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

ALAN NIALL MACPHERSON MICKEL, residing at Flat 2/1, 13 Partickhill Road, Hyndland, Glasgow

Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") with a covering letter dated 9 January 2020. The Complaint averred that Alan Niall Macpherson Mickel, residing at Flat 2/1, 13 Partickhill Road, Hyndland, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. No Secondary Complainer was identified in the Complaint. No Secondary Complainer indicated that they wished to claim compensation.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. On 26 March 2020, the Tribunal sisted the case on its own initiative under Rule 44 of the Tribunal Rules 2008 in view of government advice regarding COVID-19 (coronavirus). That sist was recalled by Interlocutor of 22 May 2020.

5. In terms of its Rules, the Tribunal set a virtual procedural hearing for 21 July 2020 and notice thereof was duly served on the parties.

6. At the virtual procedural hearing on 21 July 2020, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Iain Mitchell, Q.C., and William Frain-Bell, Advocate, instructed by Michael Gallen, Solicitor, Glasgow. On joint motion, the Tribunal allowed parties six weeks to adjust their pleadings and fixed a virtual procedural hearing for 15 September 2020. Notice of the virtual procedural hearing was served on the parties.

7. On 9 September 2020, on joint motion, the Chair, exercising the functions of the Tribunal under Rules 56 and 44 of the Tribunal Rules 2008, adjourned the virtual procedural hearing fixed for 15 September 2020. The Tribunal fixed a virtual procedural hearing for 11 November 2020 and notice thereof was served on the parties.

8. On 6 November 2020, on joint motion, the Chair, exercising the functions of the Tribunal under Rules 56 and 44 of the Tribunal Rules 2008, adjourned the virtual procedural hearing fixed for 11 November 2020. The Tribunal fixed a virtual procedural hearing for 14 January 2021 and notice thereof was served on the parties.

9. On 17 December 2020, on the unopposed motion of the Respondent, the Chair exercising the functions of the Tribunal under Rules 56 and 44 of the Tribunal Rules 2008, adjourned the virtual procedural hearing fixed for 14 January 2021. The Tribunal fixed a virtual procedural hearing for 15 March 2021 and notice thereof was served on the parties.

10. At the virtual procedural hearing on 15 March 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Michael Gallen, Solicitor, Glasgow. On joint motion, the Tribunal fixed a further virtual procedural hearing for 28 April 2021. Notice of the virtual procedural hearing was served on the parties.

11. At the virtual procedural hearing on 28 April 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Iain Mitchell, Q.C., and William Frain-Bell, Advocate, instructed by Michael Gallen, Solicitor, Glasgow. On joint motion, the Tribunal set the matter down for a three-day hearing in-person on dates to be afterwards fixed. The Tribunal later set the hearing for 18-20 August 2021. Notice of the hearing was served on the parties.

12. At the hearing in-person on 18-20 August 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Iain Mitchell, Q.C., and William Frain-Bell, Advocate, instructed by Michael Gallen, Solicitor, Glasgow.

13. At the start of the hearing on 18 August 2021, parties tendered a signed Joint Minute. As agreed by parties, the Tribunal Clerk amended paragraph 35 of the Joint Minute by deleting "April 2017" and substituting "April 2007". On the Respondent's motion, which was not opposed, the Tribunal admitted the Third Inventory of Productions for the Respondent. However, it refused to admit a Fourth Inventory of Productions for the Respondent. The Tribunal received an updated List of Witnesses for the Respondent. Two witnesses gave evidence for the Complainers. At the conclusion of proceedings on 18 August 2021, Mr Mitchell moved the Tribunal to receive a Fifth Inventory of Productions for the Respondent. Said Inventory contained two Affidavits. The Fiscal indicated that one Affidavit was agreed and could be received in place of the witness's evidence. The Tribunal admitted the first Affidavit but refused to admit the second Affidavit.

14. On 19 August 2021, three witnesses gave evidence for the Complainers. The Fiscal closed the case for the Complainers. Mr Mitchell made a no case to answer submission.

15. On 20 August 2021, the Fiscal responded to the no case to answer submission. The Tribunal rejected the no case to answer submission. The Respondent and one other witness for the Respondent gave evidence. Mr Mitchell closed the case for the Respondent. As there was insufficient time to hear closing submissions, the Tribunal continued the hearing to a virtual hearing on 8 October 2021.

16. At the virtual continued hearing on 8 October 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Iain Mitchell, Q.C., and William Frain-Bell, Advocate, instructed by Michael Gallen, Solicitor, Glasgow. Parties made submissions. The Tribunal started its deliberations. The virtual continued hearing was continued to 26 October 2021.

17. At the virtual continued hearing on 26 October 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Iain Mitchell Q.C. and William Frain-Bell, Advocate, instructed by Michael Gallen, Solicitor, Glasgow. The Tribunal concluded its deliberations.

18. The Tribunal found the following facts established:-

18.1 The Respondent is a solicitor enrolled in the Registers of Scotland. His date of birth is 21 July 1968. He was enrolled as a solicitor in Scotland on 13 June 1996. He was admitted as a Solicitor Advocate on 24 September 2008.

18.2 Between 1 June 2002 and 31 October 2014, the Respondent was a partner in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow, G5 9TQ.

18.3 Between 1 February 2008 and 30 September 2009, the Respondent was the designated Cashroom Partner at Hamilton Burns.

18.4 The designated Cashroom Partner, then designated Cashroom Manager, at Hamilton Burns between 1 October 2009 and 8 May 2015 was Tasmina Ahmed-Sheikh.

18.5 Between 14 October 2008 and 30 September 2009, the Respondent was the Anti-Money Laundering Partner of Hamilton Burns.

18.6 On 29 July 2014, Hamilton Burns WS Limited, company number SC483134, was incorporated as an incorporated practice, having its registered office at Carlton Buildings, 63 Carlton Place, Glasgow, G5 9TW. The first Directors appointed were the Respondent, Tasmina Ahmed-Sheikh, William Lawson Criggie, and Garry Christopher Moss. Two further Directors, Lorraine Kelly and Andrew Knox, were appointed on 2 March 2015.

18.7 Between 1 November 2014 and 29 December 2015, the Respondent was a Director of Hamilton Burns WS Limited.

18.8 The Respondent resigned as a director of Hamilton Burns WS Limited on 29 December 2015.

18.9 Between 8 May 2015 and the date of the Respondent's resignation as a Director on 29 December 2015, William Criggie was the designated Cashroom Manager of Hamilton Burns WS Ltd.

18.10 Between 30 December 2015 and 23 May 2017, the Respondent was a Consultant with Hamilton Burns WS Limited.

18.11 From 22 March 2019, the Respondent was a self-employed Consultant with Liu's Legal Solutions Limited, Unit 6, 42-46 New City Road, Glasgow, G4 9JT and also with England Palmer Solicitors in Guildford. He remains on the Roll of Solicitors held by the Complainers and has a full extant Practising Certificate and ID card.

Administration of Hamilton Burns WS Limited

18.12 On 23 May 2017, Hamilton Burns WS Limited went into administration and joint administrators were appointed from FRP LLP. An estimated Statement of Affairs prepared by said administrators dated 1 June 2017, indicated a deficiency of £511,084, and an updated Statement of Affairs dated June 2020 indicated an increased deficiency of £1,272,905.

The Executry Matter

18.13 Between 1-3 November 2016, the Financial Compliance Department of the Complainers conducted an inspection ("the 2016 inspection") of the financial records, books, accounts and documentation of the practice unit that was Hamilton Burns WS Limited.

18.14 The 2016 inspection identified a number of concerns in relation to the administration of an executry of the late Dr. L, B or C ("the Executry").

18.15 In her Will, dated 25 April 2013, the late Doctor L B or C appointed the Respondent and R.B. (the *ad hoc* external accountant of Hamilton Burns WS Limited) as her Executors.

18.16 Clause 10 of the Will provides that the Executors have power to (*inter alia*):

"...appoint one or more of their own number to act as solicitor or agent in any other capacity and to allow him or them the same remuneration to which he or they would have been entitled if not an Executor or Executors".

18.17 Dr. L B or C died on 27 April 2013.

18.18 Dr. L B or C's Will: (i) made a specific bequest to R.B. (one of the Executors); and (ii) provided that her late husband A.C. was the residuary beneficiary in terms of her Will dated 25 April 2013.

18.19 Following the 2016 inspection, the Financial Compliance Department of the Complainers identified anomalies in regard to the rendering of fees, incomplete accounting records and general concerns regarding the administration of the Executry by the Executors and by Hamilton Burns WS Limited. Said concerns were not fully addressed.

18.20 At a meeting of the Complainer's Client Protection Sub-Committee, held on 2 March 2017, a full investigation was authorised by the Complainer of the administration of the Executry.

18.21 On 10 May 2017, the Respondent was invited to an interview with the Complainer's Client Protection Sub-Committee.

18.22 On 17 May 2017, the Complainer's Client Protection Sub-Committee determined to refer the issues relating to the Executry to the Scottish Legal Complaints Commission.

The Administration of the Executry

18.23 The administration of the Executry was undertaken by various solicitors at Hamilton Burns WS Limited.

18.24 From March 2014, the administration of the Executry was undertaken by Lorraine Kelly, a partner of the firm and thereafter a director of Hamilton Burns WS Limited.

18.25 On 27 May 2015, the Respondent met with Lorraine Kelly to discuss the administration of the Executry estate and its completion. The Respondent instructed the said Lorraine Kelly to retain a sum of £5,000 and remit the balance

to the said A.C. and that the Executry administration accounts could be finalised at a later stage.

18.26 On 27 May 2015, Lorraine Kelly wrote to A. C., the residuary beneficiary, which letter included a cheque for £202,650.99.

Said letter narrated the following:-"

We refer to the above matter and confirm that we are now in a position to finalise the Estate. We confirm that both Executors have now approved the final accounts and we can therefore pay out the residue of the Estate to you.

We enclose herewith a cheque in the sum of £202,650.99 being the residue of the Estate due to you after deduction of specific bequeaths, debts and funeral expenses and legal fees.

We would be obliged if you could sign the enclosed receipt and return it to us in order that we can proceed to close the file."

18.27 By interlocutor dated 25 October 2019, in case reference 2019/1858/R, the Tribunal considered a complaint against the said Lorraine Kelly and found her guilty of professional misconduct in respect that on 27 May 2015, she wrote to the said residuary beneficiary stating that both executors had approved the final accounts for the administration of the said estate and enclosed a cheque in the sum of £202,650.99 being the residue of the estate due to the said beneficiary knowing that said executors had not approved the said final accounts and that a sum of £5,033.33 had been retained by the firm, said letter thereby, it was found by the Tribunal, serving to mislead the said residuary beneficiary.

The terms of the said letter dated 27 May 2015 issued by the said Lorraine Kelly following receipt by her of instructions from the Respondent, were misleading.

The said letter advised that both Executors had approved the final accounts and that a sum was to be payable to the said AC being the full balance due to him as the residuary beneficiary. Said statements in particular were misleading and not

true. The Executors, including the Respondent, had not approved the final accounts and a sum of £5,000 had been retained.

The Respondent, subsequent to the said letter dated 27 May 2015, instructed that further fees be taken and paid to him personally.

18.28 On 6 July 2015, a fee note of £2,000 was issued to Hamilton Burns WS Limited by the Respondent as Executor.

18.29 On 28 August 2015, a fee note for £3,000 was issued to Hamilton Burns WS Limited by the Respondent as Executor.

18.30 The Hamilton Burns Client account ledger for the said Executry shows that on 30 November 2015, £33.33 of interest that had accrued on the balance of £5,000 was taken for that amount and paid to the firm's account on the instructions of the Respondent.

18.31 On 6 July, 28 August and 30 November 2015, the Respondent was a Director of the incorporated practice and was an Executor of the said Estate.

18.32 The sum of £5,033.33 which had been the total amount paid to the firm, was recredited by Hamilton Burns WS Limited to the Executry Client Ledger on 20 April 2017.

18.33 This sum of £5,033.33 was thereafter paid by Hamilton Burns WS Ltd to A.C. at the request of the Complainers.

The said three fee notes were, however, at no time intimated or issued to either the said R.B. as Executor nor the said A.C. as residuary beneficiary.

18.34 The question of taxation of fees issued by the practice unit in the Executry was remitted to the Auditor of the Court of Session on joint remit. During the course of the inspection investigation by the Complainers' Financial Compliance Department, it was noted that fees totalling £31,351.33 had been rendered by the said firm and incorporated practice for the work undertaken in the administration

of the Executry Estate. The said fees were reviewed and taxed by the Auditor of the Court of Session in the sum of £17,568.39.

The Scottish Legal Aid Board ("SLAB") Matter

18.35 In or about April 2007, P.S. instructed Hamilton Burns to act for him in relation to a reparation claim in which he was the pursuer.

18.36 On or around 25 April 2007, a client ledger card was opened by Hamilton Burns in the name of P.S. as the client. That account was allocated an account number.

18.37 The partner who was allocated to P.S. and who was denoted on the client ledger card was the Respondent.

18.38 Hamilton Burns applied on behalf of P.S. to the Scottish Legal Aid Board ("SLAB") for the grant of Legal Aid, which application was granted.

18.39 The nominated solicitor shown on the legal aid certificate was Kevin Murphy, who was a partner of Hamilton Burns.

18.40 On or around 17 December 2012, settlement terms were agreed with the defender in the action, whereby P.S. was to receive £30,000 and the defender agreed to meet an award of judicial expenses.

18.41 On 20 December 2012, Hamilton Burns wrote to SLAB confirming the terms of settlement and stating that the firm intended to claim payment of their fees and outlays in the amount of the judicial expenses recovered. Said letter contained the firm's reference NM/KM/PWS/SQ/C4307/1.

18.42 On or around 18 January 2013, payment of £30,000 was received by Hamilton Burns from the Defender. That sum was paid out by Hamilton Burns to P.S.

18.43 Hamilton Burns agreed judicial expenses in the sum of £48,400.01. This sum was paid in two instalments: (i) £32,000 on or around 27 August 2013; and (ii) £16,400.01 on or around 20 February 2014.

18.44 None of the £48,400.01 of the judicial expenses received by Hamilton Burns was remitted to SLAB.

18.45 Certain outlays that were due to be paid, were settled from the judicial expenses that were received.

18.46 On or around 29 August 2013, fees were debited from the judicial expenses of £22,813.13 plus VAT. Following payment of said outlays a credit balance remained at credit on said ledger together with accrued interest until the said firm entered administration on 23 May 2017.

18.47 On 16 June 2014 at 14.50, Hamilton Burns' cashier advised the firm's Cashroom Partner, Tasmina Ahmed-Sheikh and the Respondent, by email, that there was a credit balance on the client ledger amounting to £5,046.50 but that a sum of £15,525.29 was due to be paid to SLAB. The contents of the aforesaid client ledger card, production 21/3 and 4 for the Complainers are true and accurate.

18.48 At 15.33 on 16 June 2014, the Respondent replied to the said email of 16 June 2014, suggesting that the issue should be referred to Mullens, a firm of Law Accountants which was customarily engaged by the firm.

18.49 The purpose of section 17(2)A of the Legal Aid (Scotland) Act 1986 is to ensure that the public purse recoups any costs incurred during the currency of a legal aid certificate.

During the period when the said firm acted, SLAB paid out a total sum of £23,187.29 by way of reimbursements of outlays. As a result of the said firm failing to remit the said recovered judicial expenses, SLAB did not recoup said sum of £23,187.29.

The said firm advised SLAB by letter dated 20 December 2012 that they would be accepting payment of their fees and outlays by way of the judicial expenses recovered. Said sums were not remitted to SLAB. By letter dated 5 February 2015, SLAB wrote to the said firm seeking an explanation. Said letter contained

the reference "NM/KM/PWS/SW/C4307/1". The nominated solicitor, the said Kevin Murphy, had left said firm on 31 October 2013. The Respondent and said firm failed to respond to said letter. Further reminder letters were issued by SLAB containing the same reference on 10 March 2015, 21 April 2015, 3 June 2015, 14 July 2015, 18 August 2015, 18 September 2015, 20 October 2015, 1 December 2015, 20 January 2016, 9 February 2016, 9 March 2016, 22 March 2016 and 14 April 2016. Despite said reminder letters, no funds were remitted to SLAB. The Respondent resigned as a Director on 29 December 2015 but remained engaged by the firm as a consultant until 23 May 2017.

The said firm entered administration on 23 May 2017, the said sums lawfully due to SLAB were not remitted by said date. The credit balance on the said client ledger, together with accrued interest, amounting to £5,073.76 was remitted to SLAB on 30 October 2017 by the said firm's Administrators. The balance of the sums lawfully due to SLAB amounting to £18,113.53 were remitted to SLAB from the Complainers' Client Protection Fund on 14 December 2017. Consequently, there was no loss to the legal aid fund.

19. Having considered the foregoing circumstances, and the parties' submissions, the Tribunal found the Respondent not guilty of professional misconduct in relation to the averments of misconduct relating to the executry matter contained at Articles 4.1(a) and (b) of the Complaint. The Tribunal considered that the Respondent's actions may amount to unsatisfactory professional conduct and accordingly remitted the Complaint in relation to averments of misconduct (a) and (b) under Section 53ZA of the Solicitors (Scotland) Act 1980 to the Council of the Law Society of Scotland as follows:

(a) The Respondent, in or around 27 May 2015, instructed in his capacity as an Executor and as a Director of the said incorporated practice a letter to be written to the residuary beneficiary in the Executry of the later Doctor L B or C, stating that both Executors had approved the final accounts for the administration of the said Estate and enclosing a cheque in the sum of £202,650.99 being the residue of the Estate due to the said beneficiary, knowing that both Executors had not approved the said final accounts and that a sum of £5,000.00 had been retained by the Respondents incorporated practice, said letter thereby serving to mislead the said residuary beneficiary and in breach of Rule 1.2 of the Law Society of Scotland Practice Rules 2011;

(b) The Respondent, in respect of him instructing the payment of fees totalling £5,033.33 to the said Executry in respect of his actings *qua* Executor without any lawful basis for doing so, and attempting to conceal from the residuary beneficiary the fact that he had done so, and in doing so failed to act honestly and with integrity and thereby breached Rules B1.2, B1.7.1, B1.11.1, B6.5.1(d) and B6.12 of the Law Society of Scotland Practice Rules 2011.

Having considered the foregoing circumstances, and the parties' submissions, the Tribunal found the Respondent guilty of professional misconduct in relation to the averments of misconduct relating to the SLAB matter contained at Articles (c), (d) and (e) of the Complaint in respect that:

(c) The Respondent, as a Partner or Director or Managing Partner of the said firm, having been informed and knowing that sums due to the Scottish Legal Aid Board by way of recovered judicial expenses, had been improperly taken as fees, failed to take action, or instruct others to take action, to remit said judicial expenses to the Scottish Legal Aid Board and was therefore in breach of Rules B6.2.3, B6.3.1, B6.4.1, B6.7.1, and B6.11.1 of the Law Society of Scotland Practice Rules 2011;

(d) The Respondent, as a Partner or Director or Managing Partner of the said firm, having been informed and knowing that sums due to the Scottish Legal Aid Board by way of recovered judicial expenses, had been improperly taken as fees, failed to co-operate and communicate effectively with the Scottish Legal Aid Board to resolve matters, and was therefore in breach of Rules B1.2, B6.2.3, and B6.12.1 of the Law Society of Scotland Practice Rules 2011;

(e) The Respondent, as a Partner, or Director or Managing Partner of the said firm, knowing that sums recovered by way of judicial expenses had been improperly taken as fees, failed to correct matters, co-operate and communicate with the Scottish Legal Aid Board, and knowingly retained said sums lawfully due to the Scottish Legal Aid Board, and in doing so failed to act with integrity, and was therefore in breach of Rules B1.2 and B6.12.1 of the Law Society of Scotland Practice Rules 2011.

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

By Video Conference, 26 October 2021. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Alan Niall Macpherson Mickel, residing at Flat 2/1, 13 Partickhill Road, Hyndland, Glasgow; Find the Respondent not guilty of professional misconduct in relation to averments of misconduct (a) and (b); Remit the Complaint in relation to averments of misconduct (a) and (b) to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Find the Respondent guilty of professional misconduct in relation to averments of misconduct (c) in respect of his breaches of Rules B6.2.3, B6.3.1, B6.4.1, B6.7.1, and B6.11.1 of the Law Society of Scotland Practice Rules 2011, in relation to averment of misconduct (d) in respect of his breaches of Rules B1.2 (insofar as it related to a lack of integrity), B6.2.3, and B6.12.1 of the Law Society of Scotland Practice Rules 2011 and in relation to averment of misconduct (e) in respect of his breaches of Rules B1.2 (insofar as it related to a lack of integrity) and B6.12.1 of the Law Society of Scotland Practice Rules 2011; Censure the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of two years any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to and to being supervised by such employer or successive employers as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland; Find the Respondent liable in respect of one-half of 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; and 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.

(signed)

Christopher Mackay

Acting Vice Chair

21. 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 20 January 2022.

IN THE NAME OF THE TRIBUNAL

[redacted]

Christopher Mackay

Acting Vice Chair

NOTE

At the hearing, the Tribunal had before it a Record; a Joint Minute; a List of Witnesses for the Complainers; a List of Witnesses for the Respondent; two Inventories of Productions for the Complainers; three Inventories of Productions for the Respondent; the Affidavit of Andrew Knox dated 30 June 2021 (lodged on 18 August 2021) and a List of Authorities for the Respondent (lodged on 19 August 2021).

The Tribunal declined to admit a Fourth Inventory of Productions for the Respondent, which was lodged on the morning of the hearing on 18 August 2021. This Inventory had been lodged very late indeed, and its purpose appeared to be to support an argument regarding the competency of certain aspects of the Complaint. The Tribunal was of the view that such a challenge was not appropriate at this stage in proceedings. The Tribunal admitted the Respondent's updated List of Witnesses. It queried the Respondent's purpose in calling Mr Foster. It noted that the Tribunal was itself an expert body and it would assess the weight to give to Mr Foster's evidence during its deliberations.

EVIDENCE FOR THE COMPLAINERS

WITNESS SHARON BROWNLEE (18 August 2021)

Sharon Brownlee is employed by the Law Society of Scotland as a Financial Compliance Manager. She works in the Financial Compliance Department overseeing a team of inspectors. Her team inspects solicitors' firms from all over Scotland. She has worked for the Law Society for 21 years. She has been in her current role for 15 or 16 years. The witness explained the purpose of Law Society inspections and investigations and how these are undertaken. The witness was involved in various inspections of Hamilton Burns.

During one inspection, the team looked at the L B or C executry. A number of fees had been taken across different ledgers. There was no account of charge and discharge on the file. Total fees of £31,351.33 (including VAT) had been taken but the final position could not be ascertained.

It did not appear any of the fee notes, except for one, had been rendered to the residuary beneficiary. The witness explained that the Law Society recommends that fees are rendered to the residuary beneficiary who should also approve the account. However, this guidance is not contained in a rule. The rules provide that fees have to be rendered to and approved by an executor.

A letter dated 27 May 2015 to the residuary beneficiary from the firm confirmed that the executors had approved the final accounts and enclosed a cheque for a sum which was said to be the residue. This suggested there ought to be a full account of charge and discharge. It appeared that the executry was complete in May 2015. However further fees had been taken. It was not clear what work had been done to justify those fees. If fees were due, the executry was not finalised. The witness's team compiled a report which was sent to the Cashroom Partner. It was not sent to the Respondent. The witness explained that her team repeatedly asked for information from the firm. William Criggie and Lorraine Kelly said that they had contacted the Respondent but could not get satisfactory explanations.

The matter was referred to the Client Protection Sub Committee which authorised an investigation into the executry matter. Files and information were requested. Extensions were granted. At one stage a member of the team attended at the firm.

By March 2017, the team instructed the practice unit to recredit the fees. It was noted in the report that Scots Law generally regards the office of executor as a gratuitous office. However, Lorraine Kelly and William Criggie confirmed that the fees of £5,033.33 were taken on the instructions of the Respondent, as fees due personally to him as executor. No evidence was found to support the decision that the fees were properly due or that additional work had been carried out. There were no detailed fee notes explaining the dates upon which work had been done. The fees were not re-credited until 20 April 2017 when a member of the team attended at the practice unit. There was insufficient surplus to make the re-credit. Making the correction put the practice unit in deficit.

The witness met the residuary beneficiary on 6 April 2017. She kept a note of the meeting (Production 16 for the Complainers). It was signed by the residuary beneficiary. He told her that he was not aware that £5,000 was retained on the client ledger following the payment in May 2015. He believed the executry was finalised then. He was not aware of any reason or instruction why the Respondent would receive fees as an executor. This was in contrast to the information from the practice unit that the residuary beneficiary was satisfied with the fees taken by the practice unit and that all payments were consistent with the will.

The witness was referred to the ledger entries (Production 15 for the Complainers). She spoke to fees and transfers which were noted to be "as per NM instructions" on 13 September 2013, the payment of "the residue" on 27 May 2015, and the fees taken on 6 July 2015 (£2,000), 28 August 2015 (£3,000) and 30 November 2015 (£27.77 which was £33.33 with VAT). The entry of 6 July 2015 was "to render fee note number 7256 as per NM instructions with meeting with LT and NC 25/05/15." The witness was

referred to the account of charge and discharge (Production 5/33 for the Complainers) and spoke to item 16 and 17 being the executor's fees she had referred to earlier.

