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

F I N D I N G S

in Complaint

by

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

Complainers

against

COLIN DOUGLAS RICHARDSON WHITTLE, WS, Rivermeads, Altyre, Forres

Respondent

1. A Complaint dated 30 November 2020 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 Colin Douglas Richardson Whittle, WS, Rivermeads, Altyre, Forres (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, LRN, the executor of the late DM.

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 virtual procedural hearing on 22 April 2021 and notice thereof was duly served on the Respondent.

5. At the virtual procedural hearing on 22 April 2021, both parties were represented by the Fiscal for the Complainers, Breck Stewart, Solicitor Advocate, Edinburgh. He invited the Tribunal to allow the original Complaint and Answers to be replaced by amended ones and thereafter convert the virtual procedural hearing into a full virtual hearing to be dealt with later in the day. The Tribunal converted the virtual procedural hearing into a full hearing

and thereafter adjourned it to later in the day. His motion with regard to the amended Complaint and Answers was continued to that time.

6. When the full virtual hearing called later on 22 April 2021, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was absent but was represented by Stephen O'Rourke, Q.C. On the motion of both parties, the Tribunal allowed the original Complaint and Answers to be replaced by the revised Complaint dated 22 April 2021 and revised Answers similarly dated. The Tribunal proceeded to hear submissions from both parties directed to the issue of misconduct.

7. The Tribunal found the following facts established:-

7.1 The Respondent is Mr Colin Douglas Richardson Whittle. He was born on the 13 September 1947. He was admitted to the roll of solicitors on the 19 July 1978. He became a partner in R & R Urquhart in Forres in 1980 where he practised until he retired from the LLP of the same name (which was formed in 2005) on the 31 October 2019.

7.2 DM succeeded to his mother's croft, with agreement of his siblings. He had agreed with his siblings, should it be sold, the profits would be split equally between them. MW was a local farmer and a friend of DM. At some point DM and MW agreed that DM would buy the croft from the Scottish Ministers at a price lower than the market value and in due course MW would buy the croft from DM, once any clawback provision expired. MW and DM arrived at a market value of around £87,000 for the croft. DM did not have the funds to purchase the croft. MW undertook to secure the funds. DM and MW had a loose agreement in respect of the croft. The Respondent met with MW and DM at MW's farm where a discussion took place regarding the formalisation and the implementation of the agreement.

7.3 In a letter dated 29 November 2007 the Scottish Ministers offered to sell the croft to DM. At that time DM was represented by another firm of solicitors. The price was £18,000. The offer was subject to a further payment if the croft was sold (subject to certain exceptions) within 5 years of the acquisition ("the clawback").

7.4 On the 13 May 2010 the Respondent met with DM. He made a handwritten note which is retained on file. He accepted instructions to act for DM in the purchase of the croft from the Scottish Ministers and to commit to writing the agreement between DM and MW. It was noted in a letter of the 19 May 2010 that the fee was to be passed onto MW. The Respondent sent a Terms of Business letter dated the same date. Paragraph 2 stated:

"*In general, we cannot act for two or more people if they have conflicting interests. Please tell us at the out set if you are aware of potential conflicts which may arise. There are some exceptions to this general rule and if there is a potential conflict of interests we will confirm to you in writing whether we can act for you.*".

The Respondent did not mention he was also acting for MW in the formalisation of the agreement, although that was known to DM, MW and the Respondent.

7.5 A refreshed offer in the same terms of purchase as mentioned in para 7.3 above was sent to the Respondent on the16 August 2010. The Respondent wrote to DM on the 24 August 2010 asking him to confirm he wished to accept the offer. In the same letter the Respondent wrote:

"*In addition could you please confirm whether you are happy for this Firm to represent [MW] in the option arrangement previously discussed, in order that we can co-ordinate the raising of the relevant funds*"

7.6 The Respondent wrote to DM on the 7 September 2010, advising that he had spoken to MW, who had discussed the matter with DM. The Respondent advised "*we are entitled to represent both clients in a transaction, so long as each of the clients is aware that they are entitled to independent legal advice*". DM wrote in response on the 27 September 2010.

