed the receipt of the mandate.

The Respondent did not write to all CCL's clients. He only wrote to those where he was nominated solicitor. He took advice from his own solicitor as to the content of the letter.

He believed that if he had given the other partners notice that he was leaving, that would not have helped him fulfil his duties as nominated solicitor. He described their reaction to his departure. In the first week he received a Court of Session summons. They also complained to the police about him stealing files. They complained about data misuse and complained to the SLCC. At court, they made things really difficult. He had hoped that it might be possible to let clients decide. In the first few days after his departure, most of the clients were asking for him. CCL took the steps they did to have their lawyers standing at reception to intercept clients as they arrived at court even though they were asking for the Respondent. The terms of the mandate they had clients sign prevented him from speaking to them. Clients told him that they were saying that he was in trouble with the police, had stolen files

from them, had no office and would not be able to deal with their cases. The whole thing became very confrontational at the front desk in Livingston Sheriff Court. The local Sheriff asked staff to stop the solicitors from standing at the top of the stairs and to leave the area open.

He did not prepare a list of the files he removed as he had taken them for a purpose and they were safely removed in plastic boxes to his home. Everything he took was given back in a short space of time. It had always been his intention to return them. He had only wanted to copy them. All of them, apart from those files where it was agreed he was to keep them, were returned fairly soon after he left. A list would not have changed that. He had not kept an exact number of files. When Neil Robertson had asked him for a ballpark figure, he had guessed. He believed that all matters that were relevant were dealt with in the agreement made at the solicitor's office in June.

CROSS-EXAMINATION OF GLENN JAMES FRASER

The Respondent explained that the registration of the domain name, the registration of the limited company and the copying of electronic files had all been simple matters. On each occasion it showed that he was thinking about leaving, that he had taken some small step towards that but in fact he did nothing after each step.

He said he did not choose a bank holiday weekend to leave. The timing was entirely down to his wife threatening to leave him. This had not been a good weekend to do what he did because it was his daughter's birthday party on the Sunday.

He insisted that he made no direct client contact before 6 May. He only sent letters to clients where he was the nominated solicitor. He did not accept that he was being unfairly optimistic in the content of this letter when he said that this was a seamless transition. The whole point of him taking the files was to make the transition seamless if clients decided to go with him.

He had no recollection of the local Sheriff agitating for custodies not to be delayed. He did not accept that any case had to be continued because of the removal of files.

He denied timing his departure for a Tuesday because it was the pleas court in Livingston.

He denied that the box of files that he returned to Neil Robertson had contained loose legal aid applications. He accepted that the box had contained legal aid papers that had not been submitted to

SLAB as they related to a case that had called before he left the firm. The case of KD was a petition reduction to summary where the client had already been remanded in custody. The petition had been reduced to summary complaint and the accused had pleaded not guilty. The Respondent had not submitted the completed legal aid application. He denied that the secret removal of files from the office or the failure to keep a list of files put clients at risk. He insisted that no client's case was adversely dealt with. For the first week after his departure, CCL had all of the virtual files. By the second week, they had the paper files. If a client indicated that they wanted to be represented by CCL he returned the file. The reason he had taken the files was because he had in mind his clients' interests. He did not accept that he had acted recklessly. He insisted the files were never unsafe.

He did not accept that the reason he did not make an appointment in advance to see the Law Society, SLAB and Marsh was because he wanted to keep his decision secret. He did not accept that he had not copied the files before he left the office because he thought he would have been discovered. He explained that he was often in the office late on his own.

He accepted that there was a practice in the legal profession to have salaried and equity partners. He did not accept that he was lukewarm about taking on more of a management role. He said that he was not given opportunities to get involved in management and did not believe that the offers they referred to were genuine. On the one hand they seemed to be keen for him to attend the accountant's meetings but on the other hand he was not allowed to see the information going to the accountants in advance. At the time of the merger, he told them that he did not get on well with Vincent McGovern and this made no difference.

The witness accepted that he had not told his partners about his frustrations. Over the years he had said various things to them, and it made no difference. On the occasions when they brought up with him that he was not more involved in the management side of the business, he asked them to explain what they were referring to and what needed to be done. Nothing ever materialised.

He said he had told his partners on various occasions that he could not cope with his working hours. These occasions were mostly when he was being pulled into their office and asked why he was not coping and not getting through his work. That was why he had asked for time in the office to catch up with his work. He had also raised working late with them.

He was asked if it was his position that once the Secondary Complainers had made up their minds they would not change them and he agreed. He was then asked how this was consistent with him standing

his ground about remaining a partner. He said that this was a different situation because that was not something within their power and which they had required to persuade him about.

He accepted that Neil Robertson had told him that after the long running sheriff and jury trial had finished things would be different. In fact, nothing changed for the month of April.

The Respondent insisted that he did not tell the Secondary Complainers about his difficulties because they would not have listened. The discussions regarding him remaining a partner were not evidence that they did listen as that was a different situation. He stated that if Mr Marshall was suggesting that the firm had employed two trainees because another trainee had suggested it to them, that was a strange way to run a business.

He did not accept that Ian Bryce offered to take his place at court on a number of occasions. He did accept that occasionally, on his way back to the office, Ian Bryce might offer to come to court to cover the custodies. By that time, the Respondent would have seen all of the custodies and all that was left was the court appearance. He had declined these offers because he considered that these would simply be excuses to question him later as to why he was not coping with his work.

He accepted that Productions 28/1 and 28/2 for the Complainers were strong praise from Neil Robertson for his work. He accepted that Production 26/6 and 26/7 were congratulations for a job well done. He did not accept that the texts between him and Neil Robertson suggested two people with good communication. He said that he had tried to appease or please Neil Robertson and had tried to keep things friendly.

He stated that he was required to pay the sum owed with regard to his pension contributions as a single lump sum before the merger.

He denied that his wife had booked holidays for the family on three occasions prior to the Respondent having approval from the Secondary Complainers. He accepted that there had been a problem once around the time he was made a partner. He had already explained in his evidence the incident that occurred in 2013.

The witness was adamant that things would not have worked out if he had given the Secondary Complainers notice of his departure. He had known both of them for years. People have to make decisions on the basis of their opinions.

The witness was asked if he thought he had acted in a manner compatible with mutual trust and confidence and responded that he did not think he had an option. He did not accept that he had acted recklessly. He accepted the way he left prevented any discussions from taking place before he left.

He insisted that his explanation for leaving the firm had been consistent throughout the five years that the complaint had progressed. The reasons he had given for leaving in the paperwork for the SLCC, the Law Society and the Tribunal were all consistent. The Respondent insisted that the explanation given in his original Answer at 4.4 (that he had learned about a Legal Aid Board investigation in March 2014) was an additional reason for him leaving and not an alternative to the difficult working environment. He admitted making the statement to the police which was Production 32. He did not accept that his police statement contradicted his original answer at 4.4. He accepted that he had opposed the Law Society's petition to the Court of Session to recover his original police statement. He explained that it was his solicitor's advice to amend Answer 4.4 to delete reference to the Legal Aid fraud. He understood that his solicitor's advice was based on the position that only his police statement was being produced and not others. He argued that his difficult working environment was also described in his police statement.

RE-EXAMINATION OF GLENN JAMES FRASER

The witness indicated that if he had been choosing the time for his departure at a time that would cause maximum difficulties for the firm, then he would have left during one Neil Robertson's long running jury cases.

At the time he had the conversation with the Secondary Complainers about what they had been told by Vincent McGovern regarding a Livingston solicitor leaving to set up business on his own, he had not actually decided to leave the firm. He would not have considered telling them until he had actually taken the final decision. He recalled that the Secondary Complainers had previously been told by a member of staff that she had attended an interview for another job. She was not successful in that application but nonetheless, that was the end of her career with CCL. He was absolutely certain that if he had told them that he was thinking about leaving the firm, then they would have removed him from the firm somehow.

The first week after his departure was unusual because there was only one trial and two first diets on the Tuesday. Otherwise, it was only the pleas court. There were no trials set down for Wednesday,

only intermediate diets and custodies. They had split the cases before court commenced. The Thursday and Friday had only deferred sentence business. He was not aware of any deferred sentence not being dealt with because of his departure.

With regard to the case for KD, the summary complaint had called on 2 May. The client had previously appeared on petition and been remanded in custody. He did not consider it appropriate for him to submit the legal aid application in connection with the summary complaint. At that stage no client of CCL knew of his impending departure. He had seen the client again the week after his appearance to tell him that he had left the firm. If KD had wanted him to submit the legal aid application the legal aid application, he would have done so. Rather, the legal aid application was handed over to Neil Robertson in the box of files.

He indicated that the court diary contained the detail of the name of the case, the kind of case and location of the court. The Respondent had taken all of the files where he was nominated solicitor. The firm could have obtained a list from SLAB of all of the files where he was nominated solicitor and they would have been able to ascertain where the relevant file was.

He was not personally involved in the preparation of accounts for time and line cases.

In response to a question from a member of the Tribunal, he confirmed that he had taken legal advice about the wording of the letter to be sent to his clients in either March or April.

He explained that there were never any conversations about him becoming a equity partner. He believed the Secondary Complainers earned much more than him.

He said in evidence that in November 2013 he had a glimmer of hope that persuaded him not to leave the firm. He explained that he had hoped that things could get better. When he had started to work for the firm it was a nice place to work. Later, occasionally, they were still friendly. It was enough to make him think that things were "fixable".

He confirmed that it took him about three hours on the Saturday to gather the files that he removed from the office.

WITNESS TWO: HAZEL McGUINNESS

The witness confirmed that she completed her traineeship with Central Criminal Lawyers, starting in July 2007. She remained with that firm, or Central Court Lawyers, until December 2014. She is now employed by another firm of criminal defence lawyers. It was her impression that Ian Bryce and Neil Robertson were in charge of the firm although she was aware that the Respondent was a salaried partner. The Respondent shared the same room as her and the other lawyers and he did not seem to be included in closed door discussions between the two Secondary Complainers. Even after the merger, it was her impression that things were done in accordance with Ian Bryce's wishes.

She required to work long hours. Generally, she would leave the office by 7pm but one evening a week would work until perhaps 10pm. She also took work home at weekends.

Prior to the Respondent's departure from the firm, you would not see either Ian Bryce or Neil Robertson in the office after 5:30pm and as far as she could see, they did not take work home.

Sarah Meechan and the then trainee worked similar hours to hers. On occasion when she went into the office on a Sunday, she would find both the Respondent and the trainee there.

The Respondent worked longer hours than her. He would arrive at the office before her and leave after her.

She described the style of management in the office as people basically doing what they were told. As an example, she described how she and Sarah Meechan had attempted to speak to Ian Bryce about the terms of a contract of employment that they were being asked to sign after the merger. In particular, the contract included a requirement for three months' notice. Ian Bryce had been annoyed at being challenged. At one meeting he became extremely angry. She and Sarah Meechan had both simply given in.

Work, with the exception perhaps of jury trials and out of town cases, was allocated on the morning of court. Sarah Meechan covered summary trials. She covered a mixture of trials and procedural type cases and the Respondent would be covering the majority of procedural type cases in the sheriff court. Generally speaking, Neil Robertson did not go to court, apart from on a Tuesday morning. Ian Bryce was either in the High Court or the office. Jury trials were generally covered either by her or Sarah Meechan. The first sheriff and jury trial she did she was only told about the night before.

She had found the working practices stressful and she felt under pressure. She did not realise how these working conditions were affecting her until she went to work in another criminal defence firm and saw how people were treated.

The Respondent's workload was greater than anyone else's because of the type of work he did. He was described as "the summary workhorse". Because of the type of work she did, she was occasionally given time in the office for solemn preparation. She could not remember the Respondent ever being given time in the office even though he asked.

Appointments with clients were fixed for 4pm and 4:30pm. There would perhaps be two or three clients at each time. Whichever solicitor got back from court first was required to see the appointments. It was predominantly her, Sarah Meechan and the Respondent who saw the clients in the office. She recalled regularly coming back to the office from court at 4pm and finding clients waiting for their appointments. She would be instructed to see them. Neil Robertson and Ian Bryce would be in the office and could easily have seen the clients but did not.

Ian Bryce and Neil Robertson would make fun of people who took time off work for either illness or bereavement. She had been hospitalised in 2010 with pneumonia because she had allowed herself to become really run down and should have taken time off work and did not. When her mother died in 2012, she was reluctant to take time off because she recalled the insensitive remarks made by Ian Bryce when the Respondent had taken time off to be with his dying father.

She felt that the Secondary Complainers treated her better than the Respondent which she found surprising as the Respondent was meant to be a good friend of Ian Bryce's. Ian Bryce would speak about the Respondent in a derogatory way saying things like "big daft lump". The Respondent had a massive workload and a young family. She had thought they might be more sensitive to that and give him time in the office. She did not see them give him support in managing his workload.

Sometimes the atmosphere in the office was ok but the majority of the time everyone was under so much pressure it was not. Ian Bryce was really moody although Neil Robertson tried more to "be your friend". She got on better with Neil Robertson than Ian Bryce.

If anyone did anything perceived to be wrong, they were taken into the office where Ian Bryce and Neil Robertson sat, told to close the door and sit down. She remembered on at least one occasion being

called into the office and Neil Robertson saying to her "a fucking monkey could do this job better than you". She described an occasion when Ian Bryce had criticised her at the weekly meeting for not representing the firm properly in relation to one of the custodies she had appeared for, even though he had already discussed this issue with her personally.

She confirmed that the firm's holiday policy required people to submit a written application. She described difficulties that she had experienced. People were discouraged from using all of their annual leave.

It had come to her as a surprise when the Respondent left. Prior to his departure, he had sometimes had a rant to her about things and had sometimes expressed unhappiness.

Because the Respondent did the majority of summary court work and the custodies, a lot of the clients would ask for him and the majority of police intimations of custodies were for the Respondent.

After his departure, people in the office were told to get as many clients back as they could. They were instructed to stand at the front door of the reception of Livingston sheriff court and to speak to any clients they saw entering the building. The Respondent did not stop them from speaking to the clients. She could remember hearing Ian Bryce tell either a client or his wife that the Respondent had mental health problems. The strategy employed by the firm against the Respondent was one of a war. Ian Bryce was so angry he used words to the effect that he wanted to destroy the Respondent. She was aware that Ian Bryce had "a big thing about loyalty".

She was aware that the Respondent had taken files from the office. In her experience if they obtained a mandate then the Respondent gave the file back without a fight. She believed many of the files were returned very quickly.

For the first couple of weeks after the Respondent left the firm, Ian Bryce and Neil Robertson went to the sheriff court every day. The focus was to get as many clients back as possible.

She remembered one of the court officers telling them that the sheriff had asked them not to stand at reception as it was intimidating. She recalled an incident when an out of town solicitor known to both the Respondent and Ian Bryce had been entering the sheriff court and spoke to the Respondent. Ian Bryce had announced "Don't speak to him – he is dishonest".

The only impact on any of the clients was in the first couple of days when they may have been spoken to by two solicitors at court instead of one.

She remembered preparing a statement for the police at the request of Ian Bryce.

CROSS EXAMINATION OF HAZEL McGUINNESS

The witness accepted that Ian Bryce dealt with mostly High Court work. She agreed that Neil Robertson was the managing partner as well as appearing in court.

She confirmed that the firm had put a computer system in place following the merger and that she thought they were trying to go paperless.

Ian Bryce took charge of the weekly meetings. After the merger, the nature of these meetings changed and the emphasis was on how well the firm was doing. She considered that it would be better if these meetings addressed how the work and diary were managed.

She explained that she had one day a week in the office to do her solemn preparation. On these occasions she would see both Ian Bryce and Neil Robertson in the office. A lot of the time they would be listening to music although she did see them do some work.

She accepted that Neil Robertson was involved in a challenging and long running case prior to the Respondent's departure.

She accepted that Production 28/1 for the Complainers amounted to praise of the Respondent. She accepted that if the other partners of the firm had agreed to distribute the work so that the Respondent did not have to do trials that this would be seen as supportive of the Respondent. She accepted that if arrangements had been made for the Respondent to see a time management consultant then this would be supportive of him.

She was referred to a number of text messages/emails between her and Neil Robertson and she explained that she had felt Neil Robertson was approachable and got on better with him than Ian Bryce. She was not trying to paint Neil Robertson as an ogre. She got on with him but this had to be put into the bigger context of the hours of work and stress.

She was taken through a number of text messages between herself and Ian Bryce. She stated that she did not believe that the tone of these text messages showed the true relationship within the office. Her relationship with Ian Bryce was very different to that with Neil Robertson. If you did not go along with his jokes, then he became moody.

Neil Robertson became aware that she was thinking of leaving the firm. He had assured her that he would not tell Ian Bryce. However, it became apparent that he had told him. In the end she had put in her notice before she had another job to go to. Neil Robertson was obviously upset but Ian Bryce had said to her that he was not going to make it easy for her.

The witness said she could not remember seeing Production 10/1 for the Complainers and did not remember taking the statement which was Production 11/1.

She agreed that her view of the firm as a whole in hindsight was negative. When she compared her time there to her present circumstances, she saw the stress levels she had been under. She suffers from eczema and when she was working there her skin was a mess. After she left, her skin cleared up. The texts and emails put to her she said did not reflect the whole. They did not take into account that the partners would not go to court. They did not take into account that the partners, mainly Ian Bryce, would give her a talking to in front of the others. They did not take into account that she worked really long hours and was put under pressure by not knowing what she was going to do each day until the morning. She was not saying that for the whole seven years she worked for the firm that it was hell. Even in the last two years of her time with the firm, at times it was ok. She has experienced working for another firm and can now see how difficult a place it had been to work.

She did not leave CCL because of the workload being too much for her. One of the main factors in her leaving was her relationship with Ian Bryce.

RE-EXAMINATION OF HAZEL McGUINNESS

The witness confirmed that Ian Bryce was not supportive of Sarah Meechan either and gave an example. Sarah Meechan's mother died two days before her wedding. Ian Bryce was an evening guest at the wedding and asked Sarah Meechan's father when she was coming back to work.

WITNESS THREE: SARAH MEECHAN or MITCHELL

The witness explained that she completed her traineeship with Crown Office before becoming an assistant with Central Criminal Lawyers in November 2010. She remained there until August 2014. She now works in the Office of the Advocate General.

She confirmed that she considered that the diary for CCL was not well managed. Work was not allocated until the morning of court. She could remember being told as late as 9:15am what she was going to do that day. There never seemed to be any forward planning. She found all of this very stressful.

She considered that work was not evenly distributed. Summary work was divided between her, the Respondent and Hazel. The Respondent did most of the work. In her view, Neil Robertson and Ian Bryce did not pull their weight or take a fair share.

She would get into the office at about 8:15am and leave at the back of 6pm. Most days she took work home with her to catch up and she worked most weekends. There was a distinction in the working patterns between Neil Robertson and Ian Bryce and the others. Ian Bryce and Neil Robertson seemed to work set hours. The witness, Hazel and the Respondent had to work late to catch up because they were in court every day.

When she left CCL, she moved to another criminal defence firm where she experienced how the court diary should be organised.

She was aware that Neil Robertson, Ian Bryce and the Respondent were all partners. It seemed to her that Ian Bryce and Neil Robertson were in charge rather than the Respondent. She had been aware that the Respondent was a salaried partner and so she thought that had made a difference. She considered that the workload was definitely not evenly balanced. She referred to occasions when she was contacted at court where she had multiple trials to conduct and told to deal with a police interview that had cropped up, even though Ian Bryce and Neil Robertson were sitting in the office. When she got back to the office, she would then have to see clients who had been left sitting waiting for their appointments. There were not enough hours in the day to get everything done. The same circumstances applied to the Respondent and Hazel.

She considered that she had had a good relationship with the Respondent and Hazel. She had had a very difficult relationship with Neil Robertson whom she believed had bullied her. For the first month that she started work at CCL on an almost daily basis Neil Robertson would pull her into the office. It would be apparent that he had gone through the paperwork on her desk and taken files to question her on them. He would go through them to tell her where she had gone wrong, shouting at her. On one occasion she remembered him shouting "A monkey could do a better job than you". Although things did get better, she never did have a great relationship with Neil Robertson.

It should have been apparent to both of them that if someone was in court every day then they had no time to do administration work. They did not seem to recognise that or care that they were working more than their core hours.

On the whole, the atmosphere in the office was unpleasant as everyone was stressed. The way Ian Bryce and Neil Robertson operated they were unapproachable, and it was an unpleasant working environment.

The allocation of holidays was not managed well. She could remember asking Ian Bryce for time off and him snapping at her. Three days before her wedding leave, she had been granted was revoked by Ian Bryce because he said the firm was too busy. She could remember the Respondent having to come back early from a holiday. They had a pattern of granting holidays and then changing their minds.

Her mother died three days before her wedding and so she had ended up taking the original day booked. At the wedding both Ian Bryce and Neil Robertson asked her father when she was coming back to work.

Looking back on it, she could see that she had suffered some kind of depression/anxiety.

She considered that she had had a good working relationship with the Respondent whom she had felt was very approachable. She had not kept in touch with him since leaving CCL. She had been surprised when he left the firm.

After his departure, she remembered being told in particular by Ian Bryce, that they were to try to get business back. It seemed that the partners became very hostile to the Respondent. Court became hostile between CCL staff and the Respondent.

CROSS EXAMINATION OF SARAH MEECHAN or MITCHELL

The witness agreed that Ian Bryce was a solicitor-advocate working generally in the High Court. She agreed that Neil Robertson did appear in the sheriff court before the Respondent left the firm but not that regularly.

She confirmed that there was a weekly meeting which she said was focussed on targets.

She accepted that there was a job to be done in managing the firm. She accepted that there was a distinction between someone involved in the running of a firm and a solicitor working at the coal face. She accepted that she did not know what work Ian Bryce might do in the evenings to prepare for High Court work.

She agreed that Productions 28/1 and 28/2 for the Complainers were an example of Neil Robertson praising the Respondent. She accepted that if Ian Bryce and Neil Robertson had made arrangements so that the Respondent did not have to do trial work that could be seen as supportive. She was not aware that the firm had arranged for the Respondent to see a time management consultant. It would have been more supportive of the Respondent to have taken some of his workload from him. She was referred to texts and emails between her, Neil Robertson and Ian Bryce and agreed that these tended to suggest that the atmosphere at work was not bad every day.

She accepted that it was in the nature of criminal work that last minute cases could arise. But things did not need to be as last minute as they were.

She explained that she left the firm after the Respondent's departure as it had got to the point where she could just not cope with it any longer.

