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

MARK RICHARD THORLEY, Thorley Stephenson Limited, 20 Hopetoun Street, Edinburgh

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") averring that Mark Richard Thorley, Thorley Stephenson Limited, 20 Hopetoun Street, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer, Dr A.

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

4. In terms of its Rules, the Tribunal set a procedural hearing on 21 July 2020 by video conference and notice thereof was duly served on the Respondent.

5. At the virtual procedural hearing on 21 July 2020, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was not present but was represented by Jonathan Brown, Advocate, instructed by William Macreath, Solicitor, Glasgow. As moved by the parties, the Tribunal allowed the amendments contained in the

Record of 16 July 2020. On joint motion, the Tribunal fixed a hearing for 20 August 2020 to take place by video conference. The Complainers agreed that the Respondent's evidence-in-chief could be provided by way of a written statement.

6. At the virtual hearing on 20 August 2020, the Complainers were represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Respondent was present and represented by Jonathan Brown, Advocate, instructed by William Macreath, Solicitor, Glasgow. A Joint Minute of Admissions had been lodged with the Tribunal in advance of the virtual hearing, along with the Respondent's written statement. The Respondent having no objection, the Tribunal allowed the Fiscal to amend the Joint Minute by deleting in paragraph 6 the words "prior to this" and substituting "on 20 March 2017". The Complainers did not lead any evidence. The Respondent adopted his written statement as his evidence-in-chief subject to two minor amendments. He answered some additional questions from Mr Brown. The Respondent was cross-examined and answered the Tribunal's questions. Parties made submissions.

7. The Tribunal found the following facts established:-

7.1 The Respondent was born on 18 April 1963. He was enrolled as a solicitor on 11 December 1987. Between January 1988 and April 1992 he was employed by Balfour + Manson, 54-56 Frederick Street, Edinburgh. Between April 1992 and August 2005 he was a partner in Blacklock Thorley, 89 Constitution Street, Edinburgh. Between August 2005 and August 2016 he was a partner in the firm of Thorley Stephenson. Since August 2016 he has been a Director of Thorley Stephenson Limited, 20 Hopetoun Street, Edinburgh.

7.2 Between 2014 and 2017 the Respondent acted for Ms B who had been in a relationship with the Secondary Complainer. Ms B and the Secondary Complainer owned two properties, one in Ayr and one in Edinburgh. Actions of Division and Sale were raised in relation to both properties. In or about May 2015 the actions were sisted to enable Ms B and the Secondary Complainer to negotiate a resolution. Protracted negotiations ensued. Agreement in principle appeared to have been reached in July 2015, but no minute of agreement followed and negotiations ultimately continued.

7.3 On 2 February 2016 the Secondary Complainer's solicitor wrote to the Respondent and enclosed a draft Minute of Agreement. On 17 April 2016 the Respondent returned the Minute of Agreement to the Secondary Complainer's solicitor with proposed revisals. Over the course of 2016 negotiations continued. On 22 December 2016 the Secondary Complainer changed solicitors. On 23 January 2017 the Respondent further revised the Minute of Agreement and returned it to the Secondary Complainer's new solicitor.

7.4 On 21 February 2017 the Secondary Complainer wrote a letter of complaint to the Respondent. The complaint alleged a failure to respond to communications from the Secondary Complainer's solicitor, and alleged that as a consequence of these failures two sales of one of the properties had been lost. The Secondary Complainer made a complaint to the Scottish Legal Complaints Commission (SLCC). Ms B believed that the purpose of the complaint was to make it impossible for the Respondent to continue to represent her. On 15 March 2017 the Respondent recorded a discussion with his client which mentioned the outstanding complaint. Ms B instructed the Respondent to draft a clause covering complaints for insertion into the Minute of Agreement.

7.5 On 16 March 2017 the Secondary Complainer's solicitors advised the Respondent that they were no longer acting for the Secondary Complainer. Also on 16 March 2017 the Respondent issued to the Secondary Complainer a response to the letter of complaint dated 21 February 2017 which refuted the complaint.

7.6 On 20 March 2017 the Respondent framed and issued to the solicitors then representing the Secondary Complainer a revisal adding a new clause 10 to the Minute of Agreement. Clause 10 was suggested by the Respondent following a discussion with his client. Clause 10 was drafted by him in the following terms:-

"Neither party will make any complaint or otherwise or raise any proceedings against the solicitor acting on behalf of the other party to include any complaint to the Law Society of Scotland or to the Scottish Legal Complaints Commission."

7.7 On 22 March 2017 the Secondary Complainer's newly instructed solicitors wrote to the Respondent a letter which included the following passage:-

"We refer to your revisals to the draft Minute of Agreement. In relation to your new clause 10 we have advised our client that we do not consider [the Secondary Complainer] has any requirement to agree to this revisal. However [the Secondary Complainer] is prepared to do so..."

7.8 On 12 April 2017 the Respondent sent an email to the Secondary Complainer's solicitors which stated:-

"We have revised the Minute of Agreement and trust that these revisals make sense. We would also wish [the Secondary Complainer] to sign a discharge in relation to the SLCC which is attached. Again standing the terms of the Agreement presumably there is no difficulty with that."

7.9 On 13 April 2017 the Secondary Complainer's solicitor stated in relation to clause 10 that *"...while our client was prepared to proceed on the basis of the clause as originally drafted to seek to have him sign a separate discharge is not acceptable to him."*

7.10 On 19th April 2017 the Secondary Complainer wrote in an email to the SLCC:-

"[The Respondent] has consistently refused to return paperwork, emails and telephone calls for several years. Every time I agree to yet another alteration in the Minute of Agreement he changes the goalposts.

The latest is tantamount to blackmail. A phrase which has also been used by my own solicitor. I believe she has been in touch with the Professional Advice Department of the Law Society regarding this and they advised by phone that there was no reason I shouldn't sign the document with this clause as it was unenforceable and that [the Respondent] was getting himself into deeper water by adding it. They suggested that I should sign it but go ahead with the complaint as the only way of progressing the matter..."

7.11 On 19 April 2017 the Respondent wrote to the Secondary Complainer's solicitor in the following terms:-

"Our client's position is that [Ms B] is prepared to reduce the sum previously agreed to the sum of £10,000 but on both of the conditions that we previously referred to will require to be accepted i.e. (1) that there is an all embracing discharge which incorporated your client's previously held decree and (2) that there is a letter written by your client removing the complaint."