7.7 As at 7 September 2010, the Solicitors (Scotland) Practice Rules 1986 and the Solicitors (Scotland) (Standard of Conduct) Practice Rules 2008 were "in force". They were superseded by the Law Society of Scotland Practice Rules 2011 in November 2011.

7.8 By memo dated 14 December 2010 the Respondent asked his colleague CM, who was an employee of the Respondent, to act for DM and confirmed that he would act for MW in the transaction.

7.9 CM met with DM in mid March 2011. Following the meeting he wrote to the Respondent on the 24 March indicating that he was instructed to purchase the croft from the Scottish Ministers by DM, MW was to provide "money for the sale of land" as soon as possible. DM advised MW would purchase the croft for £90,000, and pay DM £75,000 when the clawback period expired, MW's interest would be secured by a Standard security. CM enquired with the Respondent whether a nominee sale could take place and a scheme where significant funds would be transferred to DM at an early stage in the transaction.

7.10 The Respondent advised CM on the 14 October 2011 that MW had not obtained banking terms.

7.11 R&R Urquhart received a fresh offer to sell the croft on behalf of the Scottish Ministers at the sum of £19,200 dated 8 March 2012. CM wrote to DM on the 13 April 2012 advising of the fresh offer and that he had been advised MW was in a position to complete the purchase. The offer indicated that the clawback legislation had changed, a period of 10 years was now active but if the matter could be completed swiftly the Ministers would honour the 5 year period. He advised there would need to be a written agreement between MW and DM. He did not offer advice or seek instructions regarding the content of that agreement.

7.12 On the 3 July 2012 CM emailed the Respondent:

"I understand what was agreed is as follows:-
[MW] was to pay the purchase price of £19,200 plus the legal expenses of £495 plus VAT and outlays.
There is a 5 year clawback. [MW] is to be granted a Minute of Agreement which obliges DM to sell the property in 5 years' time.

The obligation on [DM] is to be backed up by Standard Security which is being

granted in [MW's] favour. The Standard Security should be able to rank ahead of the SM Security provided we register it in time.

The consideration that [MW] is to pay the complainer is £75,000. I understand that it was agreed that upon signing of the Standard Security half of this is to be paid to DM and the other half is to be paid when the 5 year clawback expires.

For the avoidance of doubt the £20,000 or so to fund the purchase is not to be deducted from the £75,000.

I should be grateful if you could check this over with [MW] and I will then finalise the following:-
Minute of Agreement setting all the above out;
Standard Security granted by [DM] in favour of [MW]."

7.13 A discussion took place between the Respondent and CM which led to an inter office memo of the 26 July 2012, from CM to the Respondent which set out a different set of conditions –

[MW] was to pay the purchase price of £19,200 plus the legal expenses of £495 plus VAT and outlays.

There is a 5 year clawback. [MW] is to be granted a Minute of

Agreement which obliges [DM] to sell the property in 5 years time.

The obligation on [DM] is to be backed up by Standard Security which is being granted in [MW's] favour. The Standard Security should be able to rank ahead of the Scottish Ministers Security provided we register it in time.

The total amount that [MW] is to pay is £87,000. (Which reflects the value of the croft)

The exact sums to be paid by [MW] are as follows:-

The purchase price payable to the Scottish Ministers... being £19,200

The Scottish Ministers' fees of £495 plus VAT and outlays.

Our fees in this matter.

[MW] and [DM] had estimated that left a sum of roughly £66,000 to be paid to DM (after all of the above are deducted from the croft valuation of £87,500.) The sum of £66,000 was to be paid in two transactions:-

Sum of £33,000 upon completion of the purchase and signing of a Minute of Agreement and Standard Security;

A further sum of £33,000 in 5 years' time when the property is transferred to [MW]

Accordingly, the sum that MW will need to transfer in the next few weeks to the firm is £53,034 plus all of the firm's expenses."

7.14 CM attached a draft State for Settlement and Minute of Agreement for approval. He proposed that the Standard Security in favour of MW be signed and registered at the same time or prior to the Scottish Ministers Standard Security with prior ranking. He concluded by saying he was looking to complete within the next month to month and a half.