WITNESS FOUR: VINCENT McGOVERN

The witness confirmed that he has been in practice for some 35 years and is now a partner in the firm McGovern Reid. From 2007 to 2011, he was part of the negotiating team for the Law Society negotiating with the Legal Aid Board and the government. He was a board member of the Legal Aid Board from 2012 until 2016.

Prior to his merger with Central Criminal Lawyers, he was a sole practitioner. He knew Ian Bryce, considered him to clever and talented and they both had similar views with regard to business. They had both considered that an amalgamation of the two firms was a good business decision. Ian Bryce introduced the witness to Neil Robertson. The two firms had shared the same accountant. The details of the merger were dealt with by the witness, Ian Bryce, Neil Robertson and their accountant. The administration of the merger later included Ian Bryce's wife.

The witness had been aware that the Respondent was a fixed drawings partner. The witness knew the Respondent from a time when the Respondent worked in Hamilton Sheriff Court. He did not consider the Respondent to be "partnership material" and had raised with both Neil Robertson and Ian Bryce what qualities the Respondent would bring to the table. They reassured the witness that the Respondent had no role with regard to the management of the business. The Respondent was described to the witness as "the summary workhorse" meaning that he would work away and never complain.

The witness was unable to comment on the management structure of the firm prior to the merger. He was aware that there was no partnership agreement. After the merger, he considered that management of the firm was a simple issue. The firm had no client account. The client base was easy to manage. The firm had no private clients so there did not need to be any process for chasing fees. The management of the firm was shared between the three equity partners.

He agreed that Neil Robertson was the nominal managing partner. That was because the witness had nominated Neil Robertson as managing partner of the year. This had been a marketing process. The witness managed the business for the Wishaw side. He had written most of the narrative for the firm website. He considered that Ian Bryce would probably be seen as the staff partner.

Holidays should have been a simple matter to organise. Staff were expected to submit a request. It should not have been difficult to simply ensure that too many people were not off at the same time.

The firm did not have regular partners' meetings. When the witness attended the Livingston office for any reason, if there were any business issues to be discussed then a partners meeting was held. No formal minutes were kept. Many business discussions were carried out on the telephone. Neil Robertson would phone the witness every night on his way home from work. The Respondent was not involved at all.

The witness confirmed that the Respondent sat in what he described as an "ante-room" in the Livingston office together with the other assistants and trainees. He had considered this to be odd and a bit undermining.

He was asked what support the Respondent was given as a partner and responded that he did not think the Respondent had any role as a partner which required support.

The Respondent was not included in any partnership discussions regarding finances. The only financial information that he would have been included in was that discussed at the regular Friday morning staff meeting. The witness agreed that the Respondent was not invited to join in the trip to the south of France. He considered there was no more reason to invite the Respondent to such a meeting than the trainee given that the Respondent was removed from partnership decisions.

The witness was surprised at the Secondary Complainers' ability to make the capital investment to purchase and set up the new Wishaw office.

He continued to work in the Wishaw office and took a lead role there. He would be in the office by 8am and work until 6:30 or 7pm.

He was of the view that the Respondent worked prodigiously hard. He knew that from the size of his caseload. Hazel and Sarah were both impressive, motivated young lawyers. The business was becoming very busy. He thought that Neil Robertson worked hard but came to the view that Ian Bryce did not have a good work ethic. The witness considered that Ian Bryce was a high achiever who wanted to pursue his High Court work. As a result, Ian Bryce was not prepared to do sheriff court work, whether the firm needed that or not. This had been a recurring issue in discussions with Neil Robertson. He would give excuses for Ian Bryce not going to the sheriff court saying that he was either preparing High Court cases or engaged in management issues.

60% of the firm's business was summary business. The Respondent was responsible for the summary work at Livingston Sheriff Court and had an enormous workload. Ian Bryce and Neil Robertson were dismissive and disrespectful of the Respondent's workload and expressed the view that he was not efficient and created more work for himself.

The witness explained that he had seen the growth in the business but had raised concerns with the others that the growth in business was not translating into increased fees. Neil Robertson told the

witness that the Respondent "churned" work in order to fill the court diary. The witness knew from seeing the Livingston diary and the content of the Friday meetings that this was not the case.

It was the witness's opinion that the Respondent's client care was quite remarkable. His client care was of a very high standard but perhaps could be regarded as inefficient if considering profitability. The witness considered the Respondent to be a diligent practitioner.

From the times that he visited the office in Livingston, the witness was not aware of an atmosphere as such. The young lawyers were respectful and friendly, although the witness was never taken into their confidence. The Respondent was meek and gentle. There did appear to be a clear hierarchy within the office. Neil Robertson and Ian Bryce were clearly the bosses and did not see clients, take client phone calls or attend police station interviews. To begin with the witness had admired that business model. They had a business model that was profitable where they sat in the office and others did the frontline work. The atmosphere in the office depended upon the moods of the partners. The barometer of this atmosphere was the door of their office – if the door was closed then people would be waiting for the smoke to escape. If the door was open, then the atmosphere was convivial.

There was never a discussion about the Respondent being made an equity partner. The witness had understood that the Respondent was made a partner for business reasons. Clients prefer to be dealt with by a partner. This had not concerned the witness as he considered that the Respondent was handsomely rewarded. He compared the Respondent to an indentured servant.

The Respondent and the witness did not work closely together. He considered the Respondent to be a gentle, likeable man and he respected how hard he worked. That, however, only goes so far. He had got to know the Respondent better since this and had regrets about the part he played in the way the Respondent was treated.

The Respondent was nominated solicitor for a vast number of clients.

The witness was stunned when he saw the Respondent's email of 6 May 2014. His focus was on how to deal with the implications of his leaving. He was keen to speak to the Respondent. Later that day they spoke on the telephone. The Respondent indicated that his departure was nothing to do with the witness. The Respondent had said that he found his working environment intolerable and that he had issues with both Ian Bryce and Neil Robertson. He had said that his wife was concerned about the way he was being treated. The witness had felt sorry for the Respondent.

The Respondent's departure had surprised the witness as he had not thought that the Respondent had the strength of character to do so. However, his departure made sense given the working environment and the witness knew that he was disrespected and overworked.

The Respondent's departure had big implications for the business. As the Respondent had indicated that he had no issue with the witness, the witness had wondered if it was possible to retrieve the situation. Accordingly, he had spoken to the Respondent about a meeting that night. The Respondent was not prepared to meet Ian Bryce but was prepared to meet with Neil Robertson. At the meeting, the Respondent was polite. There was no hostility. The Respondent had said he needed to discuss the issue with his wife, and this seemed to be more in sorrow than in anger. The Respondent later phoned Neil Robertson and said he was not prepared to return. The witness suspected that for the Respondent to do what he did meant that the situation was irretrievable. The Respondent had "crossed the Rubicon".

The witness was aware that the Respondent had taken files where he was nominated solicitor. The nominated solicitor has legal, professional and regulatory responsibilities in relation to the case. The firm would have had resources to find out which files were taken very quickly. The firm had the diary and electronic files.

At the beginning, the witness had had significant concerns about the risks to the business. However, the Respondent's level of cooperation had been greater than required and he implemented everything. He agreed that he sent the email which was Production 66. This email was written at the stage where he had had these concerns about the financial implications for the firm. None of these concerns ever came to pass. He had thought that the Respondent would have planned his departure very carefully and taken every advantage. In fact, this was not the case. The Respondent facilitated and accommodated the return of business to the firm. This reaction was more in keeping with the character of the Respondent.

The witness had carried out investigations to see if he could identify any breach of fiduciary duties by the Respondent and he had found none.

He agreed that Production 65 for the Complainers was a blog written by him for the firm website. This should be seen as a marketing tool addressed to a particular audience. He agreed that Production 67 was a statement that he had prepared in response to a request by Ian Bryce.

Ultimately, the witness did not think that a return to the firm would have worked. Each of the partners had different reactions to the Respondent's departure. The witness had a degree of sympathy on a personal level. The Respondent was clearly stressed. The witness would have had no problem in the Respondent returning to the firm. However, Ian Bryce took the departure extraordinarily personally. He considered it a personal betrayal that meant that it was irreparable.

The witness was asked what would have happened if the Respondent had given notice of his departure. He responded that he would have used that period to protect the business. He would have marginalised the Respondent's role in the firm to break clients attachments with him. It would have made no sense to allow the Respondent to build a business locally. He would have tried to limit the damage and probably would have asked that the Respondent come through to Wishaw to work.

In fact, the business recovered remarkably well. He thought that 80% of the cases taken were returned. He considered that the Respondent had facilitated the return of cases.

Both CCL and the Respondent had instructed their own solicitors to deal with the dispute. He agreed that a meeting took place on 10 June. The meeting was amicable, and matters were resolved.

The witness did not know if Neil Robertson had reported any issues to the police. The witness had not got involved with that.

The witness had no interest in making a formal complaint against the Respondent. Whilst his departure had been a shock and had possible ramifications, none of these concerns came to pass. The witness had declined to be part of any complaint and had thought that the complaint was "vindictive".

The witness only become involved in these proceedings when he was alerted to the fact that his email and blog were lodged in process.

The witness understood that Neil Robertson and the Respondent had now developed a polite and respectful business relationship. He believed that Ian Bryce was extremely bitter, angry and upset about the matter.

CROSS EXAMINATION OF VINCENT McGOVERN

The witness could not be emphatic about the content of electronic files at the time of the Respondent's departure.

He was not aware of any evidence that the Respondent had up-to-date details for clients which were not on the electronic system.

The witness accepted that the copying of electronic files could have been used to maximise his advantage if the Respondent had planned his departure.

He accepted that his email of 8 May reflected a different attitude to the attitude he described today. He explained that the email had to be taken in context. At the time that he had written that email he had not anticipated that the Respondent would react the way that he did and be as compliant as he became. The Respondent had been in a strong position to cause damage to the firm but in fact he had done the opposite.

He had not been comfortable with the strategy employed at Livingston Sheriff Court of positioning solicitors at the entrance to intercept clients. He had found this to be undignified and inconsistent with a professional approach to retrieving business.

The witness confirmed that he had disassociated himself from this complaint whilst he was still with the firm.

The witness was referred to paragraph 3 of his statement which was Production 67 for the Complainers and explained that whilst this did in a narrow sense show the Respondent ignoring a request for the return of files, in fact the Respondent had literally complied with requests for the return of files and the transfer of legal aid. He was asked if the fact that he was being sued by Neil Robertson and Ian Bryce in an action of account, reckoning and payment impacted on his evidence. He denied that it did. He emphasised that his statement should be read in the context of the time when it was generated. He did not think that the tone of his evidence today was different.

RE-EXAMINATION OF VINCENT McGOVERN

He believed that his statement was produced very soon after the Respondent's departure. The dispute itself was resolved in a matter of weeks following the departure. It was the witness's perception that all of the files were retrieved very quickly. No client was harmed at all. Everything was done, including by the Respondent, to ensure that clients' interests were protected.

In response to a question from a member of the Tribunal, the witness clarified that the new Wishaw office was purchased as a result of secured borrowing and the renovations completed on the basis of unsecured borrowing i.e. the firm's overdraft.

The Tribunal asked for clarification of his reason for dissolving the partnership. The witness explained that he had discovered that his time sheets had been altered without his knowledge to include entries for work he had not done. He dissolved the firm immediately he learned this. He understood that there had been a full police investigation and was told that he would be a witness. He had since been advised that Crown Office had decided to take no further action.

PROCEDURAL ISSUES

1. List of Productions Eight and Recall of Witness

Prior to the third day of hearing on 27 May 2019, the Fiscal lodged two motions – (a) to lodge a further Production late and (b) to recall the witness Neil Robertson. Both of these motions were opposed.

The Fiscal confirmed that the Production he sought to lodge was the recording of a conversation said to have taken place between the witness Neil Robertson and the Respondent on 27 August 2015, recorded outwith the knowledge of the Respondent. This conversation was said to include a discussion of the circumstances of the Respondent's departure. It also included some discussion of other matters which were excluded at the previous preliminary hearing and that the Fiscal did not seek to lead in evidence. The Fiscal had not prepared a transcript as this would have been a challenge given the muffled nature of parts of the recording.

The Fiscal confirmed that he had been told of the recording by the witness Ian Bryce the day before the second day of the hearing. The Fiscal had chosen not to raise the recording with Mr Robertson whilst he was giving evidence and had waited until he had returned to his office to discuss the matter

with Mr Robertson. It had then taken some time for the Fiscal to obtain the recording from him. Having listened to the recording, the Complainers considered it appropriate to bring the recording to the attention of the Tribunal, as the Fiscal indicated that this was material which appeared to be of potential relevance to proceedings, although he would go no further than that. Further, he sought to recall Neil Robertson to speak to the late Production.

The Fiscal could not explain why no mention had been made of the recording to the Complainers in the years leading up to the hearing or during the witness's evidence.

Ms Irvine invited the Tribunal to refuse both motions.

She wondered if the covert nature of the recording was in itself a breach of Rule B1, which refers to trust and integrity, but accepted that this did not make the recording inadmissible *per se*.

She accepted that a motion to recall the witness was competent. As there were no specific provisions in the Tribunal Rules regarding recalling witnesses, she thought it might be helpful to consider provisions in other proceedings. She referred the Tribunal to paragraph 16.81 of Macphail, Sheriff Court Practice, 3rd Edition and Walker and Walker, The Law of Evidence in Scotland, 4th Edition, paragraph 12.3.2.

She submitted to the Tribunal that both motions went hand in hand. Although both were competent, she submitted that the Tribunal had good reasons to refuse them.

With regard to the motion to lodge the late additional evidence, she submitted that for this to be granted two conditions must be met: (1) the evidence must be *prima facie* material and (2) it could not reasonably have been made available before the commencement of proceedings. She argued that the audio recording was not material and that no good reason had been advanced as to why it was not produced until the hearing had commenced. She did not consider the recording to be relevant. She referred to Walker & Walker paragraph 12.4.3 and the case of Cushion-v-HMA 1994 SLT 410. She submitted that Neil Robertson had known about the recording all of this time. He had given evidence over two days and his evidence was very full. He had every opportunity in preparation for the hearing to produce the evidence to the Law Society. Receipt of this audio recording had given her some pause for thought and she had wondered what other evidence the Secondary Complainers might have that they have not produced.

Part of the audio recording relates to evidence that the Tribunal had already ruled should be excluded from probation.

She submitted that the recording was not relevant. The Respondent was charged with professional misconduct by removal of files and by failing to prepare a list. Neither of these issues are raised within the conversation in the recording and so the recording is not relevant. She referred to Walker & Walker, paragraph 1.3.1.

The Tribunal asked Ms Irvine to clarify her submission in relation to Rule B1. She explained that it appeared to her that a covert recording taken by one regulated person of another regulated person may be considered deceitful. Although this was of concern to her, she was not making a great deal of that. She accepted that it was the Respondent who was facing the allegation of misconduct and not Mr Robertson. She conceded that the recording was *per se* admissible.

The Tribunal asked Mr Marshall if he required time to consider the Respondent's List of Authorities. He indicated that he did not require an adjournment and proceeded with his submissions.

He argued that the main question was one of materiality. He submitted that the Tribunal would need to listen to the evidence to reach the answer.

The Chairman questioned whether this created a problem, given that part of the recording related to an issue already dealt with. Mr Marshall suggested that the recording was in two clear parts and the first part of the conversation related to the excluded issue. He suggested that the solution was for the Tribunal to listen to the recording. He was able to say that the part of the recording he wanted to rely on began 11 minutes 57 seconds into the recording. He would not ask the Tribunal to listen to the controversial material.

He stated that he was not convinced that the authorities referred to by the Respondent were binding upon this Tribunal. He submitted that this Tribunal follows the rules in criminal procedure. The Chairman asked if the test to be applied was not the interests of justice. Mr Marshall responded that the authorities referred to by the Respondent referring to materiality etc. were of assistance to the Tribunal although not binding.

In order to answer the question of materiality, he considered that the Tribunal required to hear the recording. With regard to the second part of the test, as soon as the Law Society had become aware of

this recording, it had asked questions of Mr Robertson and made it available. Although the recording could have been made available at an earlier stage by the Secondary Complainers, it could not have been made available at an earlier stage by the Complainers.

He emphasised that it was the Respondent who was facing a question of misconduct and that Ms Irvine's remarks with regard to the trust and personal integrity of the Secondary Complainers was not relevant. In response to a member of the Tribunal as to whether the question of covertly obtaining evidence objectively breached this rule, Mr Marshall responded that the Law Society had been made aware of the evidence and that a balance required to be made.

The Chairman drew Mr Marshall's attention to the fact that this was now List number 8 for the Complainers. Mr Marshall confirmed that the Law Society had engaged with the witnesses in preparation for the hearing and had sought to recover relevant evidence. This was an item that was not made known to the Law Society at an earlier stage. He was unable to say whether the recording was made on a business or personal mobile telephone. He had no clarity as to why the existence of the recording had not been made known before now. The Chairman asked him if he could have put the existence of the recording to the witness whilst he was still on the stand. Mr Marshall responded that he had chosen to wait until the witness had finished giving evidence to raise the query with him. He had only come into possession of the recording literally a week ago.

The Tribunal adjourned to consider these submissions. The Tribunal considered that the test for considering these motions was the interests of justice and fairness to both parties. Mr Marshall had conceded that the authorities referred to were at the very least of assistance to the Tribunal in considering these motions. The Tribunal considered that it had not heard sufficient explanation as to why the existence of this recording had not been put to the witness at an earlier stage. The Fiscal had become aware of the recording the day before the second day of hearing, whilst the relevant witness was still in the course of giving evidence. Mr Marshall had submitted to the Tribunal that this was material "which appears to be of potential relevance to the proceedings". He had not submitted that the evidence was material nor had he gone as far as to say it was relevant.

The Tribunal did not agree with Mr Marshall that it was appropriate for it to edit the audio recording itself and attempt to listen to a recording which was agreed to be of poor quality in an attempt to assess its relevance.

The Tribunal determined that it was not in the interests of justice or fairness to the parties to admit this Production at this late stage and in fact Mr Marshall had not submitted that it was. If the Production was not admitted, then there was no basis for the witness to be recalled and therefore it was appropriate to refuse both motions.

Ms Irvine moved for the expenses of those motions. The Tribunal reserved the question of expenses to the end of the hearing.

2. Adjusted Answers, and Line of Cross-Examination

During cross-examination of the Respondent on 28 May 2019, the Fiscal sought to ask the Respondent if the witness accepted that his actions on his departure were not honest. Ms Irvine had objected to this line of questioning and submitted that if the Complainers wanted to allege dishonesty then that should be explicitly averred within the Record and here it was not. Mr Marshall responded that the Record referred to the duties of trustworthiness and acting honestly. He asked to be allowed to reserve that question until later in the cross-examination of the Respondent.

Later in cross-examination, Mr Marshall sought to put to the Respondent that the reasons he was now giving in evidence for his departure from the firm were not the reasons he had given in his original Answers. This line of cross-examination was objected to.

Both of these issues were continued to 7 June 2019 for full submissions to be made to the Tribunal.

On that date, Mr Marshall confirmed he was no longer insisting on the line of cross-examination relating to honesty and so would not be making any submissions in connection with that matter.

He did insist on the second line of cross-examination relating to the Respondent's change of position in the amended Answers. Ms Irvine confirmed that she continued to object to this line of cross-examination. It being her objection, she asked the Tribunal to hear her submissions first.

Ms Irvine submitted that the question for the Tribunal was whether a previous version of pleadings for a party to proceedings could be put to that party when giving evidence.

She argued that pleadings were not a 'statement' for the purposes of Section 3 of the Civil Evidence (Scotland) Act 1988. She invited the Tribunal to hold that they were more akin to a precognition,

which is seen as something taken through the eyes of the precognoscer. Pleadings should be seen as done through the eyes of the pleader.

She did however recognise that there are circumstances where it could be appropriate to cross-examine a party on such issues. She referred the Tribunal to paragraph 9.25 of Macphail, Sheriff Court Practice, 3rd Edition, Lennox-v-National Coal Board 1955 SC 438 and Healy-v-A. Massey and Son 1961 SC 198. From these cases, she deduced that it is competent to put to a party a change of position which was a stark change of position. She conceded that if there had been a change of position on the part of the Respondent in this amendment then Mr Marshall was entitled to put that to the Respondent. It was her position that there was no change of position by the Respondent in this amendment of the pleadings. In order to consider this question, she invited the Tribunal to have regard to the precise terms of both sets of pleadings. To enable the Tribunal to do that, she lodged as Inventory Three for the Respondent, a copy of the original Answer 4.4.

She invited the Tribunal to look at Answers 3.2 and 4.4 in their original and amended forms. She wanted to make her position absolutely clear that it was she who had considered that the original Answer at 3.2 did not give sufficient notice to the Complainers of the reasons for the Respondent leaving the firm. Therefore, this Answer was amended by her to give fair notice. The Respondent in giving evidence had not departed from what was averred in Answer 3.2. The area in dispute was the content of the original Answer 4.4. She argued that the amendments that took place here, did not amount to a change in position given that it was previously stated in Answer 4.4 that this was not the sole reason for the Respondent leaving the firm but simply "a factor he took into consideration".

She accepted that the responsibility for pleadings lay with her as the pleader. She was in the position to give a full explanation for the deletion of part of Answer 4.4 but was not sure whether the Tribunal would want her to go into that. In her mind, it came down to a simple issue of fairness to the Respondent.

In essence, it was her position that pleadings do not amount to a statement as defined by the Civil Evidence (Scotland) Act 1988. That being the case, it is only where the amendment amounts to a change in position that it would be appropriate to put this to the party in cross-examination.

Mr Marshall invited the Tribunal to repel the objection. He submitted that there were two primary reasons at common law supporting his proposition that this line in cross-examination should be allowed. (1) The Law Society is entitled to challenge the truth of the evidence now being given by the

Respondent and that should be done by putting specific issues to the Respondent as to why his evidence is not the truth. (2) The Law Society is entitled to put the previous Answer to the Respondent as this may have a bearing on his credibility as a whole.

In support of the first reason, he referred to the case of Clinton-v-News Group Newspapers 1999 SC 367. He submitted that in this case before the Tribunal, the Respondent's credibility was an issue as he had changed his position for his reasons for leaving the firm. The case of Clinton was authority supporting Mr Marshall's entitlement to put the previous Answers to the Respondent. The Complainers were allowed to put specific reasons to the Respondent as to why his evidence was not true.

With regard to the second leg of his argument, he submitted that the previous Answers impacted upon the credibility of the Respondent. Common law recognised that it is possible in certain circumstances to put previous averments to a party to the action. In support of this, Mr Marshall referred to the case of Lennox-v-NCB 1955 SC 438.

