

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

**DECISION**

**in Appeal under Section 42ZA(9) of the  
Solicitors (Scotland) Act 1980 as amended**

**by**

**JOHN JAMES RANKIN HODGE, 6 Killoch  
Place, Ayr**

**Appellant**

**against**

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

**First Respondent**

**and**

**MR A**

**Second Respondent**

1. An Appeal dated 24 July 2018 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by John James Rankin Hodge, 6 Killoch Place, Ayr (hereinafter referred to as "the Appellant") against the Determination and Direction made by the Council of the Law Society, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") dated 28 June 2018 upholding a complaint of unsatisfactory professional conduct made by Mr A (hereinafter referred to as "the Second Respondent") in respect of six heads of complaint, Censuring the Appellant and Directing him to pay a fine of £1,000 and compensation of £2,500.
2. An amended appeal dated 30 July 2018 was lodged with the Tribunal.
3. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First and Second Respondent. Answers were lodged for the First Respondent. The Second Respondent did not lodge Answers or enter the process.

4. Having considered the Appeal with the Answers for the First Respondent, the Tribunal resolved to set the matter down for a preliminary hearing on 24 October 2018 and notice thereof was served upon the parties.
5. The Tribunal allowed the Appellant to lodge an amended appeal dated 8 October 2018 and the First Respondent to lodge adjusted Answers. The amended appeal was formally intimated on the First and Second Respondent. Answers were lodged for the First Respondent. The Second Respondent did not lodge Answers or enter the process.
6. Parties indicated to the Tribunal Office that a preliminary hearing was no longer required in view of the amended Appeal and Answers. On 17 October 2018, the Chairman of the Tribunal due to convene proceedings on 24 October 2018, acting administratively under Rules 44 and 56 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008, adjourned the preliminary hearing set for 24 October 2018 and set a hearing for 26 February 2019. Notice thereof was served upon the parties.
7. At the Hearing on 26 February 2019, the Appellant was present and represented by Una Docherty, Q.C., instructed by Norman Fraser, Solicitor, Ayr. The First Respondent was represented by its Fiscal, Jim Reid, Solicitor, Glasgow. A signed Joint Minute was lodged agreeing that all copy documents lodged in the inventories of documents for the Appellant and Respondent were to be held as equivalent to the principals and that all documents and copy documents lodged in the inventories of documents for the Appellant and for the Respondent may be referred to and treated as evidence without the necessity of being spoken to by a witness. The Tribunal agreed to receive the Affidavit of Ms B. This became Production 66 in the Appellant's List of Documents. It became apparent during the course of Ms Docherty's submissions that the Tribunal members had not been provided with the amended appeal dated 8 October 2018 which had been lodged with the Tribunal Office and instead, had only had sight of the appeal dated 30 July 2018. The Tribunal adjourned to consider the appropriate way forward. In the interests of fairness, the Tribunal decided to fix another hearing before a differently constituted Tribunal. A hearing was therefore fixed for 10 June 2019 at 10am. All questions of expenses were reserved until the conclusion of the case.



8. At the Hearing on 10 June 2019, the Appellant was present and represented by Una Docherty, Q.C., instructed by Norman Fraser, Solicitor, Ayr. The First Respondent was represented by its Fiscal, Jim Reid, Solicitor, Glasgow. Parties confirmed that they did not intend to lead evidence. The Tribunal confirmed it had received and read the affidavit of Ms B.
9. Having given careful consideration to the submissions, productions and affidavit, the Tribunal confirmed the determination of the Law Society in respect of the six heads of complaint in accordance with Section 53ZB(1) of the Solicitors (Scotland) Act 1980. The Tribunal confirmed the Direction that the Appellant pay a fine of £1,000. The Tribunal varied the Direction that the Appellant pay compensation of £2,500 by reducing the award to £1,500.
10. Having heard further submissions in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 June 2019. The Tribunal in respect of the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by John James Rankin Hodge, 6 Killoch Place, Ayr (“the Appellant”) against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (“the First Respondents”) dated 28 June 2018 upholding six heads of complaint of unsatisfactory professional conduct made by Mr A (“the Second Respondent”), ordering that the Appellant be Censured, Directing that the Appellant pay a Fine of £1,000 and compensation of £2,500 to the Second Respondent; Confirm the Determination of the First Respondent of unsatisfactory professional conduct; Confirm the order of Censure of the Appellant; Confirm the Direction that the Appellant pay a fine of £1,000; Vary the Direction that the Appellant pay compensation of £2,500 by reducing the award to £1,500; Find the Appellant liable in the expenses of the First Respondent 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, excluding the expenses relating to preparation for and attendance at the hearing on 26 February 2019 in respect of which the Tribunal found no expenses due to or by either party; Direct that publicity

will be given to this decision and that this publicity should include the name of the Appellant.