The witness was referred to the note of the Respondent's interview with the Client Protection Fund Sub Committee on 10 May 2017 (Production 7 for the Complainers). The Respondent's position at that meeting was that he was entitled to charge a fee as an executor. He said item 16 may have been incorrectly recorded by an inexperienced cashier as having been taken under his instruction. He said that items 16 and 17 were either fees charged for work done in the entirety of the executry, or were charged by him in his capacity as executor.

The witness attended a diet of taxation in relation to the executry matter. She was referred to the auditor's report (Production 17 for the Complainers). At the diet of taxation, the Respondent told the auditor that the residuary beneficiary had agreed the fees retrospectively.

The witness visited the residuary beneficiary on 10 October 2017. She kept a note of her meeting (Production 45 for the Complainers). He told her that he was not aware of any fees that would be due to the Respondent as executor or why they would be due to an executor. He said that R.B. had recently contacted him asking if he was prepared to give retrospective consent for the executor fees. The residuary beneficiary had told R.B. he was not prepared to do that. This was contrary to the position advanced at taxation. The witness provided her note to the auditor.

The witness was referred to pre-inspection questionnaires completed by the firm (Productions 47 and 48 for the Complainers). She noted that writing off fees on client balances was the Respondent's responsibility. He also dealt with unpaid fees and client debit balances.

The witness explained that the Law Society places reliance on accounts certificates. They allow practice units to disclose deficits and provide explanations. Any breaches should be noted on the relevant account certificate.

In cross-examination, the witness confirmed that the Respondent and his co-executor were clients of the firm and that the Respondent raised a charge of £5,000 for aspects of work as an executor. This activity was seen on the ledgers. Mr Mitchell suggested that these entries could reflect a fee paid to an executor as an outlay. The witness indicated that it looked like a fee to the firm.

The witness confirmed there was no account of charge and discharge in May 2015 and in its absence, it was not possible to ascertain the residue. There was no justification on the file or ledger for any fees taken after May 2015. There did not appear to be any other assets to engather or any other work to be carried out.

Before this hearing, the witness had not seen the "note of works done as executor" (Production 10 in the First Inventory of Productions for the Respondent). If she had seen it during the investigation, she would still have based her report on the basis of the dates and fees in the ledgers. She would still have questioned the executor charging a fee.

The witness confirmed her team had asked the practice unit throughout the inspections and investigation to obtain the residuary beneficiary's approval of the account of charge and discharge.

The witness confirmed she had received emails in which Lorraine Kelly referred to meeting with the Respondent and going over the accounts, and her meeting with the residuary beneficiary and the signed account of charge and discharge (contained at Productions 20 and 25 in the First Inventory of Productions for the Respondent). She confirmed that Production 22 in the Respondent's First Inventory of Productions was effectively a discharge signed by the residuary beneficiary. She noted that the residuary beneficiary had only signed the first page of the account. He told her he was not given sufficient time to go over the accounts. He did not understand the fees charged. He said that Lorraine Kelly told him an overpayment of £900 had been made to him but if he signed the account that would be an end to the matter.

The witness was referred to Productions 1 and 2 in the Third Inventory of Productions for the Respondent. Production 1 was Law Society guidance on executry and trust accounting. Production 2 was an opinion by Iain G Mitchell Q.C. It was suggested to the witness that the retention of sums after production of an account of charge and discharge can be appropriate in some circumstances. The witness explained this was only appropriate to protect against anticipated claims. From the file, no claims were expected. An explanation should be made for retained sums in the file and in the account of charge and discharge. The residuary beneficiary should be informed.

The witness was of the view that even if the letter of 27 May 2015 had not been written (Production 19 for the Complainers), and the attendance note of the meeting of 27 May 2015 was accurate (Production 14 in the Respondent's First Inventory of Productions), there was still a question over the instruction to retain £5,000. If no further work was required, that money was owed to the residuary beneficiary.

During re-examination, the witness said it was the ledgers combined with the letter of 27 May 2015 which had sparked off interest in the case. Following the audit trail revealed six related client ledgers with transfers. The fee of £33.33 was unusual. If it was interest, it belonged to the client.

WITNESS LORRAINE KELLY (18 August 2021)

Lorraine Kelly is a director of Moss and Kelly Solicitors, Gorbals Street, Glasgow. She joined Hamilton Burns in January 2014 as a solicitor and became a director the following year. When she joined, the Respondent was the senior partner. He was the boss. He was a director until December 2015 and then became a consultant. She did not see any change in his role. Although William Criggie was latterly in charge, he took instructions from the Respondent. The firm entered administration in May 2017.

The witness took over the executry matter when another member of staff left. The executors were the Respondent and R.B. The witness prepared the attendance record of 27 May 2015 (Production 18 for the Complainers). According to her, it is an accurate reflection of the discussion between herself and the Respondent. She composed the letter to the residuary beneficiary dated 27 May 2015 (Production 19 for the Complainers). A receipt for the residuary beneficiary to sign was enclosed with the letter.

The witness said prior to the meeting on 27 May 2015, she had spoken several times to the residuary beneficiary. He asked her for the finalised accounts. However, the ledgers were a mess and she could not work it out. There were a number of Hamilton Burns ledger transfers. She prepared a draft account of charge and discharge. She had been waiting to speak to the Respondent for a couple of weeks. There were various blanks.

At the meeting on 27 May 2015, the Respondent did not even look at the accounts. He said the residuary beneficiary did not need them. He told her to send a cheque to the residuary beneficiary but keep £5,000 and they would sort it out meantime. She did not intend to mislead the residuary beneficiary in her letter. She was just trying to get the cheque out as soon as possible. She did not think about referring to the retention of money. She was trying to keep the letter brief. She was not sure it could be retained but went along with it and sent the letter as the Respondent instructed. The Respondent told her to send out the letter in that narrative. However, he did not dictate the exact terms. She did not read or sign the letter before it was sent. She did not think she made the Respondent aware of the contents of the letter. The letter told the residuary beneficiary that the executors had approved the final accounts. The Respondent told her to tell him that. The witness knew this was not true, but her intention was to finalise the accounts as soon as possible once they had an opportunity to go through them. The Respondent told her a fee was

to be paid to him as executor for managing the estate. There was no discussion. He gave no reasons for retaining the sum. She did not know if the fee was going to him or the firm. She had no involvement with the fee other than later re-crediting it to the ledger.

The witness confirmed the Tribunal had made a finding of professional misconduct against her in relation to the letter of 25 May 2017. In mitigation, she instructed her representative to tell the Tribunal that the Respondent had instructed her to send the letter. She had not been in the firm long. She was a director in name only. The Fiscal noted that the Tribunal's determination referred to her being subjected to bullying. The witness said Hamilton Burns was the type of firm where you did as you were told. It was the Respondent or William Criggie who told people what to do. She was talked into doing things she should not have done, such as becoming a director, taking loans to keep the firm afloat, and signing personal guarantees.

The witness was referred to her letter to the residuary beneficiary of 17 November 2016 (Production 17 in the Respondent's First Inventory of Productions). The letter was not signed by her. The file had been on her shelf and she had not done anything with it. Following advice from the Law Society, the firm drafted receipts and accounts and met the residuary beneficiary to have them signed. She spoke on the telephone to the residuary beneficiary and later met him. The residuary beneficiary said he had read the accounts. She did not know if she mentioned to the residuary beneficiary that the Respondent had taken fees. He signed the accounts (Production 37/2 of the Respondent's First Inventory of Productions). He signed a receipt (Production 21 in the Respondent's First Inventory of Productions). The witness could not remember if she completed the account of charge and discharge. The firm received some external assistance with the account.

The witness said both she and the Respondent had a responsibility for the misleading letter. She should have questioned his instruction. The witness did not know if the Respondent was made aware that the fees were re-credited. The Respondent was hardly ever in the office.

During cross-examination, the witness was referred to the attendance note of 27 May 2015 (Production 14 in the Respondent's First Inventory of Productions). She said it was accurate. The residuary beneficiary had been phoning every week or fortnight. She was under pressure. She understood the instruction was to retain £5,000 and pay out the rest to the residuary beneficiary. She agreed that "meantime" suggested something more was to be done later and that "at a later stage" meant there were no finalised accounts. She confirmed the Respondent did not dictate the letter but he did tell her what to write. She had recorded things in the file note which she considered to be important and material. The

letter was dictated immediately but the file note was typed later. It was suggested that the file note contained the core of what she took to be the important instructions from the Respondent. The witness said that just because something was not contained in the file note did not mean the conversation did not take place. She said she was absolutely clear she was instructed by the Respondent to send the letter. She optimistically told the residuary beneficiary the accounts were finalised because she hoped that would be the case shortly.

The witness indicated that the Law Society gave her advice, styles and documents. R.B. arranged for her to see the residuary beneficiary. She posted out all the documents to him. She asked him to confirm he had read everything. She took a copy of the documents with her to the meeting. She was really worried about the situation. She was feeling vulnerable. She needed to sort everything out. All figures on the account of charge and discharge had been taken from the Hamilton Burns ledger. She did not recall telling the residuary beneficiary there had been an overpayment of £900. The accounts were a mess. There is a possibility he was overpaid. He was given sufficient time to review the accounts.

In re-examination, the witness said that the email from her to the Respondent on 28 November 2016 was not a word for word record of the conversation (Production 18 in the Respondent's First Inventory of Productions). She did not have enough time. Other things were discussed but not recorded.

The witness confirmed that items 16 and 17 on the account (Production 37 in the First Inventory of Productions for the Respondent) were copied and pasted from the ledger. She had done this.

In answer to a question from the Tribunal, the witness agreed there was approximately a £900 difference between the accounts of charge and discharge.

WITNESS SHEILA KIRKWOOD (19 August 2021)

Sheila Kirkwood is the solicitor to the Law Society's Client Protection Fund. She provides clerking and advice to the Client Protection Sub Committee. The witness explained that the Client Protection Fund pays out money to clients or related third parties in cases of dishonesty by solicitors. She described the meetings and procedures involved in dealing with a claim to the Client Protection Fund.

The witness was referred to various minutes of the Client Protection Sub Committee which she had prepared and which concerned the executry matter (Productions 3, 4 and 6-14 for the Complainers). The Sub Committee had concerns about the executry. It ordered an investigation and invited the Respondent

for interview. The Sub Committee continued to have concerns that the fees charged had been grossly excessive. The Sub Committee noted that the auditor had not been persuaded that the Respondent was entitled to charge for his services as executor. The auditor had noted that the residuary beneficiary had not consented to the executor's fees. Ultimately the Sub Committee referred a complaint to the Scottish Legal Complaints Commission about this.

The witness was referred to various Productions in relation to the claim to the Client Protection Sub Committee by the Scottish Legal Aid Board ("SLAB") against Hamilton Burns WS Limited (Productions 40 and 46 for the Complainers). SLAB stated it had granted legal aid to a client of the practice unit. SLAB made payments totalling £23,187.29 to solicitors and counsel in respect of interim payments to account and interim reimbursement of outlays.

The witness put together the "background note" describing the claim for the Sub Committee (Production 46 for the Complainers). The note referred to SLAB producing an email of 16 June 2014 from Hamilton Burns' cashier to the Respondent and Tasmina Ahmed-Sheikh. It was recorded in the note that the firm was currently in administration. The administrator had already made payment of £5,073.76 to SLAB. The claim was therefore for £18,113.53.

The witness described the "staged process" the Sub Committee uses to assess applications. It works through seven questions. Question 2 relates to whether the loss was caused by the dishonesty of a solicitor. Question 3 asks if the allegation of dishonesty is supported by the conviction of the solicitor or a finding of fraud in a civil action. The Sub Committee assesses dishonesty based on the papers before it. It is a discretionary fund of last resort. The claim was made against the firm, not an individual. The Sub Committee decided to make a payment to SLAB. The money in the fund is made up of subscriptions of members in private practice.

In cross-examination, the witness indicated that Hamilton Burns was not given notice of the SLAB claim. The company was in administration and was not invited to attend.

WITNESS BRIAN MILLAR (19 August 2021)

Brian Millar is employed by SLAB. He is manager of compliance and investigations. He has worked for SLAB since 1998 and has been in his present role since 2003. His team look at any concerns SLAB has regarding charges by solicitors and advocates and their relationships with SLAB.

The witness explained that if a firm gets judicial expenses, rather than a legal aid account, the expenses should be paid to SLAB so that the fund is not out of pocket. The solicitor's fee and VAT is returned to the firm. In the P.S. case, Hamilton Burns elected to receive judicial expenses. SLAB started to correspond with the firm about this matter in February 2015. It was expected that the matter would take some time to resolve.

The witness was referred to various pieces of correspondence. Hamilton Burns had informed SLAB they intended to claim judicial expenses. There was nothing untoward about this. However, the judicial expenses were never paid to the Board. SLAB issued many letters to the firm about this money. The Respondent's reference was included on all these letters. The witness also spoke to Andrew Knox on the telephone and received an email from him, which contained the cashier's email from June 2014 (Production 40/15 for the Complainers). SLAB complained to the Scottish Legal Complaints Commission. Eventually, SLAB was reimbursed in full. Hamilton Burns paid about £5,000 and the balance came from the Client Protection Fund.

During cross-examination, the witness confirmed that all his dealings with Hamilton Burns were with Andrew Knox. He thought all letters were sent by Royal Mail. He did not recall sending any as email attachments to Andrew Knox.

WITNESS SCOTT COWNIE (19 August 2021)

Scott Cownie is a solicitor employed by SLAB. He explained that Section 17(2A) of the Legal Aid (Scotland) Act 1986 provides that if expenses are received in a legal aid case, they should be paid to SLAB in the first instance.

The witness first became aware of the P.S. case in January 2017. The matter was referred to him by the Principal Sums department. P.S. had been successful. He received £30,000. It was expected the judicial account would take a while. Letters were repeatedly sent to Hamilton Burns. No response was received. The matter was referred to Brian Millar to ask the witness for his opinion. The witness spoke to various pieces of correspondence, in which SLAB sought information from Hamilton Burns about the expenses in the P.S. case.

The witness contacted the administrator regarding the £5,000 on the client ledger which belonged to SLAB. The administrator paid this to the Board. The witness made an application to the Client Protection Fund (Production 40 for the Complainers). He drafted the application, but it was signed by

SLAB's principal legal advisor. In the application he referred to the email of 16 June 2014 from the firm's cashier to the Respondent (Production 40/15 for the Complainers). This email was of concern because it notified the addressees in June 2014 that money should be returned to SLAB, that this had not been done, and someone needed to sort it out.

The witness was aware that the Client Protection Fund paid out in cases of dishonesty. Due to the lack of response, he did not know the firm's position. Oversight was a possibility, but he felt that the cashier's email suggested a "sinister" conclusion, although he said he hesitated to use that word. The secretary to the Client Protection Fund asked him by email to address honesty. He responded giving the indicators which he thought suggested dishonesty. He did not know which individual was responsible. On the form he indicated the individual response was "unknown". He was aware the cashier's email went to the Respondent and Tasmina Ahmed-Sheikh. The application was granted.

According to the witness, the factors suggestive of dishonesty were primarily contained in the cashier's email addressed to the Respondent, presumably in his capacity as managing partner. The cashier asked him to draw the matter to the relevant solicitor's attention. The tone of the email suggested the cashier was worried. It emphasised money was due back to SLAB. NHS Central Legal Office had also confirmed that someone from the firm had attended their offices personally to collect the cheque. This suggested an urgency or desperation to get the money which might indicate a firm in difficulty. He was also aware from the receipts and payments departments that several arrestments had been served on Hamilton Burns fairly regularly in the last few years for fairly substantial funds. Overall, the combination of these factors made him feel there was "something going on here".

During cross-examination, the witness said his priority was to recover the money. There was little prospect of receiving a dividend. The Client Protection Fund was another option. He referred to its "surprisingly flexible attitude" to honesty and dishonesty. It was for the Sub Committee to make its own view of whether the factors outlined in the application satisfied its guidelines.

In answer to a question from the Tribunal, the witness indicated that if SLAB had pursued the client for the sum, that might just have resulted in the client making an application to the Client Protection Fund.

AFFIDAVIT ANDREW KNOX (lodged 18 August 2021)

The Tribunal had regard to the affidavit of Andrew Knox as part of the Respondent's case.

According to his affidavit, Mr Knox became aware of the P.S. matter on 18 June 2015. At that time he was a director of Hamilton Burns. Bill Criggie was the designated Cashroom Manager. A member of the administrative staff brought the matter to his attention following a call from SLAB. The file was voluminous, containing thousands of pages of email correspondence and bundles of evidence spanning a period of ten years. The ledger entries and the legal aid position were confusing. It became apparent that various financial aspects of the file were unresolved, notably abatements for expert expenses. An account had not been sent to SLAB. There were insufficient funds on the ledger to allow a cheque to be prepared along with submission of the account. According to Mr Knox, the matter could not therefore be progressed.

Mr Knox received correspondence from SLAB in October 2016. He made exhaustive attempts to find a historic accounting or cash room error to no avail. The matter was repeatedly discussed with Mr Criggie. Mr Knox said that more timely responses ought to have been made to SLAB but as there was no meaningful response that could be given, none was provided. The firm's cashflow position was in a critical state. His own litigation caseload was overwhelming as attempts were made to keep the firm trading and solvent. The firm entered administration on 23 May 2017.

From October 2016 to May 2017 Mr Knox made repeated attempts to resolve the matter internally. Throughout this period, the firm was under severe financial strain. It faced multiple winding up petitions from HMRC and other creditors which had the effect of frequently arresting the firm's bank accounts. According to Mr Knox, he did not discuss the file with the Respondent at any time prior to the firm being placed into administration.

COMPLAINERS' CASE CLOSED

The Fiscal closed the Complainers' case.

Mr Mitchell provided copies of a List of Authorities together with those authorities to the Tribunal. He indicated that he intended to make a "no case to answer" submission. The Fiscal raised concerns about the competency of such a submission. Following a break for discussion, the Tribunal allowed Mr Mitchell to make his submission.

NO CASE TO ANSWER SUBMISSION FOR THE RESPONDENT (19 August 2021)

Mr Mitchell referred the Tribunal to Rule 40 which provides that the procedure for dealing with a case, including the procedure at any hearing, shall be as the Tribunal may determine, subject to the applicable legislation and the Tribunal's Rules. Mr Mitchell submitted that disciplinary proceedings are quasi-criminal. The Tribunal employed the criminal standard of proof. Although hearsay is admissible, the Tribunal should apply a strong and rigorous approach to it. Essential facts ought to be corroborated.

Mr Mitchell submitted that the averment of misconduct at paragraph 4.1(d) of the Complaint was essentially a failure to cooperate and communicate regarding the SLAB matter. The evidence discloses that the Respondent did fail to cooperate and communicate with SLAB. However, the Tribunal has seen the correspondence and heard the evidence of the witnesses. The SLAB letters were sent to the firm and Andrew Knox dealt with the matter. There is no evidence that the Respondent ever saw any of these letters.

Mr Mitchell suggested that the averment of misconduct at paragraph 4.1(e) of the Complaint was no more than a "rehash" of that at (d). What he had said in relation to that paragraph applied also to this one *mutatis mutandis*. The evidence before the Tribunal was that the Respondent received an email from the cashroom. He instructed that the matter be referred to a law accountant. He was never asked to cooperate with SLAB.

The averment of misconduct at paragraph 4.1(c) of the Complaint alleged that the Respondent failed to take action or instruct others to remit the judicial expenses. The allegation is one of failing to take action, not failing to take sufficient action. This was underlined by paragraph 3.7 of the Complaint which referred to a failure to take "any" steps to remedy breaches. There is no narration of the appropriate action which it is said he ought to have taken. Although the "NM" reference was on all the letters, the Tribunal did not hear evidence regarding to whom this reference belonged. Its use was simply administrative and not indicative of the responsibilities for management of the case.

The averment of misconduct at paragraph 4.1(b) of the Complaint alleged the Respondent had taken fees without lawful basis and attempted to conceal this from the residuary beneficiary. Lawful basis is a matter for the Tribunal. The "bite" of the charge related to the attempt to conceal. The manner of concealment is sending the letter referred to at paragraph 4.1(a). Mr Mitchell indicated that he would make a submission later that (a) should not be before the Tribunal as a stand-alone charge.

Mr Mitchell referred the Tribunal to R-v-Galbraith [1981] 1 WLR1039 at 1042. A court can dispose of a case if there is simply no evidence upon which to convict or the evidence was tenuous, for example because of inherent weakness or vagueness, or because it is inconsistent with other evidence. He said a similar approach is taken in Scotland and referred to AJE-v-Her Majesty's Advocate (Appeal number 42/98).

Mr Mitchell submitted that the Respondent may have liability under paragraphs 4.1(a) and (b) if it is proved he instructed the letter of 27 May 2015. The charge is that he instructed a letter he knew to be misleading to such an extent that it constituted an attempt to conceal from the residuary beneficiary that he had taken a fee. This is contradictory of the evidence in the file note. Lorraine Kelly said she wrote the letter herself. She had intended to finalise the accounts and that is why the letter is in those terms. There was no evidence the Respondent saw the letter. The residuary beneficiary gave a statement that he did not know about the fee. However, it does not go so far as to say he actually received the letter. It is a huge problem that the residuary beneficiary was not called as a witness. There is a conflict between what was written in the alleged note and the other available evidence. His account in the note is not consistent with Lorraine Kelly's evidence.

Mr Mitchell submitted that because of the unsatisfactory nature of the evidence spoken to second hand, the Complainers failed to prove the residuary beneficiary was misled. The Tribunal may think Lorraine Kelly's evidence on the letter was self-contradictory. It was sufficiently unreliable so that it cannot be taken as vouching.

The Tribunal knows there was no account of charge and discharge on 27 May 2015. It makes a nonsense of the suggestion at paragraph 4.1(a) that the executors had not approved the accounts. The only evidence the Respondent was concealing anything from anyone comes from Lorraine Kelly.

Mr Mitchell submitted that paragraph 4.1(a) along with (b) could be seen as an attempt at specification of the attempt to conceal. However, it cannot stand alone. If the Tribunal decided he had not attempted to conceal in (b), it cannot use (a) as a fallback. This is a matter of competency. These proceedings are essentially a proof before answer. It is legitimate to raise competency at any appropriate stage. Even if Mr Mitchell should have raised it earlier, the Tribunal can look at competency *ex proprio motu*.

Mr Mitchell referred to The Law Society of Scotland-v-Scottish Legal Complaints Commission [2011] SC94 where Lord Reed at paragraph 44 notes that the complaint is restricted to the complainer's expression of dissatisfaction. At paragraph 46 it is noted that the focus is on the nature of the grievance

expressed by the complainer rather than on the nature of potential grievances which have never been expressed. In this case, the original complaint sent to the SLCC was concerned with an alleged attempt to conceal something from the other executor and residuary beneficiary, and failing to render an invoice. The Fiscal cannot dispute that paragraph 4.1(b) contains the terms of the remitted complaint. Paragraph 4.1(a) was not part of the remitted complaint. Part (a) maybe specification or amplification of (b) but it cannot stand alone.

Mr Mitchell submitted there was no case to answer. The prosecution had simply failed. However, the question was not all or nothing. The Tribunal can weigh each argument and reach its own view.

COMPLAINERS' RESPONSE TO NO CASE TO ANSWER SUBMISSION (20 August 2021)

The Fiscal's primary position was that no case to answer submissions were incompetent in these proceedings. He had been unable to find any Tribunal or anecdotal evidence to support them. These Tribunal proceedings were not quasi-criminal. This was a civil Tribunal using civil procedures albeit it employed the criminal standard of proof. No case to answer submissions in criminal proceedings have a statutory basis which does not exist for this Tribunal. There was therefore no basis for the Tribunal to consider the submission. The Tribunal must hold an inquiry. If it is not satisfied that professional misconduct is established, it must remit the Complaint to the Law Society if it considers the Respondent may be guilty of unsatisfactory professional conduct. If the Tribunal dismissed the Complaint at this stage, it is finished and it cannot remit the matter.

The Fiscal's secondary position was that the Complaint was not a writ, summons or a criminal complaint. The Tribunal has its own rules and procedures. Rule 6 and Form 1 set out what must be contained in a Complaint. All that is required is a statement of facts. The Tribunal must assess credibility and reliability and make findings in fact based on all the evidence. There is no requirement for corroboration. Hearsay is admissible. The hearing is a proof, not a proof before answer. Even if a no case to answer submission is competent, the procedures and rules applicable to this Tribunal make it incompetent to advance such a position. However, in the event the Tribunal was not with him, the Fiscal indicated he would address some of Mr Mitchell's observations.

The Fiscal noted the Tribunal must consider the whole actings of the Respondent *singly* and *in cumulo*. It is for the Tribunal to determine professional misconduct based on the facts found. The Tribunal can delete sections of the averments of misconduct having heard all the evidence. The averments of

misconduct are to assist but it is ultimately for the Tribunal to make the wording. For example, in relation to (a), the Tribunal could delete the reference to honesty, or it could delete rule breaches.