He submitted, therefore, at common law he was entitled to put this line of cross-examination to the Respondent for two primary reasons – (1) that he was entitled to make a specific challenge to the truth of the evidence being given by the Respondent and (2) the change in the Answers might have a bearing on the Respondent's credibility. He did not agree that the authorities supported a test of a "change of position". He submitted that the test was whether or not the previous defences had a bearing on the credibility of the witnesses. For what it was worth, he submitted that there had been a change of position. He referred to the detail of Answers 3.2 and 4.4. In the original Answers, the only specification of the Respondent's reasons for leaving were those given in the area now greyed out and deleted. Anything else was only generic in nature. In any event, it was his position that the changes raised issues of the credibility of the Respondent.

The next chapter of argument was that his line was supported by the Civil Evidence (Scotland) Act 1988, Section 3. Section 9(c) of that Act confirms that Section 3 applies to proceedings before the Tribunal. He invited the Tribunal to hold that the Answers formed a statement within the Civil Evidence (Scotland) Act 1988 and that they were a statement that reflected unfavourably upon the Respondent and therefore the Complainers were entitled to put this to the Respondent in cross-examination.

Mr Marshall invited the Tribunal to consider the history of the amendments made. The original Answers were lodged in November 2017, including the Answer 4.4 in its full and unamended terms. In January 2019, the Respondent amended his Answers to delete part of Answer 4.4 and that was replaced with the new reasons specified in Answer 3.2. Looking at Answer 3.2 as it is now within the Record, everything after the end of the fifth line was added in January 2019. For these inclusions to be added at the same time as the deletions to 4.4, raised issues as to the credibility of the Respondent.

If the Tribunal were not in agreement that the Answer amounted to a statement, he was still entitled to follow this line of cross-examination at common law (a) as a specific example of his untruthfulness and (b) because it impacts on his credibility in general.

Ms Irvine invited the Tribunal to distinguish the case of Clinton for two reasons. In the Clinton case (a) what was put to the party was never the subject of averments in the pleadings and (b) the evidence that was being challenged was something volunteered by the witness and not given as a direct answer to a question. She submitted that the Respondent had not given evidence of a different situation before the Tribunal and so she did not accept that the Clinton case helped.

The Tribunal asked Mr Marshall if he considered whether the Civil Evidence (Scotland) Act 1988 had had any effect upon the common law. He responded that he did not consider that Section 3 supplanted the previous cases.

The Tribunal adjourned in order to give careful consideration to all of the parties' submissions. Given that this was Ms Irvine's objection, the Tribunal concluded that the appropriate approach for it to take was to consider the detail of her objection first. In making her objection, she had conceded to the Tribunal that if it considered that what was now averred in the Record in Answer 3.2 and 4.4, and spoken to in evidence by the Respondent, was a change in position to that originally pled in Answer 3.2 and 4.4, then Mr Marshall was entitled to ask his question of the Respondent.

In considering the question whether there had been a change in position, the Tribunal considered that it required to read both Answers 3.2 and 4.4 together. In the previous and unamended Answers, the Respondent had admitted that his relationship with the other partners of the firm had started to break down under explanation that that began in around 2012. In Answer 4.4, the Respondent averred that he had no trust or confidence in the actings of the Secondary Complainers, that he had become aware of a Legal Aid Board investigation, that he had no desire to be associated with colleagues who might be involved in a potential legal aid fraud and that had been a factor in his leaving.

In the Record presently before the Tribunal, Answer 4.4 had been amended to delete all reference to the potential legal aid fraud and Answer 3.2 had been expanded to include averments detailing the Respondent's alleged treatment by the Secondary Complainers and a working environment that was described as having become intolerable for the Respondent.

The Tribunal took some time in comparing the two versions of the pleadings and concluded that on a plain reading of the two, the change in the Answers was capable of being read as being a change in position. Accordingly, in the interests of justice and fairness to both parties, the Tribunal concluded that it should allow the Complainers to put the previous Answers to the Respondent, whilst reserving its position as to the weight to be given to any of the evidence elicited as a result.

3. Police Statement

In the course of cross-examination, Mr Marshall began a line of questions of the Respondent relating to a previous statement said to have been made by him to the police which Mr Marshall suggested was inconsistent with his evidence and previous Answer 4.4. Various objections were taken to the form of the questions. Ultimately, Ms Irvine suggested that the Tribunal hear the evidence under reservation on the basis that the whole statement was put to the Respondent. A copy of the statement was provided to the Respondent who was given an opportunity to read it in full. The Respondent accepted that this was his statement and Mr Marshall proceeded to cross-examine him on its content.

WRITTEN SUBMISSIONS FOR THE COMPLAINERS

1 Summary of submission

2 Key facts which amount to misconduct are admitted by Respondent

2.1 Law Society's Complaint is that the manner in which files were removed by the Respondent amounts to professional misconduct.

2.2 Manner of removal was (a) without prior discussion with fellow partners and (b) without seeking client's permission.

2.3 Respondent admits (a) and (b) and so the facts which the Law Society say amount to misconduct are admitted.

2.4 The Respondent claims that these facts do not amount to misconduct.

2.5 In support of that claim the Respondent advances a factual defence and a legal defence.

3 Factual defence – Respondent poorly treated

3.1 Respondent's factual defence is his claim that he was poorly treated by the Secondary Complainers.

3.2 Law Society's position:-

(a) he hasn't proved his factual defence – I will demonstrate that by reviewing the evidence.

(b) even if he has proved his factual defence it is not a defence at all. It might help understand his reasons for **leaving** the firm of CCL. However it is not a defence against the misconduct resulting from his removal of client files in breach of his professional duties.

(c) factual defence should be viewed sceptically – it was the second reason produced by the Respondent after first reason shown was contradicted by a police statement – I will demonstrate that point by reviewing the cross examination of the Respondent.

4 Legal defence – nominated solicitor status

4.1 Respondent's legal defence is his claim that as nominated solicitor he was entitled to remove more than 200 files without consulting with partners or seeking client authority.

4.2 Law Society position is that this claim is not correct –

(a) Accepted that the nominated solicitor duty places responsibilities on the Respondent.

(b) However the Respondent was not performing these duties when he removed more than 200 files.

(c) The Respondent was not performing the role of a nominated solicitor for more than 200 files during the week that he held them.

(d) Whatever his duties as a nominated solicitor, this did not entitle the Respondent to remove the files in the manner that he did – without consultation with partners or seeking client permission.

(e) The Respondent's evidence was that he had formed the impression that the Secondary Complainers would not permit him to discharge his duties. That does not avoid a finding of professional misconduct.

5 Conclusion

5.1 In conclusion I ask you to find the Respondent guilty of professional misconduct on the following basis:-

5.1.1 The key facts which demonstrate professional misconduct are admitted.

5.1.2 The Respondent's claim that he left due to poor treatment is not supported by evidence, even if supported by evidence would not justify removal of files without consulting with partners and without seeking client permission, and is undermined by the fact that he only presented this reason when his first reason was contradicted by his police statement.

5.1.3 The Respondent's claim that his status as a nominated solicitor entitled him to remove the files secretly and suddenly, without partner consultation or client permission, is wrong in law.

5.1.4 Therefore find Respondent in breach of professional duties averred in para 4 of the Complaint and guilty of professional misconduct for the reasons set out in para 5.

6 Law Society's Complaint

6.1 The Law Society's Complaint is that the Respondent removed more than 200 client files from the offices of CCL without warning. He did so in order to start up his own practice. He gave no advance warning of his intentions to his fellow partners. He did not seek permission from clients of the firm to remove their files before doing so. These key facts are admitted.

6.2 The Law Society's Complaint is **not** about whether the Respondent was justified in his decision to leave CCL and set up his own practice. The Complaint is concerned with his removal of the files.

7 Duties breached by Respondent

7.1 The Law Society maintains that by his actions the Respondent breached a number of professional duties. These duties are set out at para 4 of the Complaint:-

7.2 Duty of trust and personal integrity – para 4.2

7.3 Duty to act with other solicitors in a manner consistent with mutual trust and confidence, including the duty not to knowingly mislead other solicitors – para 4.3

7.3.1 The Law Society submits that these duties were breached when the Respondent removed files without consulting with his fellow partners (para 4.5)

7.3.2 These failures are exacerbated by the fact that the Respondent acted recklessly (para 4.6)

7.4 Duty to act in your clients' best interests and not permit your own personal interests to influence your actings –para 4.8

7.4.1 The Law Society submits that this duty was breached when the Respondent removed client files without the prior authority or consent of clients. In the circumstances he placed his own personal interests above clients' interests (para 4.9)

7.5 Duty to communicate effectively with clients and others – para 4.11

7.5.1 The Law Society submits that this duty was breached when the Respondent removed client files without the prior authority of clients. (para 4.12)

7.6 Guidance for partners moving to another practice unit

7.6.1 The Law Society also submits that the Respondent's failure to seek client permission before removing files was in breach of its Guidance applicable to partners moving to another practice. That guidance provides that partners are

entitled to contact clients and invite them to continue to be clients at the new practice unit. In this matter the Respondent removed client files **before** contacting clients. He had no authority from clients to remove files at that time. (para 4.16)

7.7 As a result of these breaches the Law Society maintains that the Respondent is guilty of professional misconduct. This is narrated at para 5 of the Complaint.

7.8 As members of the legal profession, solicitors are obliged to uphold their professional duties at all times. Therefore I will be asking you to reject any submission from the Respondent to the effect that there was no breach of duty because of claims about the conduct of the Secondary Complainers. In my submission the Respondent was obliged to maintain his professional duties at all times.

8 Key elements of misconduct – agreed facts and supporting evidence

8.1 I have submitted that the Respondent admits the key facts which support a finding of misconduct. These are agreed in the First Joint Minute as follows:-

8.1.1 The Respondent admits removing the files without warning his fellow partners – para 8 of First JM.

8.1.2 The Respondent admits removing the files without the permission of clients –para 8 of First JM.

8.2 During the hearing evidence was given which provided more background to these key facts.

8.3 Neil Robertson explained that that in the period prior to the Respondent's departure:

"I was heavily involved in a long running fraud trial – 5 weeks – which culminated at the end of March. It was a stressful time in the office because I was covering that case and unable to go to Livingston or deal with other cases. The trial finished at the end of March 2014. It was a long running case…The trial I referred to ran for five weeks. I was in court every day for five weeks until the end of March 2014. The client was extremely demanding. I would have to spend an hour with him going through evidence at the end of each court day. By the time we got through the evidence, I would sometimes not be finishing until about 8pm."

8.4 Neil Robertson remembered that in April 2014, not long after his trial had finished, that a rumour was circulating that Glenn Fraser was leaving CCL to set up his own firm. He spoke to the Respondent about this and was reassured there was no truth in it. He stated in evidence:- "I also said things would get better with his workload because my fraud case was finished. I said he would be financially rewarded for all the hard work which he had put in while I had been dealing with that case."

8.5 Ian Bryce recollected the same rumour. He stated:-

"My wife turned 40 on 12 March 2014. We went to Venice for four days. On the Friday, I picked up a really strange phone call from Vincent McGovern. His friend had been at a Chinese restaurant in Larkhall and had been talking to a waiter who had said his brother in law was Glenn Fraser and was going to be setting up on his own. This was reported by Vincent's friend to Vincent and then Vincent passed the message on to me. Thereafter, there was a series of panic phone calls where we were all trying to get hold of Mr Fraser. I eventually got

hold of him and told him what had been said about him. He said – I wouldn't do that. He gave me his word. We ended the call and I said I'd see him on Monday. Then I went back to playing board games with my kids."

8.6 Ian Bryce was the godfather of Glenn Fraser's daughter. He gave evidence that on 1 May 2014 he was flying to Shetland to consult in connection with a High Court case. He had left a present for Glenn Fraser's daughter in the office.

8.7 5 May was a bank holiday Monday. Ian Bryce e-mailed the Respondent to check if there was sufficient cover for the next day's court. Ian Bryce was going to be starting a High Court trial in Glasgow and Neil Robertson was looking after his children on 6 May. The Respondent replied to say that there was sufficient cover. That e-mail exchange is produced at Production 19 and 20 and its terms are admitted by the Respondent.

8.8 Note that as at the time of the Respondent's reply on 5 May he had already taken steps to remove files from the office, a letter of resignation had been prepared, albeit not circulated, and letters had been prepared to clients he wished to take with him to his new firm.

8.9 Both Ian Bryce and Neil Robertson gave evidence that when they received an e-mail from Glenn Fraser on 6 May confirming he had resigned they were shocked.

8.10 Ian Bryce gave evidence that he was "devastated" when he received the email. He said everyone was "absolutely shocked" by the Respondent's actions. He said he "thought that the future of the firm was in the balance".

8.11 Ian Bryce said about Glenn Fraser:-

"He never once said to me that he was unhappy. He never once said he wanted a different status. I would have tried to accommodate it. I am not saying I would have done it, but I would have tried my best."

8.12 Neil Robertson explained his reaction:-

"I was gobsmacked. I did not see this coming at all. Nobody had saw this coming."

8.13 In my submission both Secondary Complainers were credible in the evidence they gave about the shock caused by the Respondent's departure.

8.14 I would ask you to consider the evidence of the Secondary Complainers when considering the the key facts which the Respondent has agreed (noted at 8.1 above).

9 Degree of planning in removal of files without warning – agreed facts and supporting evidence

9.1 The foundation of the Complaint is that the Respondent failed to consult with his fellow partners or seek client permission before removing files. It might be argued that the severity of that failure depends on the circumstances. If the decision to remove files was a snap decision made at short notice then the failure to consult or seek client permission is perhaps more understandable. However if the removal of files was planned over a longer period of time, then the failure to consult with fellow partners or seek client permission is also extended and becomes more significant. In my submission that is the position the Respondent finds himself in.

9.2 The Respondent claimed in evidence that he made the decision to leave the firm and remove files on 2 May 2014. However that was inconsistent with the facts he had agreed which demonstrated the degree of planning involved prior to the Respondent's removal of files:-

9.2.1 Respondent registered "fraserandco" domain name on 17 Nov 2013 – agreed para 2 of First JM.

9.2.2 Respondent incorporated a limited company with the company name "Fraser and Company Criminal Defence Limited" on 11 February 2014 – agreed para 3 of First JM.

9.2.3 During 19 April – 2 May 2014 the Respondent arranged to copy client information and client files from the CCL firm server – agreed para 1 of Second JM.

9.2.4 His resignation letter dated 5 May 2014 was printed on headed notepaper in the name of the Respondent's new firm, Fraser and Company. The letter bore the domain name "fraserandco.net" – agreed para 6 of First JM.

9.3 These facts are relevant because they demonstrate that this was not a snap decision made the Respondent in the heat of the moment. This was a step that the Respondent had been planning for some time. You should take this into account when considering the Respondent's claims that he made the decision on to leave the firm with files on Friday 2 May 2014.

9.4 The Respondent's evidence was that registering a domain name and registering a limited company were not evidence of advance planning. In my submission these are clear examples of advance planning. However, in any event the systematic, secret copying of client information and client files in the two week period up to 2 May clearly demonstrates the final stages of that advanced planning.

9.5 On 5 May 2014, a bank holiday Monday, he was drafting his resignation letter and removing files. In connection with the resignation letter Neil Robertson stated:-

"I also noted the headed note paper. It had been printed on letterhead with a place of business. I remember thinking when he would have had time to do that. He had clearly been to the printers and that had been done up."

9.6 He considered that the Respondent had been planning matters for some time.

9.7 Ian Bryce noted that "Bearing in mind the conversation I had had with Glenn in April, the fact it was on professionally printed headed notepaper made me think this wasn't a spur of the moment decision. There had been planning." He also noticed the new business e-mail address and domain name on the letter as evidence of a degree of planning by the Respondent.

9.8 Ian Bryce also gave evidence about a client called [JP] who had attended the offices of CCL in a state of distress having received a letter from the Respondent at his new firm. That letter was dated 6 May and again appeared on headed notepaper from the Respondent's new firm (Production 10).

9.9 The Respondent accepted that he had registered the domain name for his new firm in Nov 2013 and accepted that he had registered the company Fraser and Co Criminal Defence in

Feb 2014. However he maintained that there were just small steps and that he did not decide to leave until 2 May 2014.

9.10 However it was also accepted that in the period from April – May 2014 the Respondent copied client information and client files from the CCL server. This had been done secretly and with the use of specialist software called "Synctoy". It was put to him that this contradicted his claim that he did not decide to leave until 2 May. He maintained that this was easy to do.

9.11 He said "If I had decided not to leave, I could have deleted the copies. Nothing would have been erased or amended on CCL's server and I could potentially never have thought about it again."

9.12 In my submission the Respondent's evidence on this issue is not credible. He had been secretly copying client information and files using specialist software from the middle of April. That is admitted. In my submission this is evidence that the Respondent had decided on a course of action before 2 May.

9.13 The credibility of this position is further undermined by a passage of evidence identified by Mr Cochrane. Mr Fraser had sent a standard letter to clients he wished to follow him to his new firm. He advised that he had taken legal advice in the drafting of that letter. Mr Cochrane asked the Respondent when he had taken this advice on the terms of the letter. He advised that it was "Perhaps April. Perhaps March. I can't remember." Again in my submission this is evidence that the Respondent had decided on a course of action before 2 May.

9.14 The Respondent admitted going into the office on a Saturday 3 May to remove the files because he knew the office would be empty. He admitted sending an e-mail on 5 May saying there was sufficient cover for the next day's court knowing full well that he had already removed a large number of files and the next day would be arriving at court as a sole practitioner.

9.15 In my submission the Respondent's claims that his departure from the firm with files was a snap decision made on 2 May were not credible. I would submit that the opposite view provided by the Secondary Complainers, that there was a clear degree of advance planning is the correct position. That is relevant because, as I noted at the outset of this section, it makes his failure to consult with his fellow partners or to seek client permission to remove files all the more reprehensible.

10 Respondent should have consulted with his fellow partners before removing files

10.1 Instead of secretly planning his departure with a large number of files the Respondent ought to have complied with his professional duties by consulting with his fellow partners before removing client files.

10.2 In this section I consider the evidence which relates to this issue.

10.3 The Respondent gave evidence that his fellow partners would not have been willing to agree a way forward. However in cross examination he accepted that this was his impression – that they would not agree a way forward – and he accepted he could not know that for a fact.

10.4 I would submit that this impression was not supported by the evidence. (However even if it was supported by evidence that did not entitle the Respondent to ignore his professional duties.)

10.5 Both Neil Robertson and Ian Bryce recognised that the Respondent was popular with clients and that there were clients who they anticipated would instruct the Respondent at his new firm. Both advised that, difficult though it may have been, had the Respondent approached them in advance to advise them of his plans they would have worked out a mechanism for the clients going with the Respondent.

10.6 In my submission you can find that evidence credible, because the evidence of Neil Robertson and Glenn Fraser, was that in fact they did cooperate following Glenn Fraser's departure. There was no doubt that this was made more difficult by the Respondent's removal of files, but there was still cooperation.

10.7 When Neil Robertson was asked what would have happened if the Respondent had come to him in advance to advise he was leaving and planned to take clients with him he advised:-

"Practically what happened – I think we all worked pretty professionally. I think we would have done that had he came to me in first instance. I am certain I would have tried to talk him into remaining. If he was absolutely set on that, people who you kind of knew were Glenn's clients would have stayed with him...I would have been pretty taken aback. I would have no issue in him taking the clients he did take because I saw them as his clients."

10.8 Mr Robertson was tested on this in cross examination. He was asked: "Would CCL have facilitated Mr Fraser continuing to act in files in which he was nominated solictor?"

10.9 He responded: "Yes. Mr Fraser had an assortment of very loyal clients who quite simply were his own clients. I think we could have got to the stage we got to without a nuclear bomb exploding."

10.10 He was asked "Do you think your partners would have taken that approach?"

10.11 He responded "Yes. Ultimately, the reality has been Glenn and I have dealt with things in professional manner and even now still do that."

10.12 Mr Bryce was tested on the same point in cross examination. He was asked: "Would the firm have allowed the Respondent to fulfil his obligations as nominated solicitor if he had given notice of his intention to leave?"

10.13 He responded "I think we would have sat down and had some uncomfortable discussions. I think we would have done it."

10.14 That is what the Law Society's guidance expects. However that option was denied by the conduct of the Respondent.

10.15 Both Secondary Complainers were honest in saying that after the Respondent left in the manner that he did, taking files with him, that they felt they were in a battle with him. But both were clear that this was their view **after** he had left without warning taking files. Neil Robertson explained that his feelings towards the Respondent changed after he left in the manner that he did.

10.16 Both Secondary Complainers were clear that had he come to them in advance, which would have been consistent with the professional duties in para 4, and in accordance the Law Society guidance requires, they would have agreed a way forward.

10.17 I would ask you to find their evidence on this point credible. However even if you prefer to rely on the Respondent's impression that they would not have agreed a way forward, in my submission that does not give the Respondent a licence to remove files without consultation or permission.

10.18 Significantly, in cross examination the Respondent accepted that by his actions he had denied his fellow partners the opportunity to agree a way forward with him in accordance with the Law Society guidance. In my submission that concession supports a finding of professional misconduct.

10.19 We cannot know what the outcome would have been had the Respondent consulted with his fellow partners. The salient point is that he had a professional duty to do so. If they did not cooperate that would have given rise to breaches of professional duty on their part. However that seems unlikely given that we have seen there was cooperation between Neil Robertson and the Respondent in the aftermath of the removal of files.

11 Respondent should have sought client permission in advance of removing files

11.1 In addition to consulting with his fellow partners, the Respondent ought to have complied with his professional duties by seeking the permission of clients before physically removing files from CCL.

11.2 In this section I consider the evidence which relates to this issue.

11.3 The Respondent gave evidence that he considered he was acting in the best interests of clients in acting as he did. However he failed to explain why client's interests were at risk such that it was necessary for him to leave CCL and take their files. In my submission there was no risk to client interests which supported a claim that removing client files from CCL was in the best interests of clients.

11.4 In my submission the true position was contained in the Respondent's answer to the Complaint. At answer 3.7 he states:

"Admitted that the Respondent allowed his own personal interests to influence his actings under explanation that at the date of his departure, his interests no longer aligned to those of CCL."

11.5 It appeared at the hearing that the Respondent sought to depart from that answer but in my submission it remains the correct assessment of the interests the Respondent was considering when he departed with more than 200 files without first speaking with clients.