7.12 On 25 April 2017 the Secondary Complainer signed a letter of discharge. It stated that the Secondary Complainer withdrew the complaint in connection with the Respondent and that the withdrawal was irrevocable.

7.13 On 25 April 2017 the SLCC emailed the Secondary Complainer and stated:-

"On the basis of the information you have provided I consider it is unlikely that the SLCC would not consider a complaint from either of the parties to this agreement. It is likely we would take the view that such a clause effectively waiving any rights to make a complaint is too far reaching and unfair. It is unclear why it has been included in the Agreement but it does appear to be for the benefit of the solicitors. I am unable to advise you on any possible consequences of signing an Agreement with such a clause then making a complaint and would advise you to speak to your solicitor..."

7.14 On 26 April 2017 the Secondary Complainer emailed the SLCC and stated that the discharge letter was signed *"...very much against my will but it is the only way to progress matters as I am fast running out of time and funds... I am asking that it be noted that any discharge letter signed by me has been done under inappropriate duress."*

7.15 On 28 April 2017 the Respondent sent an email to the SLCC attaching the letter of discharge and requesting confirmation that the Secondary Complainer's complaint had been withdrawn. On 12 May 2017 the SLCC closed the Secondary Complainer's complaint.

7.16 On 2 August 2017 the SLCC re-opened the Secondary Complainer's complaint in accordance with he latter's instructions.

7.17 On 7 August 2017 the Respondent wrote to the Secondary Complainer's solicitor regarding the Minute of Agreement. He stated:-

"Your client has reinstated their complaint to the SLCC. It is a clear breach of the terms of the Agreement between the parties. Unless the complaint is withdrawn within the course of the next seven days court proceedings will thereafter be issued directly upon your client with the consequent costs, etc..."

7.18 At all material times the Respondent was the Client Relations Manager within his firm.

7.19 The Respondent raised proceedings in his own name and that of Thorley Stephenson Limited against the Secondary Complainer in relation to the alleged breach of the Minute of Agreement.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct in that he:-

(a) Inserted into a Minute of Agreement a provision requiring the signatories of the Agreement to refrain from making any complaint or raise any proceedings against the solicitors representing the other party;

(b) Required that the Secondary Complainer sign a letter of discharge agreeing to withdrawal of the complaints already made to the SLCC; and

(c) Wrote a letter threatening to raise court proceedings in the event that the Secondary Complainer did not withdraw the new complaint to the SLCC.

9. Having heard the Respondent in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 20 August 2020. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Mark Richard Thorley, Thorley Stephenson Limited, 20 Hopetoun Street, Edinburgh; Find the Respondent guilty of professional misconduct in respect of that he (a) Inserted into a Minute of Agreement a provision requiring the signatories of the Agreement to refrain from making any complaint or raise any proceedings against the solicitors representing the other party; (b) Required that the Secondary Complainer sign a letter of discharge agreeing to withdrawal of the complaints already made to the SLCC; and (c) Wrote a letter threatening to raise court proceedings in the event that the Secondary Complainer did not withdraw the new complaint to the SLCC; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person; and allow the Secondary Complainer, Dr A, 28 days from the date of intimation of these findings to lodge a written claim for compensation.

(signed)

Beverley Atkinson

Vice Chair

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 5 NOVEMBER 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Beverley Atkinson

Vice Chair

NOTE

At the Hearing on 20 August 2020, the Tribunal had before it the Record, a signed Joint Minute of Admissions, an Inventory of Productions for the Respondent, and the Respondent's written statement. On the morning of the hearing, the Fiscal submitted excerpts from Paterson & Ritchie's *Law, Practice and Conduct for Solicitors* which he intended to refer to during submissions. Mr Brown submitted a copy of the Law Society of Scotland-v-David Haddow Campbell and an SLCC document which had been redacted. The Fiscal indicated that he did not intend to lead any evidence. Mr Brown indicated that the Respondent would be the only witness to give evidence.

EVIDENCE OF MARK THORLEY

The Respondent gave evidence on oath. He adopted his statement as his evidence-in-chief subject to two minor amendments regarding dates. His amended written statement was as follows:-

1. My full name is Mark Richard Thorley. I am 57 years of age. I am a solicitor and a director of Thorley Stephenson Ltd at 20 Hopetoun Street, Edinburgh EH7 4GH.

2. I trained with Balfour and Manson in Edinburgh from September 1986 to September 1988. I then became an Assistant at that firm before setting up in practice in the name of Blacklock Thorley, Solicitors in April 1992. I remained at Blacklock Thorley, Solicitors until August 2005 at which point in time Blacklock Thorley became Blacklocks and I commenced a partnership in Thorley Stephenson. Thorley Stephenson was subsequently incorporated as Thorley Stephenson Ltd.

3. I have been a part time Sheriff since 2008 and sit as a legal member of the Mental Health Tribunal, Housing Property Chamber and Health and Education Chamber.

4. I served on the Law Society Council from 2003 to 2006. I was a member of the Law Society Legal Aid Committee from 2003 until 2019. From 2009 to 2019 I convened the Civil Legal Aid Committee at the Law Society. I also sit on the Legal Aid Payment Advisory Panel which is a working party consisting of Scottish Government/Legal Aid Board/Solicitors dealing with issues surrounding legal aid following upon the recommendation made by Martyn Evans in his report on the Independent Review of Legal Aid.

5. My work In private practice is mostly in family law. I would regard myself as an experienced family lawyer.

6. In the matter in issue in these proceedings my client was [Ms B] who was also known as [Ms B]. I was first instructed in November 2014. It was a family law dispute between [Ms B] and

her former partner with whom she had been in a cohabiting relationship. The opponent was [the Secondary Complainer].

7. The parties had separated some considerable time before my involvement, in about May 2010. They continued to own two properties, one in Edinburgh and one in Ayr. Both were held jointly.

8. [Ms B] described to me a very difficult relationship that she had with [the Secondary Complainer]. She described that relationship to me as being physically abusive. She told me that [the Secondary Complainer] was a very difficult person to deal with. She told me that [the Secondary Complainer] had previously been married and it had taken about 14 years to get divorced and there had been about 11 sets of Solicitors involved. She described in particular a pattern of controlling behaviour.