In the Fiscal's submission, it was not appropriate for Mr Mitchell to comment on the strength of the evidence when contrary evidence might be led. The Fiscal could not prove the Respondent received all the letters. However, he can prove they were issued. The Complainers' case is not that he failed to respond to any particular letter. Rather, the allegation is that he knew there was a problem and did not do enough to respond. The Joint Minute agreed the Respondent received an email and responded to it. He knew that money had not been returned to SLAB. He knew it had been taken to fees. He knew this was a breach of SLAB Regulations and Practice Rules. The Fiscal noted that Lorraine Kelly and Sharon Brownlee gave evidence that the reference "NM" related to the Respondent.

With reference to paragraph 4.1(c), the Fiscal submitted that Mr Mitchell's observations regarding "any" actions were semantic. The averment of misconduct merely says he failed to take action. The allegation is that he did not take appropriate action.

With reference to paragraph 4.1(b), the Fiscal submitted that the allegation is that fees were taken without lawful basis. This is an expert Tribunal and it is for the Tribunal to answer this question after hearing all the evidence.

The averments of misconduct at paragraphs 4.1(a) and (b) both aver an element of concealment. This is related to the inaccurate and misleading letter to the residuary beneficiary. Lorraine Kelly's evidence was that the Respondent instructed her to send out that note. There is a conflicting narrative in the attendance note which requires to be balanced with the Respondent's evidence. The Tribunal should not go too deeply into the evidence at this stage.

The Fiscal reminded the Tribunal it is agreed in the Joint Minute at paragraph 26 that there is no dispute that the residuary beneficiary got the cheque. Sharon Brownlee spoke to him reporting to her that he had received it.

The Fiscal submitted that any challenge to the competency based on Law Society of Scotland-v-Scottish Legal Complaints Commission [2011] SC 94 comes far too late in the day. There is no basis to deal with it now.

The Fiscal submitted the Tribunal should reject the no case to answer submission and invite the Respondent to give evidence and support his Answers.

DECISION ON NO CASE TO ANSWER SUBMISSION

Tribunal proceedings are sometimes referred to as "quasi-criminal". A finding of misconduct can lead to serious consequences for a practitioner. This Tribunal applies the criminal standard of proof. However, disciplinary proceedings are civil in nature (Pine-v-The Law Society [2001] EWCA Civ 1574) and this Tribunal applies civil procedural and evidential rules. Hearsay is admissible and corroboration of essential facts is not required.

Following submissions from both parties, the Tribunal remained of the view that it was competent in these proceedings to hear a no case to answer submission. Provision is made in Section 97 of the Criminal Procedure (Scotland) Act 1995 for no case to answer submissions in criminal proceedings. No similar statutory provision exists in relation to the Tribunal. However, the Tribunal considered it was competent in terms of Rule 40 to receive these submissions, and there were good reasons in the interests of fairness and justice to allow Respondents to make submissions at the conclusion of the Complainers' case. If the Complainers had failed to adduce sufficient evidence to support the charges, it was fair and efficient to assess this at the conclusion of the Complainers' case, rather than proceeding to hear the Respondent's case. The Tribunal noted that "half way submissions" are routinely heard by other disciplinary tribunals (for example, the Medical Practitioners Tribunal Service, the Health and Care Professions Council, Nursing and Midwifery Council, Royal Institution of Chartered Surveyors, and the Solicitors' Disciplinary Tribunal), even if no express provision is made for them in the relevant tribunal's rules.

No case to answer submissions are rare before this Tribunal and neither party could provide any example of them ever having been utilised. This Tribunal applies civil rules of evidence regarding corroboration and hearsay. It is therefore much easier for the Complainers to adduce sufficient evidence to support a charge than it would be in a criminal trial. Any Respondent also faces an uphill challenge to persuade the Tribunal that there is insufficient evidence not only to prove professional misconduct, but also to support the "alternative charge" of unsatisfactory professional conduct, provision for which is contained in Section 53ZA of the Solicitors (Scotland) Act 1980 and Rule 18 of the Tribunal Rules.

Turning to the circumstances of this case, the Tribunal was satisfied it would be inappropriate and unfair to consider the Respondent's argument relating to the competency of the Complaint at this stage in proceedings. This Complaint was a year and a half old. It had called several times for procedural

hearings. No argument in relation to competency had been raised at those procedural hearings or as a plea-in-law in the Respondent's Answers.

The Tribunal carefully reviewed the evidence adduced by the Complainers and the facts agreed in the Joint Minute. It took into account Andrew Knox's Affidavit. At this stage, it was not concerned about the quality of the available evidence, only sufficiency, bearing in mind that hearsay was admissible, corroboration was not required, and if sufficient evidence had been adduced to support unsatisfactory professional conduct, the case would have to proceed. The Tribunal noted that it was invited to find that the conduct described in the five averments of misconduct constituted professional misconduct, *singly* and *in cumulo*. While there were some inconsistencies in the evidence for the Complainers, and issues which might have to be addressed at a later stage regarding credibility and reliability, taking the Complainers' case at its highest, it could not be said that there was insufficient evidence to support the averments of misconduct or that the evidence was so tenuous, vague or inconsistent that the case could not proceed. Sufficient evidence of the essential facts had been led.

Therefore, the Tribunal repelled the no case to answer submission and invited the Respondent to present his case. Due to the availability of the Respondent's witness, it was arranged that the Tribunal would start to hear the Respondent's evidence and that the Tribunal would break to hear Mr Foster's evidence, before resuming the Respondent's evidence.

EVIDENCE FOR THE RESPONDENT

WITNESS RESPONDENT (20 August 2021)

The Respondent is a qualified solicitor and currently holds a practising certificate. The witness was a partner in the firm Hamilton Burns. In June 2014, he was managing partner, Tasmina Ahmed-Sheikh was Cashroom Manager and he thought that William Criggie was money laundering reporting officer. The firm became a limited company, Hamilton Burns Limited in 2015. On incorporation, the Respondent, Ms Ahmed-Sheikh and Mr Criggie retained these responsibilities. The Respondent referred to himself as "managing partner" but noted this is not a designation recognised by the Law Society. His role was to run the court business of the firm. Later in 2015, William Criggie became managing partner, money laundering reporting officer and Cashroom Manager. Tasmina Ahmed-Sheikh had by then become a Member of Parliament. The Respondent resigned as a director in December 2015 and became a consultant. Due to other work and family commitments, the Respondent attended at the office three or four days per month during the first 12 weeks of consultancy. He attended at the office about once a month during the summer of 2016.

The Respondent and R.B. were executors of Dr. L B or C's will. They were clients of Hamilton Burns. The executors received "client care letters" and the executry had a separate ledger.

The Respondent was referred to Lorraine Kelly's attendance note of the meeting with the Respondent on 27 May 2015 (Production 14 in the Respondent's First Inventory of Productions). The Respondent said he had been in court that day. He popped into the office. Lorraine Kelly was keen to discuss the executry. The Respondent did not give it as much time as he might have done. He knew Lorraine Kelly was under pressure from the residuary beneficiary. The Respondent made a decision to make an interim payment to the residuary beneficiary and sort out the accounts later. Lorraine Kelly's assessment of the time taken for the meeting (15 minutes) "might be generous". However, the content of the file note was accurate. The Respondent said it was not true that he told Lorraine Kelly to send a cheque and inform the residuary beneficiary that the accounts had been finalised and approved by the executors.

The Respondent was referred to Lorraine Kelly's letter of 27 May 2014 (Production 19 for the Complainers). He said that he did not see the letter after it was dictated. He did not sign the letter. The terms of the letter did not accord with the discussion at the meeting.

The Respondent explained that he decided to charge a fee as an executor. He had done a lot of work and the other executor agreed a fee was appropriate. The Respondent thought that clause 10 of the will created an exception to the general rule that executors could not charge for their services. The executry was not easy. There were difficulties regarding moveable property. There were issues about the value and provenance of art. The Respondent had discussions with valuation houses. He had to "dance delicately" around the genuineness of these works. He agreed a flat fee with R.B. of £5,000. He prepared a "note of works done as executor" for the taxation (Production 10 in the First Inventory of Productions for the Respondent). He intended the fee to be actioned as an outlay on the account but it was actually taken as a fee by the firm. With reference to the ledgers (Production 36 in the First Inventory of Productions for the Respondent), the Respondent confirmed that fees of £2,000 and £3,000 were taken on 6 July 2015 and 28 August 2015. Although the fee in July was said to have been taken on his instructions, the Respondent said that meant nothing to him. It was not the correct entry to make if the fee was an outlay. The fees went directly to Hamilton Burns. The Respondent never received the fees.

The Respondent was the recipient of an email from Lorraine Kelly on 28 November 2016 (Production 18 in the First Inventory of Productions for the Respondent) in which she referred to the executry and noted that,

"When I spoke to you about it we checked the ledger and agreed to keep £5k for possible fees to you as executor and pay the rest to the beneficiary. I don't think we ever sent the account to him and just sent him the balance of the funds we were holding."

The Respondent also received an email from Lorraine Kelly on 21 December 2016 (Production 19 in the First Inventory of Productions for the Respondent) where she noted no final accounts were sent to the residuary beneficiary. In the Respondent's view, there was not a final account at this stage. It was not sent until December 2017. He did not remember any other discussions with Lorraine Kelly about this case. He did not remember the meeting referred to in the attendance note of 7 March 2017 (Production 23 in the First Inventory of Productions for the Respondent) and thought it might have taken place by telephone. The Respondent presumed he approved the final account of charge and discharge attached to Lorraine Kelly's email of 14 March 2017 (Production 24 in the First Inventory of Productions for the Respondent). Later that day, Lorraine Kelly sent an email to the executors referring to them having approved the account. He received the account signed by the residuary beneficiary attached to that email.

During the Law Society investigation, various legal opinions were obtained by the Respondent and the Society regarding executors' fees. The Respondent believed this to be a "very grey area".

With regard to the SLAB matter, the Respondent was referred to the cashier's email of 16 June 2014 (Production 58 in the First Inventory of Productions for the Respondent). The email was addressed to him. Tasmina Ahmed-Sheikh was copied in. She was Cashroom Manager. However, due to a bereavement she was not in the office that day. He said that the email was obviously somewhat alarming. However, it was for Ms Ahmed-Sheikh's attention. The Respondent was not good at working out legal aid stuff. He thought he was doing the right thing by sending it to the law accountant. He expected the cashier to send the query to Mullans and for them to report in accordance with established procedures. Cashier queries would go to the Cashroom Manager. That person would resolve them with the nominated solicitor and SLAB. There was a constant flow of communication between the cashroom and SLAB. The firm received about £100,000 per month legal aid. All he could see was a dispute that needed a resolution. It was a serious issue but a situation like that can normally be easily resolved with SLAB. He was happy to leave it to the Cashroom Manager. He was not the nominated solicitor or the Cashroom Manager.

The Respondent said he did not see any of the series of letters between SLAB and Hamilton Burns at this time. They would have gone straight to the cashroom and be dealt with by the Cashroom Manager.

The Respondent was referred to the cashier's email of 16 November 2015 (Production 59 in the First Inventory of Productions for the Respondent). He was a recipient of that email. It referred to the P.S. file and noted that the firm had held funds for this case for years. She asked Andrew Knox to deal with this urgently. The Respondent assumed the matter was being dealt with.

The Respondent was referred to one of the letters from SLAB (Production 24 for the Complainers). He confirmed that "NM" referred to him. He appeared first in the reference as head of the civil department. This was an administrative convenience for fees. "KM" referred to the nominated solicitor. "PWS" referred to an assistant in the firm. "SQ" was a secretary in the civil department. In February 2015, Hamilton Burns employed 47 or 48 people and 23 or 24 of those were qualified solicitors.

During cross-examination, the Respondent explained that when working as a consultant he received £1,000 per month as part of his retirement agreement and his car and professional indemnity insurance were paid. He still had a shareholding in the company which he sold. His role after December 2015 was "Non-Executive Chairman". As a consultant, he anticipated he would deal with his cases, transfer some of them, and act as junior counsel in some cases. William Criggie was managing director on incorporation in May 2015 until administration. The Respondent was managing partner before incorporation. The Respondent sat in on a couple of board meetings as non-executive chair and he gave guidance to William Criggie in the first few months. He did not have access to the firm's accounts despite asking for it. He had some involvement with the cashroom regarding his own cases and whether fees had been paid. It was in his financial interest for the company to do well so he could receive his £1,000 per month. He had a claim in the administration for £240,000. This was the amount of the sale of his shareholding to the junior directors. This was not paid, and neither was the £1,000 per month. The Respondent said Lorraine Kelly was confused generally about his role in the firm.

According to the Respondent, when he left, Hamilton Burns was "a pretty good firm". It had its ups and downs. Sometimes there was a shortfall for wages. However, they always managed to pay the staff. The Fiscal said this suggested the company was struggling financially. The Respondent said it was due to lack of cashflow from SLAB. The Respondent noted that the new directors took separate financial advice and thought they got a good deal. They got financing and tried to turn the firm around.

The Respondent confirmed his role within the firm and company on various dates between August 2013 and November 2016. He was a partner or director for 13 and a half years. He was aware of his overriding obligation to keep the finances in order. However, Ms Ahmed-Sheikh was the Cashroom Manager. She worked closely with the cashiers and had external assistance. He trusted her implicitly. He would review the accounts certificates presented to him with a balance sheet but he would not examine the workings.

The Respondent worked in civil litigation. He did legal aid work. He had a working knowledge of SLAB work. He knew judicial expenses had to go to SLAB. He did not think about or know what happened to the judicial expenses when they were sent to SLAB. He would be guided by the cashroom. The individual solicitor would fee the work. The cashroom would check and record it. The cashroom would send it to SLAB to sort out. All the lawyers relied heavily on the cashroom. The cashroom fed back to the partners or directors the financial information at the end of the month regarding the fees in and out. The cashroom would provide daily updates to the Cashroom Manager. Sometimes there were requests for additional drawings. At the end of each month he had an overview of how the firm was doing and whether he was getting paid. He did not always take drawings. Sometimes there were problems with the timing of SLAB payments. Sometimes the accounts were heavily abated. This created a drive to bring in more private work.

With regard to the executry matter, the Respondent confirmed he and R.B. were the executors. He did not think there was any significance in him being referred to as "managing partner" in the letter of 8 May 2013 accepting the executors' instructions (Production 2 in the First Inventory of Productions for the Respondent). Lorraine Kelly took over the file because she was the only solicitor with executry experience. It is possible the Respondent and William Criggie told her to do it, but he did not think it was an issue. The Respondent said the attendance note of 27 May 2015 (Production 18 for the Complainers) was an accurate reflection of the meeting. He did not think he told her there was no need to send the account to the residuary beneficiary. His knowledge of executries was not that great. He was relying on her experience. He told her to retain £5,000. This was assessed on a "finger in the air" basis. He does not know why Lorraine Kelly wrote the letter of 27 May 2015 in those terms (Production 19 for the Complainers). When he told her to hold back £5,000 this was an instruction as executor. He did not see himself as her boss. He was aware of the mitigation she gave to the Tribunal at her Tribunal hearing. He did not recognise who she was talking about. At the time of the meeting, he had no idea if fees had already been rendered. The fees had also been taken on a time and line basis rather than as a percentage. The accounts did not make sense. He would have had to look at the fee notes and add them up. However, there was no need to do that because the accounts were not final. The Fiscal suggested that the Respondent had decided he could take £5,000 not knowing how much had already been charged.

The Respondent said he merely asked Lorraine Kelly to hold it back. The other executor had agreed the fee was sufficient. This had been a brief conversation.

The Fiscal referred the Respondent to the ledger card for the executry (Production 15 for the Complainers). He was referred to the entry on 13 September 2013 for a £2,000 fee plus VAT. The Respondent said this was not put through by him. It was a firm fee with a fee note, raised by the solicitors. He was referred to other fees in 13 and 19 September 2013. The Respondent said they should have been outlays but they looked like transfers between ledgers. There was no payment to him. The ultimate result should have been a fee to him as executor, paid through his drawings account. The Respondent was referred to a fee on 6 July 2015 with the narrative "as per NM instructions with meeting with LT and BC 25 June 2015". The Respondent said this was a firm fee note, not an outlay. No VAT was charged. The fee was taken from the client account to the firm account. He had "no idea" why the narrative referred to him. He did not instruct a fee. He was not involved. He was the client.

The Respondent was referred to a fee on 28 August 2015. He confirmed this fee should have been paid to him as an individual. The Fiscal noted the fee was taken near the month end when £3,000 in the firm account would have been useful. The Respondent said he did not know fees were levied at this time. If he had known, he would also have liked to get his £5,000. He would not have chased it because he had not raised a fee note. He was generally fairly relaxed about it. He knew the firm needed support. The firm owed him a huge amount of money. The directors were not answering the Respondent's calls. He sought a sensible resolution to the financial matters. £5,000 was a "drop in the ocean". Fortunately, he was earning pretty good money elsewhere. He said it must have been an absolute nightmare for the remaining directors scrabbling about that stage. He was still in discussions with Lorraine Kelly in 2017. The firm did not want to engage with him on many issues.

The Respondent was referred to the letter of 27 May 2015 from Lorraine Kelly to the residuary beneficiary (Production 19 for the Complainers). The Respondent said he did not contribute to the letter and did not instruct it.

The Respondent said up until he got Counsel's opinion, he thought he was entitled to charge a fee. It was only then that he realised he was "on to plums". He thought the fee had been increased in the finalised account. He thought R.B. spoke to the residuary beneficiary about the fees. His position was well known. The Respondent was not acting as executor for nothing. However, he did not speak to the residuary beneficiary himself. He was very surprised the Law Society had gone to see the residuary

beneficiary. In the Respondent's view, what the Law Society thinks is a giant conspiracy is actually a "ledger cockup" and a letter which was badly thought through.

The Respondent prepared the undated Note of works done as executor (Production 10 in the First Inventory of Productions for the Respondent). It was drafted for the auditor. The Respondent took information from diary notes and files. The document refers to work done by the Respondent as executor to justify the £5,000 fee.

The Respondent said he was not involved in the 2016 inspection of Hamilton Burns. He attended an interview with the Law Society on 10 May 2017. It was a "pretty hostile environment" and he sought help from the Legal Defence Union. The Fiscal asked why the Respondent did not produce the note of works at that stage. The Respondent said it was because the issue was not how much but rather whether he was allowed to charge.

The Respondent was referred to the email from the cashier dated 16 June 2014 (Production 23 for the Complainers). He agreed this was the first indication there was something wrong with the P.S. ledger card. He understood what the cashier was reporting "to an extent". He still does not understand the section on overpayment of witnesses. It looks like a dog's breakfast. The email says there was an issue with the account, not that fees were improperly taken. If all the information in the email was correct, the thrust of the email was that Hamilton Burns had to pay £15,000 to SLAB. He did not understand the spreadsheet entries. His difficulty was that he was not the nominated solicitor or the Cashroom Manager. Numbers are not his strong suit. He hoped the law accountants would give him a report confirming what had been overcharged or overpaid. He believed the email was sent to him because the Cashroom Manager was absent. He assumed normal cashroom procedures would have been followed. He did not ask if the P.S. matter was resolved.

The Respondent was referred to the email of 16 November 2015 from the cashier to the directors (Production 59 in the First Inventory of Productions for the Respondent). The Fiscal noted that 16 or 17 months after the original email, the cashier advises money is still sitting there. The Respondent said he was pretty sure he would have asked Andrew Knox what he was doing about it. Four or five weeks after this email, the Respondent left the firm. William Criggie was Cashroom Manager at this time. The firm had a Cashroom Manager and cashroom staff. Perhaps he should have chased it up, but he thought he had done enough to rectify the situation. He thought there was a dispute, not that money has been unlawfully taken. He felt a moral culpability that the Guarantee Fund paid out, but he did not think he had a legal responsibility. There was no dishonesty. Hamilton Burns was in "terminal chaos". There was

probably a lot of negligence but misconduct is a matter for the Tribunal. The firm was in terminal decline. It was struggling with cashflow. Things got missed.

The Respondent was referred to an email from Tasmina Ahmed-Sheikh to the SLCC (Production 60 in the First Inventory of Productions for the Respondent). She suggested the Respondent was involved. The Respondent noted that Ms Ahmed-Sheikh was the Cashroom Manager and "she would say that, wouldn't she?".

With reference to the email correspondence between the Respondent and his representative (Production 65 for the Respondent), the Fiscal noted that even his own solicitor was asking why he did not follow up. The Respondent said this was the first time he realised this was a serious issue. He did not receive any of the letters from SLAB. Despite discussion with Andrew Knox and William Criggie the situation was never resolved. It was only apparent the firm was firefighting and in a tailspin after the Respondent had left.

The Respondent accepted he had duties as a partner and director. However, some things were delegated to the Cashroom Manager and MO, an individual who provided external cashroom support. He trusted them absolutely. He took their word for it on the figures. He signed the accounts certificates they prepared without checking if the P.S. matter was resolved. He assumed the cashroom dealt with the issue. The dispute was about outlays not fees. He was fairly relaxed. However, he would not have signed them if he had known that it created a deficit on a client account.

The Fiscal suggested to the Respondent that he should have ensured this matter was sorted out before his retiral. The Respondent noted that Andrew Knox was in correspondence with SLAB at that time. He trusted the procedures and protocols the firm had in place. He agreed that he did not use his influence to resolve the matter.

The Respondent explained that mail was picked up from legal post by the trainee. The directors would open the mail. It was bundled up and taken to the secretaries. A letter with his reference would go to the cashroom as it got all SLAB mail. The same procedure was followed for post delivered by Royal Mail.

In re-examination, the Respondent confirmed he had received profit and loss statements for the firm in 2014 and 2015. They did not show the firm was struggling. They did sometimes show cashflow problems but nothing major. The arrestments were as a result of a disagreement with the landlord. The landlord

was a separate entity created by the Respondent and his former partner using their pension fund to buy the buildings.

Mr Mitchell referred the Respondent to the "business overview" of Hamilton Burns at Production 49 for the Complainers. The Respondent explained the purpose of the document was to help the directors to get funding.

The Tribunal members asked a series of questions. The Respondent confirmed the attendance record at Production 14 in the First Inventory of Productions for the Respondent was accurate, but 15 minutes was a generous assessment. The note of works at Production 10 in the First Inventory of Productions for the Respondent showed a meeting in 2015 said to have lasted one hour. This was the same meeting. The Respondent said he was looking at the accounts for this time and trying to work out what was going on.

The Tribunal noted no fees were rendered for the retained £5,000. The Respondent said he assumed the executry fee was taken but could see from the ledgers it was not. The Respondent said these could not be "outlay only fee notes". He thought he had rendered a fee. He knew he had not been paid. He did not chase payment. The lack of VAT suggested it was his fee.

The Respondent said the firm was feeing out £80,000-£100,000 per month. Usually, the quickest way to resolve a dispute with SLAB was to get a legal account prepared.

The Respondent confirmed the business overview document was prepared by him and Andrew Knox. The document relates to the limited company. The firm was looking to incorporate to limit liability. They had to get approval from the banks. A shareholder agreement was signed. Between May and December 2015, the Respondent was a 50% shareholder.

WITNESS MICHAEL FOSTER (20 August 2021)

Michael Foster is a solicitor. He was admitted in 1985. He is currently the sole principal of Hughes Dowdall. He described his career and areas of practice. He has experience of civil legal aid work. According to Mr Foster, the term "managing partner" does not have any legal significance. It an internal title with a number of roles contained within it. Mr Foster knew the Respondent as an acquaintance but did not know him socially or personally. He was aware of the background to the present case.

Before giving evidence, the witness had been shown the email chain of 16 June 2014 contained at Production 58 in the First Inventory of Productions for the Respondent. It appeared to him that funds had not been remitted directly to SLAB but had stayed with Hamilton Burns. Certain sums had been expended and only £5,000 was left. The witness said there was absolutely no doubt that the judicial expenses should have been remitted to SLAB in accordance with the statutory requirement. If he had received an email like this, he might delegate the matter to an experienced solicitor, particularly the person who conducted the case. If no experienced solicitor was available, the witness would attend to it. There was a need to ensure something was done. It was clear the firm had breached its duties to SLAB and almost certainly owed money. Referring the matter to law accountants would be a reasonable position to take, particularly if they had prepared the accounts.

During cross-examination, the witness was asked if he had seen the spreadsheet attached to the email. He said that he thought he had but it was indecipherable. He was aware that judicial expenses had not been remitted to SLAB and that the firm had taken its fee. This was a breach of the Legal Aid (Scotland) Act 1986. You would expect a solicitor doing civil legal aid work to know that. If he had received the cashier's email it would have worried him. He understood why reference was made to the law accountants but personally his own first port of call would have been the solicitor who conducted the case. He would expect the solicitor to report back within a day or two.

The witness said he was not an expert. He noted that sometimes solicitors do not understand numbers. It is possible that referral to law accountants might be an instinctive step, but he did not know if the Respondent fell into that category. A law accountant could explain what had happened. The witness would expect some kind of follow up, however. It would not be unreasonable for the Cashroom Partner to do that. A managing partner would want to know the issue was resolved but it was not necessary for the top man to follow up. The sums involved might be significant or insignificant for the firm. The role of the managing partner is to manage, not to do everything.

In re-examination, the witness said the spreadsheet did not make any difference to his view which was based on the fact the money was not sent in the first place. The breach of statutory duty cannot be minimised. There is an obligation on the firm, partners or directors to reimburse a loss occasioned by a solicitor. However, that is separate to professional misconduct.