**(signed)**

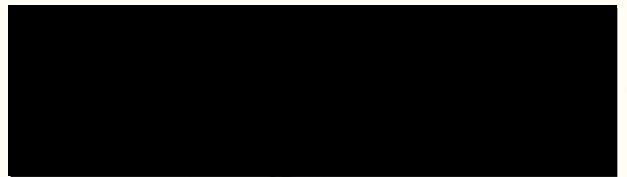
**Alan McDonald**

**Vice Chair**



11. 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 Appellant by recorded delivery service on 30 July 2019.

**IN THE NAME OF THE TRIBUNAL**



**Alan McDonald**  
**Vice Chair**

**NOTE**

On 10 June 2019, the Tribunal had before it an amended Appeal dated 8 October 2018, the determination of the Sub Committee dated 28 June 2018, Answers for the First Respondent lodged in November 2019, a Joint Minute of Agreement, a List of Witnesses for the Appellant, An Inventory of Productions for the Appellant which included the affidavit of Ms B, Three Lists of Authorities for the Appellant, and written submissions for both parties.

**SUBMISSIONS FOR THE APPELLANT**

Ms Docherty made oral submissions to the Tribunal based on written submissions which were as follows:-

**1. The nature of this appeal**

- 1.1. This appeal is brought under section 42ZA(9) of the Solicitors (Scotland) Act 1980 [Authority 6/ 2]. There is no power on the part of the Tribunal to remit the complaint back to the Council for fresh determination. This can be seen from the wording of section 53ZB(1), which stipulates the powers available to a tribunal in an appeal under section 42ZA(9) [A7/ 1].
- 1.2. The statutory wording of section 53ZB(1) gives power to the Tribunal to quash or confirm the determination being appealed against, and to quash, confirm or vary the direction being appealed against.
- 1.3. In terms of the SSDT Rules 2008, parties are entitled to lodge documents and to lead witnesses at the hearing before the Tribunal (Rules 27 and 29) [A15/ 2- 3]. The documents produced and evidence led are therefore potentially more extensive than the information available to the Professional Conduct Sub Committee ("PCSC") whose decision is the subject of the appeal.
- 1.4. An appellate court can be slow to interfere with the decision of a specialist professional disciplinary body on an evaluative question of whether or not there is unsatisfactory professional conduct ("UPC"). It has been said that the Court's role when considering an appeal from a professional disciplinary body is to examine the PCSC's decision to ascertain whether there has been an error of law, a finding for which there is no evidence or which is contradictory of the evidence, or where there has been a fundamental error in approach and

the decision reached was one which no reasonable committee could properly reach (*Hood v Council of the Law Society of Scotland* 2017 S.C. 21 at [17]) [A5 / 8].

- 1.5. Such a submission as to the restricted role of an appellate tribunal has less force when the appellate tribunal itself has specialist expertise, such as the Tribunal. Further, as noted above, the Tribunal is empowered to hear evidence whereas the PCSC requires to make a decision on the papers only. Where the Tribunal has factual evidence before it which was not available to the PCSC, as in this case, the decision of the PCSC is an adminicle of evidence only, and the correct approach is for the Tribunal to consider the whole evidence and to arrive at its decision based on that evidence. Otherwise, why would the Tribunal be empowered to hear evidence not before the PCSC, if it could not take it into account in making its decision? So although the reasonableness of the PCSC's decision should be considered by the Tribunal, and in this appeal arguments are made that the decision of the PCSC was unreasonable so should be quashed, this Tribunal should consider all of the information available to it and decide whether to quash or confirm the determination, and whether to quash, confirm or vary the direction.