11.6 In my submission the failure to act in client's best interests can also be supported by the fact that his actions put client interest at risk. I will deal with that briefly in the next section, but I don't consider that it is necessary to find that was the case. A finding that the Respondent breached his duty to act in his clients best interests can be supported by the fact that (1) there was no evidence led to suggest that at CCL client's interests were at risk, and (2) the Respondent admits that he allowed his personal interests to influence his actings.

11.7 In my submission those two points are sufficient to make a finding that the Respondent breached Rule B1.4.1 and B1.4.2 which requires a solicitor to act in the best interests of clients, and not permit personal interests to influence his actings.

12 Supplementary evidence relating to failure to act in clients' best interests

12.1 In addition to the reasons given above, I would submit that two further key facts which demonstrated that the Respondent did not act in his clients best interests were (1) that he removed paper files leaving incomplete electronic files with CCL and (2) he did not make an accurate list of files. Both of these facts were admitted or accepted by the Respondent.

12.2 Removal of paper files leaving incomplete electronic files

12.3 When a case calls in court it is in the best interests of the client that a solicitor attends, and is fully prepared to represent their client. It was common ground between the Respondent and the Secondary Complainers that as at May 2014 the paper files which he had removed from CCL's offices contained the full information. The only witness who disagreed with that position was Vincent McGovern and I would ask you to set aside his evidence on this point.

12.4 Neil Robertson explained that the electronic files did not contain key documents such as witness statements, the petition, complaint or indictment which sets out the charges an accused is facing. These would all be in the paper file. Ian Bryce said if you wanted a complete picture of a case you would need the paper file. Production 13 demonstrated that the firm was still trying to move to an electronic filing system in 2016.

12.5 In cross examination the Respondent accepted that when he removed papers files the firm of CCL was left with electronic files which were incomplete. He accepted that the electronic files would not contain the charges clients were facing. When he was asked to accept that this created a risk he responded that CCL got the files back. That was correct, but that also means that during the period where the Respondent held files, if clients wished to instruct CCL they did not have some fundamental information. That cannot have been in clients' best interests.

12.6 The Respondent claimed that he had the appropriate information to deal with client cases if clients chose to go with him. Of course that was correct but this failed to deal with the risk to clients if they wanted to stay with CCL. In those circumstances the firm did not have all of the information necessary to represent clients when their cases called.

12.7 For these reasons in my submission it cannot be maintained that the Respondent was acting in clients best interests when he removed the paper files from CCL's offices.

12.8 Failure to make an accurate list of files

12.9 The Respondent accepted that he did not have an accurate list of the files he had taken and so there was a period when it was not clear who held client files. He initially estimated 140 files when it became clear that the correct number was more than 200. It is clear that the Respondent did not fully consider the risks to clients when he departed. He was not acting in his clients' best interests.

12.10 The Respondent accepted in cross examination that the original list he provided was not accurate. He admitted that producing a list of files which was not accurate had the potential to

cause confusion. In my submission this supports the conclusion that the Respondent was not acting in the best interests of clients when he removed paper files and failed to provide an accurate list.

12.11 Neil Robertson noted that there were files returned by the Respondent which were not on the original list provided by him. He explained:-

"On Friday of that week, he returned two boxes of files which contained half complete Legal Aid forms and crumpled up complaints. There was no record of what was in the boxes."

12.12 Neil Robertson referred the case of [KD] whose papers were found among the two boxes of files returned at the end of the first week. He noted:-

"...There were also papers in relation to [KD]. There were no legal aid papers and we had no idea where [KD] was. It transpired he had been remanded in custody. He claimed he had instructed Glenn to mark a bail appeal. Glenn denied that. We visited [KD] in prison. We only found out he was in Saughton because his mum phoned the office. I went to see him in Saughton. He advised he had appeared from custody, pleaded not guilty and been remanded in custody. He advised he had instructed Glenn to mark a bail appeal but no bail appeal had been marked. No file had not been opened for a bail appeal...."

12.13 Ian Bryce also gave evidence about a client the Respondent had represented who was remanded in custody on 6 May. He recollected that a bail appeal had not been marked, and the firm knew nothing about this.

12.14 This demonstrates the risk to clients created by the Respondent in not making an accurate list of files. This demonstrates that he was not acting in the best interests of clients.

12.15 In cross examination the Respondent appeared to accept that cases were continued because there was an issue as to who was representing the client. At worst, clients can fall between the cracks, which is what happened with [KD].

12.16 Therefore I ask you to find it proved that the Respondent's failure to maintain an accurate record of the files he had removed placed clients' interests at risk (para 3.8 of the Complaint). This was another reason to support a finding that he was not acting in clients best interests when he removed files (para 4.8 and 4.9 of the Complaint).

12.17 Fortunately, it appears that the combined efforts of Neil Robertson and the Respondent served to protect against clients' interests being harmed. However that does not cure the original wrong – that the Respondent's removal of files leaving no accurate list was a breach of his professional duty to act in clients' best interests.

13 Summary – facts admitted demonstrate breach of duties and amount to professional misconduct

13.1 In my submission the agreed facts I have referred to, together with the supporting evidence I have identified, support the conclusion that the Respondent breached the duties averred in para 4 of the complaint, and support a conclusion that the Respondent is guilty of professional misconduct for the reasons set out in para 5.

13.2 Having summarised the key facts and evidence which support a finding of professional misconduct, I will now turn to the Respondent's defence.

14 The Respondent's factual defence

14.1 I have noted that the respondent appears to present a factual defence to the Complaint and a legal defence. I will deal with the factual defence first.

14.2 The essence of the factual defence is that this removal of files does not amount to professional misconduct because he had a good reason for acting as he did. In his evidence he explained that his treatment at the hands of the Secondary Complainers was his reason for his actions. I will make three submissions about this factual defence.

(1) I will first submit that this factual defence is not supported by evidence.

(2) I will then submit that even if the Respondent's claim was established, while it may justify leaving the firm, it does not justify his actions in leaving the firm with more than 200 files without consulting fellow partners or seeking permission of clients.

(3) Separately, I will submit you should take great care with this factual defence because it was the second reason offered by the Respondent for his actions, and that the first reason was abandoned when it was shown not to be consistent with an earlier police statement.

15 First submission on factual defence – not proved by the Respondent

15.1 The Respondent claims he left because of poor treatment by the Secondary Complainers. I say it's for the Respondent to prove that to your satisfaction. In this section I will consider the evidence we heard on:-

15.1.1 Respondent's administration issues and the support provided

15.1.2 Respondent's dislike for conducting trials and how that was accommodated

15.1.3 Respondent's working pattern

15.1.4 Respondent's partnership status

15.1.5 Respondent's claims that he was poorly treated

15.1.6 General evidence on the working environment at CCL prior to Respondent's departure

15.2 I will conclude by submitting that the Respondent has not proved his claims of poor treatment.

15.3 **Respondent's administration issues and the support provided**

15.4 Neil Robertson said that the Respondent progressed well through to being made a partner in 2007. He noted that the Respondent "proved to be very good with clients and he became regarded as a safe pair of hands, particularly in relation to certain clients and summary business." His one weakness was administration. He said "My impression was that Glenn struggled to organise his time properly. Dictation of his court work and legal aid applications seemed to be an issue."

15.5 He gave examples of two occasions where he discovered the Respondent had bags of concluded files which should have been submitted to the legal aid board for payment. He said: "For example, with legally aided files, you have to submit the accounts to SLAB within four months of the last piece of work on the file. On two occasions at least, I found a bag of accounts – thousands of pounds' worth – which were over four months old and hadn't been sent off to be fee'd."

15.6 Neil Robertson explained he found the files "in a canvas bag – like a sports bag." The Respondent had offered to pay for the lost fees but that was rejected.

15.7 NR explained that he tried to help the Respondent:-

"I tried to help Glenn out. I tried to go through his desk with him to help him organise his work. I would regularly go through his post it notes, asking what each one was for and encouraging him to accept that they could be thrown away. The impression I got was that he hoarded information on his desk."

15.8 Neil Robertson gave evidence that he had regular meetings with the Respondent to discuss how to improve his organisation.

15.9 In his evidence Ian Bryce gave the history of his friendship with the Respondent and offering him a job with CCL. He said that the Respondent was hard working and that clients liked him. However he also identified that the Respondent's administration skills were poor.

15.10 Ian Bryce's account of the Respondent's organisation skills was consistent with Neil Robertson's evidence. He stated:-

"He would always have a bundle of loose papers. The papers would be scrawled and scruffy. In amongst them would be partially completed legal aid forms which would have to be submitted within 14 days of the beginning of a case. We started getting data from SLAB including how many legal aid applications were late. They broke it down for us so I could tell which solicitor was bad at putting in legal aid applications late. Glenn was always the worst at that."

15.11 The senior secretary from CCL, Angie Robertson, noted that the Respondent's "desk was always messy". She said that "His desk was always full of files. At one point, he wanted every file back he worked on." She noted that he would always take a call or see a client, but that he was very long winded. In connection with his dictation she said "What could be said in one paragraph, he could do over two or three pages."

15.12 In connection with submitting accounts at the end of matters, Ian Bryce advised:-

"Once prepared, the accounts would be submitted to SLAB. For Glenn, the delay was in getting the file to Lynne. There were occasions where he delayed in submitting files for accounts to be prepared until it was too late and we were outwith the four month deadline."

15.13 Neil Robertson explained that it was felt that the Respondent needed professional support with his time management and this was arranged. He explained:-

"Eventually, we asked him to go to a time management consultant who we hoped would be able to help him prioritise. It got to the stage where we felt hopeless at resolving these issues."

15.14 The firm arranged for a time management consultant to meet with the Respondent. See Prod 38. Ian Bryce explained:-

"I spoke to him. I tried to impress on him how important these things are...Neil arranged for Mr Fraser to be seen by a time management consultant."

15.15 It should be noted that Hazel McGuinness and Sarah Mitchell were doubtful of the suggestion that the Secondary Complainers were supporting Glenn Fraser. However both were completely unaware of the fact that the partners had arranged for the Respondent to meet with a time management consultant. Both accepted that this would have been evidence of the Secondary Complainers supporting the Respondent. Both accepted that they were not aware of the discussions the Respondent was having with the other partners. I would ask you to prefer the Secondary Complainers' evidence on this matter and the averments at para 3.2 which relate to organisation, administration and time management support proved.

15.16 **Respondent's dislike for trials and how this was accommodated**

15.17 Neil Robertson described the Respondent as "adept" at dealing with summary business which he described as "intermediate diets, deferred sentences and custody appearances". He noted that on at least two occasions the Respondent had told him that he did not like doing criminal trials and that as a result he ordinarily dealt with the other summary business.

15.18 He explained:-

"Glenn preferred to do custodies, intermediate diets and deferred sentence courts. Those were all time intensive courts, but a trials court you could be back in office at 11 if witnesses didn't turn up or if the client pleaded guilty. Glenn didn't want to do trials. He preferred to do other courts. On Monday at Livingston, Glenn would do the DTTO [Drug Treatment and Testing Order] court and then he would do the breach of orders court (e.g. breach of community payback orders) – they are both quite busy courts. Then he would do the custodies. Glenn would always want to be in court 4 if he could be because court 4 was the non-trials court."

15.19 Neil Robertson explained that there was a meeting on the Friday before the following week where the week ahead was planned. He said that work was planned taking into account the Respondent's preference to avoid trials.

15.20 Ian Bryce explained:-

15.21 "Glenn seemed to thrive in the breaches of orders court. He expressed a dislike for doing trials of any sort but particularly solemn trials. Generally, he was not preparing or doing solemn work; he was generally doing the summary work at court. Hazel McGuinness and Sarah Mitchell did the summary trials. Mr Fraser was doing the custodies and intermediate diet courts. These are the courts where the cases are not so complicated but there is a volume."

15.22 Neil Robertson explained that the Respondent had been encouraged to attend the NITA course which Sarah Mitchell ultimately attended:- "He didn't want to. We discussed this in 2013. Sarah Mitchell indicated she wanted to do it. Glenn was offered to go on trial advocacy course. I can't remember if he went. He was definitely offered to go on course."

15.23 In their evidence both Hazel McGuinness and Sarah Mitchell confirmed that they did the majority of criminal trials and that Mr Fraser covered the summary courts, although neither was privy to the reasoning behind that.

15.24 Therefore we can see that in arranging of the court diary so that Mr Fraser did not usually conduct trials, that the Secondary Complainers were providing support. I would ask you to find the averments contained in para 3.2 on this issue proved.

15.25 **Respondent's working pattern**

15.26 There was no dispute that the Respondent was extremely hard working. That evidence was given by all witnesses.

15.27 Neil Robertson gave evidence that he had been involved in a long running fraud trial which concluded shortly before the Respondent's departure. He accepted that the Respondent shouldered a large workload. He said:-

"I had conversation with him when my fraud trial ended. I said now I would be able to be help him out again. I also told him he would be financially rewarded for his hard work....He left before he was rewarded."

15.28 Ian Bryce explained that prior to the Respondent's departure "There was no rule that said people had to be in until certain time. People were expected to be able to do the work unless said they were unable to do the work.... There was no expectation people would work very long hours. Had I known that was happening I would have tried to fix it."

15.29 Both Secondary Complainers strongly refuted the suggestion that the Respondent asked for additional time in the office and that this was refused. Ian Bryce said that was "absolutely untrue". Neil Robertson gave evidence that the Respondent was offered time in the office which he declined, and that he never asked for time in the office. Ian Bryce gave evidence that he had offered to go to court in the Respondent's place.

15.30 In his evidence in chief the Respondent stated that when he asked for time in the office this was occasionally granted. He also gave evidence that Ian Bryce had offered to go to court in his place but he had declined this.

15.31 In connection with managing the Respondent's working pattern, Neil Robertson stated "It is difficult to manage someone who doesn't come to you with problems. I can see in retrospect there were problems but he didn't come to me at time."

15.32 **Respondent's partnership status**

15.33 There was evidence that the Respondent was a salaried partner as opposed to an equity partner. That he was not involved in the management of the firm in the same way as the equity partners. In my submission that is a common position across law firms where you have senior and junior partners, and some partners with more role in management and others more client facing.

15.34 A number of witnesses who gave evidence, including the Respondent, accepted that it was common practice for a law firm to operate with junior and senior partners, to have salaried and

equity partners. In my submission that is not evidence that the Respondent was being ill-treated.

15.35 Neil Robertson's evidence:-

"When Glenn first became partner he said he wanted to be involved in the decision making of firm. I was all for that. He advised that he wanted to take a greater role in staff management. He was probably best out of all of us in relation to IT and computers. We had hoped he would take a bigger role in terms of online advertising and going to accountants. That involvement decreased. In the build up to merger, Glenn's management work was negligible. He would choose to go to court rather than do management work."

15.36 Ian Bryce's evidence was that the Respondent showed no interest in management but that he tried to encourage him:-

"Glenn had no interest in management. He never said anything about being made a profit sharing partner....After the merger, I had a conversation with Glenn in the office. I said he was doing very well with the summary business and that clients liked him but he had to take more management responsibility. I said if he became more involved in management, there would be strong case for him to become profit sharing."

15.37 The Respondent was asked if his views were sought prior to the merger with Vincent McGovern. He said that he was asked for his thoughts and advised that he did not know Vincent McGovern.

15.38 A number of witnesses attached some significance to the fact that the Respondent, although a partner, did not sit in the same room as the Secondary Complainers. It was explained that the Respondent has sat in the same room from the time he started with the firm. In my submission there is no great significance in seating locations.

15.39 Neil Robertson said that when they spoke at lunchtime on 6 May 2014 that the Respondent raised the issue of not being a profit sharing partner. He said the Respondent:-

"...made it clear that he didn't think that the damage was irreparable and we discussed whether we might be open to him coming back to the firm. At that point, I said that now I was aware of what his issues were, we would obviously have a discussion about that. The discussion also covered Joanne's expectations. Joanne is Glenn's wife. Glenn said that Joanne expected him to have been made a profit sharing partner by that point."

15.40 Neil Robertson's evidence was that the Respondent had never raised being a profit sharing partner with him previously. Ian Bryce also gave evidence that the Respondent had never raised his status as a partner with him. In cross examination the Respondent accepted that he had not raised frustrations about his role at any time before he left taking the files. In my submission that is a significant piece of evidence.

15.41 The Respondent painted a picture whereby the Secondary Complainers made decisions and that was the end of the matter. He also said that the Secondary Complainers were good at seeking the views of others but in reality they didn't want input or responses. However when it was put to him that the Secondary Complainers might actually have been seeking input or responses he accepted that this was possible, and went on to accept that he was giving his

impression but couldn't say what was in their minds. He accepted he could be wrong about his impressions.

15.42 In summary the Respondent was unhappy, he did not raise his unhappiness with the Secondary Complainers, and then he determined to leave with files without consulting with his partners or seeking the permission of clients.

15.43 **Respondent's claims that he was poorly treated**

15.44 In my submission the claim of ill treatment is not consistent with the evidence of Robertson and Bryce. Their evidence painted a picture of demanding but supportive working environment.

15.45 Neil Robertson's evidence on his relationship with the Respondent prior to his departure.

"I thought me and Glenn were still friends. I thought we were still relatively close. We would speak most days. We shared interests outside of work. We both enjoyed comic books – Marvel comic books and would discuss that regularly. Glenn didn't like football so we didn't really talk about football."

15.46 We heard evidence that the solicitors in the firm would communicate by email and by text. What was notable was an e-mail sent by Neil Robertson to all staff at CCL, which praised Mr Fraser for an outcome he had achieved for a client – production 28. That was notable not just because it was a very public display of support – being sent to the entire office – but also because of the timing of that supportive message. It was sent by Neil Robertson to Mr Fraser and the rest of the firm on 25 April 2014, less than two weeks before Mr Fraser left the firm with the files.

15.47 The Respondent in cross examination accepted that this was a clear example of a supportive working environment.

15.48 Neil Robertson gave evidence with reference to a set of text messages exchanged between him and the Respondent. These were produced as production 26. These included informal discussions about a faculty night out (26/1), and Neil Robertson praising the Respondent for results achieved at court (26/6, 26/7).

15.49 Neil Robertson recalls the Respondent explaining that his wife had driven him to leave the firm. She was ambitious for him. His evidence was that the Respondent said that he wanted to come back but his wife would not let him. The Respondent also gave evidence that he left the firm because his wife demanded this.

15.50 Neil Robertson gave evidence that Glenn Fraser spoke to him on 6 May about his reasons for leaving the firm. He advised that:-

"...we wandered round the McArthur Glen centre at Livingston. It was the first chance I had to ask him why he had left. He said it was his wife Joanne who had forced him into it. He said if he was still single, none of this would be happening. He made reference to working really hard and I said I told you that was going to get easier now because I was going back into summary courts."

15.51 In his evidence Ian Bryce confirmed that Neil Robertson recounted this discussion to him later. No other reasons were given at that time for him leaving.

15.52 Neil Robertson explained that on the question of the Respondent coming back:-

"He said he would be happy to have a discussion but he would need to run things past Joanne. He didn't know what she would say. He said one of the things that was a catalyst was that he had gone home and found search parameters for properties in Lenzie on his home PC. He said he took that to mean that Joanne was going to be leaving him if he didn't leave the firm. I don't know if he discussed that with Joanne – he didn't say."

15.53 The discussions with the Respondent continued later that day at the Tony Macaroni restaurant in Livingston.

"We had a further discussion. It wasn't a meal. It was just coffee. Glenn gave the impression that it wasn't irreparable. He discussed issues such as heavy workload. Vincent said at the time that it was the first time he had been aware of any issues like that and asked if the issues were capable of resolution. Glenn said they may be but he would need to speak to his wife. The clear impression given was – I don't know if Glenn was doing this to pass blame from himself – it wasn't his decision."

"Glenn said he would phone me back to let us know his decision. I waited in office till 8pm but didn't hear from Glenn. I then texted and phoned him. He eventually responded. He was quite upset. He said there was no way back. He said Joanne was not having any of it and his resignation stood."

15.54 In his evidence the Respondent admitted that "I took the files because my wife was going to leave me."

15.55 We have heard evidence about holidays and pensions. We have heard the process for holiday bookings, and that the Respondent failed to follow the process. Neil Robertson gave evidence that on four occasions the Respondent booked holidays without having these approved. He explained that as a result on one occasion he, Neil Robertson, required to re-arrange his holidays at a cost. On another occasion he explained that Ian Bryce required to re-arrange holidays because the Respondent had booked holidays without getting approval first.

15.56 When it was put to the Respondent that he had booked holidays without approval he responded:-

"My recollection is that there was a problem with holidays once. I understand there was a problem with holidays once. It was probably around the time I was made a partner. There was an issue with one holiday. I would accept that."

15.57 He went on to accept that there were two occasions when he had booked holidays without approval. He accepted that there was one occasion before 2013, and a second occasion in 2013 and on that second occasion he was asked to come back from his holiday early.

15.58 When the Respondent's wife had a baby he had requested two weeks holiday to follow his two weeks' paternity leave. He was advised that the firm could not accommodate that. That clearly caused a difficulty.

15.59 We have also heard about the overpayment of pension contributions by the firm to the Respondent and the recall of those overpayments. That was another matter which caused some difficulty.

15.60 These matters clearly impacted on the Respondent's attitude towards the Secondary Complainers. He may well have wanted to leave the firm as a result. But as I explain below, that does not justify his actions in removing files in the manner that he did. It does not excuse his breaches of professional duty.

15.61 **General evidence on the working environment at CCL prior to Respondent's departure**

15.62 It has been suggested on behalf of the Respondent that the working environment at the firm was poor. In my submission the evidence on this point is mixed, but that even if it was established that the working environment was poor this might explain a decision to leave but it did not justify the removal of more than 200 client files without consultation with partners or permission from clients.

15.63 In connection with the working environment, Neil Robertson's evidence was:-

"I thought everyone was pretty professional in terms of work ethic. The hours were put in. I don't recall people working exceptionally long hours. There was a period between maybe March 2013 to Dec 2013 where we had a large number of time intensive cases. It was all hands to the deck at that point. But people did their jobs and went home."

"I thought it was collegiate. People were friendly without being overly friendly. A lot of that is clarified from data from the office. We had training days, days out, a Burn's supper. I would describe the office as a place where people had bought into the work ethic of firm."

15.64 Ian Bryce gave evidence that there was a good working environment in the office. He noted:-

"People were busy and could be stressed at times but generally we did fun things at the office which made me think things were okay. We had Friday meetings. We would take turns to buy breakfast rolls. We had a Burns Supper. We paid for NITA courses."

15.65 The examples of supportive communications were not limited to Glenn Fraser. In the evidence of Hazel McGuinness and Sarah Mitchell, we could see supportive text and e-mail communications being sent by the Secondary Complainers.