The Tribunal asked whether it made a difference if the cashier's email was sent to the "managing partner" rather than just a partner. The witness did not think so. In answer to a follow up question from Mr Mitchell, the witness said the most important thing was that a course of action was initiated.

Mr Mitchell closed the Respondent's case. As there was insufficient time to hear closing submissions, the Tribunal continued the hearing to 8 October 2021. Both parties produced written submissions and lists of authorities in advance of the continued hearing.

WRITTEN SUBMISSIONS FOR THE COMPLAINERS

"The Complaint before the Tribunal sets out in terms of the Statements of Fact, the factual position as put forward by the Complainers, which in terms of the Rules the Complainers require to present to the Tribunal for the Tribunal to then determine if the Respondent has breached any duties and is thereafter guilty of professional misconduct. The Complainers, however, have in addition set out within the Complaint certain averments of the duties incumbent upon this Respondent and how he has breached those duties and further, have set out for the Tribunal's reference averments of professional misconduct which they seek to have the Tribunal determine singularly or *in cumulo* amount to professional misconduct.

The Complaint focusses on two particular matters which during the course of the hearing have been referred to as [the executry matter], and the Scottish Legal Aid Board (SLAB) matter.

Based on the evidence led at the hearing, and the terms of the Joint Minute of Admissions for the parties, the Complainers would invite the Tribunal to make the following findings.

Statements of Fact 2.1 and 2.2 have both been established.

Statements of Fact 2.3 and 2.4 have both been established.

Statement of Fact 2.5 has been established and specific reference will be made to the evidence in respect of this particular paragraph.

Statement of Fact 2.6 has been established.

Statement of Fact 2.7 up to line 8 and the words "...continued to be an executor" have been established.

Statements of Fact 2.8 and 2.9 have been established.

Statements of Fact 2.10 to 2.15 inclusive have all been established.

Statement of Fact 2.16 has been established to the extent that the letter dated 20 December 2012 was issued by the firm to SLAB. All of the letters from SLAB dating forward from 5 February 2015 were issued by SLAB to the firm. One particular issue which arises out of that Statement of Fact is the question of whether the Respondent received those letters or had any knowledge of them?

Statement 2.17 has been established.

Statements 3.1 and 3.3 set out the particular Law Society of Scotland Practice Rules 2011 upon which it is maintained the circumstances are relevant and which Rules the Respondent is said to have breached. These Rules and their terms are not disputed by the Respondent.

Statement of Fact 3.6 has been established.

Statement of Fact 3.8 has been established.

Insofar as Statements of Fact 3.4, 3.5, 3.7 and 4.1, the Complainers position will be further amplified following an assessment of the evidence led and the Tribunal's determination of that evidence.

EVIDENCE/WITNESSES

Evidence was heard from the following.

SHARON BROWNLEE

This witness gave clear, concise and entirely credible evidence of the position found by her and her colleagues from the Financial Compliance Department of the Complainers following upon an inspection of the firm in November 2016. She gave evidence in relation to that inspection, the Sub-Committee meetings, the subsequent investigation carried by her personally with one of her colleagues and the interview which took place between the Complainer's Committee and the Respondent.

Her evidence was that there was a concern about over charging on the Executry and a concern about the Respondent taking fees personally for acting as executor. The view taken by her Department was that the taking of these fees was not permitted and her Department never received any satisfactory explanation as to why the Respondent felt it was appropriate to take these fees. She and her colleagues could find no evidence of what work had been done and when which would justify these fees.

She also gave evidence of the two meetings which she had with the residual beneficiary and the signed statements which she took from him. There is no reason for the Tribunal to doubt the accuracy of her evidence and these two statements. (Productions for the Complainers numbers 16 and 45)

The significance of that part of her evidence is that even if the Respondent was determined to be able to charge a fee as executor (which is not accepted) he required to obtain the consent of AC which he did not have and that despite the efforts of his co-executor, [R.B.], to obtain that consent retrospectively. It would also appear that [R.B.] attempted to mislead the Complainers during the course of their investigation about that permission being granted by AC but, of course, the Tribunal did not hear directly from [R.B.] on any of these matters. It is also worthy of note at this point that during his own evidence the Respondent accepted that, in hindsight, he was not entitled to charge a fee as executor.

This witness gave evidence that the residual beneficiary was ultimately reimbursed for the fees retained by the Respondent following upon the original inspection investigation and dialogue with the remaining partners.

This witness also spoke to the letter of 27 May 2015 (production 19/1) and her evidence was that there was no doubt that that letter was misleading and inaccurate. The issue for the Tribunal, which it always has been, is who instructed that letter to be issued in the terms that it was?

The witness also confirmed that no explanation had ever been given for the fees being taken by the Respondent personally and shown through the ledger. No fee notes were provided and no note of the work justifying those fees was produced until the Respondent took it upon himself to produce such a note for the Diet of Taxation. This witness indicated that no explanation had been provided to her Department for the inaccurate letter being sent out to the residual beneficiary.

The witness also gave helpful, informative and entirely credible evidence about the pre-visit questionnaires, the accounts certificates and their function and import.

Whilst she had no direct involvement in the SLAB matter, she was able to give the Tribunal guidance as to the impact on a firm's accounts if fees are taken in error, or as alleged here, improperly. She also gave evidence of the impact on the firm's client account and how a deficit would be created which was clearly a serious matter for her Department and that there was a deficit for fairly significant periods of time.

LORRAINE KELLY

The Complainers would ask the Tribunal to find that she gave her evidence in a straightforward, credible and reliable manner. She clearly found it difficult being present at the Tribunal a few feet away from the Respondent particularly given the position which she had advanced before this Tribunal in respect of her own prosecution whereby she admitted to sending a letter to the residual beneficiary which was both inaccurate and misleading and resulted in her being found guilty of professional misconduct. That determination is Production 33 for the Respondent.

She gave a brief history of how she came to join the firm, her role, and how she was given responsibility for the executry files. She also gave brief evidence as to her perception of the role performed before the Respondent up until he resigned as a Director and thereafter as a Consultant and her position was that she did not notice a great deal of difference.

She obviously had the meeting with the Respondent on 27 May 2015 and made a file note of that meeting. Her evidence was, however, once pressed, that the file note was not fully reflective of the entire discussion which she had with the Respondent nor fully reflective of the firm instructions which she received from the Respondent.

What seems clear, and not in dispute by the Respondent is that he instructed her to hold back a sum of £5,000 for his own fees and issue a letter to the residual beneficiary. She then issues the letter and her evidence was that the Respondent had told her what to put in that letter. Whilst not actually dictating it word for word for her, he told her the content to be included. She gave evidence that the Respondent had made it clear that the residual beneficiary was not entitled to see the fee notes nor indeed the accounts and that he indicated to her "just say the accounts are finalised".

The inaccuracies within the letter were that the accounts had not been approved by the executors, the sum included was not the full residue, the accounts had not been finalised, and there was no mention of the £5,000 being retained to meet the Respondent's individual fee.

There may be some criticism of her evidence from the Respondent but it is important to recall one passage of her evidence which was clear and that was when she was asked whether the position advanced by the Respondent in his Answers on page 7 of the Record, Answer 2.5, the last five lines, when she confirm that that was not accurate and when she was further pressed as to whether the Respondent was lying if he maintained that was the position she indicated that he was.

She was also tested in cross examination regarding the apparent discrepancy between the file note and the letter and in response she indicated that "...I am positive that the letter was sent out on his instructions but accept that it is not recorded as such in the file note." She also confirmed in re-examination that the file note was not *verbatim* and that the narrative within was not long enough to cover all of the issues or matters which she discussed with the Respondent.

SHEILA KIRKWOOD

This witness gave evidence of the Complainer's Committee procedures in dealing with both the executry complaint and the claim made by SLAB. She took the Tribunal through all of the Minutes which for all but she had framed and particularly she also prepared the Minute of the Client Protection Sub-Committee which dealt with the claim made by SLAB. She gave evidence of how it was dealt with and the criteria applied by the Committee when it made its determination.

In that regard it is important that the Committee required to determine that there was an element of dishonesty in the firm's dealings with the SLAB matter although it is also important to clarify that the claim made by SLAB was against the firm and not the Respondent as an individual. Her evidence accordingly should be accepted in its entirety as being credible and reliable.

BRIAN MILLER

There is no real reason not to accept the evidence of this witness in full as credible and reliable. His evidence was given regarding the investigation carried out by the Board and his Department and the letters issued. He knew of the shortfall due to the Board and also knew the outcome. The one issue

which he was not able to give clear evidence upon was whether there was any proof that the letters were received and considered by the Respondent.

SCOTT COWNIE

This witness gave evidence from the position of a solicitor with SLAB. He knew all of the regulations and he compiled the application submitted to the Complainer's Client Protection Fund. He was unable to give any evidence as to who the main culprit might be but he did speak to the terms of the email issued to the Respondent and the Cashroom Partner on 16 June 2014. He also gave evidence about information which had been imparted to the Board by the opponents in the Court action to the effect that the firm were apparently desperate to receive the cheque due to apparent financial difficulties and they had indeed collected the cheque personally and he gave evidence about arrestments being placed in the hands of the Board all of which was an indication of the financial turmoil being experienced by the firm at the time when the matter arose.

Again his evidence was uncontested and should be accepted in its entirety.

MICHAEL FOSTER

It not entire clear what should be taken from the evidence of this witness. He made it clear that he was not an expert and that he was not set up as an expert witness by the Respondent. His knowledge of the actual complaint was limited but his evidence, for what worth it may have, is that the judicial expenses should undoubtedly been sent to the Board and when alerted by the email, his view was that any fee earner should be asked by a Partner to deal with the issue and report back or he as the Managing Partner would deal with it himself. He made it clear that he, were it his firm, would make sure something was done.

In this case, all that appears to have been done based on the evidence was the Respondent replying to the email suggesting that the matter be referred to a Law Accountant. Whilst this witness indicated that that might be a reasonable response, it would still need to be followed up. He would expect any partner to fully investigate the problem and resolve it.

It is therefore not entirely clear how any of the witness's evidence supports the position advanced by the Respondent whereas the Complainers would suggest that it supports the position being advanced

by those Complainers, namely that when he became aware of the situation, the Respondent had a duty to investigate and resolve it and he did neither.

ANDREW KNOX

His evidence was provided in the form of an uncontested Affidavit which the Complainers would suggest is of little consequence although the Tribunal may consider its terms.

THE RESPONDENT

The general tenor of the Respondent's evidence was that the events which took place at his former firm were not his fault and he was either dismissive of the allegations levelled against him or if he had some limited knowledge of their background tended to minimise his recollection of them. His overall position however does not stand up when scrutinised.

He was the Managing Partner of the firm and then became the Chairman of the Limited Company. As such, he not only had the responsibilities imposed on him by the 2011 Rules as a Partner or Manager, but more particularly had the responsibility and obligation to resolve any accounts rules issues which arose within the firm.

Lorraine Kelly gave evidence that he was heavily involved in running the firm prior to his resignation as a Director and continued to be perceived to be doing so when only engaged as a Consultant.

Insofar as his meeting with Ms Kelly is concerned, he admitted that he did not give her enough time, that he had told her to send the residuary beneficiary some money, and that the matter would be sorted out later. In his evidence in chief he indicated that a fifteen minute timeslot was generous and it probably did not last as long as that.

If we then contrast that however with the Respondent's Production number 10, where he sets out the purported time that he was involved in that meeting. The Respondent was specifically questioned by a member of the Tribunal on that document and his response was unsatisfactory which therefore suggests that his recollection and evidence on his meeting with Ms Kelly is inconsistent and dubious.

He maintained the document, production 10, was a document which he had prepared to justify his fees as the individual executor when the matter proceeded to Taxation. That would suggest that the

Respondent was already on the back foot back then and knew the he should never have attempted to render these fees in the first place. Further, in relation to that production, this had never been issued to the residuary beneficiary and no explanation has been tendered as to why the residuary beneficiary was not given those details when he was being asked to approve fees retrospectively.

In regard to the letter of 27 May he denied any knowledge of its terms and referred to it was ill thought through. The question which the Tribunal has to answer is whether they accept the Respondent's evidence in that regard as there is a clear conflict between the evidence given by Lorraine Kelly and the Respondent. The Complainers would ask the Tribunal to reject the evidence of the Respondent in this respect.

In justification of issuing these fee notes the Respondent that he maintained he thought the Will allowed him to render a fee and that [R.B.], the co-executor had agreed. No evidence whatsoever was led in regard to [R.B.]'s position, no evidence was led from [R.B.] and there was nothing led on the Respondent's behalf to suggest that any consent was given either by [R.B.] or the residual beneficiary to the fees being rendered by the Respondent. There was some suggestion however that [R.B.] was trying to get AC to agree the fees retrospectively from the Taxation. Again this is suggestive of the Respondent, in conjunction with [R.B.], trying to cover his tracks.

In regard to these fees the Respondent's evidence was wholly unconvincing. He has produced no fee notes to show if these were ever issued by him as an individual and on what basis they were issued.

In addition, he would also have the Tribunal believe that he has no knowledge as to what the words "on NM's instructions" are as narrated within the ledger. This coming from the Managing Partner/Chairman and someone in control of the firm casts some doubt on its credibility.

The Respondent accepted that the firm had cash flow problems and the Tribunal would be entitled to draw the inference that the Respondent's actions here were designed to generate some form of income for himself in that difficult period.

The Respondent to his credit did concede, following receipt by him of the opinion of his own QC, that if AC never agreed to the fees being charged, he could not render any.

The Complainers would ask the Tribunal to find the Respondent's evidence on this part of the claim to be evasive and dismissive and for him simply to indicate that he thought he had done nothing wrong and then conveniently not being able to recall certain factual events casts doubt on his credibility and reliability.

In regard to the SLAB matter, the Respondent accepted in his evidence that the email from the cashier was "slightly alarming". That said, he then went on to maintain a similar position that he thought he had done nothing wrong and indeed had done the right thing by referring the matter to a Law Accountant.

The Complainers would ask the Tribunal not to accept that explanation as being credible. The Respondent knew his firm was struggling financially and was not in a position to repay SLAB approximately £15,000. Armed with that knowledge he did nothing and simply passed matters on to a Law Accountant or attempted to do so.

His actions were simply not sufficient and again under cross examination he accepted that he could have done more, that the position advanced the firm was morally wrong and may even be negligent but was not professional misconduct.

The Respondent accepted that he knew that judicial expenses should go to the Board and he knew that a fee should not be taken.

His less than credible explanation for that however was that he trusted the Cashroom Partner, Ms Ahmed-Sheikh, to ensure that the cashroom was running properly.

When cross examined on the accounts certificates which he has signed subsequent to those fees being improperly taken, he indicated that again he trusted his cashroom colleague to ensure that the certificates were accurate and that he never checked them. He maintained that this whole situation was a cashroom mess, and an utter failure on their part. In maintaining that position, however, he was forgetting his own responsibilities and obligations as a partner within the firm, and the Manager Partner/Chairman, to take positive action to resolve the issue with SLAB.

He suggested that he was guided by the cashroom which it is submitted is abrogating his responsibility to those employees which this Tribunal has in the past found is not an acceptable position for a Partner/Manager to adopt.

Reference is made to the case of *Phillip Hogg SSDT 25 August 2016.*

The Respondent is undoubtedly an experienced solicitor dealing in legal aid cases but he would have the Tribunal believe that he did not think there was an issue when he received the email from his cashier. That position is simply not credible.

If we add to that the Respondent's production, number 59 being an email dated 16 November 2015 which served as a further reminder to him that the problem with SLAB still was in existence and by that date, at least seven reminder letters had been sent by the Board to the firm. Again he chose to take no action.

SUMMARY

Having made those comments in relation to the evidence led, if those submissions which the Complainers advanced are then applied to the alleged breaches of duty and alleged instances of professional misconduct, the Complainers would maintain the following arises.

Statement of Fact 3.2 is established if the Tribunal prefers the evidence of Lorraine Kelly over that of the Respondent. If the Tribunal makes that determination then the terms of the letter, with the knowledge of its terms, clearly demonstrate an attempt by the Respondent to conceal the true position from the residuary beneficiary and that of itself is an act of dishonesty or lack of integrity.

Statement of Fact 3.4 is similarly established in that the Respondent's position within the firm is not disputed. Whether he actually received the fourteen letters is a matter of some conjecture but the Tribunal would be able to draw the inference that the letters having been sent to the cashroom, on the Respondent's evidence, and containing his reference, it stretches his credibility to suggest that he had no knowledge of any of the letters or that no member of the cashroom team or any of his other colleagues did not attempt to discuss the SLAB correspondence with him.

Statement of Fact 3.5 is similarly established in that the Respondent was made aware by his Cashier of the position and he failed in his capacity as a Partner and or Managing Partner or Director to take any action of any note to address the position.

Statement of Fact 3.6 is similarly established. The Respondent knew that the sums had not been remitted to SLAB. He knew that those fees had been improperly taken and therefore he should have known that he was signing inaccurate accounts certificates which did not disclose the deficit created on the firm's client account.

Statement of Fact 3.7 is similarly established for the reasons given that with the knowledge the Respondent had, he failed to remedy any of the breaches of the 2011 Rules.

Statement of Fact 3.8 is established and is a summary of the various Rule breaches enacted by this Respondent.

In regard to Rule B1.2, this is particularly a matter for the Tribunal to consider and determine whether the Respondent has breached it. If they determine that he has, they then have the option of determining to what level he has breached that rule whether it be at the higher end of the scale being dishonesty or the lower end of the scale being a lack of integrity.

The Complainers would request that the Tribunal determine that all five sub-paragraphs of the Statement 4.1 have been established. It is a matter for the Tribunal to determine whether the Respondent's actings either singularly or *in cumulo* amount to professional misconduct.

Statement 4.1 (a) is established in that the Respondent's hand or instructions are in the letter to the residuary beneficiary. The letter is undoubtedly misleading. The Respondent concedes that the letter was misleading. The Respondent's involvement in that misleading letter amounts to professional misconduct and the Complainers would maintain that it is the higher end of the breach of Rule B1.2 namely that it was deceitful and dishonest.

Reference is made to the case *Fife –v- Law Society of Scotland 2017 CSIH 6.*

In relation to Statement of Fact 4.1 (b) this is similar to sub-paragraph (a) but there is the additional element of the Respondent lacking a lawful basis to charge these fees personally and then seeking to conceal them from the residual beneficiary. The evidence referred to suggests concealment and it was only after the residual beneficiary was spoken by the Complainers that he understood that fees were being rendered by the Respondent as an individual. The co-executor then attempted to convince the residual beneficiary after the event to give his consent retrospectively which he refused. There appears to be little doubt that there was an attempt to deceive the residual beneficiary.

As regards whether the Respondent had a lawful basis at all for seeking to render these fees,

An Executor nominate is, in terms of Section 2 of the Trust (Scotland) Act 1921, also a Trustee. The Respondent was appointed as an executor in the deceased's will and was, as a matter of law, an executor nominate and therefore also a trustee.

A Trustee cannot act auctor in rem suam:

Bells Principles (Tenth Edition - edited by Guthrie) at paragraph 13 on page 753

"Trustees cannot be auctores in rem suam, that is to say they are personally disqualified from contracting in anyway with the Trust Estate."

It also states:

"nor can a Trustee receive renumeration for work done professionally for the Trust, unless it be authorised by the constitution of the Trust."

Professor TB Smith - "A Short Commentary on The Law of Scotland", at page 597.

"a Trustee must not be auctor in rem suam."

Further on the author went on to state:

"The Trustee must act gratuitously; he is not entitled to charge for work done by him, except where the Truster authorises him to do so or where all the beneficiaries have consented."

Gloag and Henderson (Twelfth Edition) at 42.13.

"thus it has long been established that the Trustee must not be auctor in rem suam; that is to say, he must not place himself in a situation in which his interest as an individual may conflict with his duty as a Trustee."

Later on, in the same paragraph, the authors went on to state:

"It is also settled that a Trustee may not make profit out of the office, unless this is authorised "(either expressly or impliedly) by the Truster or agreed to by all the beneficiaries."

Sleigh v Sleigh's Judicial Factor 1908 SC 1112.

In that case it was noted that Lord Ardwall at 1120(page 9 second para) had stated:

"it is settled law that neither a Trustee nor a Judicial Factor is entitled to obtain a renumeration out of the Trust funds for agency business performed by him for the Trust under his charge... The principle upon which this rule is based undoubtedly is that the trustee...must not place himself in a position where he has or may have a double interest to serve, namely, his own interest and the interest of the estate ; and in order to discourage persons in such fiduciary positions from doing business for the estate under their charge, the law has said that although it is not illegal for them to do so, yet they shall not get any remuneration for so doing, but shall only be entitled to recover cash outlays which they made."

There is no evidence that any attempt was successfully made to obtain the agreement of the beneficiary to personal fees being charged by the Respondent prior to them being debited. The only attempt was made apparently by [R.B.] after the fees were taken, and to justify them at the taxation. At no time was any note of fee rendered to or copied to the deceased's husband. The Respondent accordingly had no lawful basis for charging a personal fee to the Executry.

The question remaining is whether the conduct complained of meets the test for professional misconduct. The Respondent's position is effectively that he did not know or was simply wrong about the law. His position is predicated on clause 10 of the Will which states that the Executors had the power to:

"...appoint one or more of their own number to act as solicitor or agent in any other capacity and to allow him or them the same remuneration to which he or they would have been entitled if not an Executor or Executors".

Any assertion that this justifies an executor feeing for work done as an executor is founded on a misreading or misinterpretation of the clause. In the account of his explanation to the Client Protection Fund at the interview of 10 May 2017 (Production 7 for the Complainers) the Respondent appears to partially describe his own basis for interpretation as "spurious" (page 7/6 first full paragraph) Any ignorance of the law cannot excuse his position.

In his evidence the Respondent's position was that he only realised he was *"on to plums"* in respect of his position (that he could genuinely charge for work as executor) was when he received the opinion from senior counsel in September 2017. Despite this he still attempted to justify those fees at taxation, and he was unsuccessful in persuading the auditor of his entitlement to these fees. He ought to have begun to question his authority to do so far earlier than this point if he genuinely believed he was so authorised but, by his own admission, he did not.

For there to be professional misconduct there may have to be more than mere ignorance. The circumstances under which the fee was taken in 2015 are indicative of the Respondent having something to hide and knowing that he had something to hide. If he genuinely believed he could charge these fees, the why would the Respondent chose to conceal them from the residuary beneficiary ?

The Tribunal can accordingly find that the Respondent had no lawful basis for charging the fees and that he also concealed from the residuary beneficiary the fact that he had done so.

The Respondent knew exactly what he was doing and opted to deliberately hide his doing so from the residuary beneficiary, and his actings were, at least, lacking in integrity.

Reference is made to *Wingate and Another v The SRA [2018] EWCA Civ 366 at paragraph 101*

"Subordinating the interests of the clients to the solicitors' own financial interests" and *"making improper payments out of the client account"* are both specified as illustrations of what constitutes acting without integrity. Accordingly, the conduct complained of amounts to a serious and reprehensible departure from the standard of conduct to be expected of a competent and reputable solicitor and did therefore meet the test for professional misconduct.

In relation to Statement of Fact 4.1 (c) the Complainers would maintain that this has been established. The Respondent knew that sums were due to SLAB and he knew that the sums should not have been taken to fees. He failed to take any reasonable action whatsoever and were it not for the actions of the Complainer's Guarantee Fund, following upon the application made to them by SLAB, there would have been a loss incurred by SLAB given that it was still outstanding when the firm fell into administration and at which point the Respondent still had a role to play within that firm. Evidence

was led, that it is profession as a whole that has reimbursed SLAB here and that the actings of the Respondent and perhaps some of his partner colleagues have caused the profession a loss in that regard.

In relation to Statement 4.1 (d) again this has been established. There is no evidence whatsoever that he co-operated with the Legal Aid Board to resolve the issue, comment has already been made as to whether or not it can be established that he received the letters or had knowledge of them. His explanation that it was all down to mess within the cashroom does not absolve him of his responsibility and again the case of *Hogg* (supra) is referred to.

Lastly, Statement 4.1 (e) is broadly similar to the previous sub-paragraphs other than it is alleged that his knowledge of the events on this ledger card displayed a lack of honesty or a lack of integrity given that he knew that those sums were not lawfully due to his firm. The simple fact of the matter was that the firm was struggling financially and could not afford to remit them to the Board and again the profession as a whole has been required to meet that commitment.

The Complainers accordingly invite the Tribunal to find all of the allegations of professional misconduct against the Respondent as having been established to the necessary level. The evidence as a whole indicates that the actings of the Respondent clearly pass the *Sharp* test and accordingly the appropriate findings should be made.

In addition, the Complainers would be seeking an award of expenses and for there to be no restrictions on the publicity of the Tribunal's decision."

WRITTEN SUBMISSIONS FOR THE RESPONDENT

"Part 1 — Introduction and Summary

1. These submissions for the Respondent, Mr. Niall Mickel, follow upon the Evidential Hearing held in Perth Theatre on 1 8th to 20th August 2021. Although taking the form of Outline Submissions, they are intended to provide sufficient detail to provide real assistance to the Tribunal in analysing the evidence. It is intended, however, to supplement them by oral submissions to be made in the continued Hearing that has been fixed for Friday 8th October 2021 by video conference.