## **2. The test for unsatisfactory professional conduct**

- 2.1. UPC is defined in section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007 [A9/3]. For a solicitor, it is defined as "professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services".
- 2.2. UPC therefore means something which does not amount to professional misconduct but which is more serious than inadequate professional services ("IPS"). IPS is defined in section 46 of the 2007 Act [A9/2]. For a solicitor, it is defined as "professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor. In terms of statutory definitions, the difference between UPC and IPS is the use of the word 'reputable'. UPC is measured against the standard of the competent and reputable solicitor; IPS is measured against the standard of the competent solicitor. It is submitted that UPC connotes a more serious lapse than IPS, which bears on the reputation of the solicitor or the profession.

## **3. Ground of appeal 1- failure to provide a properly reasoned decision**



- 3.1. The PCSC made its determination in terms of section 42ZA(1) of the Solicitors (Scotland) Act 1980. That section requires the PCSC to determine the complaint, without giving further specification of the extent of reasons to be given with its determination [A6/1].
- 3.2. In *Garner v GTCS* [2012] CSIH 39, the appellant successfully appealed against a decision of the disciplinary sub-committee of the GTCS [A1]. The Inner House noted that whilst a body's governing legislation may only require that reasons for the direction to be stated, the law may require that a fuller statements of reasons is necessary for a sound decision at [19]- [20] [A1/ 13- 14]. The Court concluded that the disciplinary sub-committee had without explanation failed to deal with several controversial and potentially significant issues raised before them, and the reasons given did not persuade the Court that proper consideration had been given to matters relied on. The Court quashed the findings and determination at [32] [A1/ 21].
- 3.3. In *Brennan v Health Professions Council* [2011] EWHC 42 (Admin), the reasoning of a competence and conduct committee of the Health Professions Council to strike off the register a physiotherapist involved in the fabrication of an injury to facilitate cheating during a rugby match was not legally adequate [A2]. It did not explain why it was proportionate to impose the most punitive sanction of striking off - see [45]- [47], [A2/ 14]. The decision was quashed and the case was remitted to the committee with a direction that it reach a reasoned decision on sanction - see [65], [A2/ 18]. So it is clear that it is important that the decision demonstrates clearly the weight given to mitigating factors in demonstrating a proportionate sanction.
- 3.4. In *Wisniewska v Nursing Midwifery Council* [2016] A.C.D. 141; [2016] EWHC 2672, the Court concluded that an NMC panel had been wrong to strike a nurse off the register, rather than to suspend her [A14]. It was critical of the panel's failure to evaluate all the available mitigation- see [17]- [19], [A14/ 6- 9] It stated that it was impossible on reviewing the panel's reasoning to evaluate what weight the panel gave to points made in mitigation or to the NMC Indicative Sanctions Guidance - see [21], [A14/10].
- 3.5. In *Khan v General Pharmaceutical Council* [2017] 1WLR 169; [2016] UKSC 64, the Court allowed the appeal and ordered that Mr Khan should be suspended from the register instead of the professional conduct review committee's decision that he be removed from the register [A4]. The Court noted that the committee required to have regard to the Indicative Sanctions Guidance when determining sanction. Although the committee had referred to part of that guidance, the Court said it might usefully have referred to another part of the same guidance entitled 'Mitigating Features- General' and then it would have picked out factors relevant to the case - see [39], [A4/11].

3.6. It is submitted that it clear from the authorities that the essential requirement of a decision is that its terms should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the decision. As stated in Ground of Appeal 1, it is submitted that the PCSC did not provide a properly reasoned decision.

3.7. Ground of Appeal 1i)

*It failed properly to explain why it found the issues “factually accurate”.*

This will be dealt with later, in Ground of Appeal 2.

3.8. Ground of appeal 1ii)

*It failed properly to explain why the issues it found proved amounted to unsatisfactory professional conduct. It stated that the conduct “fell well below the standard of conduct to be expected of a competent and reputable solicitor; that the public would not have been impressed by the stance adopted by the solicitor or the terms of some of the correspondence issued by him and that the conduct clearly met the test for unsatisfactory professional conduct.”*

- *It did not explain what it meant by “the stance adopted by the solicitor”.*

In the Answers to the Grounds of Appeal, it is said that “the stance adopted” refers to the appellant’s refusal to pay sums due to the beneficiaries unless and until such time as they accepted his view on the fees. This relates to issue 3. It is submitted that it is not clearly stated at page 6 of the decision that this is what is being referred to [Production 65/ 6].