9. From [Ms B]'s perspective she never wished to keep the jointly owned properties and her preference was always for them to be sold. It came as something of a surprise when Actions of Division and Sale were raised by [the Secondary Complainer] in relation to both properties in late 2014. There were two actions – one for each property, raised in Edinburgh and Ayr Sheriff Court respectively. [Ms B] would readily have consented to sale without the need for court proceedings. The issue was not so much the principle of sale as the division of the proceeds and/or accounting for rental income derived from the Edinburgh property in particular.

10. From May 2015 [Ms B]'s position was that she wanted a payment of £10,000 made to her in respect of her interests In the two properties. That in fact is ultimately what she achieved two years later.

11. In this statement I refer to a number of items of correspondence. Each item referred to has been produced. I have sought to limit the references to the minimum necessary to explain what happened. In each case where I refer to a letter I can confirm that what has been produced is a true copy taken from my correspondence file.

12. This ought not to have been a difficult case to resolve. There was agreement that the properties should either be sold, or, at [the Secondary Complainer]'s option, transferred in exchange for a payment. There was a negotiation of the amount. I do not think it is necessary to go through every stage in the negotiation , but by letter of 13 May 2015 [the Secondary Complainer] made an offer of payment of £2,000 on certain other terms That was rejected by me on [Ms B]'s instructions by letter of 14th May 2015. I indicated that while the non financial terms were acceptable the sum of £2000 was not and [Ms B] wished to receive £10,000. By letter of 16 June 2015 [the Secondary Complainer]'s offer was increased to £8,000. By letter of 2 July 2015 on [Ms B]'s instructions I rejected that offer and renewed the proposal of £10,000.

13. By letter of 19 July 2015 we received from [the Secondary Complainer]'s solicitors confirmation that [the Secondary Complainer] was prepared to make a payment of £10,000 to our client and in exchange to take title to both properties. It seemed that there was an agreement at that stage. Both sides seemed to proceed on that basis. The letter said in terms that "matters are now agreed" and indicated that the various drafts would be forwarded. For some time afterwards there was no progress, despite numerous reminders. We did get some explanation about a delay with loan papers.

14. By letter of 16 October 2015 we were told that [Solicitor 1] had left the firm and [Solicitor 2] was dealing with the matter. [The Secondary Complainer]'s position had changed. Notwithstanding the purported agreement a sale was now proposed, although subject to a number of contingencies. From the perspective of [Ms B], although we might have sued on the agreement apparently reached, she took the view that a sale would be the quickest way to reach a conclusion. While expressing her dismay at the waste of time and money in negotiating and agreeing terms for a transfer if a sale was what was intended she indicated her agreement. A Minute of Agreement was drafted by [the Secondary Complainer]'s solicitors and sent to us on 2nd February 2016. That made reference to both properties being sold. It also made reference to [Ms B] receiving the sum of £10,000 from the proceeds.

15. A further round of negotiations ensued. The main issue was the amount of the payment, the timing of it and the protections in the event of the properties not selling. The sum of £10,000 that [Ms B] had consistently said she would take in exchange for a transfer of her interest was calculated under reference to the home report values. If there was now to be a sale and not a transfer that raised the prospect of a significant premium being achieved over home report value. On her instructions we sought to revise the agreement to provide for her to receive half of any uplift. As to timing there was a dispute about whether [Ms B] was to be paid from the first or the second sale. The other issue was the need for some sort of long stop provision to stop [Ms B] being tied as a co-obligant in terms of the borrowing for an indefinite period. There was also an issue as to expenses.

16. The next thing we knew was that in May 2016 and without agreement having been reached on the outstanding issues the Ayr property appeared to have been put on the market without any consultation with [Ms B]. This had been discovered by [Ms B] and there had certainly been no intimation of this to us. [Ms B] objected to the choice of agent as [the Secondary Complainer]'s daughter worked there. This was then followed up by [Ms B] finding that [the Secondary Complainer] had also placed the Edinburgh property on the market again without any form of consultation with [Ms B] or indeed through solicitors. Again she was unhappy with the choice of agent, who were the former letting agents. No explanation was given by [the Secondary Complainer]'s solicitors. It was simply said that marketing the properties was not a new proposal.

17. In July 2016 while correspondence was ongoing about all of this an offer came in for the Edinburgh property. It emerged that the selling agent in Edinburgh, D.J.Alexander, had not

been told when instructions were issued by [the Secondary Complainer] that the property was jointly owned and the parties were in dispute. The offer was £157,000 against a home report value of £160,000. Notwithstanding this unhappy situation [Ms B] was prepared to accept the offer provided the payment of £10,000 was made to her from the proceeds, and we advised [the Secondary Complainer]'s solicitors of that on 12th July 2016, and again on 15th July. We advised the selling agents directly on 21st July 2016 and confirmed to [the Secondary Complainer]'s solicitors that we had done so. Throughout the second half of July 2016 negotiations proceeded on other outstanding issues on the basis that the offer was to be accepted. In order to conclude a missive it would have been necessary for agreement to be reached either on an overall resolution, or, if not, at least on the destination of the proceeds of sale, pending further negotiations or resolution by the court.

18. On 17th August 2016 D J Alexander advised that the offer was no longer going ahead and the property had been taken off the market. The only assumption we could make was that [the Secondary Complainer] had issued those instructions. [Ms B] did not do so.

19. In December 2016 [the Secondary Complainer] moved solicitors to [Firm 1] and resumed a solicitor client relationship with [Solicitor 1] who had joined that firm.

20. By email dated 23rd January 2017 we set out what our client's position was namely that she wanted a payment of £10,000 and she would relinquish all her rights in both the properties in Edinburgh and Ayr. That would allow [the Secondary Complainer] to control the sales of the properties and a time period of 12 months would allow to do that. [The Secondary Complainer] could take title to both properties and could sell them if so wished. [Ms B] was also seeking the expenses of both court actions.