7.15 The Minute of Agreement recorded that the standard security would be granted over the Croft – there was no mention of a standard security over any other property.

7.16 The Minute of Agreement contained as paragraph 8:

"The parties agree by their execution hereof that they have the opportunity to seek independent legal advice and having regard to the whole circumstances ...that the terms of this agreement are both fair and reasonable. The parties acknowledge that they are both represented by R&R Urquhart LLP and acknowledge that they have been made aware of the Law Society of Scotland's Conflict of Interest regulations

and that in the event of a Conflict of Interest arising they may be required to take independent legal advice.

7.17 On the 30 August 2012, CM, on behalf of DM, submitted for revisal, to the Respondent a draft standard security over the croft by inter office memo. In the same memo CM noted he had spoken to DM who understood that MW would pay in total £87,875 for the croft. The immediate payments would be: the purchase price (£19,200), the Scottish Ministers legal fee (£594), the registration dues (£240), R &R Urquhart's fees (Not listed) and £33,000 to DM on the signing of the Joint minute. A further payment of £33,000 was due in 5 years time at the end of the clawback period.

7.18 An undated hand written note on the file, filed before correspondence of the 14 October 2012, begins "*Check with law soc – Conflict interest letter*" and highlights 13 other legal points which on the face of the note required to be addressed. The points raised the parties ongoing rights and obligations in terms of the croft over the period of the clawback period. They included - 10 years; index the sum/interest; failure to implement; death of parties; no leasing; issues crofting commission; transfer (?); tax CGT when payable. It further listed:– what about the £33k?; Occupy and work the land – requirement?; Does MW live near enough?; Delay/payment of sum –maintenance /insurance; Grants/scheme?. There were significant rights and obligations which still required to be addressed and agreed upon. In due course some of these were addressed. There was a risk that the terms favoured MW.

7.19 AR, a solicitor employee at R&R Urquhart, took over from CM in handling the firm's file. She wrote by email to the Law Society on the 13 December 2012 enquiring whether the firm could continue to act for DM and MW. The Society's reply is not on the Respondent's file. However, in an email to the Respondent on the 20 December 2012, she advised that R&R Urquhart could not act for both parties. She enclosed for consideration by the Respondent a draft letter to DM advising him of this. In the letter DM was advised MW would be passed to another firm of solicitors.

7.20 The Respondent emailed AR on 23 January 2013 advising that he had spoken to MW and he was relaxed about being represented by another solicitor's firm and that R&R

Urquhart should continue to act for DM. DM was advised by the Respondent on the 14 February 2013 that:

"there have been various changes in the Law Society of Scotland "Conflict of Interest regulations" and, given that there are potential financial arrangements between [MW] and yourself, we find ourselves now what would be considered a Conflict of Interest situation were we to continue to representing [MW] and yourself in this matter....[I have asked] [MW] to be separately represented... Could you ..confirm to me whether you are happy with this arrangement or whether you would indeed prefer to have independent legal advice....and in those circumstances we would be in a position to continue to represent [MW]..."

7.21 In correspondence during 2012 and 2013 R&R Urquhart had been advised of the change in legislation extending the 5 year claw back to a period of 10 years. The Respondent on behalf of DM sought a return to the 5 year period in April 2013, when finance had been confirmed, but the Scottish Ministers indicated that would not be permitted. The Respondent advised DM of this in April 2013 and indicated he had asked if MW wished to continue with the transaction.

7.22 The Respondent's firm's file holds a draft minute of agreement dated 12 June 2013 which is generally in the same terms as previous drafts but it has handwritten script on the front page "*secure against house site*". The draft standard security of the same date only describes the croft. At this point in time neither DM nor MW had been referred to other solicitors.

7.23 On the 11 July 2013 the Respondent wrote to DM advising inter alia, that he had prepared two agreements between him and MW –

"The first Agreement relates to the purchase price of £19k and related costs whereby you also give a Standard Security to [MW] which is acknowledged by the SM, in order that his position in providing the purchase funds are duly acknowledged. In that Agreement you are obliged to apply (at MW's cost) for a De-crofting Direction if you are able to obtain this.