15.66 Production 42 consisted of a series of text messages between Neil Robertson and Hazel McGuinness. This included text messages which Ms McGuinness accepted were supportive and reassuring (Production 42/8). She stated she had a supportive working relationship with Neil Robertson. She found him approachable and she accepted this was demonstrated by her communications with him (Productions 42/4, 42/7, 42/16). These text messages were also confirmed by Neil Robertson.

15.67 Production 40 contained text communications between Ian Bryce and Hazel McGuinness. These demonstrated an informal style of communication which Ms McGuinness described as "jokey" (40/2, 40/3, 40/4). The text messages also referred to Hazel McGuinness attendance at a NITA advocacy course run by visiting US trial lawyers (40/1). These text messages were also confirmed by Ian Bryce.

15.68 Production 39 consisted of a series of text messages between Ian Bryce and Sarah Mitchell. This included encouragement for Sarah to pursue the solicitor advocate qualification "Brilliant – well done. Step closer to the sol ad course I think" (Prod 39/1), and Sarah asking Ian Bryce if she can call later one evening to discuss a case and he replies "Of course, call when suits" (39/1). Sarah accepted that she had a supportive relationship with Ian Bryce. These text messages were also confirmed by Ian Bryce.

15.69 Production 44 contained text messages between Neil Robertson and Sarah Mitchell. This included text messages on 17 April 2014 where Neil Robertson was asking after Sarah's welfare following an exchange she had had at court with another solicitor (44/3). Sarah gave evidence that after a difficult start at the firm her relationship with Neil Robertson had improved by this time and that he was being supportive here. These text messages were also confirmed by Neil Robertson.

15.70 It was interesting to note that Hazel McGuinness gave evidence that she had developed a good working relationship with Neil Robertson, and found Ian Bryce more challenging to work with, while Sarah Mitchell's evidence was the opposite. She had developed a good working relationship with Iain Bryce and that Neil Robertson was more challenging to work with.

15.71 In my submission there is nothing remarkable in this. In a working environment there is nothing unusual about the fact that one person may strike up a good working relationship with an individual that another person finds more difficult. Indeed that was the view offered up by Sarah Mitchell to explain the difference of views. She said "It is human nature that different personalities get on with each other."

15.72 There was a sense that neither Hazel McGuinness nor Sarah Mitchell remembered their time at CCL particularly fondly. However some of the negatives identified don't hold up to closer scrutiny. Hazel McGuinness gave evidence that she found Ian Bryce difficult to deal with. However the examples she gave of that were (a) he was keen to implement a hot desking policy against her wishes (b) that solicitors were asked to agree to a three month notice period in their employment contract, and (c) that there was a focus by management on financial performance. In my submission none of these examples support a conclusion that Ian Bryce was difficult to work with.

15.73 It was also clear that Hazel McGuinness and Sarah Mitchell left the firm in the period following Mr Fraser's departure with the files. That was a demanding time for all. Both gave evidence that the working environment became more demanding after Mr Fraser left with the files. It was put to them that their recollection of their time with the firm was influenced by the difficult period immediately before their departure. Sarah Mitchell explained that after the Respondent left the increased demands of the working environment were such that she decided to leave.

15.74 Both Hazel McGuinness and Sarah Mitchell gave evidence that there were good and bad times working at the firm before they left. That evidence was supported by the positive e-mail and text communications produced. These texts demonstrated that junior solicitors were supported in the work they were doing but they also showed concern for the wellbeing of Hazel and Sarah.

15.75 The suggestion that Hazel McGuinness and Sarah Mitchell had had positive experiences at the firm which were lost a little in the manner of their leaving was consistent with Michael Bell's views of these two solicitors. Of Hazel McGuinness he said "She was very much in her stride

as a trial lawyer. Pleasant and easy to deal with." Of Sarah Mitchell he said "She always struck me as being very relaxed and capable lawyer."

15.76 In my submission the overall picture presented was of a supportive but demanding working environment which was made more demanding when Glenn Fraser left the firm.

15.77 It was interesting to hear the evidence of Michael Bell. Mr Bell had been a senior civil servant with management responsibility in the Crown Office before working with CCL. In his time at Crown Office he held senior roles including Head of the Appeals Unit and Head of Fatalities Unit. After leaving Crown Office he had been retained by CCL on a consultancy basis to assist with increased workload. He was a solicitor advocate and often worked in tandem with Ian Bryce, with Mr Bryce acting as the senior solicitor advocate and Mr Bell his junior. He started working with the firm in 2012 and was with the firm in May 2014 at the time of Mr Fraser's departure.

15.78 He was asked about the office environment and said:-

"Physically it was a bit of a mess – papers all over the place getting ready. I was used to that. I had been a fiscal in Glasgow. Much the same. All about making sure you are ready for court. People spoke. People were busy. I didn't think there anything wrong with atmosphere....I was not aware of any difficulties or undercurrents. Never heard people arguing. I wasn't there all the time. I saw nothing which I would have regarded as untoward or inappropriate."

15.79 His assessment over the running of the caseload was that "I did not notice or spot anything which troubled me. Cases were prepared for well and dealt with appropriately."

15.80 Of Neil Robertson he said: "He knew the business. He knew the cases and what the points were in them and he knew the clients. He would be helpful to me."

15.81 Michael Bell advised that he conducted 9 or 10 High Court cases with Ian Bryce over the years. He said: "A lot of work I did with him was as second solicitor advocate and as instructing solicitor. He was always very well prepared. He would rely on me to provide a robust opinion.... He was easy to work with. I don't think we've ever had an argument. We are two people who come to an opinion on a case. Where we didn't agree, it never became an argument. We usually could come to agreement. He would listen to what others had to say. He could make a point forcibly if he had to but not nastily."

15.82 Of working alongside Glenn Fraser he said: "The conversations would always be pleasant. I never saw him being overly anxious and I never saw him lose his temper."

15.83 The senior secretary from CCL, Angie Robertson noted that said the working environment was good. She considered that everyone got along with everyone else. Until the Respondent's departure she thought that Ian Bryce and Glenn Fraser were best friends.

15.84 She explained that Ian Bryce did a lot of work in the High Court and for the Parole Board and so she tended to speak more with Neil Robertson that Ian Bryce. She said:-

"I got on well with all the partners. Neil was very approachable in my personal view. If I had any problems, I could speak to Neil Robertson. I could speak to him either about personal or work problems. I could probably do that with all the partners there."

16 Summary: Respondent has not proved his factual defence

16.1 Returning to the Respondent, in summary my submission is that the Respondent has not established on evidence that he was poorly treated.

16.2 On the one hand the Respondent says he was not supported by the Secondary Complainers but on the other hand he accepts that arranging a time management consultant was supportive; he accepts that Ian Bryce offered to take his place at court, he progressed through the firm from assistant to partner. He accepted that the Secondary Complainers had proposed that he become a partner. He accepted he was praised for a job well done.

16.3 Therefore in my submission the Respondent has failed to prove that he was poorly treated. He has failed to prove his factual defence.

17 Second submission on factual defence: Even if poor treatment made out it is no defence to misconduct

17.1 In the previous section I submitted that the Respondent had not proved his factual defence – he had not proved that he had been poorly treated by the Secondary Complainers.

17.2 However even if you considered that the Respondent had been poorly treated in the ways he claims, in my submission this would not provide a defence to the complaint of professional misconduct.

17.3 If the Respondent was not happy with how he was treated and his positon in the firm that may have been a reason for him to leave, but it did not justify the removal of more than 200 client files without consulting with his fellow partners or seeking the permission of clients to remove their files.

17.4 Therefore even if you considered that the Respondent had been poorly treated in the ways he claimed, in my submission that does not allow him to ignore the professional duties referred to in the Complaint.

17.5 The Respondent seemed to consider that he was able to set aside his professional duties in these circumstances. It was put to the Respondent that he hadn't acted in manner consistent with mutual trust and confidence. His response was "I didn't think I had an option given their [the Secondary Complainer's] conduct."

17.6 As members of the legal professional, solicitors are obliged to uphold their professional duties at all times. In my submission this obligation does not fly off in certain circumstances. This is not a contractual arrangement where if one party breaches the terms of a contract the other party is no longer held to the contract. Therefore I ask you to reject any submission that there was no misconduct by the Respondent because he had been poorly treated by the Secondary Complainers. In my submission the Respondent was obliged to maintain his professional duties at all times.

17.7 In summary it is submitted that the Respondent has not proved poor treatment, but that even if he had that does not entitle him to breach the professional duties outlined in the Complaint. I will return to this point under the chapter of the submission which sets out why the Respondent's conduct amounts to professional misconduct.

18 Third submission on factual defence – background to factual defence being produced

18.1 Separately, in my submission you can have reason to doubt the Respondent's factual defence when you come to consider the background to that defence being produced.

18.2 The factual defence, which was the Respondent's evidence at the hearing, was that poor treatment by the Secondary Complainers was his reason for leaving.

18.3 However this was not the original reason he provided for leaving. The original reason, as contained in his answers was that he learned of a fraud on the board in March 2014 and did not want to be associated with others who had committed a fraud on the board. It was put to the Respondent in cross examination that he had been aware of a fraud on the board at an earlier stage. He did not accept that. It was put to the Respondent in cross examination that he had deleted his original reason and produced a new reason only when his first reason had been contradicted by a police statement. He conceded that he had deleted the first reason, that he left when he learned of a fraud, because he had been advised that it would not be in his best interests to adhere to the original reason.

18.4 The Respondent's original answers to the complaint, and his prior police statement (production 32) were put to him in cross examination.

18.5 At para 4.4 of his original Answers the Respondent denied that his actions were in breach of the duty of trust and personal integrity and the duty to act with other solicitors in a manner consistent with mutual trust and confidence. In denying those duties were breached he averred:-

> *"Explained and averred that the Respondent did not mislead the Secondary Complainers. His conduct in relation to the removal of files was transparent. The Respondent had no trust or confidence in the actings of the Secondary Complainers.* ***In or around March 2014, the Respondent became aware of investigations at the instance of the Scottish Legal Aid Board in respect of false claims upon the Legal Aid Fund. The Respondent did not wish to be associated with colleagues who had potentially committed a fraud upon the Scottish Legal Aid Board. This was a factor which the Respondent took into consideration in reaching his decision to leave the firm of CCL.***"

18.6 These averments suggested that the first time the Respondent was aware of the alleged fraud was March 2014. These averments also suggested that the Respondent had no part in the alleged fraud.

18.7 In my submission both of these points are inconsistent with a statement the Respondent provided to the police on 25 May 2017. This was a witness statement and was provided by the Respondent in the knowledge that he was no longer under investigation. As a result I would suggest he was more able to state his position clearly than during the period when he was still facing investigation personally.

18.8 <u>Prior police statement</u>

18.9 His witness statement is production 32. This statement was taken by [...] on 25 May 2017 at the Respondent's business address. Another officer, [...] was present. The Respondent

remembered giving a statement to these officers. In the section on authentication this was noted as signed by the Respondent.

18.10 In his witness statement the Respondent discusses a three accused case [...]. At page 3, the Respondent stated in the second paragraph:-

> "Several months after the firm took on the 3 cases, myself and Sarah Meehan were spoken to by Neil Robertson. He spoke to us both at our desks, and told us that perusals needed done in the 3 co-accused drugs case. He has a sheet of paper, which he gave to us, which was a full list of all perusable items in the cases. Beside the entries was figures relating to the length of the perusals. There [these?] were all co-accused and the legal aid board do not pay for perusals for more than one accused in these circumstances. I told Neil Robertson that this was pointless and that we shouldn't be doing this, we were told "get it fucking done"."

18.11 He goes on:-

> "Sarah and myself agreed to put entries in for a client each. I think I took the [...] perusals. I put entries in my timesheets for dates after his legal aid had been granted. The times and dates entered were not correct, and neither was the length of time taken to peruse the items in question. For the avoidance of doubt that is exactly what Neil Robertson had asked us to do. He was very precise and there was no room for misunderstanding his instructions. Time records were created to match the entries in the timesheets. Because I had been dealing with [...] and [...] on the telephone I had read disclosure as it came in, but not on the times and dates in the final accounts, and certainly not for the length of time charged. I was aware that these time records would likely be charged to SLAB. [The piece of paper supplied by Neil Robertson was a single A4 handwritten sheet. I'm in the process of looking for it.]
>
> I have been shown the Label No Spreadsheet of Timesheet data for Glenn Fraser, the police have pointed out that I appear to have created and amended a number of timesheets for the [...] case on 25 September 2013. I would guess this was the date Neil Robertson instructed us to add these perusals, and the amendment of so many timesheets on the same day was part of the process of creating records. I assumed the times provided by Neil Robertson were based on the formulaic rate of 15 minutes per 10 pages."

18.12 In this passage of the Respondent's police statement we can see that he admits creating false time records. He accepts that he understood that these time records would be submitted to the legal aid board. He accepts that he created a number of these false time records on **25 September 2013**.

18.13 Compare this statement with the original defence to this Complaint where he pled that he became aware of an issue in **March 2014**, did not want to be associated with colleagues who were engaged in a potential fraud, and that this was a factor in his decision to leave the firm, taking the files with him.

18.14 In my submission his police statement challenged the credibility of his original defence to the claim. Not only did he know about a potential fraud on the board in Sep 2013, not March 2014, but by his own admission he created false time entries.

18.15 The Respondent did not depart from his police statement when he gave evidence.

18.16 Therefore you can conclude that the Respondent admitted creating the false records, and that he created some of those false records on 23 September 2013. If you reach that conclusion then I submit that you can consider the Respondent's original reason for leaving the firm, and taking the files, as set out in Answer 4.4 was not correct.

18.17 It was put to the Respondent that his original answer referring to learning of a fraud in March 2014 was deleted after the police statement referring to false time entries in September 2013 was lodged with the Tribunal. The Respondent accepted that.

18.18 He was asked why he had given instructions for his original answers to be deleted after the police statement was lodged. He responded:-

18.19 "I took legal advice from my solicitor. It was felt - and I agreed - that with only my statement being produced, that it wouldn't be fair. It was one tiny part of one huge investigation. It wasn't fair. It was not in my best interests for that one statement to be produced. That was the reason why I agreed with my solicitor's advice and asked for that averment to be deleted."

18.20 Therefore we can see that the Respondent provided an answer, which was subsequently undermined when a statement he had given to the police was produced. I would ask you to bear that in mind when you are considering the credibility of the factual defence now pled by the Respondent. This was only produced after the original reason had been contradicted by a police statement.

19 Summary of Law Society's position on Respondent's "factual defence"

19.1 He has offered poor treatment as his reason for leaving.

19.2 First, he has not proved poor treatment.

19.3 Second, even if he had established poor treatment, that does not justify his actions in removing files in the manner that he did. It does not excuse his breaches of duty. It may explain why we wanted to leave, but it does not justify the secret and sudden removal of files with no consultation or client permission.

19.4 Third, poor treatment is not credible because it is the second reason arrived at. The first reason having been undermined by a police statement which contradicted it.

19.5 Therefore in my submission you can reject the Respondent's factual defence to the complaint.

19.6 In his evidence the Respondent pointed to another reason for removing client files which was his status as the nominated solicitor for the majority of files he removed. I have referred to that as the Respondent's legal defence, and this is considered next.

20 Respondent's legal defence: his nominated solicitor status

20.1 The Respondent appeared to suggest that he considered he was entitled to remove the files, secretly and suddenly, without partner consultation or client permission, to comply with his duties as nominated solicitor.

20.2 On one reading the claim here is that the Respondent is thinking about his duties to service clients. However that claim is contradicted by the Respondent's pleadings. In his pleadings he accepts that he was acting in his own personal interests. He states at Answer 3.7 "*Admitted that the respondent allowed his own personal interests to influence his actings under explanation that at the date of his departure, his interests no longer aligned to those of CCL*". Note here this is not a claim that he was concerned with his client interests. He makes clear he is concerned with his personal interests. I would ask you to bear that admission in mind whenever you are considering the Respondent's claim that he required to take the files to comply with his nominated solicitor duties.

20.3 Legal Aid (Scotland) Act 1986 at section 21 explains criminal legal aid "*shall consist of representation…on terms provided for by this Act… and shall include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings.*"

20.4 The 1986 Act makes no provision about entitlement or ownership of client files. There is no authority here for a solicitor to remove files in a planned and secretive way.

20.5 Stoddart and Neilson on Legal Aid note that "the nominated solicitor is personally responsible for ensuring his duties are performed properly." (para 20.40) "They say he should attend with **or make arrangements for the representation of the assisted person** at all diets and continue to act until the final disposal" (para 20.42). Therefore he is not expected to personally perform all aspects. It was not necessary to act as he did here.

20.6 <u>McKinstry</u>

20.7 *McKinstry* concerned a petitioner who was asked by a duty solicitor to represent an accused in custody charged with murder. The petitioner became the nominated solicitor. The petitioner then received a mandate from another solicitor. He then visited the accused and obtained a mandate in his favour. The accused then granted a further mandate in favour of the other solicitor. The petitioner then passed his papers to the other solicitor.

20.8 Therefore in that case the issue was the interaction of mandates and legal aid cover in relation to a specific live matter. The Legal Aid Regulations (Reg 17(3)) considered in McKinstry provide that legal aid should only be transferred if there is a good reason for that. Until the Board decided that there was a good reason for the transfer the original nominated person should continue to act. In that context the petitioner's conduct in continuing to act was not misconduct.

20.9 In *McKinstry* the Court noted "*that so long as a nominated solicitor remained in that position, he was under a clear professional duty by regulation 17 to render all normal services provided by a solicitor for an accused person including representation at diets.*"

20.10 The Court noted "*that it could not be professional misconduct to perform a professional duty incumbent upon the petitioner*".

20.11 There are several facts which distinguish that case from the present one. Firstly that case related to one specific active case which was in the hands of the Respondent at the time the mandate was received. In that case the Respondent was actually performing his nominated solicitor duties at that time. That is to be contrasted with the current matter where, in the

absence of any client instructions or client mandates, the Respondent removed more than 200 files from the offices of CCL.

20.12 In the present case the Respondent told us in evidence that there were not many cases calling in the first week. He did not take the files in order to discharge his duties in more than 200 files during the course of that week. He took the files in order to copy them.

20.13 The Law Society's position is that the Respondent's act in removing 200 files for the purpose of copying their contents is not equivalent to the position where the solicitor in *McKinstry* was performing duties in connection with one specific matter.

20.14 *McKinstry* can also be distinguished because in that case the solicitor was considered to be acting in good faith. It was noted by the Court "*that, in any event, the course taken by the petitioner could not be the subject of a finding of professional misconduct as, faced with the situation he was in, he bona fide took a view about the existence and nature of his professional duties.*"

20.15 In the current matter the Respondent planned and executed the removal of more than 200 files from the office of CCL without discussion or consultation. He was not acting in good faith. He planned and acted secretly. He has accepted that he was motivated in part by his own personal interests. It cannot be said that he was acting in good faith in the manner that the solicitor in McKinstry was.

20.16 In summary *McKinstry* can be distinguished from the current matter, and does not assist the Respondent to avoid a finding of misconduct in the current matter for the reasons noted in the next section.

21 Submission on why Respondent guilty of professional misconduct

21.1 As noted at paragraphs 4 and 5 of the complaint the Law Society submits that the Respondent has breached the professional duties owed and that as a result he is guilty of professional misconduct.

21.2 The Respondent has cited his duties as a nominated solicitor as a reason for removing the files. It is submitted that his duties as nominated solicitor did not entitle him to remove more than 200 files from the office.

21.3 However even if his duties as a nominated solicitor entitled him to remove files, it is submitted that these duties did not entitle him to remove the files in the manner that he did. His duties as a nominated solicitor did not entitle him to plan and then secretly remove the files without any consultation with his partners and without client permission.

21.4 The Respondent claimed that the Secondary Complainers would not have allowed him to discharge his duties otherwise. The Respondent accepted that this was his impression. In my submission that impression is not supported by evidence.

21.5 However even if the Respondent was correct to believe that the Secondary Complainers would not have allowed him to discharge his duties as a nominated solicitor, in my submission the correct approach was to continue to comply with his professional duties and if they failed to cooperate that would present a profession issue for the Secondary Complainers.

21.6 The thrust of the Respondent's position appears to be that he was entitled to acted as he did because he had gained the impression that his fellow partners would not cooperate with him. It cannot be correct that based on an impression that they would not cooperate that he was entitled to act as he did. In my submission you would require to demonstrate something more, such as a risk to client interests, before you were entitled to act in such a way.

Complaint against Lynsey McLean

21.7 That was the essence of the position in McLean, where the Tribunal had some sympathy with the respondent's position because the Secondary Complainer was on the verge of sequestration at the time when the respondent removed the files. In those circumstances it could be argued that the respondent was removing files to protect client interests. There was no similar risk to client interests in the current matter.

21.8 Equally, there was no personal risk to the Respondent in the current matter comparable to the risks to the solicitor in McLean. In the current matter it was noted that prior to the Respondent's departure the firm was performing well. That was the evidence of a number of witnesses. There was no suggestion that the firm was about to fail, that client's interests were in jeopardy, or that there would be any development such that the Respondent would be called upon personally to meet any liability of the firm.

21.9 McLean can also be distinguished because in that case the Tribunal found that the Secondary Complainer had breached Rule B1.14.1 which is the duty to act in a manner consistent with mutual trust and confidence. There is no basis for making such a finding in connection with the Secondary Complainers in the current matter.

21.10 McLean can also be distinguished because in that matter the Tribunal was not able to find that the respondent had actually resigned from the partnership and because it considered that the respondent (page 119), as an equity partner, had an equal claim to the files and the papers in the client's file that were the property of the firm. (page 121).

21.11 In all the circumstances McLean does not assist the Respondent in the current matter.

Finlayson v Turnbull 1997 SLT 613

21.12 This case will assist the Tribunal to assess the Respondent's conduct. In Finlayson three partners resigned from the partnership, taking a large number of clients' files with them, and opening a new partnership.

21.13 The remaining partners brought an action and claimed that the removal of files constituted a breach of the fiduciary duty by the partners who had removed the files. The key point for current purposes was that the Court held that the defenders had no right of ownership in the files they had removed. (page 617)

21.14 Lord Milligan made clear at the outset of his decision that "The defenders as salaried partners, had no interest in the profits of the partnership or, on dissolution, in its assets." (page 613)

21.15 In my submission that decision can assist you in the current matter to conclude that the Respondent, as a salaried partner, had no right of ownership in the files he had removed.

21.16 Complaint against Jardine and Philips

21.17 In this case the two respondents were partners in a partnership together with a third partner, Elizabeth Watt. The partnership was called Guild & Guild WS. In that matter Mrs Watt had been a partner in the firm for a number of years. The two respondents had joined the firm as trainees and had been assumed as salaried partners in 2001 and 2004. There was no written partnership agreement between the three partners.