21. On 21st February 2017 we received a letter directly from [the Secondary Complainer] setting out a complaint. I spoke with [Ms B] on the 23rd February 2017 explaining what we had received. [Ms B] was outraged. [Ms B]'s comment was that [the Secondary Complainer] "would do anything to try and stop us acting". [Ms B] was emphatic that she wanted us to keep on acting. She made clear that she considered the complaint to be a tactical device and that she was wholly supportive. By this time [Ms B] was hugely frustrated. She had offered to agree a sale at the outset but [the Secondary Complainer] had pushed for a transfer. That had been accepted in principle and a payment of £10,000 had been negotiated and we thought agreed. [The Secondary Complainer] had then changed position to go back to a sale and had without authority instructed agents to market both jointly owned properties. [Ms B] had made clear she would accept the offer that had arrived for the Edinburgh property subject to her being paid the £10,000 from the proceeds but [the Secondary Complainer] had then instructed the property be taken off the market. For it to be suggested that sales had been lost because of some failure by me was absolutely not true. [Ms B] saw this as a continuation of a wider pattern of behaviour of the deliberate creation of difficulties and of dragging the dispute out to wear her down. She was under a degree of financial pressure.

22. A revised Agreement was sent to us on the 8th March 2017. Coincidentally, also on that date, solicitors in Glasgow sent an offer in relation to the Ayr property. So it appeared that there was a possibility of both properties being sold.

23. I had a discussion with my client on 15th March 2017 regarding amongst other things the outstanding complaint. It was at the point of the concluding of a Minute of Agreement. [Ms B] wanted to make sure that everything was concluded and there were no outstanding issues and that we were going to be able to see this through. She wanted me to carry on acting and was desperate for a conclusion. We discussed a clause covering complaints. She did not want to complain about [the Secondary Complainer]'s solicitors. She wanted this complaint by [the Secondary Complainer] brought to an end. She did not want to be dragged into the complaints process. That was the origin of clause ten.

24. A copy of the revised Agreement was sent to [Ms B] on 16th March 2017 and with her agreement was sent out to [the Secondary Complainer]'s agents on 20th March 2017. On the 22nd March 2017 The Elizabeth Welsh Family Law Practice came back and indicated in writing "In relation to your clause ten, we have advised our client that we do not consider that [the Secondary Complainer] has any requirement to agree to this revisal. However [the Secondary Complainer] is prepared to do so." The issue of the expenses of the court actions was not accepted.

25. A formal letter of complaint came through the SLCC on the 6th April 2017. On the 10th April 2017 I was invited by [the Secondary Complainer]'s agents to confirm the figure for expenses for the two actions. The figure suggested was £7,000. On [Ms B]'s instructions I proposed that she would either accept £10,000 plus the expenses or alternatively would accept a global sum of £15,000 in full and final settlement. On 11th April 2017 [the Secondary Complainer]'s solicitors indicated that they would accept this. The Agreement was further revised by ourselves and with a revised clause ten to the effect of saying that any complaint would be withdrawn.

26. There were further revisals to the Agreement in relation to a mutual discharge clause between the parties. This was a relatively standard clause confirming that all disputes and claims were compromised. [Ms B] did not want to settle the dispute only to be drawn into something else

27. On 13th April 2017 I was advised by [the Secondary Complainer]'s agents that the revised clauses were not accepted, in particular the mutual discharge of all claims.

28. On 19th April 2017 I reverted again. The figure that [Ms B] would take would be revised down to £10,000 with an all embracing discharge between the parties and with clause ten as had been revised.

29. On 19th April 2017 I received an email from [the Secondary Complainer]'s agents indicating that what we had offered in terms of settlement by our letter of 19th April 2017 was accepted but that "our client has requested that we make it clear .. agreement to your client's conditions are on the basis that the attached Minute of Agreement is executed by your client by close of business on Friday 21st April 2017" so any pressure that was being brought to bear here to conclude matters came from [the Secondary Complainer]'s Agents.

30. On 20th April 2017 we sent the Minute of Agreement to [the Secondary Complainer]'s agents enclosing the Minute of Agreement as signed by [Ms B] together with the Discharge of the complaint.

31. On 26th April 2017 we received confirmation that the Minute of Agreement and Discharge had been executed by [the Secondary Complainer] and copies were attached. Both the Minute of Agreement and the Discharge were signed by [the Secondary Complainer] on 25th April 2017 in Ayr in the presence of [the Secondary Complainer]'s solicitor.

32. As matters transpired the Ayr transaction settled in July. The Edinburgh property had not settled by then.

33. I did write a letter to [the Secondary Complainer]'s agents on the 4th August 2017. I advised my client fully of this. She understood it. She was entirely supportive throughout the whole transactions. She was keen just to make sure everything was concluded.

34. I have set out the main events to make clear what the circumstances were in which this complaint was intimated. I draw particular attention to the terms of the letter from [the Secondary Complainer]'s agents of 22nd March 2017. There was no suggestion by them of any concern as to the propriety of the clause. If, as appears now to be suggested, they had been in contact with the Society seeking guidance on the matter and had been advised of concerns I would have expected them to raise any such concern with me. I accept that the initial responsibility to consider whether the clause was appropriate was mine. I can say that the view I reached was that it was appropriate and necessary in the very particular circumstances of this case. In particular the view taken of the underlying complaint was that it was very obviously not only unfounded but tactical in nature and was designed to drive a wedge between me and [Ms B]. As I have indicated the clause had [Ms B]'s wholehearted support and she was adamant that a settlement of the matter had to achieve finality. The immediate assent to the clause reinforced our view of there being no real issue with it, and also reinforced our view of the true nature of the underlying complaint. If I had thought for a moment that [the Secondary Complainer] was genuinely under any duress or if the concern now raised had been communicated to me a different view would have been taken. I maintain that what I did was an exercise of judgment in a difficult case where there was no clear guidance. Third party complaints are now a major problem but they are a relatively recent development. I do not consider that my conduct I this case ought to be regarded as a serious and reprehensible departure from accepted standards. I acted in good faith at all times.

In oral evidence, the Respondent noted that this had been a difficult case, even in his experience. Reaching agreement with the Secondary Complainer had been difficult. Two properties were co-owned by the separated couple. The Secondary Complainer put the properties on the market at one stage without telling the Respondent's client. Offers the client was prepared to accept did not go through. The Secondary Complainer wrote a letter of complaint to the Respondent regarding his actions. The Respondent said his client saw this as a mechanism to remove him from acting on her behalf. He spoke to his client at the outset of the intimation of the complaint. She made it clear this was a vexatious complaint, that it was tactical and without merit. Her overriding sense was that the separation had occurred in 2010 and it was now 2017. She wanted it all brought to an end.