In the second Minute of Agreement you give a security over your house for the £33,000 that is to be paid to you in addition at this time and the balance of £33,000 at the end of the 10 year clawback period."

This is the first time a second standard security had been mentioned to DM. There is no mention other than the handwritten note, narrated in the immediately preceding paragraph, of a security over DM's home. At this time the Respondent acted on behalf of both DM and MW. He advised DM that MW would now be represented by another firm of solicitors. The Respondent invited DM to meet with him to discuss the paperwork.

7.24 The Respondent did not receive written confirmation from MW, either directly or from his new agents, that a standard security over DM's house was necessary to conclude the transaction. The Respondent did not offer written advice to DM about the legal consequences of granting the Security over his house.

7.25 On the 12 July 2013 a solicitor employee at R&R Urquhart wrote to MW's new agents enclosing:

a) Draft Minute of agreement re the purchase of the croft and MW providing the purchase price
b) Draft Standard Security over the Croft Land re the first Minute of Agreement
c) Plan of Croft land
d) Draft Minute of Agreement regulating the transfer of the croft after the 10 year clawback period
e) Draft standard security over DM's house in favour of MW in respect of the second Minute of Agreement.

7.26 The Respondent wrote to DM on the 17 July 2013 reporting a telephone call, the letter notes DM was "*happy with documentation except for two items*". In particular (1) the decrofting provisions, and (2) he wished the second £33,000 payment to be made after 5 years not 10, as per the original agreement, but "*...would be happy to continue with the security over [the] house and land to protect MW's position until he exercises the right to buy in 10 years, after the clawback period (to its statutory extended term) has expired.*"

7.27 From July 2013 MW was represented by the replacement firm of solicitors and DM by R&R Urquhart. The Respondent either directly corresponded with DM or delegated matters to junior employees, as he had done since first instruction. The transaction stalled for various reasons until the summer of 2014. In August 2014 the Respondent attended at DM's house and secured his signature to the two Minutes of Agreement and the two standard securities – one over the croft and the second over DM's house and garden. Prior to the meeting in 2014 it was not explained to DM that the transaction would not proceed if there was not a second standard security, no correspondence in those terms was sent by the solicitors who took over acting for MW.

8. Having given careful consideration to the revised Complaint, Answers and the submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct *in cumulo* in respect that:-

(a) He acted in a conflict of interest situation between 19 May 2010 and 11 July 2013 by acting on behalf of both DM and MW in the preparation and initial drafting of Minutes of Agreement between DM and MW, in respect of which DM and MW had separate and conflicting interests, in breach of Rule 3 of the Practice Rules 1986, Rule 6 of the Practice Rules 2008 and Rule B1.7 of the Law Society of Scotland Practice Rules 2011;

(b) In acting in a conflict of interest situation, he failed to act in the best interests of DM, in that he: failed to offer advice to DM re the reasonableness of the purchase price, the changes to the clawback rules, or the necessity of concluding missives before the rules changes; he allowed the delay in concluding missives due to MW's inability to fund the transaction to continue; he did not advise re marketing the croft of new; he offered no advice in connection with the matters narrated in para 7.18; he knew that, in drafting the terms of the minutes of agreement, there was a risk that the terms favoured MW, and by corollary there was a risk that DM would be disadvantaged by the terms of the said minutes; and

(c) He, separately thereafter, in attending at DM's home in August 2014, at which time DM signed the Minutes of Agreement and standard security over his house and

garden, he did not act in the best interest of DM, specifically in that : the inclusion of the standard security over the house and garden was not contained in the draft minutes of agreement when CM had acted; and the Respondent converted the draft minute of agreement into two minutes, and drafted a second standard security without written instruction from DM or intimation from MW's agent that they were necessary for the transaction to conclude; and, although he did discuss these developments with DM, he did not offer advice in writing, did not set out the significance of the obligations in writing and nor did he record DM's instructions in writing in respect of the same and he accordingly failed to act DM's best interest.