21.18 Note the position of the respondents as salaried partners, and the absence of a written partnership agreement, mirrors the position in the current matter.

21.19 On 31 July 2006 the respondents delivered a letter to the offices of the partnership giving notice of dissolution of the partnership "from today's date".

21.20 The respondents, while still partners in the partnership, removed documentation, including files, from the partnership's offices. They had no permission from Mrs Watt to do that. They had no permission from any of their clients to do that. Neither Mrs Watt nor the clients were consulted or in any other way advised of the proposed removal.

21.21 The conduct of the respondents in that matter mirrors the conduct of the Respondent in this matter.

21.22 In that case the Law Society Guidance on a partner leaving a practice unit was considered. The guidance is the same as applying in the current matter, namely that the proper course is for the client to be advised of the position, told the new business addresses of the relevant partners and asked to choose which, if any, to instruct to hold the files.

21.23 In that case there had been no discussion between the respondents and Mrs Watt in respect of the removal of the files. The question of removal of the files had never been raised by the respondents with Mrs Watt. The respondents simply removed the files. That is the position in the current matter.

21.24 In that case it was submitted that the respondents acted as they did having taken legal advice, and that the inconvenience to clients was minimal, with the files being returned within a week. Again there appear to be parallels with the current matter in that case.

21.25 In Jardine and Philips, the respondents were found guilty of misconduct for among other things:-

21.25.1 failure to act in best interests of client and not permit personal interests influencing their actings (Rule 2 of the then Conduct Rules)

21.25.2 failure to act honestly at all times and in such a way as to put their integrity beyond question (Rule 7 of the then Conduct Rules)

21.25.3 failure to act with fellow solicitors in a manner consistent with persons having mutual trust and confidence in each other (Rule 9 of the then Conduct Rules)

21.25.4 failure to follow the Law Society Guidance on what should be done when a solicitor leaves a practice

21.26 In my submission that decision assists you to find the Respondent guilty of misconduct in the present matter, and for the same reasons.

Complaint against Michie

21.27 This complaint followed from the case of Jardine and Philips because Michie was the solicitor who advised Jardine and Philips to remove files. In that matter the respondent sent an e-mail to Jardine and Philips in which he advised "walk with as much as we can – strictly we should not take the client files without a client mandate, however I would and would immediately contact the clients and request that they give a mandate to the new firm."

21.28 In determining that the respondent was guilty of professional misconduct:-

"The Tribunal concluded that the provision of such advice to clients [Jardine and Philips] to carry out acts which were tantamount to theft is behaviour which demonstrates a clear lack of comprehension on the Respondent's behalf of his professional responsibilities and is therefore inconsistent with being a solicitor."

21.29 Therefore we can see that in Michie the Tribunal considered that removal of files by Jardine and Philips was tantamount to theft. In the current matter the Respondent acted in the same manner.

21.30 In my submission Michie assists you to find the Respondent guilty of professional misconduct in the current matter.

22 Conclusion

22.1 The test for professional misconduct is as set out in the decision of Sharp v The Council of the Law Society of Scotland 1984 SC 129 at 134:-

22.2 "There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

22.3 I ask you to find the Respondent guilty of misconduct as defined in Sharp, for the reasons set out in paragraphs 4 and 5 of the Complaint, and for the reasons developed in this submission.

WRITTEN SUBMISSIONS FOR THE RESPONDENT

Introduction

In assessing all of the circumstances of this case, I invite the Tribunal to consider the following matters:-

- The legal relationship between the Respondent and Secondary Complainers
- The significance of the Respondent`s status as nominated solicitor

- The evidence of all of the witnesses and the weight to be attached to that evidence
- The legal framework
- Whether the evidence led supports the contention that the Respondent breached certain practice rules
- If there has been any such breach, assess the culpability of the Respondent in order to determine whether the Sharp test is met

Legal Relationship

It is submitted that one must view the evidence through the prism of the legal relationship which existed between the Respondent and Secondary Complainers.

The parties operated a partnership at will. There was no written partnership agreement. The Respondent was assumed as a partner in 2007 and it was agreed that he would receive a fixed salary. Beyond that, there has been no evidence to suggest that specific terms were agreed. It is submitted that the Respondent was in fact in a very precarious position. Although it is not uncommon to have different classes of partner to reflect their respective seniority and responsibility, the Respondent was in the position of having all of the responsibility but with limited benefit. It was apparent from the evidence of Neil Robertson that the Respondent was not given an indemnity by the other partners which one would normally expect a "salaried" partner to have. The Respondent was therefore responsible, as far as the wider world is concerned, for the liabilities of the firm CCL.

I invite consideration of how the Secondary Complainers behaved towards the Respondent:

Merger

Most, if not all of the witnesses gave evidence about the merger of Central Criminal Lawyers and McGovern Court Lawyers in 2012.

In terms of section 24 of the Partnership Act 1890, no partner may be introduced as a partner without the consent of all existing partners.

Despite the fact that the Respondent was a partner of Central Criminal Lawyers, he was not involved at all in the discussions about that proposed merger and was given no financial information about the proposed merger. This was spoken to by Neil Robertson, Ian Bryce, Glenn Fraser and Vincent McGovern.

Management

The evidence of Neil Robertson was that following the Respondent`s assumption as a partner he took a greater role with management decisions and being involved with management decisions and meeting the accountants. The evidence of Ian Bryce supported this. However, the evidence of the

Respondent and Vincent McGovern was that after CCL merged with McGovern Court Lawyers, the Respondent was not invited to attend meetings with the accountants and took no part in the management of the firm. The Secondary Complainers' position was that, despite apparent encouragement from the Secondary Complainers, the Respondent showed no interest in the management of the firm. That evidence was contradicted by Vincent McGovern. On this point, the Tribunal is invited to prefer the evidence of the Respondent and Vincent McGovern which was to the effect that the Respondent was excluded from any management role in the firm.

Workload

The Secondary Complainers accepted that the Respondent was hard working, but not that he was overworked. He was referred to by one of the Secondary Complainers as the "summary workhorse". The Secondary Complainers were not in a position to dispute the long hours worked by the Respondent. The Tribunal is invited to prefer the Respondent's evidence and that of Hazel McGuinness and Sarah Mitchell (Meehan) as far as that is concerned. Although Neil Robertson was the managing partner of the firm, the only example he could give about how he managed the workload of the Respondent was the instruction of a time management consultant.

Status of Respondent as nominated solicitor

The Respondent gave evidence about how he selected the files which he removed from the offices of CCL. His intention was to remove the files in which he was nominated solicitor in order that he could obtain from those files the information necessary for him to fulfil his duty as nominated solicitor and then to return the files to the Secondary Complainers.

What are the duties incumbent upon the Respondent as nominated solicitor?

A solicitor is under a duty to prepare and conduct criminal cases by carrying out work which is actually and reasonably necessary and having due regard to economy. It is essential at each stage of the conduct of a criminal case that the necessary preparation is undertaken timeously. It is essential that a solicitor should use his best endeavours to discover all relevant information and evidence relating both to the Crown case and any substantive case for the defence. The solicitor must remember that his primary duties are to the client and the court and ensure that the case is properly prepared and there is no prejudice to the client.

Regulation 17 of the Criminal Legal Aid (Scotland) Regulations 1996 provides:-

(1) Where the solicitor nominated by an assisted person determines that he should cease to act for him, the solicitor shall notify the Board and, where possible, the assisted person accordingly, and shall supply to the Board a statement of his reasons for ceasing to act.

(2) Where an assisted person has required the solicitor nominated by him to cease to act for him, the solicitor shall notify the Board accordingly and shall supply the Board with a statement of the circumstances, so far as they are known to him, in which he was required to cease to act.

(3) Where an assisted person desires that a solicitor other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him, and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application may grant the application.

The nomination of the Respondent for the purposes of legal aid is a personal one, rather than one connected to a practice unit. The effect of Regulation 17 is that, unless and until the Board has given authority to the client to nominate a different solicitor, the responsibility rests with the Respondent to prepare and conduct the case.

Evidence

Neil Robertson

His evidence was that he did everything he could to support the Respondent, the Respondent was hard working but not overworked and that it was a collegiate and friendly place to work. Even if that was truly the witness`s perception, it is submitted that he was unable to step back from that and recognise that others may not perceive it in that way. It was astonishing that the managing partner of the firm appeared to be entirely unaware of what an indemnity is as far as it relates to salaried partners. This gives an insight into the lack of understanding on the witness`s part of the legal relationship between CCL and the Respondent. It was also surprising that the managing partner appeared to be unaware of the workload and working hours of others and seemed to rely on others to tell him about these matters. This gives an insight into the lack of understanding of the true working environment as far as it related to the Respondent and others. What the witness had to say about the performance of the Respondent and how CCL acted towards the Respondent was curious; on the one hand, the witness was critical of the Respondent`s ability to process work and deal with administration and on the other hand he said that the Respondent had been promoted from assistant, to associate, then salaried partner and that they were considering making him a profit sharing partner. The witness gave evidence that the Respondent returned items such as the computer and ipad and was quite forthright is stating that that was not without delay. It was put to him in cross examination that he was mistaken about the delay and he was referred to the terms of the report prepared by John Butler, which indicated that those items were in the possession of Mr Butler only three days after the Respondent`s resignation. The witness was not prepared to accept that he must have been wrong about that. He said that he considered that both he and the Respondent were quite professional about how they dealt with the matters in the days following the Respondent`s departure. When asked how he would have responded if the Respondent had come to him before leaving he reiterated that he and the Respondent had worked "pretty professionally" but that if the Respondent was set on leaving there would not have been much difference. The email exchange within CCL entitled "scores on the doors" gives an insight into how the Secondary Complainers viewed the Respondent`s departure. In cross examination the witness said that he had

refused to accept a mandate the Respondent wished to give to him. The witness said that advice had been taken from the Law Society about delivery of mandates but he could not remember who obtained that advice. He could not remember the outcome of a complaint made by him and the other Secondary Complainer to SLCC.
It is submitted that there are a number of areas in which this witness`s evidence cannot be relied upon.

Angela Robertson
Whilst no issue is taken with this witness`s credibility or reliability, it is submitted that she was not in a position to comment on material matters. The witness worked in a different part of the office and accepted that those who would be able to speak to the atmosphere in the office were Hazel McGuinness, Sarah Meehan, David McLaughlin and Graham Gibson.
It is submitted that the evidence of this witness is of little assistance in assessing conduct and culpability.

Michael Bell
Whilst no issue is taken with this witness`s credibility or reliability, it is submitted that he was not in a position to comment on material matters. The witness was not a full time employee and at times was not in the offices of CCL for weeks, although at other times he was there 3-4 days in a week.
It is submitted that the evidence of this witness is of little assistance in assessing conduct and culpability.

Ian Bryce
What came across from this witness is that commercial matters were of concern. He said that he thought that the future of the firm was in the balance. He said that every client was to play for. He denied telling a client`s girlfriend that he had concerns about the Respondent being mentally ill. However, production 69/9 appears to cast doubt on that. Hazel McGuinness also gave evidence that she heard the witness tell a client or a client`s wife that the Respondent was mentally ill. Hazel McGuinness gave some context as to why she remembered that (she remembered discussing that with a colleague about what would be said about her if she left). It is submitted that the witness cannot be believed about this aspect of his evidence and the Tribunal should prefer the evidence of Hazel McGuinness on this matter. The witness accepted in cross examination that he considered the resignation of the Respondent to be a personal betrayal. He accepted that this is why he has reacted so personally at points. He accepted that agreement was reached on 10th June 2014. He did not accept that his reaction to the Respondent`s departure was vengeful or vindictive. The witness volunteered that he had told clients that the Respondent had stolen files in the middle of the night. In circumstances where clients had to make an informed decision about which solicitor they wished to instruct, was it appropriate for the witness to tell clients that? Is that an appropriate manner in which the witness should act towards other regulated persons (ie the Respondent). It is submitted that it was not appropriate, nor was it the manner in which the witness should act towards regulated persons. Following questions from the Tribunal, the witness said that at the point the Respondent resigned, his tax account was approximately £3,000 in credit but that sum was not paid to the Respondent.

It is submitted that the evidence of this witness was coloured by emotion, even 5 years after the Respondent` departure. As a consequence, it is submitted that he could not be objective. In these circumstances, the Tribunal is invited to prefer the evidence of the Respondent and his witnesses, to that of this witness, where their accounts differ.

Glenn Fraser

The Respondent`s evidence was that after being assumed as a partner, there was no change in the work he did or the responsibilities he had. He said that his working hours were from just after 7am to 7pm or 7.30pm but sometimes worked until 10pm. Hazel McGuinness and Sarah Mitchell supported the Respondent` evidence in relation to long working hours. The Secondary Complainers, on their own evidence, were not in the office as late as the Respondent and therefore were not in a position to give an informed view about working hours. He spoke of the criticism made of him by the Secondary Complainers; he asked for time in the office to allow him to process administration but those requests were refused. That evidence was supported by Hazel McGuinness. Work was often allocated on the morning of court. Although the Secondary Complainers did not accept this, the Respondent`s evidence in this regard was supported by Hazel McGuinness and Sarah Mitchell. Vincent McGovern spoke of conversation between him and Neil Robertson in the evening about the following day`s court and it is submitted that this evidence is also supportive of the Respondent on this matter. The Respondent recalled that prior to the merger, the Secondary Complainers tried to persuade him that it was in his interests not to be a partner. This piece of evidence makes sense when one considers what Vincent McGovern said about the prospect of being in partnership with the Respondent. The Respondent felt unsettled and insecure about what had been suggested by the Secondary Complainers. The Respondent spoke to the issues that he had in relation to annual leave and it is submitted that his account was supported by Hazel McGuinness and Sarah Mitchell. One can take from the Respondent` s evidence that he considered that his work/life balance deteriorated over the last 2 years of his time with the firm. He spoke of the impact of the work on his health and his family life. Such was the Respondent`s unhappiness at work that he did take certain steps (setting up a domain name and a limited company) which the Secondary Complainers considered to be planning to leave. However, the Respondent`s evidence was that the limited company did not in fact trade until 2016. It is submitted that the distance in time between the Respondent setting up the limited company and actually trading that company mitigates against this being part of a plan devised by him to leave the firm. Although the Respondent had considered leaving the firm, he did not make the decision until the first week in May 2014. The Respondent recalled that during his time at the firm, nobody had left the firm on good terms. This knowledge informed the Respondent`s view about how the Secondary Complainers would have reacted if he had given notice of his intention to leave. The Respondent anticipated that if he had given notice, he would have been dismissed and would not have been permitted to take any files. Vincent McGovern`s evidence lends support to this anticipated reaction and it is submitted that in the particular circumstances of this case, the Respondent was justified in apprehending what the reaction would have been. The Respondent gave an account of the process adopted by him in selecting the files he removed from the office. His intention was to remove the files in which he was the nominated solicitor and the reason was to enable him to comply with obligations to the clients. It is accepted by the Respondent that there were 9 files removed in which he was not the nominated solicitor. It is submitted that there was a margin of error on the

Respondent`s part but given the small number, that this does not go to culpability. The Respondent`s view about the clients was that they were not his property and it boiled down to the client`s choice of solicitor. That is quite a different approach to the one adopted by the Secondary Complainers and indeed Vincent McGovern who seemed to view the clients as a commodity. The Respondent wrote to clients for whom he was the nominated solicitor; he did so after resigning from the firm. An example of the letter he issued is at Complainers` Production 10. It is submitted that the Respondent cannot properly be criticised in relation to communication with clients because he communicated with clients about his departure at the earliest possible opportunity. In cross examination it was suggested to the Respondent that he did not avail himself of opportunities to become involved in the management. The Respondent did not accept that; his evidence in that regard was supported by Vincent McGovern. It was also suggested to the Respondent that he had changed his position from the original answers lodged to the answers now before the Tribunal. Having heard submissions, the Tribunal allowed the original answers to be put to the Respondent. A statement was then put to the Respondent (Complainer`s production 32) and the purpose of that was to test his credibility. The Tribunal is invited to examine the terms of that statement and consider it in connection with the evidence given by the Respondent. It is submitted that, rather than undermining the Respondent`s credibility, it in fact reinforces it. The account given by the Respondent in his evidence before the Tribunal is at one with the information contained within the statement.

Hazel McGuinness

It is submitted that this witness supported the Respondent`s account as far as it related to the following matters: working atmosphere at the firm, lack of time allocated for work in the office; derogatory treatment by the Secondary Complainers; that if presented with a mandate, the Respondent complied and handed over the file; that the Respondent`s departure had no impact on clients. The witness recalled that a solicitor known to the Respondent and Ian Bryce was in Livingston Sheriff Court after the Respondent`s departure from the firm. The witness recalled hearing Ian Bryce referring to the Respondent and telling the solicitor "do not speak to him, he is dishonest." This gives another example of how Ian Bryce acted towards another regulated person (the Respondent) and once again, it is submitted that he did not behave in the manner that he should have. In cross examination, production 11 was put to the witness. After objection, evidence was heard under reservation about that. In the event, the witness could not recall noting a statement from the individual involved (James Paterson). In these circumstances, it is submitted that the Tribunal cannot consider production 11 at all when assessing the evidence and should now exclude it from probation.

Sarah Mitchell

The witness spoke of her own experiences regarding lack of support from the Secondary Complainers; she recalled the events leading up to her wedding, including her mother`s passing and said that she felt pressured to go back to work. The examples given by the witness were consistent with the approach of the Secondary Complainers as spoken to by other witnesses.

Vincent McGovern

The evidence of this witness was largely unchallenged. This witness confirmed that the Respondent played no part in the discussions about the merger of Central Criminal Lawyers and McGovern Court

Lawyers. Although this witness was not based in the Livingston office of Central Court Lawyers, he was in partners` meetings and involved in the management decisions. He confirmed that the Respondent took no part in the partners` meetings, nor the management of the business. It is submitted that the evidence on this point doesn't sit well with the evidence given by both Secondary Complainers; this witness knew nothing about the Respondent being apparently reluctant to be involved. The explanation given for the Respondent`s absence was that there was no place for the Respondent in partners` meetings. This witness was told by the Secondary Complainers that the Respondent would do what he was told and didn`t have a role in the business. When asked about the suggestion that the Respondent was supported in his role as partner, the witness said that as a partner he had no role to be supported. If the Secondary Complainers` evidence is accepted insofar as it relates to their support of him as a partner, one might expect that this witness would have known about that support; one might expect that the Secondary Complainers would have invited the Respondent to attend meetings. It is submitted that the evidence of the Secondary Complainers about support given to the Respondent as a partner cannot be accepted. Of the Respondent, the witness described him as a prodigious worker. The witness contrasted that with the work ethic of Ian Bryce and the witness along with Neil Robertson contrived how Ian Bryce could be more involved. The witness described the Respondent as a diligent practitioner whose client care was quite remarkable. Contrary to what was said by both Secondary Complainers, the witness was unaware of any discussions about the prospect of the Respondent becoming an equity partner in the firm; he expressed surprise at the suggestion that this was ever discussed. The witness was aware that the Respondent was disrespected and overworked. Following the Respondent`s departure, the witness was surprised at the Respondent`s reaction when mandates were given to him. When asked about production 66, the witness accepted that none of the matters he speculated about came to pass. Despite enquiry following the Respondent`s departure, the witness could not find any evidence of the Respondent having breached his fiduciary duties. He said that the Respondent facilitated the return of files. The witness described what followed after the Respondent`s departure as "a business dispute, first and foremost." The witness said that if the Respondent had given notice of his intention to leave, his view would have been to marginalise him. It is submitted that this view given by a principal of the firm, is significant. It gives an insight into how the firm may have reacted if notice had been given by the Respondent. The witness would have sought to restrict the Respondent`s ability to continue to act for clients for whom he was the nominated solicitor. The witness considered that the firm coped admirably following the Respondent`s departure, recovering 80% of the cases the Respondent had taken. The witness accepted that settlement terms were agreed between the firm and the Respondent on 10th June 2014. The witness said that no client had been harmed at all following the Respondent`s departure; everything was done including by the Respondent, to ensure that the clients` interests were protected. The witness did not join as a Secondary Complainer in these proceedings. He explained that there had been a discussion between him and the Secondary Complainers about making a complaint about the Respondent but that the witness chose not to be involved. His explanation was that he viewed the complaint as vindictive on the part of the Secondary Complainers and to be borne out of revenge. It was suggested to the witness that his involvement as a defender in a litigation at the instance of the Secondary Complainers has an impact on the evidence given by him before the Tribunal. In response to a question from the Chair, the witness gave the reason why he dissolved the firm; he discovered that hundreds of pounds of charges in his name had

been created in the Livingston office for work that he did not do. He discovered that his timesheets had been amended without his knowledge. The witness felt compromised because he was a member of the Scottish Legal Aid Board. There followed an investigation at the instance of the Scottish Legal Aid Board and the police removed a large number of files from the Livingston office. The witness is aware that a recommendation was made to prosecute members at Livingston and the witness had been advised that he would be a witness in respect of any proceedings. The Crown decided not to proceed with a prosecution.

Summary

It is submitted that where the accounts differed in the evidence given, the evidence of the Respondent and his witnesses should be preferred over that of the Secondary Complainers. It is submitted that the reaction of the Secondary Complainers to the Respondent`s departure gives an insight into how they might have reacted had the Respondent given notice.

Productions

In my submission it is worthy of note that the Fourth Inventory of Productions lodged by the Complainers contained, inter alia, email exchanges, some of which had been redacted. Those productions obviously came from the Secondary Complainers. As I understood Mr Marshall, it was not his decision to redact the material and in fact, Mr Marshall arranged for an unredacted copy of those emails to be lodged.

During the course of these proceedings, the Complainers moved lodge an eighth inventory of productions which contained an audio recording. Although the Tribunal ultimately refused that motion, we are aware that the audio recording was made by Neil Robertson in August 2015 when he recorded a conversation between him and the Respondent. He did so surreptitiously and without the Respondent`s knowledge or consent.

One may be left with the impression that the approach adopted by the Secondary Complainers is a very unseemly one; they wanted to present a particular picture here and did not want to disclose all of the material available to them. In fact, if one considers the material which was previously redacted, one can see that the emails which the Secondary Complainers did not want us to see:-

Complainer`s production 68/2 – an email from Ian Bryce "Bagged! Wife coming in in morning to collect mandates for signature. Interestingly, major factor was police investigating Glenn, "I don't` want to be in the dock with a lawyer that everyone knows is dishonest. What if he gets the jail before my case is up? Ian"

Complainer`s production 69/3 – an email from Neil Robertson "Ian and David also managed to spirit away a [LD] from under Glenn`s nose – the big galoot had already spoken to her but hadn't sealed the deal as it were – well played – we also got 6 fresh undertakings today – out of a total of 15 available – add to duty in the district and that was another good day on the ground."