Mr Brown asked the Respondent whether his client had any view or interest in the complaint. The Respondent said the complaint was that he had failed to respond to the Secondary Complainer and that somehow he had been responsible for the loss of the sale of the Edinburgh property. The client believed she had accepted and offer on a property in 2016 which was lost. The client was of the view that the Respondent had done nothing other than act in her interests. All communication with the Secondary Complainer's agents took place by email. The revised agreement was sent to the agents and they said they were prepared to accept the clause.

Mr Brown noted that the Secondary Complainer's complaint to the SLCC was that the clause was accepted under duress and he wished to insist upon the complaint. The Respondent said this was not communicated to him. The Secondary Complainer's agents accepted the clause in very clear terms. The Respondent referred to his letter of 19 April 2017 (Production 23 for the Respondent) and the email of 19 April 2017 (Production 24 for the Respondent). He said the Secondary Complainer's agent made it clear that the agreement as revised had to be signed by Ms B by 21 April 2017 or they were going to walk away again. The Respondent understood that the Secondary Complainer by that stage had live offers for both properties but this had happened before and in his view there was no particular urgency to demand signature by 21 April.

The Respondent was cross-examined. He confirmed that he was the Complaints Partner in 2017 and had been since 2005. He was familiar with the complaints system. He sat on a Complaints Sub Committee for the Law Society for a period. If he had read clause 10 in the context of a complaint while sitting on that Sub Committee, he would have considered it to be "unusual' but his view would depend on the context.

The Fiscal noted that the Secondary Complainer's solicitor had indicated in March that they did not think the Secondary Complainer had any obligation to accept clause 10. The Fiscal suggested this should have sounded "warning bells" for the Respondent. The Respondent said he was not concerned because of their follow-up statement which indicated the Secondary Complainer was prepared to sign the Minute of Agreement as amended to include clause 10.

The Respondent confirmed the Secondary Complainer sent a letter of complaint to him in February 2017. On 12 April 2017 the Respondent sent an email to the Secondary Complainer's solicitors asking for a discharge regarding the complaint to the SLCC. The Respondent said this was to bring an end to the complaint. The agreement had not yet been signed.

The Fiscal referred the Respondent to Production 22 for the Respondent which was a letter from the Secondary Complainer's agent dated 13 April 2017. In that letter, the agent noted that:-

"With regard to clause 10, whilst our client was prepared to proceed on the basis of the clause as originally drafted to seek to have him sign a separate discharge is not acceptable to him."

The Respondent said this did not concern him because by email of 19 April 2017 they accepted the clause. On 22 March 2017, the Secondary Complainer accepted he would not make a complaint but between then and 19 April 2017, the complaint went through the system.

The Fiscal referred to the Secondary Complainer's email to the SLCC which complained about the Respondent "changing the goal posts" and "blackmailing" him. The Secondary Complainer understood the Professional Practice team at the Law Society considered the clause to be unenforceable. The Respondent said he only became aware of this email at the report stage after the complaint had been passed to the Law Society. He has never seen the email itself but has seen the content referred to in reports. The Fiscal suggested that the Secondary Complainer felt under duress. The Respondent said the history showed there was absolutely no duress applied. It had to be seen in context. The Secondary Complainer had created significant difficulties for his client.

The Respondent was asked about the client's reaction to the complaint. The Respondent said she was "outraged". She wanted to do everything to resolve the complaint and finish the ongoing financial relationship with the Secondary Complainer. She did not want the Respondent removed from the case.

The Fiscal asked how clause 10 arose. The Respondent said that the Minute of Agreement was still a live document and it was possible to insert into it a clause about complaints. The Fiscal asked if the Respondent gave any advice to his client about whether the complaint would in fact preclude him from acting. The Respondent said that he did not. It might or might not have had that effect. Complaints are often used now as a tactic in these cases. The client had no faith in the Secondary Complainer proceeding with any agreement as one agreement had already been unpicked. Any complaint has potential to prevent a solicitor acting. The idea of clause 10 was the Respondent's, having had a discussion with his client about what could be done. It was in the client's interests to finalise matters and allow the Respondent to keep acting on her behalf. There was potential for the matter to go on and on.

The Fiscal asked what would have been the position if clause 10 had been signed by parties and then during the implementation period a conduct issue arose. He asked whether the Secondary Complainer would have been precluded from raising a complaint. The Respondent said he would not. The Law Society can always raise a complaint *ex proprio motu.* At the time, the Respondent thought the clause was enforceable. The Fiscal asked if he thought it was enforceable whether he was also "future proofing" against any complaints yet to arise. The Respondent said that he was just dealing with the complaint which had been raised at the time. The Fiscal suggested that was not consistent with the words used in clause 10. The Respondent said this was a matter of interpretation.

The Fiscal noted that in August 2017 the Respondent wrote to the Secondary Complainer's solicitors saying that their client had reinstated his complaint with the SLCC and that this was a breach of the agreement between the parties. The Fiscal asked what prompted this letter. The Respondent explained it was the intimation of the new complaint. He sought Counsel's opinion. He had an ongoing dialogue with the client. Matters were still live. The Respondent confirmed he instigated court proceedings but these were currently sisted.

The Chair asked about the Respondent's reference to an ongoing dialogue with his client in August 2017 and the part this played. The Respondent said he wanted the client to be aware of the complaint. He said she had an interest in the complaint because she did not want to dragged into the complaints process. She wanted matters completed. The Chair asked the Respondent to explain more about his thinking in relation to clause 10 and his client's interests. The Respondent said his client was aware of the history of the case and also the Secondary Complainer's previous divorce which she said took 14 years to conclude and involved 11 separate agents. The client was incredibly clear she did not want to lose her lawyer and represent herself or start again with another solicitor. She wanted everything brought to an

end. The Respondent had acted since the end of 2016. He been consistently involved negotiations and difficulties. The client did not want the Respondent to be in a position where he could not act.