9. The Tribunal heard further submissions from both parties with regard to disposal, expenses and publicity. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 22 April 2021. The Tribunal having considered the Complaint dated 22 April 2021 at the instance of the Council of the Law Society of Scotland against Colin Douglas Richardson Whittle, WS, Rivermeads, Altyre, Forres; Find the Respondent guilty of professional misconduct *in cumulo* in respect of his contraventions of Rules 3 and 5 of the Solicitors (Scotland) Practice Rules 1986, Rules 3 and 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 and Rules B1.4 and B1.7 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person: and Allow the Secondary Complainer 28 days from the date of intimation of these findings to lodge a written claim for compensation.

(signed)

Nicholas Whyte

Chair

10. 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 23 JUNE 2021.

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chair

NOTE

This Complaint was originally set down for a procedural hearing on 22 April 2021. In advance of that date, parties had contacted the Tribunal Office indicating that they had reached agreement and that there was a desire for the Complaint to be dealt with in substance on that date. Accordingly, when the matter called at the procedural hearing, the Fiscal appeared for both parties. He invited the Tribunal to receive a revised Complaint and revised Answers and thereafter convert the matter to a full hearing. He explained that Counsel representing the Respondent was not available until later in the day and invited the Tribunal to convert the hearing to a full hearing to be dealt with in the afternoon. The Tribunal granted the motion to convert the hearing to a full hearing and thereafter adjourned it to 2pm. However, the Tribunal considered the motion regarding the revised documents was more appropriately made when the case called at that time.

When the case called later as a full hearing, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was absent but was represented by Stephen O'Rourke, Q.C. On the motions of both parties, the Tribunal allowed the revised Complaint and revised Answers to be received in substitution of the originals. The Fiscal confirmed that he was happy for the Tribunal to treat paragraph 3.1 within the Respondent's Answers as if it were the evidence of the Respondent. Mr O'Rourke explained that 3.1 was additional background information for the Respondent.

Both parties confirmed that they were aware that the question of misconduct remained one for the Tribunal and the Tribunal proceeded to hear submissions from both parties addressed to the question of misconduct.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal explained that DM had been the original Secondary Complainer in this matter but, following his death, the executor to his estate had carried on with the Complaint.

He took the Tribunal through the averments within the Complaint. He explained that there was a relationship between DM and MW before the Respondent had become involved. The first offer made to DM by the Scottish Ministers was made in 2007 at a stage when DM was represented by another firm of solicitors.

The Respondent was first instructed by DM in May 2010. He had not previously been a client.

On 19 May 2010, the Respondent sent a terms of business letter to DM which made reference to the general position with regard to conflicts of interest but made no reference to the Respondent acting for MW. On 24 August 2010, the Respondent wrote to DM making specific reference to MW and seeking permission to act on his behalf. The matter progressed as noted within the Complaint with an employee of R&R Urquhart representing DM and the Respondent representing MW. Conditions to be included in the Minute of Agreement were discussed and fine-tuned by the Respondent. At that stage, the discussions referred to a standard security being granted by DM in favour of MW over the croft alone.

In October 2012, the file was passed to another solicitor within R&R Urquhart for review. At that point, the issue of conflict of interest was raised in a file note. An email was sent to the Law Society on 13 December 2012 enquiring whether the firm could continue to act for both clients. The Respondent was made aware of the Law Society's response, that the firm could not represent both clients, by AR in an email on 20 December 2012. The suggestion made was that MW be passed to another firm of solicitors.

It can be seen from the Complaint that work continued and papers for MW were not passed to a new firm of solicitors until 12 July 2013. During that time, the first reference to a standard security being granted over DM's house, which was not part of the croft, was made.

The first time the Respondent explained to DM that the transaction could not progress unless a standard security was granted over DM's house, which was not part of the croft, was in August 2014 when the Respondent attended at DM's house to have the various documents signed.

The Fiscal referred the Tribunal to the averments of duty and explained that the Solicitors (Scotland) Practice Rules 1986 and the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 continued to be in force until November 2011. In response to a question from the Tribunal, he accepted that the Code of Conduct for Solicitors 2002 was replaced by the 2008 Practice Rules and he confirmed he was content for the Tribunal to ignore any reference to the Code of Conduct 2002.