2. To that end, these submissions seek to assist the Tribunal first, by identifying what it is in terms of the Complaint, the Complainers seek to prove, and, further, **what the Complainers require to prove** before the Tribunal would be able to convict Mr. Mickel. This is an important point for two reasons:

   (a) The Tribunal cannot convict Mr. Mickel of anything which is not complained of in terms of the Complaint; and
   (b) even where the Complaint contains a charge in respect of a specific instance of alleged professional misconduct, that charge would be incompetent if it had not formed part of the subject-matter of the Complaint as remitted by the Scottish Legal Complaints Commission to the Law Society of Scotland. In such a circumstance (and whether or not the Tribunal has evidence before it regarding that specific matter) it would be incompetent for the Tribunal to purport to convict Mr. Mickel in respect of that specific matter.

3. The Tribunal will, of course, be aware that the **onus lies throughout on the Complainer**. It is for the Fiscal, as prosecutor on behalf of the Complainers, to prove each and every element of each and every charge which he seeks to invite the Tribunal to find proven beyond a reasonable doubt. The onus does not lie upon Mr. Mickel to prove his innocence.

4. This reflects the recognition by the Law of Scotland of the immense significance which a finding of Professional Misconduct may have, above and beyond such penalty as the Tribunal may impose, on the future life and livelihood of a person convicted of such misconduct. It is for that reason that the standard of proof imposed by the Law is the criminal standard of **proof beyond a reasonable doubt**, and, in consequence, when approaching their task, the members of the Tribunal should be mindful of the quasi-criminal nature of the proceedings and be especially vigilant to make sure that it holds the prosecutor to the high standard that is required by law.

5. The Tribunal will, of course be familiar with what is meant by "Proof beyond a reasonable doubt", but it may, nonetheless find the following observations of assistance. It will be noted that this standard is a higher one than the usual civil standard of the balance of probabilities. It means that every person charged with an offence is innocent until proven guilty by the Complainer or prosecutor. It follows, therefore, that the burden of proving that Mr Mickel is guilty of any of the charges in the petition, rests upon the Fiscal as prosecutor. The prosecutor must prove beyond a reasonable doubt that Mr Mickel is guilty of the offences as alleged, and this standard means that the Tribunal must be "sure" of Mr Mickel's guilt in the matter: if the Tribunal comes to the view that something may have happened, this is not good enough, as

the Tribunal requires as a matter of law to be "sure". Likewise, even if the Tribunal comes to a view that something may have been "more likely than not" (which would be sufficient for proof on the civil standard of balance of probabilities) that, too, is not good enough. The burden of proving that something happened lies upon the Prosecutor alone, and he must prove beyond a reasonable doubt, that it did happen. This requirement extends to include the burden of disproving any defence for which evidence is adduced. It is for the Fiscal to persuade the Tribunal that any evidence led by Mr. Mickel should not be believed, and if any defence evidence is not challenged by the Fiscal, then it must as a matter of law be accepted by the Tribunal.

6. In summary, it is submitted by the Respondent that the Fiscal has failed to prove any of the following crucial facts:

- That Mr. Mickel knew that (if it be the case) he was not entitled to charge for his services as Executor in [the executry matter], without the consent of the beneficiary;
- that Mr. Mickel intended to conceal anything from the beneficiary;
- that Mr. Mickel instructed Ms. Kelly to write the letter of 27th May 2015 in the terms in which it was written;
- that Mr. Mickel failed to take any action on being informed of the failure of the Practice Unit to remit the recovered expenses to the Scottish Legal Aid Board; - that (if it be open to the Tribunal to consider this matter) such action as Mr. Mickel took was not reasonable;
- that Mr. Mickel received any of the letters sent to the Practice Unit by SLAB in respect of this matter;
- that Mr. Mickel failed to co-operate with SLAB; and
- that Mr. Mickel acted dishonestly and/or without integrity.

7. These are the facts which it is essential for the Fiscal to prove **beyond a reasonable doubt** for it to be possible for the Tribunal to consider convicting Mr. Mickel in relation to the matters based upon and derived from those facts, or any of them. They are, however, "the Headlines", as it were. In order to understand why they are of critical importance, it is necessary now to proceed to consider, in some detail, the full context which makes the failure of the Fiscal to prove these crucial facts so important.

Part 2 — The Complaint

8. The Complaint brought against Mr. Mickel is one of Professional Misconduct, as alleged in the specific charges which are set out at paragraph 4.1 of the Complaint (pp 26-28 of the

Record), to which reference is made.

9. As a matter of law, in considering the Complaint, the Tribunal is confined to the matters which have been referred by the Scottish Legal Complaints Commission, in the exercise of its gatekeeping function under sections 2, 4 and 6 of the Legal Profession and Legal Aid (Scotland) Act 2007, to the Law Society of Scotland, and as placed by the Law Society of Scotland before the Tribunal. It is not competent for the Tribunal to consider any matter beyond what is referred by the SLCC to the Law Society of Scotland (See *Law Society of Scotland v Scottish Legal Complaints Conmission 2011 SC 94 per* Lord Reed at [44]), though, of course, it is open for the Complaint remitted by the Law Society of Scotland to the Tribunal to be in narrower or more restricted terms.

10. The terms of the Complaint by the Law Society of Scotland to the SLCC in [the executry matter] were as follows:

> "1. The Respondent charged fees of £5,033.33 to the executry in respect of his actings qua executor in the absence of any lawful basis for doing so, and attempted to conceal from the co-executor and residuary beneficiary the fact that he had done so (or failed to render or otherwise disclose the said fees to either the coexecutor or the residuary beneficiary), thereby acting in breach of his duty to act in accordance with Rules Bl .2, Bk. 11.1, B6.5. I (d) and B6.12 of the Law Society of Scotland Practice Rules 2011.
>
> "2. The Respondent failed to provide reasonable co-operation to Ian Messer, Director of Financial Compliance (being a person authorised by the Council of the Law Society of Scotland to undertake an investigation of The Respondent and his practice in terms of Rule B6.18.4 of the said Practice Rules) or his delegates, thereby acting in breach of his duty to do so in accordance with Rule B6.18.7 of the said Practice Rules."

A copy of the SLCC Eligibility Decision report is appended hereto as Appendix A.

It will be noted that paragraph 4.1(b) of the Complaint properly reflects paragraph 1 of the original LSS Complaint to the SLCC, though, quite properly, does so in slightly restricted terms. Paragraph 2 does not form the subject matter of the Complaint before the Tribunal. In this context, paragraph 4.1(a) properly falls to be regarded as a particularisation of the Complaint in paragraph 4.1(b), rather than as a stand-alone complaint: in other words, it can be read together with paragraph (b) as setting out the detail of the manner in which the

complainer alleges that Mr. Mickel performed the wrongful acts alleged in paragraph (b), but it does not constitute a separate stand-alone charge.

11. The terms of the Complaint by the Scottish Legal Aid Board to the SLCC in the SLAB matter are as follows:

> "1. Niall Mickel, as Managing Partner and Tasmina Ahmed Sheikh, as Cash Room Partner, having been informed that sums due to SLAB had been inappropriately taken as fees, failed to take action, or instruct others to take action to remit expenses in the [P.S.] reparation matter to SLAB.
>
> "2. Niall Mickel, as Managing Partner, and Tasmina Ahmed Sheikh, as Cash Room Partner, having been informed and knowing sums were due to SLAB had been incorrectly taken as fees, failed to co-operate and communicate effectively with SLAB to resolve matters.
>
> "3. Niall Mickel as Managing Partner and Tasmina Ahmed Sheikh, as Cash Room Partner, knowing expenses awarded in the [P.S.] reparation matter had been inappropriately taken to fees, failed to correct matters, co-operate, communicate with SLAB, knowingly retained sums due to SLAB and in so doing failed to act honestly and with integrity."

A copy of the SLCC Eligibility Decision Report is appended hereto as Appendix B.

12. The terms of this Complaint by SLAB are reflected in paragraphs 4.1 (c), (d) and (e), though the Tribunal will note the area of overlap between (d) and (e).

Part 3 — What needs to be proved by the Complainer

13. In [the executors matter], in terms of paragraph 4. I (b), the Complainer offers to prove the following elements:

(a) Mr Mickel instructed the payment of fees of £5,033.33 to the Executry in respect of his actings as Executor. (The Tribunal will note that paragraph (b) does not state the capacity in which Mr. Mickel is alleged to have instructed the payment of the fees).
(b) Mr. Mickel had no lawful basis for charging said fees.

(c) Mr. Mickel attempted to conceal from the beneficiary the tact that he had instructed the payment of such fees. The particularisation of this is to be found in paragraph 4.1(a). It is:

(d) In his capacity as (i) an Executor and (ii) a Director of the Incorporated Practice Unit, he instructed a letter to be written to the beneficiary stating that both Executors had approved the final accounts.

(e) He knew that (i) both Executors had not approved final accounts and (ii) a sum of E5,000 had been retained.

(f) The beneficiary was misled.

(g) By attempting to conceal this from the beneficiary, Mr. Mickel failed to act with honesty and integrity.

14. It will be noted that proposition (b) above amounts to an offer to prove the absence of a legal basis for the charging of a Fee as Executor, but is not an offer to prove that Mr. Mickel knew that he had no legal basis for the charging of a fee. In order to establish the necessary mens rea for an attempt to conceal, it would be necessary for the Complainer to prove that Mr. Mickel knew that he was not entitled to instruct the taking of a fee, and that the letter was an attempt to conceal that wrongful action. If guilty knowledge is absent (esto Mr. Mickel instructed the writing of a letter in those terms — which it is submitted he did not), then the letter might have been false, and even misleading, as to whether there had been approval by both Executors of final accounts, but there would have been no concealment, as concealment is the hiding of an act known to the actor as having been wrongful.

15. Another way in which this might be expressed is that without that guilty knowledge, there can be no professional misconduct which meets the standard of the *Sharp* test. At worst, there may have been inadequate professional service. This is a matter to which the present Submissions will return after having considered the legal principles and the evidence.

16. The obvious factual issue which arises is whether Mr. Mickel instructed the writing of the letter in the terms alleged. However, though not made explicit on the face of the Complaint, it will be seen that the allegation that Mr. Mickel attempted to conceal the retention of £5,000 from the beneficiary, necessarily raises the question of whether, if it be the case that Mr. Mickel was not entitled to charge the fee, did he know or believe that he was not so entitled? In any event, that question is highly material to the question of whether he acted dishonestly and without integrity.

17. In the SLAB matter, the Complainer offers to prove that:

(a) Sums recovered as judicial expenses had been improperly taken as fees;

(b) Mr. Mickel was told of this;

(c) he "failed to take action" to remit said judicial expenses to SLAB. (The Tribunal will note that the allegation is that he failed to take any action at all, and not that he took action but that this action was not such action as would have been reasonable in the circumstances) [4.1 (c)];

(d) having been so informed, Mr. Mickei, "as Partner or Director or Managing Partner" failed to co-operate and communicate effectively with SLAB [4. I(d)]. (The question of whether any special duty falls upon a "Managing Partner" will be the subject of submission below;

(e) in like capacities, Mr. Mickel failed to correct matters [4.1(e)]

(f) he failed to co-operate and communicate with SLAB [4. I (e)];

(g) he knowingly retained sums lawfully due to SLAB [4.1 (e)]; and

(h) in so doing he failed to act honestly and with integrity. [4.1 (e)]

18. The Complainer alleges that these alleged acts or omissions (individually or together) amounted to Professional Misconduct. The Tribunal will be aware that the question of whether or not such facts as are proved amount to professional misconduct (in effect, whether the Sharp test is satisfied) is a matter uniquely for the Tribunal.

19. The Tribunal will also be aware, as more fully set out above, that the allegations against Mr. Mickel fall to be proven to the criminal standard of beyond a reasonable doubt.

Part 4 — The Core Issues

20. From the above analysis of the Complaint, the following Core Issues emerge:

In [the executry matter]:

(i) In what capacity did Mr. Mickel act?

(ii) Did Mr. Mickel instruct the writing of the letter in the terms alleged?

(iii) Was he entitled to charge a fee as Executor?

(iv) Even if he was not entitled to charge such a fee, did he genuinely believe that he was in fact entitled to do so?

(v) Did he act dishonestly and without integrity by attempting to conceal the charging of a fee from the beneficiary?

In the SLAB Matter:

(i) Was there an obligation upon the Practice Unit to remit the judicial expenses to SLAB?

(ii) When informed of the situation, did Mr. Mickel fail to take action?

(iii) Did he fail to communicate with SLAB?

(iv) Did he knowingly retain funds due to SLAB?

(v) If he did, did he act dishonestly and without integrity?

In both matters:

Did whatever actions or omissions as the Complainer may have proved beyond a reasonable doubt, to the satisfaction of the Tribunal, amount to Professional Misconduct?

22. These are partly questions of fact, partly questions of law and partly questions of mixed fact and law. In order to provide a context for an analysis of the evidence, it is proposed, first, to identity the core legal issues.

Part 5 - The Law

23. *The Entitlement to charge a Fee as an Executor:*

This is a matter on which there was some disagreement. Mr. Mickel formed a belief (and, it is submitted below, a genuine belief) that upon a proper interpretation of Clause 10 of the Will [Complainer's Second Inventory of Productions, number 5], he was entitled to remuneration for the work he had carried out as an Executor in relation to the complex matters which he referred to in his evidence. During the LSS investigation, he obtained advice from William McCreath, an experienced solicitor, which supported that view and subsequently he obtained an Opinion from the Junior of us, Mr. Frain-Bell, Advocate, which also supported that view. Mr. Frain-Bell's opinion is no. 35 of The Respondent's First Inventory of Productions. On the other hand, the LSS obtained an opinion from Senior Counsel that there was no such entitlement. Mr. Mickel then obtained an Opinion from the Senior of us, Mr. Mitchell QC [Respondent's Third Inventory of Productions, no. 2] for the purposes of sharing it with the LSS. The view expressed in that Opinion was that, although *prima facie* such a charge cannot be made, it could be made with the informed consent of the beneficiary, and such consent may be given retrospectively. The question of whether the beneficiary gave his consent is bound up with the view which the Tribunal may take of the evidence. On the underlying issue of whether, absent such consent, Clause 10 of the Will may be properly interpreted so as to permit an Executor to charge a fee, the Tribunal is invited to consider the conflicting Opinions and form its own view. In any event, even if Mr. Mickel were not entitled to take a fee, the material question is whether he genuinely believed that he was entitled to do so. That question is addressed below.

24. *The obligation upon the Practice Unit to remit the iudicial expenses to SLAB:*
Section 17(2A) of the Legal Aid (Scotland) Act 1986 provides as follows:

> "(2A) Except in so far as regulations made under this section otherwise provide, any sum of money recovered under an award of or an agreement as to expenses in favour of any party in any proceedings in respect of which he is or has been in receipt of civil legal aid shall be paid to the Board."

It is not disputed that the said statutory provision required the Practice Unit to remit the sums recovered in the instant case by way ofjudicial expenses to the Scottish Legal Aid Board.

25. However, the primary responsibility lies upon the nominated agent, whom failing the cashroom manager. Although, in particular instances, for example, where a respondent may be a sole partner in the firm but fails to supervise his cashroom manager (*McColl v Law Society of Scotland 1987 SLT 524*); or actively condones dishonest behaviour by the Practice Unit (*Fyfe v Council of the Law Society of Scotland 2017 SC 283*); or fails to act with reasonable care (*Philip Simon Hogg 25th August, 2014*) that a respondent may also, in the case of a sole partner, be liable, or, in another case share liability. None of these situations arise in the present case. In the absence of such special factors, then, insofar as any liability rests on any other partner or director of the Practice Unit, it would be, at most, a purely vicarious breach of the relevant rule; but may well not amount to professional conduct in its own right. Reference is made to the evidence of Mr. Foster who said that he was, *"not convinced of attributing professional misconduct — not sure if professional misconduct can be transferred vicariously to another solicitor even up the way."* Furthermore, the title "Managing Partner" is not a term of art; it is neither mentioned in the Act or the Regulations and nor do the Act or the Regulations make any special provision or impose any special obligations upon a "Managing Partner"; furthermore, it is not recognised by the Law Society of Scotland as importing any special obligations, beyond that of any other partner (see Respondent's First Inventory of Productions no. 73). Reference is made also the evidence of Mr. Foster.

26. It is not disputed that Mr. Mickel was neither the nominated agent, nor the cashroom partner at the relevant time (and ceased to be a partner or director at all on his resignation on 29th December 2015). In these circumstances, the reference in the Complaint at 4.1(c), (d) and (e) to Mr. Mickel acting in the capacity of "Managing Partner" are irrelevant, or, at any rate, add nothing to the obligations generally incumbent upon him as a partner or director of the Practice Unit.

27. *Acting with Honesty and Integrity*

The leading case on the matter of dishonesty is the UK Supreme Court case of *Ivey v Genting Casinos (UK) Ltd [2018] AC 391*. Lord Hughes (with whom all the other Justices concurred) on page 410, at paragraph [60], discussed the situation, posited in the earlier case of *Ghosh*, of a visitor from a foreign country where public transport is free travelling on a bus in England without paying, and without any intention of paying, and in which the judge had suggested that this could not be regarded as dishonest. Lord Hughes continued:

> "But the man in this example would inevitably escape conviction... because, in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging. In order to decide whether this visitor was dishonest by the standards of ordinary people, it would be necessary to establish his own actual state of knowledge of how public transport works. Because he genuinely believes that public transport is free, there is nothing objectively dishonest about his not paying on the bus. The same would be true of a child who did not know the rules, or of a person who had innocently misread the bus pass sent to; him and did not realise that it did not operate until after 10.00 in the morning. The answer to the court's question is that "dishonestly", where it appears; is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts."

At paragraph [74], he laid down the following test:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his I belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

In short, the first stage is to determine the genuinely-held belief of the Respondent.

28. Subsequently, in the case of *SRA v Wingate & Another [2018] 1 WLR 3969*, the Court of Appeal considered further the remarks of Lord Hughes in *Ivey* as to what constitutes dishonesty, then considered the relationship between the separate concepts of honesty and integrity.

29. In particular, at page 3993, paragraphs [93] and [94], Rupert Jackson LJ stated:

"...The legal concept of dishonesty is grounded upon the shared values of our multicultural society. Because dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest. .... the test for dishonesty is objective. Nevertheless, the defendant's state of mind as well as their conduct are relevant to determining whether they have acted dishonestly." He then proceeded to consider the concept of integrity, which, at paragraph [95] he described as a "broader concept than honesty", though also (at paragraph [96]) a "more nebulous concept than honesty". At paragraph [97] he stated:

> "In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members... The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards."
>
> Then, at paragraph [100], he observed:
>
> "Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse."

30. In light of these authorities, when approaching the question of the honesty and integrity of the Respondent's conduct, the Tribunal should first determine what was the belief in fact held as to the relevant conduct (the foreigner genuinely believing that bus travel is free); second, the Tribunal should determine whether that conduct is dishonest, standing the belief *which is objectively held*. There is no requirement for that belief to be a reasonable one, but, it is submitted, if the belief is reasonable, then it may be easier for the Tribunal to determine that society would not consider that there is any dishonesty. Next, the Tribunal requires to grapple

with the more nebulous issue of whether the conduct lacked integrity. In approaching that question, the Tribunal will require to have regard to the whole circumstances, including the belief held by the Respondent. As it does so, the Tribunal will require to recognise that the onus remains throughout on the Complainer, and that, if the Tribunal has any reasonable doubt (for example, as to whether the conduct lacked integrity), then the Tribunal will require to acquit the Respondent.

31. *The Sharp Test*

The Tribunal will be familiar with the Opinion of Lord President Emslie in *Sharp v Law Society of Scotland 1984 SC 129*. As. the Tribunal will recollect, the solicitor in that case had been found to have failed to act in accordance with a number of the conduct rules of the Law Society of Scotland. The question was whether those breaches amounted to professional misconduct. At pp 134-5, Lord President Emslie stated:

> "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."

The Tribunal will note that its task is to determine whether in the whole circumstances, the conduct is both *serious* and *reprehensible* and the degree of culpability which attaches.

32. The Tribunal's attention is directed to the decision in *CLSS v Kenneth Stewart Gordon* (16th June, 2021) as a useful example of the structured manner in which the Tribunal will go about its task of addressing an allegation of professional misconduct. Starting at the heading "Decision", one can see the following stages:

(a) "The first step for the Tribunal was identify which facts had been established. The standard of evidence required for these proceedings was that of beyond reasonable doubt and the burden of proof rested with the Complainers throughout. "

(b) "The next step for the Tribunal was to consider whether the established facts supported the averments of misconduct."

(c) "Having determined [the relevant facts], the Tribunal required to consider whether the Respondent's actings amounted to professional misconduct. "

(d) "The Tribunal then applied the Sharp test of whether there was serious and reprehensible conduct on the part of the solicitor."

(e) "Having done so, it came to the conclusion, in relation to the first issue (conflict of interest) that: "the Tribunal considered that the Respondent's conduct amounted to a serious departure from the standard to be expected of a competent and reputable solicitor but it hesitated to hold that the conduct was reprehensible. Therefore, the Tribunal concluded that it was not satisfied that professional misconduct had been made out in terms of averment 5.1 (a)."

(f) In relation to the second issue, it found that: "Whilst the Tribunal took the view that the Respondent's email of 29 July 2009 amounted to the respondent not acting in the best interests of his client, it hesitated to hold that this was sufficient to reach the conjunctive test of serious and reprehensible conduct."

(g) Looking at the matter as a whole, "the Tribunal was satisfied that the Respondent's conduct had represented a departure from the standards of conduct to be expected of competent and reputable solicitors. It considered that the case was very close to the boundary between unsatisfactory professional conduct and professional misconduct." It found that the conduct lay on unsatisfactory professional conduct side of that boundary, and remitted the case to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

33. The manner of disposal is instructive. On the first matter, the Tribunal found that, although there was a *serious* departure from the standard to be expected of a competent and reputable solicitor, the conduct was not *reprehensible*. This underlines that the circumstance of conduct amounting to a serious departure from the standard to be expected of a reputable solicitor is not automatically or necessarily of itself to be regarded as professional misconduct.

34. Further, on the second matter, having found a failure on the part of the solicitor, the Tribunal in applying the *Sharp* test of "serious and reprehensible conduct" correctly treated the test as 'a conjunctive test" - that is to say that the conduct should be both serious *and* reprehensible.

35. There is a passing comment in the case of *Khan v Bar Standards Board [2018] EWHC 2184 (admin)* (which case accepted the *Sharp* test as being applicable also in England) at paragraph 36 to a test of "seriously reprehensible", though the court's comments on that matter proceed on an *esto* basis. However, it is submitted that the words of the *Sharp* test are clear: the test is a conjunctive test requiring the conduct to be <u>both</u> serious and reprehensible, which is the approach which has consistently been taken in Scotland by the Tribunal. This is underlined by the comments of Marc Beaumont, Barrister, in his article, *The meaning of professional misconduct in barrister disciplinary proceedings* (Barrister

Magazine) [item 13 of the Respondent's bundle of authorities] at paragraph 12:

> "...the only species of professional negligence that warrants a disciplinary prosecution is in respect of acts or omissions by professionals that are both "serious" and "reprehensible" in all the three pre-requisites of: (a) mental element, (b) deficient performance and (c) practical impact."

We should respectfully adopt that formulation of the task which lies before the Tribunal in assessing whether Mr. Mickel is guilty of professional misconduct, and submit that it is the approach which properly ought to be taken by the Tribunal in performing that task.

Part 6 — The Evidence

6A — [The Executry Matter]

36. In summary, Mr. Mickel's position is that: he acted throughout as one of the two Executors; the work which he did in relation to certain aspects of the winding up of the Estate were especially challenging: (i) he genuinely believed that Clause 10 of the Will authorised him to charge a fee for this work, as Executor, thereby varying the normal rule that an Executor acts gratuitously; (ii) that he met with Ms. Kelly and had the conversation with her the terms of which are accurately recorded in the Attendance Record of 27th May, 2015 [Respondent's First Inventory of Productions no. 14]; (iii) that the Practice Unit should retain the sum of £5,000 and should pay out the balance to [A.C.] with the accounts to be finalised at a later stage; (iv) that the terms of the letter of 27th May, 2015 [Respondent's First Inventory of Productions no. 14 page 2], dictated by Ms. Kelly were misleading in that it was stated that the Executors had approved the final accounts; (v) that he had not instructed Ms Kelly to send a letter in those terms; and (vi) that if such a letter had been sent, he was not aware of its terms, and that the beneficiary, [A.C.], subsequently approved the payment of the fee.

37. Turning to the evidence, it was consistently Mr. Mickel's position that he was acting in this matter as an Executor and not as a partner or director of the Practice Unit, albeit that Ms. Kelly said that she did what Mr. Mickel requested *"because he was my boss"*. This, however, falls to be read along with paragraph 24 of the Joint Minute of Admissions which narrates "from March 2014, the administration of the Executry was undertaken by Lorraine Kelly, a partner of the firm and thereafter a director of Hamilton Burns WS Limited." In this context, the relationship between Mr. Mickel and Ms. Kelly is one of client and solicitor, and, in particular, the comments recorded in the Attendance Note as having been made by Mr. Mickel fall to be understood as instructions given. by the client (Mr. Mickel as Executor) to his solicitors.