The Chair asked what would have happened if the Secondary Complainer had refused to sign the agreement containing cause 10. The Respondent said it could not have gone into the agreement. It was not linked to money, properties or the division and sale.

A Tribunal member asked about the reference to Counsel's opinion. The Respondent said the opinion was that the clause was proper. The member asked whether that related to it being contractual or personal ethical propriety. The Respondent said he asked for an opinion on locus to raise proceedings and enforceability.

The member asked whether the Respondent considered the personal interest issue. He said he had his client's interest at heart. His client had been separated for seven years and matters were no nearer a conclusion. The Secondary Complainer had withdrawn from a previous agreement. The client had never seen a penny in rent. She was not informed when properties were put on the market. She was at her wits' end.

The Chair asked the Respondent whether he gave any consideration as to whether clause 10 created a conflict between his interests on the client's interests. The Respondent said that they both wanted the same thing. The client was "more than clear". She just wanted him to see it through. She was more than happy with anything to get to that goal. The Chair asked the Respondent if it was for the client or the Respondent to make that decision. The Respondent said it was for the client. If she had wanted to complain about the other side, he could not have kept the clause in.

Another member asked about the circumstances leading to the clause. The Respondent said the client asked, "What can we do about the complaint?". The Respondent suggested the clause. The member asked if he Respondent considered the wider propriety of the public interest and the profession in using such a clause. The Respondent said parties were free to contract as they wished. He was not looking at any greater scale than what was best for the client.

The member noted the Respondent had described the clause as "unusual". The Respondent confirmed he had never seen such a clause used before and he had never drafted one before or after this occasion. The Respondent said in hindsight he regretted drafting it. He never thought there was any substance to the Secondary Complainer's complaint. With the benefit of knowing what has happened since, he would

not have put it in. In answer to another question from the member, the Respondent said he was not aware of any guidance to the profession on this matter.

The Chair asked why the Respondent had never used a clause like this before or since the incident. the Respondent said that third party complaints are much rarer that complaints from clients. However, they do exist, particularly in matrimonial situations and there is potential for disruption. The situation was due to a particular set of circumstances. The client's case was also still live because the agreement was not finalised.

The Fiscal asked to clarify an answer to one of the member's questions about the court action. The Respondent confirmed the action was raised by Thorley Stephenson and in name of the Respondent.

Mr Brown indicated he had no re-examination or any questions arising from the members' questions.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to make its findings in fact in terms of the Joint Minute. He also asked the Tribunal to make two additional findings in fact. Firstly, that the idea of the unusual clause came from the Respondent and not the client. Secondly, that proceedings were raised in the name of the Respondent and his firm rather than in the name of the client. He invited the Tribunal to find the Respondent guilty of professional misconduct in terms of the averments of misconduct contained in the complaint at paragraphs 26 (a), (b) and (c). He reminded the Tribunal to consider unsatisfactory professional conduct if they thought the Respondent was not guilty of professional misconduct.

The Fiscal noted the Respondent's distinguished career in law. On one view he had the benefit of greater experience, judgement and insight into professional responsibilities. However, it was no part of the Complainers' case that the Respondent was to be judged by higher standards than other solicitors.

The Fiscal said there was little point in statutory professional regulation if professionals could opt out of the scheme. The Answers complained about the existence of certain third-party complaints. however, this was not within the scope of this hearing. Solicitors have been regulated since the 1930s. The Fiscal referred to the recent case FF-v-AFMS Limited [2020] SC GLA 31. He said the context to that that case was different to this one but it showed that standards had to be maintained and that solicitors could not contract out of the 2007 Act. The Fiscal also referred the Tribunal to paragraphs 4.04 to 4.06 of Paterson and Ritchie's *Law, Practice and Conduct for Solicitors*. The authors talk about contracting out of ethical

or legal obligations and implied clauses for services. This refers to the relationships between solicitors and their own clients. However, the Fiscal suggested that the following paragraph at 4.04 applied equally to third party complaints:

"If the expectation that the solicitor will abide by the ethical rules of the jurisdiction is matched by an expectation that the client may not ask him or her to infringe these rules, can the parties reduce the impact of this mutual restraint by agreeing to reduce the applicability of the rules? Public policy would seem to frown on such a possibility; otherwise it would open the door to corruption or undue pressure from one or other party."

The Fiscal also referred the Tribunal to the following section at paragraph 4.06:

"Ryder argues that there is an expectation by the client that the solicitor will not only deliver an adequate professional service, but also comply with the rules for the conduct of his or her profession."

The Fiscal noted that the context of this section was confidentiality and privilege.

The Fiscal said it was a moot point whether the Secondary Complainer's complaint related to service or conduct. Part of the complaint related to delay in replying to professional correspondence and this is potentially a conduct matter. Whether it was well founded is a matter for the SLCC and the Law Society.

The Fiscal said that it seemed the intention behind clause 10 was to prevent complaints being made in the future. The Respondent intended the clause to be enforceable. The statutory provisions exist for the protection of the public. If the clause was enforceable it would frustrate the SLCC and the Law Society, potentially depriving them of information they required.

The Fiscal said this was not a single instance of an error of judgement. The Respondent could have been forgiven if he had later withdrawn the clause having thought about it. Warning bells ought to have been ringing when the Secondary Complainer's solicitor said the clause was inappropriate. The course of conduct continues through April when he seeks a separate discharge, then August when he threatened court proceedings. the terms of the letter of the 17 August 2017 where strident. Proceedings were brought in the name of the Respondent and his firm.

The Fiscal anticipated that a submission would be made on the basis of Law Society of Scotland-v-David Haddow Campbell. In that case there was a lack of guidance to the profession. The case was not

applicable to current circumstances. Paterson and Ritchie did not even contemplate solicitors trying to protect themselves in this way. No expert opinion was offered on behalf of the Respondent.

SUBMISSIONS FOR THE RESPONDENT

Mr Brown's motion was for the Tribunal to find that professional misconduct was not established and dismiss the Complaint. It was a matter for the tribunal to consider remission to the Law Society for consideration of unsatisfactory professional conduct.

Mr Brown said solicitors ought to not to contract out of the ability to make complaints in their terms of business. Solicitors should not leverage their own clients or unrepresented third parties. This was not controversial.