Complainer`s production 69/8 – an email from Ian Bryce "David is modestly failing to mention [BF], who Glenn had arranged to come down to Court to discuss getting a CPO reviewed. David spotted him and grabbed him, and he is now signed up on a GTF mandate. Ian"

Complainer`s production 69/9 – an email from Ian Bryce "[DR] signed GTF mandate. He expressed the view that Glenn was a "Fuckin Rat" His girlfriend asked if Glenn was mentally ill. I said that I had my concerns (which I do). Both [R] and [F] got good results, and fully on side. Ian"

Complainer`s production 69/15 – an email from Ian Bryce "[DM] wants Glenn. Spoken to though, amicably, and understands that we will pick up the pieces when Glenn can't do his jury trial. Expected loss. [IMcC] asking for him from custody. This is client who he hooked last Tuesday. Expected loss. [DF], [JM], [JR] and [KD] want us. [J] heard to tell Glenn in corridor to sling his fuckin hook, and [F] refused to speak to him. I met [GS], and had him sign a keep away mandate. Hazel confronted Glenn in the means court re touting [JM], and then stood up and did it when it called. Client happy. Glenn expected [CH], in custody, to ask for him. He asked for us. I spoke to [P] from G4S and [V] the court reporter. Got firm impression they understand problem and behaviour that has led to it (he said euphemistically!). Team performing brilliantly. Is equivalent of carpet bombing. Glenn looks totally at 6s and 7s. Ian"

Complainer`s production 69/21 – an email from Ian Bryce "Dear All, We want to keep a "rolling" updated thread to let everyone know how things are going. Please add stuff as it comes in. As far as today at Livingston was concerned, it was a good day. We got [LF], who reprimanded Glenn publicly for his behaviour in the corridor. Glenn approached [DM], which was spotted by Hazel, who told Graham, who was outpaced by Mike, who got Ian, who softened him up for Neil, who sealed the deal. This was a magnificent display of teamwork, and making our resources count. Ian got [AP], and Neil got [RG], [JN] and [WF] from custody. The only fresh custody was [ML], who asked for Hazel. [IW] spent a while with Ian. He ultimately didn`t want to sign anything today, but wants Neil to phone him tonight. Glenn looked nervy, and ill. A few more days like this please. Ian"

Legal Framework

The test to be applied in determining a complaint of professional misconduct is of course set out by Lord Emslie in *Sharp v Council of the Law Society of Scotland*, 1984 SLT 313:
"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

Although there is no statutory requirement, the standard of proof is of course beyond reasonable doubt.

In order to find the Respondent guilty of professional misconduct, the Tribunal must be satisfied that the Respondent`s conduct would be regarded by competent and reputable solicitors as being in all the circumstances, serious and reprehensible. The Tribunal must also consider what degree of culpability should be attributed to the Respondent.

The Complaint

The Complaint alleges that the Respondent has been guilty of acts or omissions which, singularly or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 (as amended) Section 53. In particular, it is averred that as a consequence of the Respondent`s actions in removing files from the office, that he is guilty of professional misconduct in respect that he did so:-

- Without prior notice or discussion with the Secondary Complainers in breach of Practice Rule B1 1.2 and B1 1.14.1
- When he was not entitled to do so because he had failed to obtain the necessary prior authority or consent of the client to do so in breach of Practice Rule B1, Rules 1.4.1 and 1.4.2
- Without the necessary prior authority of clients to do so in breach of Practice Rule B1, Rule 1.9.1 and 1.9.2
- Without obtaining the necessary prior authority of clients to do so in breach of the Law Society`s Guidance to Practice Rule B3 which relates to partners moving to another practice unit and
- In relation to those clients where he was neither the nominated solicitor for legal aid purposes nor the responsible partner

The Rules and Regulations said to have been breached are in the following terms:-

The Law Society of Scotland Practice Rules 2011, at B1 Standards of Conduct, provide:-

"Trust and personal integrity
1.2 You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful."

"**1.14**.1 You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it."

"The interests of client

1.4.1 You must act in the best interests of your clients subject to preserving your independence and complying with the law, these rules and the principles of good professional conduct.

1.4.2 You must not permit your own personal interests or those of the legal profession in general to influence your advice to or actings on behalf of clients."

1.9.1 You must communicate effectively with your client and others. This includes providing clients with any relevant information which you have and which is necessary to allow informed decisions to be made by clients. It also includes accounting to clients for funds passing through your hands. Information must be clear and comprehensive and, where necessary or appropriate, confirmed in writing.

1.9.2 You must advise your clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them..."

The Law Society of Scotland Practice Rules 2011, at B3 Advertising and Promotion, provide:-

"**3.2** You shall not make a direct or indirect approach whether verbally or written to any person whom you know or ought reasonably to know to be the client of another regulated person with the intention to solicit business from that person."

The Law Society guidance relating to Rule B3 on Advertising and Promotion contains the following specific guidance relating to partners moving to another practice unit:-

The partners of the practice unit involved should attempt to agree on the procedure to be adopted in advising clients of the change in the practice unit. In some cases it may be agreed amongst the partners that the departing partner should carry on with certain cases. In others it may be desired to leave it to their clients to decide whether to stay or go with the departing partner. It makes sense to agree the approach in advance.

Particular difficulties arise where there is no cooperation between the departing partner and remaining partners. Some take the view that all clients are clients of the firm rather than individual partners and maintain that a departing partner has no right to try to take clients away from the continuing practice unit. If that were the case then the departing partner would not be allowed to seek mandates from the clients. The Professional Practice Committee has reaffirmed its view however that subject to what the partners themselves have agreed a departing partner is entitled to contact clients for whom he or she has acted personally as the responsible partner and invite them to continue to be clients at the new practice unit..."

Does the evidence support the contention that the Respondent has breached practice rules?

Rule 1.2

What is the evidence that supports a breach of this rule by the Respondent? The Secondary Complainers` position was that they had heard a rumour that the Respondent intended to leave the firm and they raised that with the Respondent in April 2014. This particular issue has already been considered by the Professional Practice Sub Committee – see comments at page 14 and the Respondent`s Second List of Documents. The Respondent`s position is that at that stage, he had not made a decision to leave the firm. Although he had thought about leaving prior to that date and had registered a domain name and a limited company, he had not made a decision to leave. It is submitted that the Respondent`s evidence on this point is to be preferred; he is the only person with knowledge of decisions he had reached. Why should he be believed? If he had made a decision and was lying to the Secondary Complainers in April 2014, one would have expected him to have made contact with professional bodies such as the Law Society, SLAB, the indemnity insurers. One would expect that he would have those matters in hand and have a plan in place to practice on his own account. In the event, he only consulted those bodies on the afternoon of 2nd May 2014, without appointment. It makes sense that he had not made a decision to leave at an earlier stage if one takes account of this adminicle of evidence. It is submitted that there is no evidence that the Respondent behaved in a manner which was fraudulent or deceitful.

Rule 1.14

It is submitted that there is no evidence supporting a breach of this rule. The comments made in respect of rule 1.2 apply equally in relation to this rule. If the Tribunal accepts the Respondent`s evidence about when he decided to leave the firm of CCL, the earlier conversations about the rumour cannot be considered to have bound the Respondent never to leave the firm.

Rule 1.4.1

Most, if not all of the witnesses gave evidence about the Respondent`s client care. It was said that he was well liked by clients and in fact often spent too much time talking to clients. The Respondent`s position is that, following his decision to leave, his focus was his clients and fulfilling his duties towards them. It is submitted that in doing so, he acted in his clients` best interests. There is no evidence that he failed to act in their best interests; there is no evidence that any client was disadvantaged or prejudiced by the Respondent`s departure from CCL. One can certainly take from the evidence that the offices of CCL were disrupted by the Respondent`s departure. However, that is not the charge the Respondent.

Rule 1.4.2

The comments made in relation to rule 1.4.1 apply equally to this rule. It is submitted that there is no evidence which supports a breach of this rule.

Rule 1.9.1

It is accepted that the Respondent did not advise clients that he had removed their files from the office until after the event. There is no evidence about any concern over the Respondent`s substantive handling of clients cases. Clients were advised in the days which followed the Respondent`s departure that the Respondent was no longer with CCL. Clients then made decisions about whether to be represented by the Respondent or CCL. There was no earlier opportunity to

advise clients about the Respondent`s departure from the firm. The communication was timeous and meaningful and allowed clients to make informed decisions as to their representation. Even when that resulted in the Respondent not remaining the nominated solicitor, the transfer of agency was seamless.
It is submitted that the evidence led does not support a breach of this rule.

Rule 1.9.2
The comments in relation to rule 1.9.1 apply equally to this rule. It is submitted that this rule relates more to the substantive handling of the clients` cases.

Rule 3.2
It is submitted that there was no evidence supporting a breach of this rule.

The Law Society guidance relating to Rule B3 on Advertising and Promotion
The Respondent accepts that he did not follow the guidance insofar as there was no discussion between the Respondent and the Secondary Complainers prior to his departure; however, it is guidance and no more than that. It is submitted therefore that a failure to follow guidance cannot amount to professional misconduct.

Is the Sharp test met?

If after consideration of all of the evidence, the Tribunal consider that there has been a breach of a practice rule, that does not necessarily lead to the conclusion that the Respondent is guilty of professional misconduct. In *Sharp v Council of the Law Society of Scotland* SLT 313 at page 316, Lord Emslie considered Section 20(3) of the 1949 Act which contains the same provision as we now see in Section 35(3) of the 1980 Act and said that provision "means precisely what is says. A failure on the part of a solicitor to comply with a relevant rule *may* be treated as professional misconduct. The subsection introduces nothing new to the law. Such failure might have been so treated before it was enacted, and it may well be that the true purpose of the subsection is to draw the attention of practitioners to the importance attached to compliance with the rules. However that may be, whether such a failure 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 assessing the whole circumstances, one must consider the degree of culpability to be attached to the Respondent`s actions.

There is no dispute that the Respondent left, without notice, and removed a number of files. The Respondent sent an email to the firm of CCL and left a letter in the office (Complainer`s Production 1). In that letter, the Respondent advised CCL that he had resigned from the firm with immediate effect; that he had taken files in which he was the nominated solicitor; that he would be in contact with CCL.

It is submitted that the absence of notice to the Secondary Complainers has no bearing on the charge of professional misconduct. The parties operated a partnership at will and no notice was required. The Respondent was candid about having taken files in which he was the nominated solicitor. It is the Respondent`s position that he did so to enable him to fulfil his duties to his clients. The working week in which the Respondent resigned started on a Tuesday and by the end of that week, most of the files had been returned to the firm of CCL. An examination of the lists of files produced gives detail about how many files were returned during the course of the week following the Respondent`s departure will show that 8 days after his departure, only 27 files had not been returned. Thereafter, discussions took place between the Respondent, the Secondary Complainers and their legal advisers. Settlement terms were agreed exactly 5 weeks after the Respondent resigned. The witness Vincent McGovern characterised the events the followed the Respondent`s departure as a partnership dispute. It is submitted that this is a fair way to characterise. It was one in which there was no breach of fiduciary duty found and which resolved very quickly.

It is submitted that in the whole circumstances, even if certain rules were breached, the Sharp test is not met. The Respondent may be considered to have misjudged the manner in which he left the firm of CCL. However, it is submitted that his conduct neither singly nor in cumulo has the degree of culpability or the taint of serious reprehensibility required to constitute professional misconduct.

One final matter which ought to be brought to the Tribunal`s attention is that the Professional Conduct Sub Committee of the Law Society of Scotland made certain findings relating to the Respondent`s departure from the firm. Some of the matters which were the subject of those findings have been mentioned by witnesses before this Tribunal. Reference is made to the Respondent`s Second List of Documents which contains a copy of the decision of the Sub Committee.

Comments on Complainer`s authorities

McKinstry v Council of the Law Society of Scotland 1997 SLT 191
This case involved a failure to comply with a mandate. It is helpful in assessing the present case to the extent that it sets out the provisions relating to nominated solicitors being entitled to act unless and until the Scottish Legal Aid Board have granted authority to the client to nominate another solicitor.

Finlayson v Turnbull (No 1) 1997 SLT 613
This relates to a partnership dispute in which the Court found that the Defenders had breached their fiduciary duties. It is submitted that this case has no application to the present proceedings.

Council of the Law Society of Scotland v Paul Sanders Jardine & Gordon Alexander Philips (unreported, Tribunal`s interlocutor dated 19 December 2008)
This case involved an examination of the conduct of 2 departing salaried partners and in which both Respondents pled guilty to the charge of professional misconduct. It is submitted that the conduct of the Respondents is vastly different than the conduct of the Respondent in the present proceedings. The Respondents removed a large number of published a notice of dissolution, wrote to all active clients, suppliers and professional bodies informing them of dissolution, placed a mail redirect,

commenced trading with an almost identical name, removed files and all wills and titles. There were a number of letters of complaint from clients about the Respondents` conduct. For that reason, it is submitted that this decision can be distinguished and is not of assistance in determining the present complaint.

Council of the Law Society of Scotland v Mark Victor Michie (unreported, Tribunal`s interlocutor dated 9 March 2011)

The Respondent in this case was the solicitor who advised the Respondents in the previous case – Jardine and Philips. The Respondent was found guilty of professional misconduct. Again, it is submitted that the conduct of the Respondent is vastly different than the conduct of the Respondent in the present proceedings. For that reason, it is submitted that this decision can be distinguished and is not of assistance in determining the present complaint.

Council of the Law Society of Scotland v Lynsey Ann McLean (unreported, Tribunal`s interlocutor dated 4 June 2015)

Whilst one may consider that there are parallels in relation to the conduct of the Respondent and that of the Respondent in the present case, it is submitted that the conduct of Ms McLean was significantly different in a number of respects. The evidence in that case was that the Respondent had removed 180 of the 200 active files in the office; some of the files were in respect of cases in which her partner was the nominated solicitor; the timescale for return of files was far greater than in the present case (up to 4 months after removal of the files) and this was only after court proceedings had been raised for return of files. It is submitted that the difference in conduct is important because it goes to culpability. It is submitted that this case is of limited assistance and can be distinguished on the basis that the conduct is materially different.

DECISION

The first step for the Tribunal was to ascertain which facts had been established in the case. The Tribunal required to have regard to two fundamental principles:

(1) That the onus of proof lay with the Complainers;
(2) The standard of proof in the Tribunal proceedings is that of 'beyond reasonable doubt'.

In considering which facts had been established, it was important for the Tribunal to identify what issues of relevance to the averments of misconduct were actually in dispute.

The conduct criticised and said to be the basis for a finding of professional misconduct in averment 5.1 is the taking of files without (a) prior notice to or discussion with the Secondary Complainers; and (b) obtaining the necessary authority from clients. Whilst it is not specifically included in averment 5.1,

there is also criticism in the averments of duty of the Respondent being unable to state with any accuracy the number of files he had removed.

The core elements of this criticised conduct were not in dispute. The Respondent was a salaried partner of Central Court Lawyers. He resigned from that firm on 6 May 2014 by an email of that date and a letter dated 5 May 2014 left in the office. He removed a number of files from the office without prior discussion with either the other partners or any clients. He did not make an accurate list of the files he had taken.

What appeared to be in dispute was the Respondent's explanation. It was his position that his relationship with the two Secondary Complainers had broken down. His work environment was such that it was affecting his health and family life. He had begun to consider leaving the firm but did not reach that final decision until his wife gave him an ultimatum. He did not discuss this with the Secondary Complainers because he was convinced that, one way or another, they would have prevented him from having access to any files. He was anxious to be able to continue to provide the same service to his clients as he had always done. He took files, principally, where he was the nominated solicitor for legal aid purposes and had the associated duties and obligations of a nominated solicitor. He did not photocopy the files in the office rather than taking the files because he considered that this was misuse of firm resources. He did not contact any clients before leaving. His intention was to copy the files at home and then return them to the firm. He had placed all of the files into boxes and taken these boxes home. He did not make a list.

The Secondary Complainers disputed that they had acted in any way unfairly towards the Respondent to cause the relationship to break down and denied that they had allowed him to be overworked. It was their position that the Respondent had carefully planned his departure in such a way as to ensure that he was able to set up his own business.

Having carefully listened to all of the evidence, the Tribunal believed the Respondent. His description of his work environment and relationship with the Secondary Complainers was supported by the evidence of the defence witnesses who were two former assistants of the firm and a former partner. When giving evidence, the Respondent and the defence witness, Sarah Mitchell both became distressed. In contrast it appeared to the Tribunal that there were contradictions in the evidence of the two Secondary Complainers. The Tribunal also had regard to the Secondary Complainers' demeanour when giving evidence and determined that where there was a conflict between the evidence of the

Secondary Complainers, the Respondent and the defence witnesses, it preferred the evidence of the Respondent and the defence witnesses.

In relation to the other two witnesses led by the Complainers, the Tribunal considered Mr Bell was a reliable and credible witness but someone who had little to add to the case, having had much less involvement in the Livingston office. The Tribunal considered the evidence of Angela Robertson to be less than satisfactory, but in any case, it added little to the case.

In cross-examination, the Fiscal attacked the credibility of the Respondent on the basis of the amendment that was made to the Answers and the content of a police statement. The Tribunal considered the statement to the police in fact to be a prior consistent statement when taken as a whole. Having heard the Respondent's evidence, and having seen the police statement, the Tribunal concluded that the amendment made to the Answers did not in fact amount to a change in position. Additionally, a letter from the solicitor who had represented the Secondary Complainers in the course of the dispute between them and the Respondent referred to correspondence disclosing that the Respondent had been "unhappy at Central Court Lawyers for a number of years."

The Fiscal had also placed significance upon steps taken by the Respondent prior to the date of his actual departure. The Tribunal considered that these steps did not amount to organised pre-planning but were consistent with the hesitant fits and starts described by the Respondent. The disorganised manner of his eventual departure, taking files in boxes and without having an office, also supported this interpretation.

Much was made by the Fiscal of how the Respondent could 'know' that the Secondary Complainers would react by preventing him from having access to the files. It seemed to the Tribunal that this was an unrealistic approach and failed to take into account that in taking decisions, people require to exercise their judgment. The Respondent had worked with the Secondary Complainers for 14 years. He had seen the Secondary Complainers' reaction to others leaving. He had reason to hold the belief that he did. The Fiscal invited the Tribunal not to have regard to the Secondary Complainers' actual reaction to the Respondent's departure as this he said was influenced by the way the Respondent had left and was not connected simply to the fact that Respondent had left. The Tribunal found it difficult not to have regard to how matters proceeded after the Respondent's departure. It was apparent from the terminology used by the Secondary Complainers in their evidence and in the emails and texts produced that they considered this to be 'a war'. This resonated with the evidence of Hazel McGuiness when she stated that Ian Bryce had said words to the effect that he wanted to destroy the Respondent.

The Tribunal also had regard to the evidence of Vincent McGovern when he stated that if he had been given notice of the Respondent's departure, he would have 'marginalised' the Respondent's role in the Livingston business.

It was also suggested by Mr Marshall that the fact that the Respondent had returned the files to Central Court Lawyers as quickly as he did suggested that he had not taken them in order to fulfil his duties as nominated solicitor. The Tribunal could not follow this reasoning. The Respondent, in evidence, stated that it was his intention to copy the files and return them. He would have had access to these files during that time in order to deal with any matters that arose. Mr Marshall had placed a restrictive interpretation on the duties of a nominated solicitor. It seemed to the Tribunal that he was suggesting that this was restricted to representation at court, on the basis of which he seemed to suggest that the Respondent would not require to take so many files in the short term. The Tribunal did not accept this restrictive interpretation. In the case of McKinstry-v-Council of the Law Society of Scotland 1997 SLT 191, the duties of a nominated solicitor are described as "All normal services provided by a solicitor". In Stoddart, Law and Practice of Legal Aid at paragraph 20-40 it is stated that the nominated solicitor has a professional duty to render all the normal services provided by a solicitor for an accused person. Clearly the duties and obligations of a nominated solicitor go well beyond simple appearances at court.

Having determined the established facts, the Tribunal went on to consider the Rules that the Respondent was said to have breached by his conduct.

(1) Failure to communicate with Secondary Complainers

It was suggested that Rule B1.2 *'You must be trustworthy and act honestly at all times so that your personal integrity is beyond question'* was breached by the Respondent's removal of files without discussion with his partners. There was no specific averment of dishonesty within the Complaint and Mr Marshall withdrew his question directed to honesty.

Some members of the Tribunal had concerns that on an objective view an outsider might consider that removing files in the manner that the Respondent had done might call into question his integrity. However, having regard to the explanation the Respondent had given, which was accepted by the Tribunal, it concluded that in the whole circumstances, this Rule was not breached. The Tribunal had accepted that the actual departure of the Respondent did not involve complex pre-planning. The Respondent took files where, in the majority, he was nominated solicitor. Most files were returned quickly. The Tribunal accepted the Respondent's explanation that where any files were not returned,

that was by agreement. The evidence disclosed that the Respondent had cooperated fully with any mandates delivered.

Even if the conduct established had amounted to circumstances calling the Respondent's personal integrity into question, the Tribunal was satisfied that the above circumstances resulted in a conclusion that the conduct did not meet the test for professional misconduct set out in the case of Sharp-v-CLSS.

The complaint also referred to the Respondent's inability to state with any accuracy the number of files he had removed and the confusion of a second inaccurate list amounting to a breach of Rule B1.2. The Tribunal did not understand the Fiscal to be suggesting that the Respondent had deliberately created a false list. In the circumstances, it concluded that the issue regarding the number of files taken was more appropriately considered under the averments of failing to act in the best interest of clients which is how the matter seemed to be dealt with by Mr Marshall in his submissions.

The failure to communicate with the Secondary Complainers was also said to be a breach of Rule B1.14.1 *'You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it.'* It appeared to the Tribunal that by the time the Respondent resigned from the firm there was little or no mutual trust or confidence between him and the Secondary Complainers. Given that the Tribunal accepted that the Respondent's eventual departure was not pre-planned, that the files were taken at relatively short notice, that the Respondent had said in his letter of resignation that he had taken files where he was nominated solicitor and that the Respondent cooperated fully with the Secondary Complainers following his departure, the Tribunal determined that this Rule was not breached by the conduct of the Respondent.