38. Mr. Mickel was not challenged on his evidence as to the complex nature of the work undertaken by him as Executor. As Mr Mickel told the Tribunal, *"it was not an easy executry*

and there were difficulties with the deceased's moveable property. There were issues regarding the valuation of works of art and the basis of the provenance of the works themselves. We had to dance delicately around the issue of the genuineness or otherwise of these works." As to the retention amount of £5,000, Mr. Mickel told the Tribunal that, *"[R.B.] [fellow Executor] and discussed the issue and agreed that 5k was sufficient recompense for what had been going on — that would have been in June [2015] or maybe later."* Although the original Complaint as remitted by the SLCC, alleges that Mr. Mickel misled his fellow Executor, [R.B.]; that is an allegation which is not now a matter of complaint to the Tribunal.

The Tribunal is referred to the letter from [R.B.] to the Complainers dated 8th February 2019 [Respondent First Inventory of Productions no. 32], wherein he wrote inter alia that, *"...At no stage did Mr Mickel fail to disclose to me any of the fees he charged to the estate and I understand that the beneficiary, [A.C.], was also kept informed of what was being charged by the firm of Hamilton Burns and had a copy of the final accounts which included Mr Mickel's fees, which he signed off."* [R.B.] did not give evidence, but the Tribunal may have regard to his letter *quantum valeat* for the limited purpose of vouching Mr. Mickel's evidence that the level of fees to be charged by Mr. Mickel were discussed and agreed between the Executors. [R.B.'s] comments about [A.C.'s] state of knowledge should be taken with a degree of caution as this is a controversial matter, and [R.B.] was not available for cross examination by the Complainer. However there is direct evidence as to the dealings with [A.C.] and submissions about this aspect are made below.

39. So far as an entitlement to charge fees is concerned, Mr. Mickel gave evidence that the terms of Clause 10 of the Will created an exception in the case of this particular Executry to the general rule that Executors do not ordinarily charge for carrying out this role and which clause appeared to him as he said, *"to grant the power to charge a fee"* for carrying out works as an Executor. He was not challenged on the genuineness of that belief, and, in any event, it is submitted that from the manner in which he gave that evidence, it is apparent that this was indeed his belief. Furthermore, this remained consistently his interpretation of the will throughout the subsequent investigation and remained so until he received the Opinion of the Senior of us on or after 26th September, 2017.

40. This belief was a reasonable one for Mr. Mickel to hold. Both an experienced solicitor and Junior Counsel interpreted Clause 10 in the same way. The advice from the solicitor and the Opinion of Junior Counsel came after Mr. Mickel formed his belief, so are not relevant to the basis upon which Mr. Mickel formed his belief, but the fact that two experienced lawyers subsequently formed the same belief is powerful evidence of the reasonableness of that belief. The Tribunal will bear in mind that the question is not whether the belief was correct

(that is a matter on which, quite literally, opinions differed) but whether the belief was *reasonable*.

41. In relation to the meeting between Mr. Mickel and Ms. Kelly on 27th May 2015, the Tribunal has before it the record in the contemporaneous Attendance Note. The evidence of both Mr. Mickel and Ms. Kelly was that this is an accurate record of what was discussed (although Ms. Kelly suggested that it was incomplete, as to which reference is made to the next paragraph of these submissions). That evidence was not challenged. The terms of the Attendance Note are clear and, it is submitted, that what is recorded is, indeed, what was said. It is also important to note that Sharon Brownlee, when asked in cross-examination, whether there was anything in the Attendance Record that was improper told the Tribunal that there was not.

42. The terms of this letter, in asserting that both Executors had approved the final accounts and that the sum of £202,650.99 was the final payment were clearly inaccurate — the evidence of Mr. Mickel and Ms. Kelly agreed that the sum of £5,000 was to be retained and that final accounts were to be approved later. Those terms failed to disclose that the sum of £5,000 had been retained. There is a clear contradiction between the terms of the Attendance Note and the terms of the letter.

43. It was the evidence of Mr. Mickel that he did not instruct Ms. Kelly to write a letter in those terms. The Tribunal will recall the evidence given by Mr. Mickel himself during the hearing in relation to the 27 May 2015. letter. He told the Tribunal that he didn't know why Ms. Kelly had written the 27 May 2015 letter in the way that she had, describing it as, *"just wrong."* However, it would appear to be the Complainer's position that he did so instruct Ms. Kelly. We say "appears to be" because of the wording of the averment that appears at paragraph 2.5 of the Complaint:

> "Mr. Mickel instructed the said Lorraine Kelly to retain a sum of £5,000 and remit the balance to the said AC and the Executry accounts could be finalised at a later stage [That averment is correct and is proved by the terms of the Attendance Note]. *In reliance upon and in response to those instructions* [emphasis supplied] on 27 May 2015 the said Lorraine Kelly wrote to the said AC and the said letter narrated the following...."

It is curious that at first sight the averment seems to be saying that Mr. Mickel instructed a letter to be written in those terms, but the Tribunal will note that, as a matter of grammatical construction, what is actually averred is that Mr. Mickel instructed the writing of a letter and

that Ms. Kelly wrote a letter. It is averred also that the letter was in the terms following, but not, specifically, that Mr. Mickel told Ms. Kelly to write in those terms — the word "and" is merely conjunctive, but does not indicate a causative connection between the instruction to write a letter and the terms in which the letter was written. It is not the intention here to make a "clever" point about the pleadings (and, indeed, the general thrust of the remainder of the pleadings is that Mr. Mickel instructed the writing of the letter in those terms). Rather, the point is that the Pleadings on this crucial matter — arguably the matter upon which [the executry matter] complaint hinges - reflects an equivocation which was very much present in the evidence.

44. The Tribunal should treat with extreme caution what was recorded as having been said on behalf of Ms. Kelly at her own disciplinary hearing — namely that Mr. Mickel effectively dictated the terms of the letter to her. That is not evidence — it was a submission filtered through a representative — and, in any event, it is not evidence in the present Hearing. When one has regard to Ms. Kelly's actual evidence, it was a little confused. At the outset, in examination on chief, she said that with hindsight she regretted writing what Mr. Mickel asked her to write, but did not say what it was that she claimed that Mr. Mickel had actually asked her to write. This leaves open that what she wrote may have represented her understanding of what Mr. Mickel had asked her to write, not what (if anything beyond what is recorded in the Attendance Note) he actually told her to write. There was an attempt in examination-in-chief to get her to agree that this is what she was told to write (a proposition which she agreed) but the tribunal should place greater weight upon her first, spontaneous, answer. However, her final position in cross-examination has about it the ring of truth: she had been under some pressure from the beneficiary to make a payment. The Tribunal will also recall that during her examination in chief, when asked about the 2? May 2015 letter said, *"...when I sent the letter I didn't mean it to be misleading. I was just in a rush to get the cheque out to [A.C.]."* Ms. Kelly later accepted at her own misconduct hearing that the letter was misleading (as she also confirmed to the Tribunal) along with the fact that it had been her intention to finalise the accounts shortly after writing the letter but hadn't ever done so and was only reminded of this being the case, when the Law Society began its investigation. By 27th May, 2015 she had every intention of having finalised accounts completed very soon thereafter. Because, therefore, she expected that final accounts were to be ready soon, she chose to tell the beneficiary that they had been approved; even though they had not. It is not submitted that she was consciously dissembling for any improper reason, as she no doubt genuinely believed that willing final accounts, as good as, made them so. It is submitted also that she knew that there was an intention by Mr. Mickel to charge a fee, that £5,000 had been retained, and that accordingly the final payment was likely to turn out to be the same as the payment of £202,650.99, which was sent with the letter. It may be (and this is to some extent speculation)

that writing in the terms which she did would get the beneficiary, with his constant pressure for payment, off her back.

45. However, the submission that the Tribunal should accept the evidence of Mr. Mickel that he did not instruct Ms. Kelly to write in the terms which she did, does not depend solely upon the respective evidence of those two witnesses, as there are external factors which support the evidence given by Mr. Mickel: first, there is the evidence of the Attendance Note, which was recorded by Ms. Kelly herself. It is implausible that if she had been asked to write stating that the final accounts had been approved, she would not have recorded that in the Attendance Note, especially as such an instruction would contradict what she had recorded as being what she had asked to do by Mr. Mickel; second, there is the very fact of the contradiction between what she admits was an accurate attendance note and what she subsequently wrote, and, third, if Mr. Mickel genuinely believed that he was entitled to charge a fee (and it is submitted that he did so genuinely believe), he had no reason to seek to instruct Ms. Kelly to mislead the beneficiary.

46. On balance, therefore, the Tribunal is invited to accept the evidence of Mr. Mickel on this matter and to determine that he did not instruct Ms. Kelly to write the letter of 27th May 2015 in the way that it was framed by her.

47. At this point, it is worth mentioning the evidence of Sharon Brownlee, the Financial Compliance Manager of the Law Society of Scotland [evidence Day 1/3] whose initial position was that the taking by Mr. Mickel of a fee was improper, but this was based upon the proposition that once final accounts have been approved, it is not possible to make any further charges. This was based upon the supposition that when the letter of 27th May 2015 said that final accounts had been approved, this was, indeed so. However, she accepted in cross-examination that if final accounts had not been approved as at 27th May, it would have been in order for Mr. Mickel to raise fees subsequently, prior to approval of final accounts, if, as she told the Tribunal, *"the file showed the work had been done."* (In fairness to Ms. Brownlee, this answer was implicitly based on the assumption that, as a matter of law, Mr. Mickel was entitled to make a charge for his work as an Executor, as to which, see above.) The Tribunal is invited to accept the evidence of Mr. Mickel (which was not challenged) as to the amount of work which he had done and which he said was apparent from in his "own diary notes and the files", upon the basis of which he had later prepared a note of works for the Auditor of the Court of Session. This note of works was reconstructed from that material and it is possible that, in the process, errors may have crept in, but the Tribunal will be aware that the Complaint is directed against Mr. Mickel for charging fees at all, rather than at the precise amount of the fees which he charged.

48. Whether or not [A.C.] was actually misled by the letter is a matter of conflicting evidence, as is the related question of whether, whatever the letter may have said, he subsequently approved the charging of the fees.

49. There is the statement taken by Ms. Brownlee on 6th April, 2017, which is referred to for its terms. However, the Tribunal should be very slow to place weight on this statement. First, it is hearsay evidence filtered through Ms. Brownlee, and, of particular importance is the circumstance that [A.C.] was not called to give evidence, and was not available for cross-examination. On the other hand, there is the direct evidence of Ms. Kelly and the signed discharges by [A.C.]. The Tribunal is referred in particular to the discharge signed by [A.C.] on 14 March 2017 [Respondent's First Inventory of Productions no. 22] wherein he accepts inter alia that, *"...I have had sight of my late wife Will and am satisfied that the income and expenditure including the specific bequests contained in the Will have all been made in accordance with the terms of the said Will."* The Complainers' case is that [A.C.] was not provided with the opportunity to have made such an assessment. The Tribunal is invited to reject that submission. Reference is made to the following:

(a) Ms. Brownlee told the Tribunal that [A.C.] had told her that, *"he didn't look at the account in depth and he did not understand the level of fees charged nor that [NM] had taken the other £5,000 in fees..."*

(b) Ms. Brownlee also told the Tribunal that at the same meeting, [A.C.] had told her that Ms. Kelly had told him that, *"there was a £900 overpayment to him but that he was just to sign the discharge in any event."*

(c) This evidence concerning what [A.C.] had told Ms. Brownlee was disputed in its entirety by Ms. Kelly, who told the Tribunal that:

(i) she had posted AC a set of the accounts in advance of her meeting with him, *"at least a few days before";*

(ii) she said that she was, *"really worried about this one and wanted to be very clear he had read through all the accounts";*

(iii) she had no recollection of saying anything to [A.C.] about a £900 overpayment: she said *"I don't know why I would say that"* and that she thought that she would recall if she had said anything like that to [A.C.];

(iv) in response to the Complainers' position that [A.C.] had not been given enough time to review the final account of charge and discharge, Ms. Kelly told the Tribunal that, *"he said that he had read it and I had sent it to him in advance*"; and

(v) the Tribunal is referred also to the contemporaneous documentary evidence (file notes and copy letters) which vouch her account of sending the accounts sufficiently far in advance to [A.C.].

50. In light of the above, the Tribunal is invited to prefer the evidence of Ms. Kelly on this matter and to determine, that in fact, [A.C.] did have sufficient opportunity to consider the final accounts, that he did so and that he was indeed *"satisfied"* with them as he stated in his signed declaration to this effect in the discharge of 14 March 2015 [Respondent's First Inventory of Productions no. 22]. For completeness sake, the Tribunal will recall that Sharon Brownlee also said that [R.B.] had visited [A.C.] to ask him for retrospective agreement in relation to Mr. Mickel's taking of the £5,000 in fees for his work as Executor and that he had declined to give this. This request was however made following the Opinion by Mr Mitchell QC, which advised that such a course of action be taken, lest the Tribunal is under misapprehension about the reason for this request by [R.B.].

51. The remaining matter is how Mr. Mickel's instruction to retain £5,000 and, subsequently, to pay him the fees, was actioned by the Practice Unit. The evidence of the ledger card is scant and not very clear. However, the following can be discerned from the evidence. On 27th May, 2015, Mr. Mickel asked Ms. Kelly to retain the sum of £5,000 from the balance to be paid to [A.C.]. His intention was to raise fees for his work as an Executor. He discussed the matter with his Co-Executor, [R.B.] in about June 2015, and agreed with him that £5,000 would represent sufficient recompense (see paragraph 32 above). The Fiscal, at page 3 of his Outline Submissions (in reference to the evidence of Ms. Brownlee) states that "No fee notes were provided" and, again, on page 7, that "no fee notes were produced". It may be that the Complainers were not provided with copies of such fee notes, but it is specifically a matter of Joint Admission that Mr. Mickel issued fee notes as Executor in the sum of £2,000 to the Practice Unit on 6th July, 2015 and on 28th August, 2015 in the sum of £3,000 [Joint Minute of Admissions paragraphs 28 and 29]. The Fiscal cannot now seek to depart from that Admission. Mr. Mickel was not registered for VAT, so no VAT fell to be added to the fees which were issued. For reasons which are not clear, the Practice Unit accounted for these fee notes in the ledger, as though they had been raised, not by Mr. Mickel as Executor, but by the Practice Unit itself, in the process showing them (as issued by Mr. Mickel) without VAT, even though, if the fees had really been issued by the Practice Unit, VAT should have been added. In the event, Mr. Mickel never received payment of any of these fees. It appears that he gave little or no attention to this, as there were many other things going on. As he said, he was "fairly relaxed" about it and he was also due some £240,000 from the firm in any event, which had not been paid and, in relation to which sum, he put in a claim in the administration of the

company. As he said, "Hamilton Burns owed me a lot of money and nothing was ever done and so 5k was a drop in the ocean...".

6B – The SLAB Matter

52. There is no substantial dispute as to what happened in the SLAB matter. The core facts are set out in the Joint Minute of Admissions, in particular at paragraphs 47 and 48, reference to which is made. It is also accepted that, as a matter of law, there was an obligation upon the Practice Unit to remit to SLAB the sums recovered as expenses. It is accepted also that the Practice Unit failed to do so. This leaves as the live issues those set out as (ii) to (v) in paragraph 21 above.

53. The issue for the Tribunal is whether Mr. Mickel, "failed to take any action" when it was brought to his attention by [J.S.] in the firm's cashroom that the money had not been paid to SLAB. Within 45 minutes of being alerted to this, Mr. Mickel asked for the matter to be referred to the Law Accountants; a course of action that was in Mr. Foster's view "understandable" in the circumstances. Demonstrably, Mr. Mickel did not fail to take action (the wording of the Complaint) though, as the hearing unfolded, it seemed that the position of the Complainer was that Mr. Mickel failed to take such action as was reasonable in the circumstances. This is not what is alleged against him, and the Tribunal should find that the Complainer has simply failed to prove the charge against Mr. Mickel, rendering the remainder of the submissions on this matter otiose.

54. However, even if, contrary to this submission, the Tribunal may properly deal with the Complaint as though it were one of a failure to take such action as was reasonable in the circumstances, the evidence discloses no such failure. In particular, Mr. Mickel told the Tribunal that, having replied in the way that he had to the cashier's email that the cashier would then, *"send the queries in the account to Mullens [Law Accountants] and then report. It was a well-established procedure, first the cashier; then the Cashroom Partner [Tasmina Ahmed-Sheikh] is made aware and then to the nominated solicitor [Kevin Murphy] for the account... ".* The Tribunal is invited to find that it is clear from the evidence that Mr. Mickel trusted the firm's cashroom operation and partner to deal with this issue; and that he believed that it had been dealt with. On the propriety and adequacy of this course of action, the Tribunal, as an Expert Tribunal, may bring its own experience to bear, but in doing so, it is submitted that its views should be informed by the extremely helpful evidence of Mr. Foster. As Senior Counsel explained to the Tribunal in seeking permission to call Mr. Foster, it may be that the particular experience of the legal members of the Tribunal might not extend to how legal aid matters, including payments,, were dealt with in a busy solicitors' office and that Mr. Foster had, in a long career as a solicitor who (as Mr. Foster stated in his evidence), *"had not*

known a time when he was not doing legal aid work." It was submitted that the experience and expertise which Mr. Foster had accumulated in that capacity would allow him to assist the Tribunal in that narrow but important area in which the Tribunal might require assistance. The Tribunal will' recollect that it allowed him to be called on that basis. To that end, the first part of his examination in chief was devoted to setting out that accumulated experience and expertise in some detail, Mr. Foster, it is suggested, impressed as a witness with a wealth of experience as: a partner in a busy legal aid firm. He impressed also as very careful and measured in the way he gave his evidence. This was manifested in the way that he gave evidence of how he might do things, but explained that this was not the same as the way that others in the same position might reasonably act. It is submitted that this is because there is a range of reasonable responses to a particular situation and action falling within that range of reasonable responses cannot be criticised. (A good analogy would be the *Hunter* v *Hanley* test in negligence, where the defender is not negligent unless he does or fails to do something which no reasonably competent member of the relevant trade or profession would have done or failed to do). In the present case, it was the evidence of Mr. Foster that the action taken by Mr. Mickel in remitting to the Law Accountants and trusting to the firm's processes was a reasonable action for him to take.

55. The Respondent was referred during cross examination to an email dated 16th November 2015 [Respondent First Inventory of Productions, no 59] advising the then partners (excluding Tasmina Ahmed Sheikh who was an MP) that the SLAB matter was still outstanding. It is to be noted that there is no Record relating to this later email and what Mr. Mickel is alleged to have done, or failed to do in connection with it. The relevant passage is at paragraph 2.15 of Complainers' averments in the Record, which relates exclusively to Mr. Mickel's actions on receiving the email of 16th June 2014, and it is on those specific averments, and none other, that the case of Professional Misconduct against Mr. Mickel is built. In these circumstances, the Tribunal should exclude from its consideration any evidence concerning any alleged Professional Misconduct by Mr. Mickel built on the email of 10th November 2015. Further and in any event, *esto* the Tribunal does consider that matter, the Fiscal has, in any event, failed to prove that anything Mr. Mickel did following receipt of the email of 16th November 2015 was unreasonable. Mr. Mickel made it clear, when asked, what he did about the 16th November, 2015 email, that he was, *"pretty sure I would have spoken to Andy Knox and asked him where things are on this but then 4-5 weeks later I am out".* He was not challenged by the Fiscal as to whether he did indeed speak to Mr. Knox. He also said in cross-examination that, *"I trusted the system I had in place and thought it would work. "* The Tribunal is also referred to the affidavit of Mr Knox (the contents of which are agreed) dated 30th June 2021, where he states at paragraph 4 that he was made aware of the SLAB matter as of 18th June 2015 by one of the firm's administration staff and that he, *"... undertook to look into the*

matter of my own volition and revert to the Scottish Legal Aid Board". It is also clear from paragraph 9 of his affidavit that Mr Knox regarded himself as the person in the firm with the responsibility for resolving the SLAB matter; as he says, *"[f]rom receiving the formal notification of the position on 26 October 2016, through to the firm being put into administration on 23 May 2017, I made repeated attempts to resolve the matter internally and ensure compliance with Section 17(2A) of the Legal Aid (Scotland) Act 1996."* The Tribunal will also recall that in his evidence, SLAB's Brian Miller confirmed that Mr Knox was the contact in the firm that SLAB communicated with directly. In these circumstances, it is submitted that (if it does consider evidence concerning the email of the 16th November, 2015) the Tribunal should consider that Mr. Mickel's response was both reasonable and proportionate. In any event, it is not for the Mr. Mickel to show the reasonableness of his response: it is for the Complainers to prove that the action was unreasonable. In this regard, the Tribunal should note that this was not a matter which was put by the Fiscal to Mr. Foster (even although the reasonableness of Mr. Mickel's initial response on 16th June, 2014 most certainly was the subject of vigorous cross examination of Mr. Foster.) In short, the Fiscal has failed to prove that Mr. Mickel's response was not a reasonable one.

56. In short, the position of Mr. Mickel is that he believed that the action he took at that time on first being informed of the matter on 16th May, 2014 (and, esto relevant, at the time of the email of 16th November, 2015) was the correct course of action to take and that it was made in good faith and with a view of resolving the issue. It was both a justifiable and understandable course of action for Mr. Mickel to have taken. The Tribunal will also note that Mr. Mickel was not the firm's cashroom partner, a role that was fulfilled by Tasmina Ahmed-Sheikh. The Tribunal is invited to find that whilst other steps could have been taken that it has not been proved that Mr. Mickel "failed" to take any action, nor that the action which he took was not reasonable.

57. At page 7 of his Outline Submissions, the Fiscal attempts to suggest that Mr. Mickel was dishonest and lacked integrity based upon the proposition that the Practice Unit was struggling financially, that Mr. Mickel was aware of this and that this provided a motive for Mr. Mickel to fail to take action to have the sum recovered as expenses paid over to SLAB. However, this is a suggestion which, on the evidence will simply not fly. No such proposition was ever put to the Respondent by the Fiscal. All that Mr. Mickel was asked was whether the firm started to struggle financially in 2013, in respect of which Mr. Mickel responded, that this was not as far as he was aware. It was also suggested that money had to be borrowed to pay wages, which Mr. Mickel accepted had been the case. However, such a suggestion may be indicative of intermittent cash flow problems caused by the SLAB payment cycle, which problems, as Mr. Foster in his evidence confirmed often arise in firms which are heavily

dependent on payments from SLAB (as the Practice Unit was). There was simply no evidence that the firm was "struggling" in the sense sought to be conveyed by the Fiscal. There was no evidence that the firm was struggling financially whilst Mr. Mickel was a partner or director. The only evidence touching on this was the evidence of Mr. Cownie of SLAB that he was suspicious because of the number of arrestments which had been laid upon the Practice Unit by its landlord, suggesting that it was unable to pay its rent. However, this was refuted by the evidence of Mr. Mickel who explained that this arose because the Practice Unit was in an ongoing dispute with its landlord. He was not cross-examined on this. Furthermore, in respect of the allegations made by the Complainers at Article 3.6 that Mr. Mickel knew that the Account Certificates for the accounting periods ended 30.9.13; 31.3.14 and 30.9.14 were inaccurate, the Tribunal is referred to Mr. Mickel's evidence that he trusted the cashroom partner *"implicitly"* and was also assisted by [M.O.].

58. As an aside, it is noted that the Fiscal makes a similar suggestion in relation to [the executry matter] at page 7. He invited the Tribunal to "draw the inference that the Respondent's actions were here designed to generate some form of income for himself *in that difficult period*" [emphasis added]. This is no more than mere speculation. Furthermore, there is lacking any proven factual basis for the drawing of any such inference. First, reference is made to the preceding paragraph of these submissions as to the failure of the Fiscal to prove that the Practice Unit was "struggling financially". Further, it is a perfectly fair inference that, having done work for which he believed he was entitled to payment, Mr. Mickel would have issued Fee Notes, as would any other professional. The implication of what the Fiscal submits is that Mr. Mickel was personally in financial difficulties so issued fees to which he knew he was not entitled. If he was not in personal financial difficulty, the motive which the Fiscal seeks to impute to Mr. Mickel disappears. This foundational premiss was simply not put to Mr. Mickel in cross-examination. The Fiscal's submission, in short, has no basis in the evidence.

59. Finally, there is simply no evidence that Mr. Mickel failed to communicate with SLAB. For there to have been such a failure, Mr. Mickel would need to have seen and been aware of the correspondence in question. The allegation that he had failed to communicate is built upon the flimsy basis that the initials "NM" appeared at the start of the case reference in the letters. On the other hand, Mr. Mickel's evidence was that he had not seen any of the correspondence, which would have gone straight to the cashroom. The Fiscal, at page 8 of his Outline Submissions, that the letters were "containing his reference". This submission is not only not supported by the evidence, but is actually contrary to the evidence. The Tribunal will recollect the evidence of Mr. Mickel concerning the way that the referencing system worked and that the presence of the initials "NM" was used, not as personal reference, but as merely a designator of the type of work (i.e. civil) involved. It did not mean that the letters

would have been placed before him. Furthermore, the evidence of Mr. Miller was that SLAB had communicated directly with the cashroom and not with Mr. Mickel. Put shortly, there is no evidence upon the basis of which the Complainers can prove charge 4.1(d) or (insofar as concerning a failure to co-operate or communicate) charge 4.1(e). Proof beyond a reasonable doubt is required, and not merely speculation.