Mr Brown noted that third party complaint was a post-2007 phenomenon. Before that, the Law Society filtered less formally but more effectively, legitimate complaints. However, problems have arisen in the manner in which the 2007 Act has interpreted third party complaints. This is a particular problem in consistorial cases. They are a substantial sustained problem despite efforts from both the Law Society and Legal Defence Union to get guidance from the court. The point has been repeatedly conceded by the SLCC. Mr Brown referred to the redacted SLCC complaint which he said was an example of what the SLCC will accept through the gateway but then concede on appeal.

Mr Brown also noted the problem with client confidentiality when defending a third party complaint. He described the situation as being "absolutely through the looking glass" when one party complaints about a solicitor not acting in the other party's interests. These kinds of complaints ought not to be categorised in the same way as client complaints or "legitimate" third party complaints.

Mr Brown explained that third party complaints create a huge administrative burden and drive a wedge between solicitor and client. Solicitors have to consider withdrawing from acting for their client and they also have to consider issues regarding client confidentiality and privilege. Bereft of guidance from the court of session, the SLCC does as it pleases.

Mr Brown said the Tribunal had heard the narrative of what had happened. It could understand the degree of frustration and what the client classed other controlling relationship. He invited the Tribunal to look at the context of the way the Secondary Complainer had behaved when he put the properties on the market. In this context of an unfounded, vexatious complaint it was difficult to categorise the conduct

as a serious and reprehensible departure from the standards of competent and reputable solicitors. He noted that the Respondent received no information about the Secondary Complainer's feelings or the Professional Practice team's advice. There was no suggestion the Secondary Complainer was under duress. The pressure came from the Secondary Complainer who wanted the Minute of Agreement signed by the end of the week after seven years separation and two years of toing and froing. If a jury of competent and reputable solicitors was assembled, would they consider the Respondent's conduct to be outrageous? It cannot be correct that there are no circumstances in which a complaint cannot be given up. A complaint is a legal right. The entire regulatory regime acknowledges that complaints can be conciliated and lots of them are dealt with this way.

The Chair clarified that the SLCC encourages resolution of service complaints not conduct complaints. Mr Brown agreed but asked whether this truly was a conduct complaint or a third party service complaint. There may be many reasons for delay and this should not be reviewable at the behest of the other side. Mr Brown asked how a solicitor should record and document the resolution of the complaint informally. Is it acceptable to have a second bite of the cherry through the SLCC? Nowhere is it said that one can never document a settlement or waiver of a right to complaint. The Chair asked whether the correct way to do that was in a Minute of Agreement relating to something totally different. The Chair asked what would have happened if the Secondary Complainer came back and agreed to the clause on condition that something else was changed which affected the interests of the parties. Mr Brown said it was correct to proceed in the way that Respondent had acted. The clause was inserted on instruction from the client. She did not want to give evidence in a regulatory matter years down the track. However, he said it was easy to imagine lots of hypothetical problems. For example, what if the Secondary Complainer offered £10,000 without a waiver or £8000 with a waiver. The client would then be in conflict with the solicitor. The solicitor would have to remove the clause. A more difficult example would be where the client did not want to give up the clause. This would have to be confirmed with the client very carefully. However, none of that happened. The Secondary Complainer's solicitor confirmed they told him he did not have to sign. The Respondent accepts it was a mistake but was it a serious and reprehensible departure from the standards of competent and reputable solicitors? It was a pragmatic attempt in good faith to resolve the situation not of his making and supported by the client.

The Chair noted that Mr Brown said the clause was accepted by the Secondary Complainer. However, at the time it was inserted, the Respondent did not know what the Secondary Complainer's response would be. It could be said to have created a scenario where the solicitor was potentially prevented from giving independent and impartial advice to the client. Mr Brown said the insertion of the clause did not

get things to that stage. There were a range of foreseeable responses. The Tribunal can see from the context how matters got to this stage. The Respondent acted transparently and in good faith.

Mr Brown referred to the Law Society-v-David Haddow Campbell. In that case the Tribunal said there was no clear guidance applicable to the situation and found the Respondent not guilty of professional misconduct. Expert evidence was used in that case because of the details of specific executry practice. However, expert evidence before the Tribunal is unusual and not required in this case. The question of whether this is above or below the notional dividing line is a question for the Tribunal. There is no guidance for the profession on this issue. The profession is encouraged to resolve and conciliate complaints. This case involves a particular class of complaint in a particular context with wholehearted support of the client. At its highest, when seen with hindsight, this was an error of judgement. The Secondary Complainer's response contributed to the result. In his submission, the Respondent's actions could constitute unsatisfactory professional conduct because the bar for that is very low. The same general points applied. A remit would be within the Tribunal's discretion.

In response, the Fiscal said he accepted a complaint is a legal right that may carry compensation. He also accepted that encouragement was given to mediation and conciliation but not for conduct complaints. However, this complaint was already in the system and there was no attempt to mediate through the SLCC. The Respondent simply was attempting to bring matters to an end. The agreement could have been recorded in an exchange of emails or letters.

A member asked Mr Brown whether the problem with the clause was it was too general, preventing any complaint of any kind. Mr Brown said if the mischief was a drafting accident and caught more than intended, that might be so. However, the clause is clearly directed at the complaint already made. If the clause is accidentally too wide, that is just clumsy drafting and a different category of wrongdoing. The member asked if a solicitor as experienced as the Respondent had made a drafting mistake. Mr Brown said he did not think the clause covered outrageous actings by the Respondent five years later. Any future-proofing was in incidental and accidental.

DECISION

The Tribunal accepted as proved beyond reasonable doubt the admitted facts in the Joint Minute. As invited by the Fiscal, the Tribunal made two additional findings in fact to correspond with the Respondent's evidence regarding the fact that the Respondent had suggested the clause following discussion with this client and that proceedings were raised in the name of his firm and himself.

The 2007 Act established a scheme which allows third-party complaints. Counsel for the Respondent made various criticisms of the way the SLCC has operated this system. However, the Tribunal must deal with the case that was before it. There is a public interest in the statutory scheme operating without interference, subject to the desirability of solicitors settling service complaints themselves or through SLCC mediation.