(2) Failure to act in the best interest of clients

The Complainers had averred that the Respondent's conduct breached Rules B1.4.1 *'You must act in the best interests of your clients subject to preserving your own independence and complying with the law, these rules and the principles of good professional conduct.'* Rule B1.4.2 *'You must not permit your own personal interests or those of the legal profession in general to influence your advice to or actings on behalf of clients.'*

The Tribunal accepted that the Respondent had taken files where he was nominated solicitor with the intention of continuing to be able to obtemper his duties and responsibilities as nominated solicitor and to continue to provide the same level of service as he had done previously. In their evidence, the

Secondary Complainers had been critical of the Respondent's approach to his clients. In particular, Neil Robertson had stated that the Respondent had spent too much time with clients and that this had "prevented him from doing his work". It was clear that the Respondent considered spending time with clients as his work and that he considered that he had only taken the time necessary to advise and represent clients appropriately. It was interesting to note that Vincent McGovern in his evidence praised the Respondent's interaction with his clients.

Having regard to the above, the Tribunal concluded that the Respondent had not acted contrary to the best interests of his clients. Whilst the Respondent had admitted on record that he allowed his own personal interests to influence his actings, that admission and his evidence did not extend to him allowing his interests to influence his advice or actings on behalf of clients.

As noted above, whilst the failure to keep an accurate note of files taken is not averred under this heading in the Complaint, given the Fiscal's submissions it seemed to the Tribunal appropriate to consider these issues at this juncture.

It seemed to the Tribunal that the only evidence of the client's interests being put at risk was said to be in relation to the client KD. In that regard, Neil Robertson's evidence was not particularly clear. He stated that he had become aware that KD was in custody when the client's mother telephoned the office at the end of the week, but he went on to describe the office trainee arranging for a prison visit on Friday. It was not clear when the mother had called. The Respondent gave evidence that KD had been remanded already, and that the calling of the case latterly was a petition reduction to summary. Given that the standard of proof is one of beyond reasonable doubt, the Tribunal was unable to draw any conclusions from the evidence that KD had been prejudiced.

Nor did the Tribunal accept that clients had been put at potential risk. All parties had a note of future court diets. Vincent McGovern gave evidence that it should have been a simple process to identify who the nominated solicitor was in each case. Sarah Mitchell and Hazel McGuiness both gave evidence that in their view, no client was prejudiced.

The Tribunal was satisfied that the Rule had not been breached.

(3) Failure to communicate with clients

It was averred that the Respondent had breached a) Rules B1.9.1 *'You must communicate effectively with your clients and others. This includes providing clients with any relevant information which you*

have and is necessary to allow informed decisions to be made by clients. It also includes accounting to clients for funds passing through your hands. Information must be clear and comprehensive and, where necessary or appropriate, confirmed in writing.' b) Rule B1.9.2 *'You must advise your clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions required to be given by them.'*

The Tribunal had accepted that the Respondent's eventual departure was executed at short notice. The evidence of the Complainers was that the Respondent had written to clients immediately after his departure and reference was made by the Secondary Complainers to the Respondent repeatedly telephoning clients.

The Tribunal concluded that these Rules were not breached.

(4) Failure to seek Central Court Lawyers client authority before removing files

The Complaint averred that the Respondent breached the Law Society's guidance on Rule B3.2 *'You shall not make a direct or indirect approach whether verbal or written to any person to whom you know or ought to reasonably to know to be the client of another regulated person with the intention to solicit business from that person.'*

Averment 4.1(6) states – *'The Respondent's actions in removing client files when he had not in the first instance contacted these clients and invited them to continue to be clients at his new practice unit is in breach of the Law Society's guidance to Rule B3 on advertising and promotion.'*

It is interesting to note that the guidance itself concludes that if partners can agree a way forward between themselves then *'in some cases it may be agreed amongst the partners that the departing partner should carry on with certain cases.'* This appeared to be a concession that client instructions in some circumstances are not essential.

In this case, it is agreed that the Respondent took files where he was nominated solicitor, apart from some seven files considered below. The guidance makes no reference to the issue of the duties and obligations of a nominated solicitor. Whilst this Tribunal is not stating that a nominated solicitor has an entitlement to the file, it is relevant to note that in this case the majority of the files fell into that category.

The Tribunal accepted that the Respondent had failed to follow Law Society guidance. This in itself is not necessarily professional misconduct. The Tribunal concluded that the Respondent's conduct in this regard did not meet the Sharp Test. The Respondent had departed at short notice. He took files to photocopy them. Where required, files were returned.

The Tribunal did consider it important to emphasise that any solicitor departing from guidance issued by the Law Society should expect their conduct to fall under scrutiny.

The Complaint refers to the Respondent taking files where he was not nominated solicitor nor the partner responsible for the matter. It was agreed between the parties that only seven files were taken where the Respondent was not the nominated solicitor. The Respondent gave evidence that he believed that those were cases running alongside other cases for the same client where the Respondent was nominated solicitor. The Complainers did not lead evidence as to the nature of the seven files referred to and whether there was or was not a solicitor and client relationship between the Respondent and the clients involved. The Tribunal was not satisfied that in relation to the seven files referred to, Rule B3.2 was breached.

Having considered the averments of duty, the Tribunal proceeded to consider the averments of misconduct. Averments 5.1.1, 5.1.2, 5.1.3, and 5.1.5 rely upon averments of breaching Rules where the Tribunal had concluded breaches were not established. Accordingly, the Respondent was found not guilty of professional misconduct in relation to these averments.

Averment 5.1.4 referred to the breach of the Law Society's guidance to Practice Rule B3 and the Tribunal held that the breach of the guidance did not meet the Sharp Test for professional misconduct and found the Respondent not guilty of professional misconduct. The Tribunal determined that the conduct did not meet the test for unsatisfactory professional conduct and therefore no referral back to the Law Society was appropriate.

Having found the Respondent not guilty of professional misconduct, the Tribunal invited submissions from both parties on expenses and publicity.

Ms Irvine moved for expenses. She raised the issue that expenses should be awarded on an agent client basis. The Tribunal confirmed that this was the normal scale awarded by the Tribunal. Accordingly, she confirmed that she would restrict her submissions in principal to an award of expenses.

She submitted that expenses should follow success and referred the Tribunal to paragraph 19.07 of Macphail, Sheriff Court Practice. She submitted that the general rule was that expenses followed success and that there were no reasons here to justify departing from that rule.

Mr Marshall invited the Tribunal to repel that motion. He submitted that the Law Society was not in the shoes of a normal civil litigant when it came to disciplinary proceedings. He referred the Tribunal to the case of Baxendale-Walker-v-Law Society [2007] EWCA Civ 233.

He explained that the Tribunal has a responsibility to uphold the standards of the profession. It is important for the Tribunal to be able to make its judgments and publish these as guidance for the profession. The Law Society should not be constrained to only prosecuting cases where it is certain of success and this would not be in the profession's interest.

He argued that it was the wrong approach to say the presumption of expenses following success applied in these proceedings. Such an award would only be appropriate if proceedings were incompetent or unreasonably brought. There was no suggestion of that here.

He went on to invite the Tribunal to award expenses to the Complainers and referred the Tribunal to the case of The Council of the Law Society of Scotland-v-Lynsey Ann McLean [4 June 2015] where it was said – *'Non-observation by solicitors of Law Society guidance will not automatically result in a finding of professional misconduct but any individual partner contemplating removing files from an office in such a situation will remain at risk at his/her individual conduct to past the Sharp Test and be found to be serious and reprehensible and to amount to professional misconduct.'* Although the conduct in that case occurred before the conduct of the Respondent, the decision was dated 4 June 2015, therefore before the prosecution in this case was raised.

Ms Irvine accepted that it was the role of the Tribunal to consider the conduct of solicitors in order to maintain the standards of the profession. However, she invited the Tribunal to consider the unequal resources of the parties – the Law Society versus a sole practitioner. This case had been hanging over the Respondent's head for a number of years.

She invited the Tribunal to distinguish this case from that of McLean. In that case the Tribunal had referred the case back to the Law Society in relation to the question of unsatisfactory professional conduct. She invited the Tribunal to distinguish the case of Baxendale-Walker on the basis that case involved two allegations of misconduct, one of which the solicitor had admitted.

With regard to publicity, Mr Marshall invited the Tribunal to name the Respondent but to anonymise the Secondary Complainers. The Tribunal referred Mr Marshall to paragraph 14A of Schedule 4 of the Solicitors (Scotland) Act 1980. Mr Marshall invited the Tribunal to hold that paragraph 14A did not apply to former partners of the Respondent, namely the Secondary Complainers.

Ms Irvine submitted that there was no reason to anonymise the Secondary Complainers. She referred the Tribunal to the case of McLean and noted that the Secondary Complainer was named in that case and he was the former partner of the Respondent.

Mr Marshall invited the Tribunal to distinguish McLean case from this case as in the McLean case the Tribunal had considered that the Secondary Complainer himself might be guilty of professional misconduct.

DECISION ON EXPENSES

The Tribunal gave careful consideration to the submissions in relation to expenses. It agreed that it would not be in the profession's interest to constrain the Law Society in bringing cases to the Tribunal. However, the Respondent had been successful at various stages in the proceedings: the preliminary hearing, the motion for a late production to be received and witness to be recalled, and in the whole case itself. In all of the circumstances, the Tribunal considered that the fair and appropriate award was one in favour of the Respondent but restricted to 25%.

The issues being raised in relation to publicity were significant and the Tribunal concluded that they required fuller argument. Given the late hour of the day, the Tribunal continued the question of publicity and gave the parties 28 days to lodge written submissions if so advised.

PUBLICITY

Both parties lodged written submissions. Additionally, Mr Marshall invited the Tribunal to issue its findings in the case so far, excluding the question of publicity and thereafter to allow him time to lodge more detailed submissions. This request was considered by the Chairman of this Tribunal under Rule 56 of the Tribunal Rules 2008. He considered that this would be a significant departure from normal procedure. Mr Marshall had been present during the whole hearing and should have been aware of the

content of all of the Productions. The Chairman considered that little, if any, purpose would be served by this additional delay and refused the motion.

WRITTEN SUBMISSIONS ON PUBLICITY FOR THE COMPLAINERS

1 Motion

1.1 The Tribunal has discretion under Schedule 4, Paragraph 14A(b) of the 1980 Act to refrain from publishing the names of the Secondary Complainers and the place of operation of their business. The Law Society invites the Tribunal to exercise its discretion, and to refrain from giving publicity in its decision to the names of the Secondary Complainers and the place of operation of their business, if it considers to do so would damage or be likely to damage the interests of the Secondary Complainers.

1.2 *Please note, as explained in this submission, the Law Society's ability to make detailed submissions on whether or not damage would be caused or would be likely to be caused to the Secondary Complainers' interests by publication is limited, by virtue of the fact that the terms of the decision are not available at this time. The Law Society would be happy to make further submissions on this issue once the terms of the decision are available.*

2 Submission

2.1 Schedule 4, Paragraph 14 of the Solicitors (Scotland) Act 1980 provides that every decision of the Tribunal shall be signed by the chairman and, subject to paragraph 14A, be published in full.

2.2 Paragraph 14A provides:

In carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage or be likely to damage, the interests of persons other than –

(a) the solicitor against whom the complaint was made; or

(b) his partner; or

(c) his or their families.

2.3 The Tribunal's discretion under paragraph 14A(b)

2.4 Paragraph 14A (b) of Schedule 4 of the Solicitor (Scotland) Act 1980 excludes from the Tribunal's discretion to anonymise the partners of the solicitor against whom the complaint was made.

2.5 The Secondary Complainers, who were the Respondent's **former** partners at the time the complaint was made, do not fall within any of the categories of exception contained in paragraph 14A(b). Therefore the Tribunal retains the discretion to refrain from publishing the names of the Secondary Complainers if it considers to do so would damage, or be likely to

damage, the Secondary Complainer's interests.

2.6 In addition the Tribunal retains the discretion to refrain from publishing the place of operation of the Secondary Complainer's business.

2.7 The Law Society invites the Tribunal to exercise its discretion by refraining from publishing the names of the Secondary Complainers and the place of operation of their business, if it considers to do so would damage, or be likely to damage, the Secondary Complainers' interests.

2.8 Exercise of discretion: damage to interests

2.9 *As noted above, the Law Society's ability to make specific submissions on whether or not damage would be caused or would be likely to be caused to the Secondary Complainers by publication is limited by virtue of the fact that the terms of the decision are not available at this time. The Law Society would be happy to make further submissions on this issue once the terms of the decision are available.*

2.10 For the present, it is submitted that if the Tribunal considers that publication of the Secondary Complainers' names and the place of operation of their business would damage or be likely to damage their interests, then the Tribunal should exercise its discretion not to do so.

2.11 **Comment on *Lynsey Ann McLean case***

2.12 In oral submissions, the Respondent's agent referred to the case of *Lynsey Ann Mclean* in support of the proposition that 14A (b) extends to former partners. However that case demonstrates the opposite. In that case the Secondary Complainer had previously been in partnership with the Respondent. In considering publicity of the Secondary Complainer in *McLean*, the Tribunal's discussion centred around the exercise of their discretion under paragraph 14A(b) to refrain from publishing the name of the Secondary Complainer. That discussion implicitly accepts that 14A(b) does not apply to former partners. If the Tribunal had considered that the 14A (b) extended to former partners, they would have had no discretion to refuse publicity of the Secondary Complainer and publicity would have required to have been given to him without further discussion. *McLean* suggests that the Tribunal considered that former partners were not included within the exception provided by paragraph 14A(b). If the position was otherwise, the decision to publish the Secondary Complainer's name would have followed automatically as a matter of law and there would have been no discussion in the Tribunal's decision.

2.13 The Secondary Complainer was ultimately named in that decision. The Tribunal emphasised that that case was exceptional on its facts. Given that this was a discretionary, fact-sensitive decision, it does not assist the Tribunal in the current matter to determine that publicity should be given to the Secondary Complainers and the place of operation of their business in this case. Whether or not the Tribunal should give publicity to the names of the Secondary Complainers in this case is a matter for the Tribunal's discretion on the basis of the facts of this case.

3 Conclusion

3.1 The Law Society invites the Tribunal to exercise its discretion by refraining from publishing

the names of the Secondary Complainers and the place of operation of their business where it considers that such publicity would be likely to be damaging to their interests and the interests of their firm.

3.2 If it does consider that publicity would damage or be likely to damage the Secondary Complainers' interests then to do so would be penal, disproportionate and unnecessary. The Secondary Complainers complaint of misconduct was made in good faith and was consistent with the decision of the Tribunal in the case of *McLean* where the Tribunal noted that solicitors who remove client files without partner agreement or client instructions may be guilty of professional misconduct. In that case, the Tribunal at page 122 said:

"*The Tribunal wish to emphasise that it is not indicating that it is in order for solicitors to embark on a course of removing files from partnership offices either before or during the dissolution of a partnership. … Non-observation by solicitors of Law Society guidance will not automatically result in a finding of professional misconduct but any individual partner contemplating removing files from an office in such a situation will remain at risk that his/her individual conduct will pass the Sharp Test and be found to be serious and reprehensible and to amount to professional misconduct".*

3.3 There is no suggestion that the complaint was brought improperly before the Tribunal. In those circumstances, it would be draconian for the Secondary Complainers to be subjected to damage to their interests if the Tribunal considers that this would be the result of publicity of their names and place of business.

4 Reply to the submissions on behalf of the respondent

4.1 With reference to the submissions on behalf of the respondent, the Law Society accepts that these proceedings are subject to the principle of open justice and that the Tribunal is obliged to conduct proceedings in a manner which is compatible with ECHR Article 6(1).

4.2 ECHR Article 6(1) provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all ***or part of the trial*** *in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or* ***the protection of the private life of the parties so require****, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"* (emphasis added).

4.3 Article 6(1) is not absolute; derogations are permitted in certain circumstances. Article 6(1) contemplates that proceedings may be heard in public but that the names of persons such as the Secondary Complainers may be anonymised in the Tribunal's written decision *where the protection of [their] private lives so require*. Paragraph 14A of Schedule 4 to the 1980 Act is a permitted derogation to Article 6(1). As noted above, paragraph 14A confers on the Tribunal a discretion to refrain from publishing the names of the Secondary Complainers where to do so would or would be likely to cause damage to their interests. The Law Society invites the Tribunal to exercise its discretion, as provided for in terms of paragraph 14A,

against publication. Exercise by the Tribunal of its discretion in this manner is compatible with Article 6(1). As noted above, the Law Society's ability to make specific submissions on these matters is limited by virtue of the fact that the terms of the decision are not available at the time of drafting. The Law Society would welcome an opportunity to make further submissions on this issue once the terms of the decision are available.

WRITTEN SUBMISSIONS ON PUBLICITY FOR THE RESPONDENT

At the Hearing on 30th August 2019, parties were invited by the Tribunal to make written submissions, if they so wished, in relation to publicity.

Prior to the Hearing, there was no motion made in terms of Rule 43 and therefore the Tribunal held the Hearing in public. I acknowledge that even in these circumstances, the Tribunal requires to consider whether the decision should be published in full.

Legal Framework

The starting point in considering this issue is paragraphs 14 and 14A of schedule 4 to the Solicitors (Scotland) Act 1980.

Paragraph 14 provides:
Every decision of the Tribunal shall be signed by the Chairman or other person presiding and shall, subject to paragraph 14A, be published in full.

Paragraph 14A provides:
Jn carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage, or be likely to damage, the interests of persons other than-

1. *The solicitor against whom the complaint was made; or*
2. *His partners*
3. *His or their families,*

but where they so refrain they shall publish their reasons for so doing.

In considering the issue, the Tribunal may find assistance from the following:-

Disciplinary and Regulatory Proceedings, 9th Edition, Gregory Treverton-Jones, Alison Foster QC and Saima Hanif

Paragraphs 9.06 - 9.21

In particular, I invite attention to paragraph 9.14. I submit that the Tribunal ought to follow the course which involves the least restriction on the principle of open justice and in the present case, that means the publication of names of all of the individuals involved.

Paul William Miller v General Medical Council (2013) EWHC 1934 (Admin)

This case involved consideration of whether the decision of the GMC to hold the hearing in private was justified. Albeit the decision related to the hearing itself, I submit that the decision may be of assistance to the Tribunal in determining whether there are circumstances in the present case to justify a departure from publication of the decision in full.

The issue in this case was consideration of whether the GMC were entitled to hold the proceedings in private on the basis that a witness would otherwise not have given evidence. There was an analysis of the status of the witness in question: although his status was as a witness and not a party to the proceedings, he was considered to be a witness with interest and his status was therefore closer to that of a party. He was a complainant whose complaint underlies the proceedings.

There was an examination of the legal framework, which is not dissimilar to the framework set out in the 1980 Act and the 2008 rules, that is to say that hearings are to be held in public, subject to a discretion.

Our rules in relation to hearings and publication of decisions very much mirror the provisions in ECHR Article 6. There is however a qualification to Article 6 which says that " .. .the press and the public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

SSDT cases

In their closing submissions, parties both made reference to the case of The Council of the Law Society of Scotland v Lynsey Ann McLean. In that case, the Tribunal published the name of the Respondent and the Secondary Complainer.

Summary

In my submission, there is no justification to refrain from publishing the names of the Respondent, the Secondary Complainers and witnesses; I consider that publication will not damage, or be likely to damage the interests of those persons.

Although the Secondary Complainers did not initiate the proceedings, their complaint underlies the proceedings. Their status is therefore closer to that of a party than that of witnesses with no interest.

It is for the Complainers to demonstrate why it is necessary and proportionate to depart from the norm, which is to publish the decision in full. In the particular circumstances of this case, I submit that there is no reason to justify a departure from the norm.

Even if the Tribunal considers that one of the exceptions may apply, any derogation from the general principle should be proportionate.

In my submission, the decision about publicity in the Lynsey McLean case should be followed in the present case so that the Respondent and Secondary Complainers are named in the published decision. It is submitted that it would be artificial and inequitable to do otherwise. I see no reason why the witnesses should be anonymised, although the Tribunal may consider that there is in any event, no need to make reference to them.

I have made contact with the Respondent's witnesses and they have confirmed to me that they have no objection to their names being referred to in the Tribunal's decision.

DECISION ON PUBLICITY

Copies of written submissions were provided to all members of the present Tribunal. On 30 October 2019, the members of this Tribunal met by way of conference telephone call.

Mr Marshall had submitted that the Tribunal a discretion to anonymise the Secondary Complainers within its written decision. He argued that paragraph 14A of Schedule 4 of the Solicitors (Scotland) Act 1980 did not apply to the Secondary Complainers as they were "former partners" of the Respondent. The Tribunal was not persuaded by this argument. The purpose of publication of the decision is to clearly identify the conduct of the Respondent to both the profession and the public. If the extent of the word 'partner' was to be restricted then it was not clear what restriction Mr Marshall was requesting. Was it a restriction to partners at the time of the conduct? Or at the time the complaint was made? Or at the time the Complaint was submitted to the Tribunal? Or at the date of the hearing? Or at the date of the Decision? In any case before the Tribunal, it is likely that a significant period of time will have elapsed between the conduct complained of and the Tribunal decision being issued. In most cases, the Respondent is likely to have moved firms. In the Tribunal's view, if publication is to identify the conduct of the Respondent, then, at the very least the provision must be read to include the partners of the Respondent at the time the conduct took place. The Tribunal was not prepared to put any restriction on the extent of the word 'partners' used in paragraph 14A and concluded that the Tribunal was bound by that provision to include the names of the Secondary Complainers within its decision.

Even if the Tribunal had not been bound by paragraph 14A, it was not persuaded by Mr Marshall's argument. The whole of the hearing had taken place in public. The Secondary Complainers had made the original complaints against the Respondent, resulting in these proceedings. Both had given evidence in the course of the hearing. Both are experienced court practitioners.

To anonymise the decision sufficiently to prevent the Secondary Complainers being identified would involve not only anonymising their names but also the names of the firm and its place of business. The essence of the misconduct was that the Respondent had breached duties owed to his partners. It would be impossible to properly describe the conduct complained of without disclosing that element, which inevitably would make identification of the Secondary Complainers a straightforward matter.

It was not clear what prejudice was likely to be caused to the Secondary Complainers by being identified in the Tribunal's decision.

Both parties had recognised that the Tribunal was bound by the basic principle of open justice and that should not be interfered with lightly or without foundation. The Tribunal concluded that in this case, the least restrictive option was to name the Secondary Complainers within the decision.

Accordingly, the Tribunal refused Mr Marshall's motion and ordered that publicity should include the names of the Respondent, Secondary Complainers and other witnesses in the case.

Colin Bell

Vice Chair