Part 7 - Analysis

60. We now proceed to apply the legal principles to the evidence in order to address the Core questions set out at paragraph 15 above.

61. In [the executry matter]:

(i) *In what capacity did the Respondent act?*

First, the evidence clearly discloses that Mr. Mickel acted solely as an Executor, in effect, a client of the Practice Unit. This is of importance in the Tribunal's consideration of any regulatory breaches which may or may not have occurred. In particular, the rules cited at paragraphs 3.1 and 3.2 are rules which are directed at a person acting in his capacity as a solicitor, and are not, on the face of it, applicable to his conduct in any other capacity. It may be that egregious conduct by a person who is a solicitor, though not acting in his capacity as a solicitor (for example a case where a person, who is a solicitor, engages in conduct in his private life which is thoroughly dishonest and disreputable — for example, leading a gang of drug dealers) might expose that person to professional disciplinary proceedings, but that is not the route employed in the Complaint. Paragraphs 3.1 and 3.2 are directed at alleged breaches of specific rules as the foundation for the charges in paragraph 4.1. Since those rules did not apply to Mr. Mickel in [the executry matter], then the foundation upon which the Complaint is built falls away and the Complaint in [the executry matter] cannot therefore be found to have been established.

Second, there are allegations in the Complaint of Mr. Mickel having acted in a situation of a conflict of interest. Esto the relevant rules applied (as to which see above), neither the Complaint as referred by the SLCC to the Law Society of Scotland, nor the charge as stated in paragraph 4.1 (b), read along with (a) contain any allegation of conflict of interest, nor was any evidence led as to this, nor was any cross-examination directed at Mr. Mickel on the matter. On no view should the Tribunal consider any allegation that Mr. Mickel acted in conflict of interest.

(ii) *Did the Respondent instruct the writing of the letter in the terms alleged?*

First, it is submitted that (as discussed at paragraphs 36 to 41 above) the evidence clearly

discloses that Mr. Mickel did not instruct the writing of the letter in the terms in which it was written by Ms. Kelly. If the Tribunal is satisfied that this is so, then that is sufficient to acquit Mr. Mickel of the charge of attempting to conceal, as set out in paragraph 4. I (b) read along with (a) of the Complaint.

Second, the Tribunal will note that paragraph 4.1(b), mirroring the terms of the Complaint referred by the SLCC, alleges that Mr. Mickel instructed payment of fees without any lawful basis for doing so. In the manner in which both the SLCC complaint and paragraph 4.1 are expressed, it is unclear whether the "instruction of payment of fee" is intended as a separate charge, or whether it is intended as a narrative to justify the substantive charge of attempted concealment. Given the quasi-criminal nature of the proceedings (reflected in the standard of proof beyond reasonable doubt), it is submitted that Mr. Mickel should be given the benefit of the doubt by resolving it in favour of the interpretation that the allegation of instruction of a fee without lawful basis is not a separate charge, but, rather, is no more than narrative provided tb support the allegation of attempted concealment. If the Tribunal accepts this submission, then, if it also accepts that the Respondent did not write the letter, that will be an end of [the executry matter]. On the other hand, if the Tribunal chooses to treat the allegation of "instructing a fee" without reasonable basis, as a separate charge, then it will require to consider the following submissions.

(iii) *Was the Respondent entitled to charge a fee as Executor?*

First, we have placed the phrase "instructed the payment of fees" in quotation marks, as we submit in paragraph 51 that, on a proper understanding of the evidence, Mr. Mickel did not, as a solicitor instruct the payment of fees, but. rather, as Executors instructed his solicitor to retain the sum of £5,000 and subsequently rendered fee notes as Executor to the Practice Unit for that sum. This is pointed out in the interests of accuracy and in order to assist the Tribunal in its analysis of the evidence and in reaching its decision. It is of great importance in the context of question (i) above, but, in the present context, it is accepted that the *gravamen* of the Complaint is the charging of fees, to which Mr. Mickel was not in law entitled, though, it should be noted that he was never actually paid those fees.

Second, it is fair to say that the question of whether Mr. Mickel was, objectively, entitled in law to charge a fee was a matter of some disagreement; to the extent that the Senior of us disagreed with the Junior of us on that matter. The Tribunal may be tempted to reach its own view on this question but it is not necessary for it to do so; as the material question is, whether or not Mr. Mickel genuinely believed that he was entitled to charge such a fee.

(iv) *Even if he was not entitled to charge such a fee, did Mr Mickel genuinely believe that he was in fact entitled to do so?*

First, it is submitted that there is an unwarranted assumption in paragraph 41.1(b), which appears to proceed on the basis that it is sufficient to prove the *actus reus* ("instructing payment" of fees without a legal entitlement to do so) without proving *mens rea* (knowledge that he was not entitled to "instruct payment" of the fee).

Second in approaching this question, The Tribunal requires to follow the methodology laid down in *Ivey v Genting Casinos (UK) Ltd [2018] AC 391* by addressing, first, proceeding to "ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts... the question is whether [the belief] is genuinely held."

Third, it is submitted that it is clear on the evidence, Mr. Mickel genuinely believed, on the basis of his interpretation of Clause 10 of the Will, that he was entitled to charge a fee. Reference is made to paragraph 33 above.

Fourth, "the reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable" (*Ivey v Genting Casinos*, quoted above). It is, however, submitted that the circumstance that other lawyers, when subsequently giving their Opinion, interpreted Clause 10 in the same manner as Mr. Mickel is a powerful indicator that Mr. Mickel's belief was reasonable. Even if the Tribunal does not believe that the belief was reasonable, it is still open to it to consider, on the rest of the evidence, including the demeanour of Mr. Mickel Lin the witness box; and the absence of cross-examination as to the genuineness of Mr. Mickel's belief, nonetheless to find that, even if unreasonable, the belief was genuinely held (*Ivey v Genting*, above). It is submitted that the Tribunal should so find.

Fifth, in consequence, it is submitted that, (a) if the Tribunal finds that Mr. Mickel did instruct the writing of the letter in the terms in which it was written, then, because (as it is submitted) he genuinely believed that he was entitled to charge a fee, there is no room for the Tribunal to find that he had any intention to attempt to conceal anything, including the intention to charge a fee (reference is made to paragraph 9 above) and (b) whether in the context of a charge of concealment, or (if it be a stand-alone charge, which it is submitted it is not) the charging of a fee to which Mr. Mickel was not in law entitled, there is absent, in the light of that genuine belief, the *mens rea* which would be required before the Tribunal could find the charge proved.

(v) Did the Respondent act dishonestly and without integrity by attempting to conceal the charging of a fee from the beneficiary?

First, this question has in part been answered in relation to the previous question, but to expand upon that answer: if, in the event that the Tribunal finds that Mr. Mickel instructed the letter to be written in the terms in which it was written (which it is submitted, the Tribunal should not find) but if the Tribunal finds that Mr. Mickel genuinely believed that he was entitled to charge a fee (as it is submitted the Tribunal should find), then the first question is whether Mr. Mickel acted dishonestly. In this regard, reference is made to the cases of *Ivey v Genting Casinos* and *SRA v Wingate & Another* as discussed at paragraphs 27 to 29 above. Given the holding by Mr. Mickel of the genuine belief, *a fortiori* if that belief were reasonable, there is simply no proper basis upon which the Tribunal could properly find that he acted dishonestly. He is, rather, like the foreigner who, not knowing that one usually pays to ride a bus in the United Kingdom, fails to buy a ticket.

Second, although, as Rupert Jackson LJ commented in *SRA v Wingate*, integrity is "a more nebulous concept than honesty", nonetheless, it is difficult to see upon what basis the Tribunal might properly find Mr. Mickel's actions as having lacked integrity, if he had not acted dishonestly. This is particularly so because the Complainers failed to lead any evidence on the question of integrity and did not put specifically to Mr., Mickel in cross examination that his actions had lacked integrity, otherwise than by making the vague suggestions referred to at paragraph 69 below.

62. Therefore, in relation to [the executry matter], it is submitted that the Tribunal should find that Mr. Mickel did not instruct the writing of the letter in the [the executry matter] complaint. Itis further submitted that the Tribunal should find that the accusation of "instructing the payment of fees" to which Mr. Mickel is not entitled, is merely a narrative step in the justification of the charge of attempted concealment, then it will follow that that accusation will also fall if Mr. Mickel did not instruct the writing of the letter in the terms in which it was written. Should, contrary to that submission, the Tribunal decides that this charge stands as a separate charge, then, for the reasons more fully set out in the preceding paragraph, the Tribunal should find that the necessary *mens rea* has not been proved and that charge should likewise fall. Further and in any event, the Tribunal should find that none of Mr. Mickel's actings in [the executry matter] were dishonest or lacked integrity.

63. In the SLAB matter:

(i) Was there an obligation upon the Practice Unit to remit the iudicial expenses to SLAB?

It is accepted that there was such an obligation.

(ii) When informed of the situation did Mr. Mickel fail to take action?

First, it is a matter of Joint Admission that Mr. Mickel did take action (see paragraphs 47 and 48 of the Joint Minute of Admissions). That is a complete defence to the Complaint in the terms in which it is expressed.

Second, in the event that the Tribunal interprets paragraph 4.1(c) as being a Complaint that Mr. Mickel failed to take such action as was reasonable in the circumstances (and it is submitted that, given the quasi-criminal nature of the proceedings, the Tribunal should not give such an extended meaning to said paragraph), then it is submitted that it has not been proved by the Complainers that the action taken by Mr. Mickel was not reasonable. Reference is had to paragraph 54 hereof, and, in particular, to the evidence of Mr. Foster.

(*Third*) Mr Foster was not asked specifically about the November 2015 email but only about the issue of delay. He was clear that the issue was not the question of delay but the fact that the money had, "not been sent in the first place"

(iii) Did the Respondent fail to communicate with SLAB?

First, the Complainers have failed to adduce any evidence that any of the communications from the Scottish Legal Aid Board were seen by Mr. Mickel, or that he had any knowledge of those communications. The charge of failure to communicate, or co-operate with SLAB must inevitably fall.

Second, paragraph 4.1(d) contains the accusation that Mr. Mickel "failed to correct matters". It is the case that the Practice Unit had an obligation to correct matters. However, reference is made to the evidence of Mr. Foster that the primary responsibility fell upon the nominated solicitor and the Cashroom Partner, and that any responsibility on the part of Mr. Mickel, as with all of the other partners or directors of the Practice Unit, was merely vicarious. He did not have any personal responsibility to "correct matters".

Third, in the matter of this Practice Unit, the cashroom partner was Ms. Ahmed Sheikh, succeeded by Mr. Criggie, both of whom have subsequently pleaded guilty in disciplinary proceedings brought before the Scottish Solicitors' Discipline Tribunal to charges in connection with their running of the cash room. This reflects the primary duty upon them. However, the Complainer has failed to adduce any evidence that Mr. Mickel was aware, or could have made himself aware of any deficiencies on the part of Ms. Ahmed Sheikh or Mr. Criggie, and that he ought, on that account to have taken some form of corrective action. Reference is made in this regard to the discussion in paragraph 25 hereof.

(iv) Did the Respondent "knowingly retain " funds due to SLAB?

This charge needs only to be stated for its ineptness to be manifest. Any funds which were retained were retained by the Practice Unit, not by Mr. Mickel. The obligation to remit the funds lay on the Practice Unit and not Mr. Mickel. For that reason, the charge must fall. Furthermore, retention is a process which has a duration. The funds were continuously retained by the Practice Unit. Although Mr. Mickel was informed that, as at 16th June, 2014, the funds had not been remitted to SLAB, he remitted matters to the Law Accountant, trusting in the Practice Unit's normal processes to sort matters out. The Practice Unit did not do so, but Mr. Mickel was not aware of that until he received a further email in November 2015, shortly before he retired. Comment is made above as to the extent to which the Tribunal can have regard to this evidence, given the absence of Record; but, in any event, Mr. Mickel had assumed that matters were in hand and that resolution of the issue was being led by Andrew Knox – which it is clear that they were from Mr Knox's affidavit. *Esto* the Tribunal can properly consider this matter, the Complainers have failed to prove that Mr. Mickel's position was unreasonable. In short the Complainers have failed to prove that Mr. Mickel "knowingly retained" such funds. This charge must also fall.

(v) Did the Respondent act dishonestly and without integrity?

First, the Tribunal will note that the charge of acting dishonestly and without integrity is explicitly levelled against Mr. Mickel only in paragraph 4.1(e), upon the basis that by "knowingly retaining" the sums due to SLAB, he acted dishonestly and without integrity.

This charge is in similar terms to the Complaint remitted by the SLCC to the Law Society of Scotland, and so, the complaint of lack of integrity in this specific matter is properly before the Tribunal. However, the Tribunal will observe that the Complaint as remitted by the SLCC contains no accusation of lack of integrity in the other matters which were the subject of complaint. The Tribunal will further note that the Complainers seek to introduce the question of lack of integrity in the other complaints by the following means:

(a) At para 3.7 of the Complaint in relation to the funds that were not returned to SLAB, it is pleaded for the Complainers that: *"[NM], knowing said sums of judicial expenses had not been remitted to SLAB, and knowing that fees had been rendered utilising said sums, failed in his capacity as a partner and/or Managing Partner and Director of said firm to take any steps to remedy the breaches of the 2011 Rules..."*, which, at paragraph 3.8, the Complainers aver to have been a breach of (inter alia) Rule B1.2 of the 2011 Rules; and

(b) at para 4.1(d)/27 of the Complaint the Complainers aver that, *"The Respondent as a Partner or Director or Managing Partner of the said firm, having been informed and*

knowing that sums due to [SLAB] by way of recovered judicial expenses, had been improperly taken as fees, failed to co-operate and communicate effectively with [SLAB] to resolve matters, and therefore in breach of [Rule] B1.2...".

Rule B1 .2 of the Law Society of Scotland Practice Rules 2011 provides:

"A solicitor must be trustworthy and act honestly at all times so that their personal integrity is beyond question. Further, a solicitor must not behave whether in any professional capacity or otherwise, in a way which is fraudulent or deceitful."

Second, the Tribunal will further note that the complaint of lack of integrity in respect of these matters may be a complaint which could have been made to the SLCC against Mr. Mickel and could have been a complaint that could have been remitted to the Law Society of Scotland by the SLCC, but it was not. It is not competent for the Complainers to seek to extend the terms of the Complaint beyond that which was considered and remitted. by the SLCC. As Lord Reed said in *Law Society of Scotland v Scottish Legal Complaints Commission 2011 SC 94* at paragraph [46]: "The focus is thus on the grievance expressed by the Complainers, rather than potential grievances which have never been expressed." In these circumstances, it is submitted that the Tribunal should proceed upon the basis that no accusation of dishonesty or lack of integrity is competently made against Mr. Mickel in respect of any of the matters specified in paragraph 4.1(c), (d) or (e) other than the matter of his allegedly "retaining funds" as alleged in paragraph 4.1(e).

Third it is submitted that it follows from this that, if the Tribunal finds that Mr. Mickel did not "knowingly retain" the funds, the issue of acting dishonestly and without integrity will fall, as it does not competently arise in relation to any of the other matters stipulated in the SLAB complaint.

Fourth, even if the Tribunal finds that Mr. Mickel did "knowingly retain" the funds, for there to be any basis for the Complainers to prove dishonesty and lack of integrity, the Complainers would require to prove circumstances in which such retention was undertaken in circumstances that amounted to more than mere carelessness or incompetence. In this regard, the Complainers have sought to suggest that, at the time of retention, the firm was struggling financially and that Mr. Mickel was aware of that supposed circumstance. That, however, is a matter which the Complainer has failed to prove. Reference is made to paragraph 58 hereof.

Fifth, even if the Tribunal considers that the question of lack of integrity is competently before it, in relation to any of the other matters raised in paragraph 4.1(c), (d) or (e), it is for the

Complainers to prove something more than mere carelessness or incompetence. That, for the reasons explained in the preceding sub-paragraph, they cannot do.

64. Therefore, in relation to the SLAB matter, it is submitted that the Tribunal should find that Mr. Mickel did not fail to take action. In the event that the Tribunal rejects the submission that it should not innovate upon the words of the Complaint, so as to treat it as a Complaint of failure by Mr. Mickel to take such action as was reasonable in the circumstances, then the Tribunal should find that the action taken by Mr. Mickel was, indeed, reasonable in the circumstances. Further, the Tribunal should find that Mr. Mickel did not fail to communicate or co-operate with SLAB. It should find also that there was no obligation upon Mr. Mickel (as opposed to the Practice Unit) to "correct matters" (which is to say to pay the funds to SLAB). Further and in any event, the Tribunal should find that Mr. Mickel did not "knowingly retain" any funds due to SLAB, and that, in any event, he did not act dishonestly and without integrity.

Part 8 — Professional Misconduct

65. In the event that the Tribunal finds that any of the complaints against Mr. Mickel are proven, it will then require to determine whether he is guilty of professional misconduct. It will do so by means of the application of the *Sharp* test, namely whether in the whole circumstances as found by the Tribunal, Mr. Mickel's conduct is both serious and reprehensible, having regard to the degree of culpability which attaches thereto. Reference is made to paragraphs 25 to 29 above.

66. Since it is the submission on behalf of Mr. Mickel that none of the complaints against him have been proven beyond a reasonable doubt, any submissions concerning professional misconduct are necessarily speculative, depending, as they do, upon the Tribunal finding that, contrary to the Respondent's submissions, one or more of the complaints made against him have been proven in whole or in part. Nevertheless, some general guidance can be given.

67. Though the question of whether such of Mr. Mickel's conduct as may have been proven is both serious and reprehensible is a matter for the judgement of the Tribunal, it is difficult to see how (certainly in the present case) the Tribunal could so find in the absence of some element of dishonesty or lack of integrity. If such accusations are to be made, they must be made explicitly in cross-examination and Mr. Mickel must be given the opportunity to respond to them.

68. In this regard, reference is made to the decision of the Tribunal in *CLSS v Kenneth Stewart Gordon* - 16 June 2021 [Respondent's authorities number 12]. In that case, the Tribunal held

inter alia that the Respondent, was not guilty of professional misconduct. In making this finding the Tribunal found that the charge of failing to act with integrity made against the Respondent was not made out. The Tribunal noted that, *"the Fiscal had not put this allegation in terms to the Respondent when he was giving evidence".* The Tribunal accepted the submissions of senior counsel for Mr. Stewart on this point in closing submissions where he said on Mr. Stewart's behalf [as recorded in the decision] that, *"... a lack of integrity required the same qualitative element to dishonesty. He submitted that, if the Law Society wanted the Respondent to be found guilty of a lack of integrity, this should have been put to him directly."*

69. In the present case, it is submitted that dishonesty and (especially) lack of integrity was not properly or directly put to Mr. Mickel. In particular, in relation to [the executry matter], Mr. Mickel was asked if he had played a part in the writing of the 27th May 2015 letter, to which he said he had not. It was then put to him that he was, *"not being truthful"* to which he responded, *"you would be incorrect"*; and, in relation to the SLAB matter, Mr. Mickel was asked if there had been any *"impropriety"* on the part of the firm (not on his part), which he did not accept, in any event. There was no suggestion made to Mr. Mickel that he himself had acted in a way that showed a lack of integrity.

70. The Tribunal may find as being especially persuasive on the question of whether Mr. Mickel's conduct was serious and reprehensible, the evidence of Mr. Foster, a solicitor of considerable experience and standing who, as he said, had, *"never had a period in my career when I was not involved in Legal Aid matters ".* It was clear from his evidence that he did not regard the action taken by Mr. Mickel in relation to the SLAB matter as being reprehensible. On the contrary, he said in his evidence that what Mr. Mickel had done was "understandable" in the circumstances. He told the Tribunal that he would have, *"made sure something was done as it was clear that the firm has breached its duties to SLAB"* but that making [as Mr. Mickel did], *"a reference to the law accountants was a reasonable position to do particularly if they had prepared the accounts...".* He also said of the note (in reference to the [J.S.] email of 16 June 2014 [Respondent Inventory of Productions no. 58] that, *"the message does not ask the recipient to deal with it and asks to appoint someone else and in that case I would have either referred it to the Law Accountants or to the solicitor who had been in charge of the case."* He also told the Tribunal that, in relation to the resolution of the issue, *"good management practice would be to delegate it"*, as Mr. Mickel had done.

71. Beyond these general comments, the further assistance which may be given to the Tribunal on the question of professional misconduct very much depends upon any views which the members of the Tribunal may provisionally be forming as to the facts which have been proved,

and it is anticipated that such further assistance might best be given in the context of a dialogue with the Tribunal Members at the remote hearing on Friday 8th October.

72. For the avoidance of doubt, Mr. Mickel denies all of the charges brought against him in the Complaint and, furthermore, he does not accept that, in any of the matters competently forming the subject-matter of the Complaint he acted dishonestly, or without integrity, or that his conduct was serious and reprehensible.

Part 9— Disposal

73. In the whole of the foregoing circumstances, the Respondent, Mr. Mickel, submits that the Tribunal should find that the Complainers have failed to prove, beyond a reasonable doubt, each and all of the complaints made against him in paragraph 4.1 of the Complaint and should dismiss the Complaint in its entirety. In the event that the Tribunal finds any of the matters specified in paragraph 4.1 proved beyond reasonable doubt, then it is submitted that the Tribunal should find that in respect of none of them did the Respondent act dishonestly, or in a manner lacking in integrity, and, further, should find that none of the Respondent's acts or omissions constituted professional misconduct.

74. In the event that the Respondent is successful, he seeks Orders (first) that there will be no publicity given to these proceedings standing the extremely serious nature of the charges against him and the obvious reputational damage that the publication of such matters would entail; and (second) an award of expenses against the Complainers. The matter is one of obvious difficulty and complexity. It is plainly of great importance to the Respondent, as it would potentially at least bring his career to an end. In these circumstances, the Respondent seeks also a determination by the Tribunal that the cause is suitable for the employment of both Senior and Junior Counsel.

ORAL SUBMISSIONS FOR THE COMPLAINERS

Mr Knight asked the Tribunal to ignore the documents attached to the Respondent's written submissions. He said that it was disappointing that another attempt was being made to put these before the Tribunal when it had refused to receive these as the Fourth Inventory of Productions for the Respondent on the first day of the hearing. Attaching them to the submissions was an attempt to have them admitted "by the back door". Mr Knight said that the Tribunal could not look at these documents because it had already decided they were not relevant. They were therefore not before the Tribunal. The hearing was a "proof at large", not a proof before answer. No preliminary issues had been raised. No preliminary hearing was sought. Any challenge to the competency came too late and should be ignored.

According to Mr Knight, it was for the Tribunal to determine what facts it found proved and then whether professional misconduct was established. With reference to his written submissions, he summarised the witness evidence in the case. He asked the Tribunal to hold the Respondent's evidence as wholly unconvincing, and in particular to prefer the evidence of Lorraine Kelly over the Respondent. If the Tribunal did that, the terms of the letter clearly demonstrated that the Respondent attempted to conceal the true position from the residuary beneficiary. This showed dishonesty or a lack of integrity. He said dishonesty and lack of integrity were "jury questions" for the Tribunal to determine on the basis of the evidence and established facts. It was for the Tribunal to determine professional misconduct, either singly or in cumulo. Mr Knight referred to various authorities which were also set out in his written submissions. The Respondent's apparent ignorance of the law on the power of an executor to charge a fee was not a defence. Mr Knight moved for expenses.

ORAL SUBMISSIONS FOR THE RESPONDENT

Mr Mitchell referred to his written submissions. He agreed that the hearing was a proof and not a proof before answer. He said that where a pleader has chosen to provide detail, the Tribunal needs to look at what he has offered to prove. Equivocation in pleadings leads to equivocation in evidence. It is for the Complainers to make their case. These are not ordinary civil proceedings. A higher standard of proof applies. He therefore described the various pleading issues which he had raised in his written submissions.

Mr Mitchell invited the Tribunal to have regard to the documents he had attached to his written submissions, and which the Tribunal had previously refused to admit as the Fourth Inventory of Productions for the Respondent. If the Tribunal refuses to have regard to them, there is a danger that the Tribunal makes a decision on something that is incompetent. This serves no one any good and may result in an appeal or application for judicial review. The Chair asked why the issue was being raised at this stage. Mr Mitchell indicated that it was only at a late stage in preparing for the hearing that "the penny dropped". The Tribunal can deal with a matter of competency *ex proprio motu.*

With reference to his written submissions, Mr Mitchell described the central issues in the executry matter. He said it was clear that a trustee (including an executor) cannot charge a fee unless this is authorised by the trustees or beneficiaries. However, the Respondent had a genuine belief he could do this. He noted that the position was not quite so simple as saying the residuary beneficiary did not accept the fee. He did not do so when interviewed by the Law Society. However, his position was apparently

different when [R.B.] went to see him. There is a conflict between the second-hand reported evidence. The residuary beneficiary did not give evidence.