The Respondent inserted into a Minute of Agreement a provision requiring the Secondary Complainer to refrain from making a complaint or raise any proceedings against him. He required that the Secondary Complainer sign a letter of discharge agreeing to withdrawal of the complaints already made to the SLCC. He also wrote a letter threatening to raise court proceedings in the event that the Secondary Complainer did not withdraw the new complaint to the SLCC. The Respondent gave evidence that he had raised proceedings against the Secondary Complainer but these were presently sisted.

The Fiscal alleged that the Respondent had breached Rules B1.2, B1.3 and B1.4.2 of the Law Society Practice Rules 2011 and that the conduct met the test for professional misconduct. It was alleged that the Respondent had allowed his integrity to be called into question, he had not given independent advice, and had allowed his personal interests to influence his advice and actings. According to 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 examined the Respondent's conduct in the whole circumstances of the case as against the standard of competent and reputable solicitors and considered the degree of culpability involved. The Tribunal noted the difficult background to the case and the client's perception of the Secondary Complainer. The Secondary Complainer was a third-party separately represented by another solicitor. The clause was specifically added in correspondence between the solicitors. The Respondent believed, at least initially, that the Secondary Complainer was keen to have the Minute of Agreement signed quickly even with the clause. The Respondent believed he was acting to protect his client's interests and

he thought that their interests were aligned. He did not have the benefit of the Professional Practice team's advice sought by the Secondary Complainer's solicitor.

However, the way the Respondent dealt with this matter was not appropriate. The Minute was an agreement about a separating couple's money and finances. This was not the correct place to deal with a complaint. The Tribunal accepted the Respondent's evidence that he was trying to meet the best interests of his client, however, he sought to insert a clause into the Minute of Agreement that was in his interest. He did so without proper consideration of the full implications. The Tribunal considers that whilst to some extent, the interests of the Respondent and his client were aligned, in that neither wished to deal with a complaint, full and proper consideration of the client's interests would have counted against such a clause as drafted. The client's best interests lay mainly in having the financial arrangements between her and the Secondary Complainer resolved. The clause introduced potential for derailment of that agreement, if for example, the Secondary Complainer had attempted to negotiate the clause. It also introduced the client to the risk of becoming involved in an action in implement of the clause, for example, by assigning her rights in an action to the Respondent or attendance at proof as a witness. The clause in this case was very wide and could potentially cover future actings, even if that was not what the Respondent had intended.

There were other ways of resolving the complaint without introducing a clause into the client's own Minute of Agreement. Vexatious or spurious complaints are not uncommon. Most of these are filtered out at the outset. There is the option to mediate a resolution. A complaint about service with merit could be settled and documented in an exchange of correspondence or a separate Minute of Agreement. If the Respondent considered the complaint to be without merit he ought to have advised the client that complaint had been made, that it did not concern the client and that the solicitor would deal with it. Any of these options could have been the proper course of action for a competent and reputable solicitor.

The Tribunal noted the suggestion that this could not be professional misconduct because of the lack of guidance on the subject. However, it is not practical to have guidance on every specific scenario and the rules on independence, best interests of clients and integrity clearly applied to the situation. The right to independent advice from solicitors is an important principle for the public. The Respondent's advice could not be truly independent or impartial when the clause also involved his own interests. The Tribunal had regard to the Law Society-v-David Haddow Campbell but considered the circumstances too different to the present case to be of assistance. In that case there was no guidance on the point of contention, and the experts who gave evidence could not categorise the conduct as serious and reprehensible. During its deliberations, the Tribunal also had regard to the Law Society of Scotland-v-John Hodge and the Law

Society of Scotland-v-Alan Nicoll. These cases were decided and published after the Respondent's conduct. The Respondent could not therefore have known about them when he acted as he did. However, the Tribunal noted that these were examples of cases where misconduct had been established and the Tribunal had highlighted the well-known requirement to maintain impartiality and provide truly independent advice uninfluenced by the Respondents' personal interests.

The Tribunal considered carefully whether the Respondent had breached Rule B1.2. He had not acted dishonestly. However, the Tribunal considered that in introducing his own interests, his personal integrity could not be said to have been beyond question. He had allowed his independence to be impaired (Rule B1.3) and had permitted his personal interests to influence his actings on behalf of his client (Rule B1.4.2). Having considered the whole circumstances, the Respondent's conduct did amount to a serious and reprehensible departure from the standards of competent and reputable solicitors and was therefore professional misconduct rather than merely unsatisfactory professional conduct. However, the Respondent's culpability might not have been high enough to reach the threshold for professional misconduct but for the length of time he persisted with this clause. The suggestion by the Secondary Complainer's solicitor that her advice to the Secondary Complainer had been that the Secondary Complainer did not have to agree to the revisal should have prompted reconsideration. Instead, the Respondent went on to seek a separate discharge from the Secondary Complainer, threatened legal proceedings, and then raised legal proceedings against the Secondary Complainer.

The Fiscal moved for the usual orders regarding publicity and expenses.

SUBMISSIONS IN MITIGATION

Mr Brown noted that the circumstances had been fully canvassed before the Tribunal. The Respondent's statement contained details of his lengthy and distinguished career. He had not appeared before the Tribunal before. It was a matter of very considerable concern and regret to him. The particular consequences for him were likely to be severe regarding his ability to sit in a part time judicial capacity.

Mr Brown noted the Tribunal would be keen to uphold the reputation of the profession and protect the public. He said there was no risk of recurrence or harm to the public. This was an isolated error of judgement. The circumstances were unlikely to reoccur. The conduct was very unlikely to be repeated. He submitted that the conduct was at the lower end of the scale. The finding in and of itself was the most significant consequence for the Respondent. He suggested the matter could be dealt with by a censure

only. Mr Brown said that the Respondent could not properly oppose the motion for expenses and publicity was mandatory in the circumstances.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The conduct was at the lower end of the scale of professional misconduct. It was an isolated incident involving only one case. There were no findings of unsatisfactory professional conduct or professional misconduct against the Respondent. He had shown remorse and had been transparent when giving evidence to the Tribunal. He had a long career without incident. With all that in mind, the Tribunal was of the view that Censure was sufficient penalty. It found the Respondent liable in expenses and ordered that publicity be given to the decision. The Secondary Complainer will have 28 days from intimation of these findings to lodge a claim for compensation.

[redacted]

Beverley Atkinson

Vice Chair