The Fiscal then turned to the averments of misconduct within the Complaint. He invited the Tribunal to hold that the conduct described met the test for misconduct set out in the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313. He invited the Tribunal to have regard to the specific reference to the exchange of heritable property within the Rules referring to conflict of interest. He submitted that

the whole circumstances set out within his averments 5.2, 5.3 and 5.4 were sufficient to lead to the Tribunal holding that the Respondent's conduct was serious and reprehensible.

SUBMISSIONS FOR THE RESPONDENT

Mr O'Rourke submitted that the question of misconduct came into clear focus within averments 5.2, 5.3 and 5.4. He suggested there were two aspects to the averments of misconduct. The first aspect was that of acting in a conflict of interest which is referred to in averments 5.2 and 5.3. The second aspect was that of the Respondent not acting in the best interests of DM.

The Respondent was senior partner at the time of this transaction and so the responsibility for it fell properly on his shoulders.

He explained that DM and MW were friends, and prior to any contact with the Respondent, had reached an agreement of their own. The croft had been valued by an independent and respected valuer and it was the Respondent's information that both parties were happy with the valuation. It was on that basis that an approach had been made to the Respondent by DM.

The Respondent was alive to the potential conflict of interest and sought to address this by allocating, CM, who worked in a different office to the Respondent, to act for DM whilst the Respondent was to act for MW. It is accepted that this was not an entirely satisfactory way of dealing with the conflict which was engaged by this transaction. The conflict continued from May 2010 to 11 July 2013.

AR, another solicitor within the firm became involved in place of CM. She had alerted the Respondent to her concern in relation to an active conflict of interest. This had led her to contacting the Law Society and the Law Society giving its input. The Respondent considered that DM was in the less strong position and that it would be best if he, the Respondent, continued to act for DM whilst MW be represented by another firm.

There is no departing from the fact that during this period of time a conflict of interest continued and it was not satisfactorily addressed, despite the arrangements put in place.

With regard to the second aspect, namely averment 5.3, the Respondent had attended at the croft in 2014 with paperwork for DM to sign. It is the Respondent's instructions that in the course of that meeting he did explain the reasons for the various documents. The Respondent considered he was acting in the best

interests of DM in order to get the sale in place. It was the Respondent's understanding that DM was somewhat impecunious. Whilst it was clear that the Respondent did discuss the various developments, he did not record this in writing. There is nothing on the file to detail the instructions received by the Respondent or the advice given by him. It is therefore respectfully accepted that he did not act in the best interests of DM.

The Tribunal asked Mr O'Rourke where the suggestion for a standard security over DM's house had originated. The Fiscal had suggested that the requirement did not come from the other solicitor, so his conclusion was that the idea had come from the Respondent himself and thus he was not acting in the best interests of DM.

Mr O'Rourke conceded that this was somewhat anomalous. He was unable to explain why this standard security was needed. There was no reference to it in the earlier discussions noted on the file.

The Fiscal drew the Tribunal's attention to the draft Minute of Agreement being prepared in June 2013, whilst papers were not passed to the new solicitors under July 2013. In other words, the Respondent was taking steps to draft the second standard security and the Minute of Agreement whilst the firm was still representing both parties. He submitted that the Respondent was clearly not acting in DM's best interests.

The Tribunal asked the parties what the nature of the Respondent's involvement was when he attended at the meeting described in averment 3.2 of the Complaint (now 7.2). The Fiscal explained that he could not give the precise date of that meeting. He clarified that it was the Law Society's position that the solicitor-client relationship between the Respondent and DM commenced in 2010. He accepted that the Respondent was not involved in the matter until 2010.

In response to a question from the Tribunal, the Fiscal moved to amend his description of the 2011 Rules to "The Law Society of Scotland Practice Rules 2011". Mr O'Rourke confirmed he had no objection to that and the motion was granted.

DECISION

The averments of fact within the revised Complaint were admitted by the Respondent in his Answers. Accordingly, the Tribunal found all of the averments of fact to be established.

Albeit, the Joint Minute also admitted the averments of misconduct, the question of whether or not the Respondent's conduct amounts to misconduct is always a question to be answered by the Tribunal itself. The test for misconduct is that as set out in the case of 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 to be made."