Mr Mitchell posed the question: Have the Complainers proved beyond reasonable doubt that the Respondent did not hold a genuine belief that clause 10 of the will entitled him to make a charge? Mr Mitchell noted in answer to a question from the Tribunal that it was agreed in the joint minute that the Respondent rendered two fees to the practice unit. It is agreed that they were raised. If they were to be an outlay, this would be the correct way of proceeding. The beneficiary is not the client. The client is the executry. According to the Respondent, he discussed the matter with the other executor. Mr Mitchell said that even if he ought to have raised the matter with the residuary beneficiary, agreed an hourly rate, and kept better records, this might justify a finding of inadequate professional services only. In order to be guilty of this charge, me must have formed the *mens rea* to conceal.

According to Mr Mitchell, the next core issue was the evidence of Lorraine Kelly. He did not invite the Tribunal to find that she was anything other than confused. Her evidence was inconsistent with her own file note. She said that she felt as if the Respondent continued as before, even after his retirement. However, the Complaint does not criticise anything done after his resignation as Director. According to Mr Mitchell, the Tribunal should put out of its mind any suggestion that he had any kind of a role after he ceased to be a Director.

In relation to the SLAB matter, Mr Mitchell said he was diffident about calling Michael Foster. The Tribunal brings its own expertise to bear. It is for the Tribunal to decide whether misconduct is established. However, Mr Foster said that he might have done something different, but that the Respondent's action was reasonable.

Mr Mitchell noted that the proposition regarding the financial situation of the Respondent was not put to the Respondent, although he was asked to comment on the situation of the firm. The Fiscal is struggling to get guilty knowledge by suggesting that the Respondent knowingly retained money to benefit the practice unit.

DECISION ON MISCONDUCT

The Tribunal declined to consider the competency issue raised by the Respondent in the written submissions. The Tribunal had already decided on the first day of the hearing, and in its decision on the no case to answer submission, that the challenge was not appropriate at those stages in proceedings. It

remained of that view. The Tribunal has established procedures for parties to raise preliminary issues in advance of hearings by way of preliminary pleas. The Tribunal generally sets preliminary hearings to deal with these matters in advance of the hearing. It was not fair to the Complainers or in the interests of justice in this case to deal with the preliminary issue at the substantive hearing. The Tribunal therefore had no regard to the documents attached to the written submissions for the Respondent.

The Tribunal considered the admitted facts, the joint minute, and the evidence of the witnesses. It found the Law Society witnesses (Sharon Brownlee and Sheila Kirkwood) and the SLAB witnesses (Brian Millar and Scott Cownie) credible and reliable.

The Tribunal generally believed what Lorraine Kelly had to say. However, there was a clear conflict between her evidence and her own file note which troubled the Tribunal. If the standard of proof the Complainers required to meet was that of balance of probabilities, the Tribunal may have preferred Lorraine Kelly's evidence over that of the Respondent. However, the file note in question raised a reasonable doubt in the Tribunal's mind about what the Respondent had instructed Ms Kelly to do following their meeting. The Tribunal would have expected such an important and unusual instruction to have been recorded.

The Respondent lacked credibility. He was vague about matters of importance. His evidence about the detail of meetings was lacking. He was evasive when giving evidence about the financial state of the firm. His evidence appeared inconsistent on some things. For example, he said he was somewhat alarmed by the cashier's email but did not satisfactorily explain why that did not result in more action than just a one line question to the cashier.

The Tribunal could not give much weight to Andrew Knox's affidavit. His evidence had not been tested, and was, in any case, not of great relevance to the allegations of misconduct against the Respondent.

The Tribunal ordinarily discourages parties from leading evidence of individual practitioners, however, experienced they are, to express their personal opinion regarding the acceptability of a particular course of conduct (Smith and Barton *Procedures and Decisions of the Scottish Solicitors' Discipline Tribunal* pages 36-37). The Tribunal highlighted at the start of the hearing that it was unsure of the purpose in calling Michael Foster as a witness. He was not set up as an expert. The Tribunal was not clear on what productions he had seen. It noted that Mr Foster, an experienced legal aid practitioner, would have regarded the cashier's email with concern, and that action and follow-up were required. However, the Tribunal is an expert body itself and its duty is to determine whether professional misconduct has been

established and to uphold the standards of the profession. Therefore, Mr Foster's evidence was of limited assistance.

Overall, there were various matters which could not be resolved on the witness evidence led. While the Tribunal can take account of hearsay evidence, it considered that it would have been helpful to hear directly from R.B. and the residuary beneficiary, rather than relying on other witnesses to explain their positions. There was some evidence of cash flow problems at the firm. However, generally the background factual matrix to the firm's financial position, and that of its partners/directors, during the relevant periods, remained opaque to the Tribunal.

The burden of proving professional misconduct is on the Complainers. This Tribunal must be satisfied beyond reasonable doubt of the facts supporting an allegation of professional misconduct. Due to the deficiencies in some parts of the evidence, the Tribunal had some reasonable doubts. The benefit of these doubts must be given to the Respondent. Having considered all the evidence in this case, the Tribunal found the facts which have been set out in its findings at paragraphs 18.1-18.49.

The Tribunal considered the duties incumbent on the Respondent. Solicitors must be trustworthy and act honestly at all times so that their personal integrity is beyond question. They must not act in a way which is fraudulent or deceitful (Rule B1.2). Clients must not act where there is a conflict of interest (Rule B1.7.1). Fees must be fair and reasonable (Rule B1.11.1) and rendered (Rule B6.5.1). Solicitors must not act, or omit to act, in a manner which is dishonest, reckless or intentionally misleading in respect of accounting records or financial affairs (Rule B6.12.1). Managers are responsible for their practice unit's compliance with the accounts rules and no solicitor shall cause or knowingly permit the practice not to comply with the accounts rules (Rule B6.2.3). The client account should never be in deficit (Rule B6.3.1). Breaches should be remedied promptly (Rule B6.4.1). Proper accounting records must be kept (Rule B6.7.1). Client money should be returned as soon as there is no longer any reason to retain it (Rule B6.11.1). In holding funds for clients, a solicitor is in a privileged position of trust. The public must have confidence that the profession will comply with the Accounts Rules and that solicitors can be trusted. Failure to comply with the Accounts Rules undermines the trust the public places in the profession.

The Tribunal noted that not every breach of a rule will constitute professional misconduct. According to the definition of professional misconduct contained 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 to be made."

The Tribunal considered the allegations against the Respondent in the light of the facts found and the relevant duties. The Complainers made five allegations of professional misconduct. Two averments of misconduct related to the executry matter and three averments of misconduct related to the SLAB matter.

With regard to the executry matter, the Complainers firstly alleged that on or around 27 May 2015, the Respondent instructed a misleading letter to be written to the residuary beneficiary. This was said to be in breach of Rule B1.2 of the Law Society's Practice Rules. Lorraine Kelly gave evidence that the Respondent had instructed her to send the letter in these terms. She said that he had not dictated the letter to her, but he had told her that this was the information which was to be given to the residuary beneficiary. However, this alleged instruction is not contained in the contemporaneous file note which she typed herself. When that inconsistency was put to her, she said that just because the matter was not in the file note, it does not mean that it did not happen. The Tribunal would have expected such an important and unusual instruction to have been recorded. The terms of the file note created a reasonable doubt in the Tribunal's mind regarding this matter. The benefit of that doubt must be given to the Respondent. Accordingly, the Tribunal found the Respondent not guilty in relation to the first averment of misconduct contained at paragraph 4.1(a) of the Complaint.

Secondly, and still in relation to the executry matter, it was alleged that the Respondent had instructed payment of fees to himself as an executor without any lawful basis and that he had attempted to conceal this from the residuary beneficiary. It was said that he had failed to act honestly and with integrity and in breach of the Practice Rules. Clause 10 is a standard clause in wills allowing solicitors to charge a fee for administering an estate.

The Respondent was said to have obtained two opinions (one from an experienced solicitor and one from Counsel) in support of the proposition that Clause 10 also allowed executors to charge a fee, separate to any fee they might charge as a solicitor administering the estate. The solicitor's opinion was not provided to the Tribunal and the Tribunal does not know what information was given to him about the

circumstances of this case. Mr Frain-Bell's opinion was provided to the Tribunal. It raises questions about the interpretation of Clause 10. However, these are framed as a challenge to the Sub Committee's decision-making and the lack of reasons it provided for its view that Clause 10 could not be interpreted in the way the Respondent suggested. The Respondent's position was that this was a genuine error and that the situation was "a grey area". The Tribunal was satisfied that despite the apparent differences of opinion on this matter, Clause 10 did not bear the Respondent's interpretation.

There was no lawful basis for the Respondent to charge a fee as an executor in these circumstances. He had therefore instructed payment of fees to himself personally without any lawful basis. The Tribunal was invited to consider the genuineness of his belief in this regard. It seemed that he did not apply his mind to the issue at all. His actions were far from consistent in showing that he genuinely believed he could charge. However, the Tribunal was left with a reasonable doubt about the Respondent's state of mind with regard to this matter. In these circumstances, it was not satisfied that this was a serious and reprehensible departure from the standards of competent and reputable solicitors.

In addition, the Tribunal did not find it established that the Respondent had attempted to conceal the fees from the residuary beneficiary. As noted in the paragraph above, it had not found that the Respondent instructed the misleading letter to the residuary beneficiary. The Tribunal heard evidence from Sharon Brownlee and Lorraine Kelly regarding attempts made to get the residuary beneficiary to approve the fees retrospectively. However, the evidence was confusing. Best evidence would have been to hear from the residuary beneficiary and R.B., so that their positions could be tested, and the Tribunal could have all available information before it. The Tribunal noted that best practice is to be transparent with residuary beneficiaries regarding fees. However, there was no breach of any rule in these circumstances. A lack of transparency about fees could not be characterised in this case as an attempt to conceal. The behaviour was not a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, the Tribunal also found the Respondent not guilty in relation to the second averment of misconduct contained at paragraph 4.1(b) of the Complaint.

According to Section 53ZA of the Solicitors (Scotland) Act 1980, where, after holding an inquiry into a complaint of professional misconduct against a solicitor, the Tribunal is not satisfied that he has been guilty of professional misconduct and considers that he may be guilty of unsatisfactory professional conduct, it must remit the complaint to the Council. According to Hood-v-The Law Society of Scotland [2017] CSIH 21,

"Unsatisfactory professional conduct is measured against the standard of the competent and reputable solicitor...Unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional service at the lesser end and determining where the conduct complained lies on that spectrum is a question for evaluation by the relevant disciplinary tribunal, either the Council of the Respondents or the Scottish Solicitors Discipline Tribunal."

The Tribunal considered that while the facts in relation to the averment of misconduct at paragraph 4.1(a) of the Complaint could not be proved beyond reasonable doubt, they might be capable of being proved at the lower standard of proof applicable to unsatisfactory professional conduct cases. It considered that therefore, the Respondent may be guilty of unsatisfactory professional conduct, which is subject to the lower standard of proof of balance of probabilities. Accordingly, the Tribunal remitted this complaint to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

The Tribunal considered that while the Respondent's conduct in relation to paragraph 4.1(b) of the Complaint did not meet the *Sharp* test, it may represent a departure from the standards of conduct to be expected of competent and reputable solicitors. Accordingly, the Tribunal also remitted this complaint to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

With regard to the SLAB matter, the Complainers alleged firstly that the Respondent having been informed and knowing that sums due to SLAB had been improperly taken as fees, failed to take action, or instruct others to take action, to remit judicial expenses to SLAB. Secondly, it was alleged that the Respondent failed to cooperate and communicate effectively with SLAB. Thirdly it was said that the Respondent failed to correct matters, cooperate and communicate with SLAB and failed to act honestly and with integrity.

The Respondent was informed and knew that sums were due to SLAB when he received the cashier's email on 16 June 2014. The spreadsheet attached to that email made it perfectly clear that sums due to SLAB had been improperly taken as fees and that there was insufficient money left on the ledger to make payment of the judicial expenses to SLAB. This was client money (Rule B6.1.1) and public funds. In failing to remit the sums to SLAB and taking money to fees, a deficit was created on the client account.

The Tribunal took account of the fact that the Respondent was not the nominated solicitor for SLAB purposes. He was not the designated Cashroom Manager. The Respondent was not the person who would have been responsible for instructing the cashroom to remit the judicial expenses to SLAB at the

conclusion of the case. He was not responsible for taking the fees. The Tribunal placed no weight on the Respondent's designation as "managing partner" or "non-executive chair". All principals have duties to ensure the practice unit's compliance with the Practice Rules (Rule B6.2.3).

However, the Respondent was the head of civil litigation in his firm. The nominated solicitor had left the firm in October 2013. The Respondent was an experienced legal aid practitioner and a principal in a firm which dealt with a high volume of SLAB cases. The firm was a SLAB top earner. He had previously been a Cashroom Manager. He ought to have been able to understand the cashier's spreadsheet and the ledger. The email was addressed to him. The matter was drawn to his attention at a time when he knew the designated Cashroom Manager was on bereavement leave. He must have been aware of his duty under section 17(2)A of the Legal Aid (Scotland) Act 1986 to immediately remit the judicial expenses to SLAB. This statutory duty is fundamental to ensure that public money is returned to the public purse.

Mr Mitchell raised a question regarding the wording of the averment of misconduct at 4.1(c) of the Complaint. He said that the Respondent had taken some action and so could not be guilty of his averment of misconduct. However, the Tribunal noted that the averment is that the Respondent failed to take action...to remit said judicial expenses" (emphasis added). His one-line email to the cashier, ("*Can I suggest that we run all of this past Mullens?*") was insufficient in the circumstances. It did not constitute action to remit the judicial expenses to SLAB. The Respondent's evidence on the purpose of referring the matter to Mullens was vague. Even the action he suggested was not carried out and he did not ensure that it was done.

All the information the Respondent required was contained in the cashier's email and the spreadsheet. The ledger and file would also have been available to him as a principal in the firm. Despite this, he did not arrange for money to be paid to SLAB. He did not even follow up on his suggestion to send the file to a law accountant. In November 2015, the matter was again drawn to his attention in another email from the cashier. He was therefore on notice that this matter was not resolved. He still did not take any action to return the money. The Respondent knew that judicial expenses owed to SLAB had not only been retained by his firm, but taken to fees. This was in breach of an express statutory obligation. Public funds were used for the firm's benefit. The firm did not repay this money and the loss had to be covered by the Client Protection Fund.

The Respondent failed to cooperate and communicate effectively with SLAB. He did not communicate with them at all or offer any cooperation. This would have been the appropriate action. The Tribunal

proceeded on the basis that it was not established that the Respondent had received any correspondence from SLAB. However, having been put on notice of the issue in June 2014, he was under an obligation to cooperate and communicate with SLAB. He failed to do so. The situation required positive action by a partner before any SLAB letters were received by the firm. He was the partner who was made aware of the problem.

The Respondent failed to correct matters. He was aware of the problem in June 2014 and failed to remedy the problem. He did not even attempt to engage with SLAB to explain the problem or seek a resolution. It was his duty under the 1986 Act as well as his professional obligation to contact SLAB and correct matters.

The Complainers averred that the Respondent had breached Rule B1.2 by failing to act honestly and with integrity in relation to averments of misconduct (d) and (e). They also averred that he had breached Rule B6.12 by acting in a way which was dishonest, reckless or intentionally misleading in respect of accounting records or financial affairs. These are very serious allegations against a solicitor and the Tribunal considered them carefully. The principles of honesty and integrity are fundamental to the profession. Members of the profession are in a very privileged position and members of the public must be able to trust that a solicitor will carry out his/her duties and obligations in an honest and trustworthy manner.

The Tribunal had regard to the test for dishonesty described in Ivey-v-Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. According to that case, the Tribunal should first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. When that is established the question whether his conduct was honest or dishonest is determined by applying the objective standards of ordinary decent people.

Lack of integrity is defined in Wingate & Evans-v-SRA; SRA-v-Malins [2018] EWCA Civ 366. According to that case, integrity is a broader concept than dishonesty. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. Integrity connotes adherence to the ethical standards of one's own profession and involves more than mere honesty. Examples of lack of integrity were noted to include a sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules; recklessly allowing a court to be misled; subordinating the interests of the clients to the solicitors' own financial interests; making improper

payments out of the client account; allowing the firm to become involved in conveyancing transactions which bear the hallmarks mortgage fraud; and making false representations on behalf of the client.

The Client Protection Sub Committee paid money to SLAB on the basis of dishonesty by the firm. However, this finding alone was not sufficient for the Tribunal to find dishonesty in respect of the Respondent as an individual. The Client Protection Fund is a discretionary fund. Overall, the evidence was not sufficient to satisfy the Tribunal that the Respondent had acted dishonestly.

The Complainers suggested that the Respondent's conduct was more than careless. In support of this, references were made to the financial position of the firm. However, there was a lack of evidence to show the extent of the financial difficulties experienced by the firm at this time. There was insufficient evidence that any financial issue influenced the Respondent's actions in this case (other than that the firm did not appear to have sufficient money to pay the judicial expenses when it was found the money was not present on the client ledger). From time to time the firm suffered from cash flow problems. However, no causal link was established between this and the Respondent's conduct. No finding of dishonesty or lack of integrity was made on this basis. The Tribunal noted that the misconduct was restricted to a single case and there was no suggestion that the firm was regularly financed by money which had been improperly retained.

However, the matter was brought to his attention. The Respondent acknowledged he was alarmed. He therefore knew that money had been improperly retained and taken to fees. He did not rectify the situation or communicate with SLAB. The only acceptable action in this situation was to send a cheque to SLAB and communicate with them. As a result of this failure the Respondent allowed his integrity to be called into question. He subordinated the interests of SLAB and his client, to his firm's interests. The Respondent was also reckless in terms of Rule B6.12.1. Action was necessary, to replace the money and report the situation to the Law Society. He failed to do so.

A competent and reputable solicitor, on receipt of the cashier's email in June 2014, would have contacted SLAB and arranged for the sums to be paid by the firm. The money ought to have been remitted immediately and any questions regarding outlays resolved in communication with SLAB. The Respondent's lack of action was reckless and lacked integrity. It was a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, the Tribunal found the Respondent guilty in relation to the averments of misconduct relating to the SLAB matter contained at paragraphs 4.1(c), (d) and (e) of the Complaint.

SUBMISSIONS FOR THE COMPLAINERS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal drew the Tribunal's attention to the Respondent's previous analogous previous conviction for professional misconduct (15 January 2019). It referred to the same period of time as this Complaint but there was no finding of dishonesty or lack of integrity. The Respondent was censured and fined. He noted that in mitigation in the last case, the Respondent had said he did not intend to work as a solicitor in Scotland again but appeared subsequently to have taken up a consultancy position in Glasgow.

The Fiscal moved for expenses on the usual scale. By remitting parts (a) and (b) for consideration of unsatisfactory professional conduct, the Tribunal had recognised that there was some merit in this complaint. He referred the Tribunal to its decision in Law Society v Kenneth Gordon (26 April 2021) where a whole case was remitted for consideration of unsatisfactory professional conduct, but expenses were still awarded against the Respondent. He said there was no factor in this case which would allow the Tribunal to anonymise the name of the Respondent. The hearing was in public and the findings ought to be published.

SUBMISSIONS FOR THE RESPONDENT ON SANCTION, PUBLICITY AND EXPENSES

Mr Mitchell lodged a Sixth Inventory of Productions for the Respondent and an additional reference in mitigation.

Mr Mitchell noted that although there was an overlap of time between this case and the previous one, the meat of it predated the issues in the present Complaint. There was no finding of dishonesty or lack of integrity in that case. There was an acceptance that the real problem was not the borrowing of the sum but the conflict and the failure to comply with Rule B6.20. The Respondent had thought that borrowing money from the trust was a private family matter and did not consider the trust to be a client. There were echoes there with the averments of misconduct (a) and (b). Each case must be looked at on its own facts. In the previous case, the Respondent had trusted the designated Cashroom Manager to get things right. However, this is not a case where the Respondent could have learned any lessons about trusting the designated Cashroom Manager before the events of this case.

The Respondent is mostly working in England. He has no interest in acting as a solicitor in Scotland. The Respondent is seeking to pursue a career as an English barrister. He has qualified and has a pupillage arranged but has not progressed this until the current matter was clarified. He started the process of qualification prior to these proceedings. He has disclosed the 2019 findings to the Joint Inns of Court

and they accepted that it did not affect him as a fit and proper person to be a barrister. As a barrister he will not be involved in the sorts of issues which exposed him to difficulties in the current case. However, the Tribunal's finding of lack of integrity may result in problems for him pursuing a career at the English bar. However, if the Tribunal's decision is fully explained, it may be possible to make it clear that this was an isolated incident rather than a person careless of his obligation to act with integrity.

With regard to sanction, Mr Mitchell submitted that strike off would be wholly inappropriate and would not serve the public. The Tribunal must consider what is necessary for the protection of the public. A restriction would not be particularly useful because he has no interest to practise as a solicitor. He would be content to give a voluntary undertaking to the Tribunal that he would not act as designated Cashroom Manager again for a firm in Scotland. Mr Mitchell suggested that a censure might be appropriate in all the circumstances.

Mr Mitchell invited the Tribunal to consider the medical report carefully. He suggested that a restriction with supervision would not give the Respondent closure and help him to move on. Mr Mitchell asked the Tribunal to read the references provided in support of the Respondent. The referees say the Respondent is honest and trustworthy. In Mr Mitchell's submission it would be unduly punitive to prevent the Respondent starting out in his new career, not least because of the length of time that had elapsed since the misconduct, and the stress and effect on the Respondent's health.

Mr Mitchell asked the Tribunal to consider the circumstances of the case which involved a single moment of inattention when the Respondent was under stress. The Tribunal might find a way of disposing of the case so that it did not affect the Respondent's career.

Mr Mitchell also asked the Tribunal to consider the Respondent's "pressing" financial position which was set out in his precognition at Production 6 of the Sixth Inventory of Productions for the Respondent. The fine from the last occasion is being paid off at a monthly rate. The expenses have not yet been paid. If the Respondent is successful in going to the bar, he will be able to earn money and pay these matters off.

Mr Mitchell asked that the case not be given any publicity which might impede the Respondent's aspiration to go to the bar. He asked that the Tribunal did not name the Respondent in its decision. He made a plea for the Tribunal's understanding. The Respondent's great strength is his ability to move on and the Tribunal should not kill his hopes.

With regard to expenses, Mr Mitchell suggested the appropriate way to proceed was to make no award of expenses due to or by either party to reflect the measure of divided success. Alternatively, he said the Tribunal could reflect the Respondent's success on parts (a) and (b) and the failure to find dishonesty by modifying any award of expense to 50% or less of the Complainer's expenses.

Mr Mitchell urged the Tribunal to come to a final decision on 26 October 2021 as this would be of most benefit to the Respondent's health.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal considered the submissions made on sanction, publicity and expenses. It also had regard to the documents lodged by Mr Mitchell on the Respondent's behalf in mitigation.

Aggravating factors in the case included the ongoing course of conduct for a prolonged period of time, and the previous conviction which also involved financial impropriety. Mitigating factors included the fact that the misconduct only involved one case. The Tribunal had regard to the challenges the Respondent faced which were outlined in the medical report. The Tribunal also noted the references produced in support of the Respondent, while appreciating their limitations (Bolton-v-Law Society 1994 1 WLR 512).

The Tribunal considered that the misconduct fell in the middle of the scale of misconduct. The case involved a failure to take appropriate action in a single case (although that failure persisted for some time). The Tribunal recognised that the finding of lack of integrity might have serious repercussions for the Respondent but also had regard to its duty to protect the public.

Censure was not a sufficient penalty in the circumstances to mark the seriousness of the conduct, which involved a lack of integrity, or to protect the public. A fine was dismissed for the same reasons. The Tribunal also considered the Respondent's ability to pay a fine. A restriction was the appropriate sanction to protect the public and mark the seriousness of the conduct. A restriction ordering the Respondent to work under supervision if he returned to practice in Scotland would protect the public from harm as this would mean he would have to work for two years under direct supervision and could not be a manager of a practice unit in any capacity. A restriction would uphold the reputation of the profession by demonstrating how seriously the Tribunal viewed the conduct involved in this case. A restriction, rather than suspension or strike off, will allow the Respondent to be rehabilitated, and to work as a solicitor in Scotland if he chooses to do that. Working under supervision of an employer

approved by the Law Society for two years will give the Respondent time to consider his misconduct and his ethical obligations to act with integrity in relation to holding and intromitting with client funds and public money. His adherence to the Practice Rules requires review, retraining and supervision. Suspension or strike off would be excessive in the circumstances of the case.

The Tribunal found the Respondent liable in the expenses of the Complainers and the Tribunal on the usual basis, restricted by 50%. This reflected the fact that the Complainers were overall, the successful party, but also that the Respondent had been found not guilty of professional misconduct in relation to the executry matter.

Publicity will be given to the decision and this publicity will include the name of the Respondent but need not, subject to paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, identify any other person. The terms of paragraph 14A of Schedule 4 to the 1980 Act leaves very little discretion to the Tribunal to avoid naming the Respondent. The Respondent's former partners and fellow directors must be named. The witnesses who gave evidence before the Tribunal will also be identified. However, third parties need not be named as publication of their personal data may damage or be likely to damage their interests.

Christopher Mackay

Acting Vice Chair