It was accepted that the Respondent had acted in a conflict of interest from 19 May 2010 to 11 July 2013. The inappropriateness of this was highlighted to the Respondent in December 2012 and yet the conduct persisted until papers were passed to new solicitors for MW on 12 July 2013. During that time, work continued with regard to drafting the Minute of Agreement between the two parties and, in particular, with the drafting of the second standard security, an explanation for which could not be given.

The Tribunal accepted that all of the averments of misconduct had been established. However, it considered that the Respondent acting in a conflict of interest and failing to act in the best interests of DM were difficult to separate out into different issues. Accordingly, it concluded that they should be treated on an *in cumulo* basis. The Tribunal was satisfied that the conduct of the Respondent fell below the standard of conduct to be expected of a competent and reputable solicitor to the extent that it could only be seen as serious and reprehensible.

The Tribunal invited the parties to make submissions with regard to disposal, expenses and publicity.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal lodged a record card for the Respondent which disclosed a previous finding of unsatisfactory professional conduct from May 2011. He explained that this related to the delay on the part of the Respondent in issuing terms of engagement letters in two distinct family matters. The Respondent had been censured and ordered to pay compensation of £250.

He invited the Tribunal to award the Complainers expenses on the usual basis. He had no submissions to make with regard to publicity.

SUBMISSIONS FOR THE RESPONDENT

Mr O'Rourke drew the Tribunal's attention to what he described was the long and useful career of the Respondent as a solicitor in the Highland region. Following a medical procedure in approximately May 2017, the Respondent had resigned as managing partner of the firm. He had continued as a consultant until 2019 when he had retired from practice.

He very much regrets the circumstances that arose here. He wishes to express his apologies to all concerned. The Respondent recognises, in hindsight, that he should have dealt with matters differently. He invited the Tribunal to consider the Respondent's conduct as him anachronistically playing the role of an old-fashioned Highland broker. He had honestly been trying to help both men. When his assistant had brought her concerns to his attention, the Respondent had sought as quickly as he could to resolve the problem.

He invited the Tribunal to accept that the Respondent had achieved what he was trying to do, namely for DM to sell the croft and receive financial benefit from that. DM did receive financial benefit from the transaction within his lifetime. Albeit DM did broker the transaction, clearly his beneficiaries have gone on to raise these issues. Claims have been made against the firm involving the firm's insurance. The Respondent has made it known to his former partners that he will personally pay any excess involved in the insurance claims. Three service issues remain outstanding with the Scottish Legal Complaints Commission which the Respondent will require to address. The matter will remain live for some time.

This complaint has been an involved matter extending over a number of years. The Respondent has sought to explain and defend his actions. It has not been easy to come to terms with the conclusion that his actions amounted to misconduct. He very much regrets the way he dealt with matters.

Mr O'Rourke confirmed that the Respondent was in a position to meet any financial penalty. Otherwise, he invited the Tribunal to deal with matters as leniently as possible. He emphasised that there was no risk to the public given that the Respondent had retired from practice.

Mr O'Rourke confirmed he had no objection to the Fiscal's motion for expenses and confirmed that he was aware that the Tribunal's usual award was on an agent-client paying basis. He had no submissions with regard to publicity.

DECISION

The Respondent had been in practice as a solicitor for over 40 years. The Tribunal considered that the finding of UPC on his record card was not analogous and of no real relevance.

The Tribunal accepted that the Respondent had acted in good faith but in the ill-advised role of an honest broker to both parties.

The Tribunal noted that both DM and MW had been separately represented for some time prior to the completion of the transaction.

Even if the Respondent had not been retired, the Tribunal would not have been considering either a strike off or suspension. Given that he was no longer practising, and there was no risk to the public, no restriction was appropriate or necessary.

In all of the circumstances, the Tribunal considered that the appropriate disposal was one of Censure.

The Tribunal made an order of expenses in favour of the Complainers. With regard to publicity, this publicity requires to include the name of the Respondent but given the personal nature of the information contained within the findings, the Tribunal considered it appropriate not to name any other individual.

Additionally, the Tribunal allowed the Secondary Complainer 28 days from the date of the intimation of the findings to lodge a claim for compensation.

[redacted]

Nicholas Whyte

Chair