- *It did not specify what items of correspondence it took into account.*

This refers to the statement at page 6 of the decision that the public would not have been impressed by the stance adopted by the solicitor or the terms of some of the correspondence issued by him [P65/ 6]. The decision does not specify the terms of the correspondence referred to, to enable a clear understanding of why the public would not have been impressed by it.

- *It did not explain why the conduct “clearly met the test for unsatisfactory professional conduct”. All of the issues except issue 3 relate to alleged failures to communicate effectively with the complainer over fees. Communication over fees is properly regarded as a professional service, rather than an issue of professional conduct.*



In the Answers to the Grounds of Appeal, it is said that the Council set out clearly why the conduct amounted to UPC. In its decision, the PCSC simply states out that the conduct fell below the standard expected of a competent and reputable solicitor, the wording of section 46 of the 2007 Act [P65/ 6].

It is appreciated that the PSCS required to evaluate whether the conduct amounted to UPC. Given that all but issue 3 relate to alleged failures in effective communication, it is not clearly explained why the issues found proved amounted to conduct below the standard expected, rather than an IPS. As discussed in *Law, Practice and Conduct for Solicitors* by Paterson & Ritchie (2<sup>nd</sup> edition) at paragraph 1.31.05 [A12/1], guidance on what is likely to be regarded as IPS is likely to be found in the Law Society Standards of Service, and the most frequent forms of IPS include failure to communicate. The Law Society's Standards of Service has communication as one of the four standards of service specified, and lists letters of engagement and costs as aspects of communication [A13/ 2].

It is submitted that there is no clear explanation of why what is alleged amounted to UPC.

### 3.9. Ground of appeal 1iii)

*It failed properly to explain its approach in deciding on the discretionary sanctions of a fine of £1,000 and a compensation award of £2,500.*

- *It made brief reference to the Guidelines but did not explain its approach or what factors it took into account when determining that the conduct was significant and merited a fine of £1,000.*

At page 6 of its decision, the PCSC stated that it considered having regard to the guidelines that the UPC was significant and determined that there should be a fine of £1,000 [P65/ 6]. That is a simple assertion, without explanation. There is no indication of whether the PSCS applied the three part process set out in the Guidelines [P53/ 50- 52]. There are inadequate reasons given for this decision.

- *It made no express reference to the Guidelines and did not explain what evidence it relied on to conclude that the complainer suffered a significant level of inconvenience and distress, and that the level of distress just fell short of being exceptional.*

The PSCS's decision to make an order for compensation is stated briefly. There is no proper reasoning demonstrated [P65/ 6].



**4. Ground of Appeal 2- that the Council erred in finding that issues 2- 7 were factually accurate**

4.1. Ground of Appeal 2i) issue 2

*It failed to have regard to and give due weight to the fact that the terms of business letter which related to the executry was issued to the complainer (as residuary beneficiary) on 11 September 2015, in response to his query over fees. Thereafter there was correspondence which explained the basis on which the executry fees were calculated and which showed a modification to the fees charged. There was no evidence that the complainer had sought clarification of the basis on which fees would be charged in advance of the fees being prepared.*

The letter of engagement dated 18 November 2014 [P1] was provided to the complainer on 11 September 2015. As that letter made clear on page 2, the list of potential work was not exhaustive. The appellant responded to this issue in his letter dated 30 January 2017 [P47/3, 47/6- 47/8 including reference to [Ms B's] report P46/ 2- 4. [Ms B's] breakdown of the fees was provided to the complainer [P10, 14 and 15].

4.2. Ground of Appeal 2ii) issue 3

*It failed to have regard to and give due weight to the appellant's position that he retained funds pending resolution of the dispute over fees, that significant payments to account had already been made to the residuary beneficiaries, and that he did not anticipate the extensive delay in having the matter resolved. There was no suggestion that the complainer required funds immediately. The appellant reasonably suggested resolving the dispute by having the account independently assessed.*

The appellant responded to this issue in his letter dated 30 January 2017 [P47/3, 47/8-9]. After the PCSC's decision, he responded again in his letter dated 13 August 2018 [P57/5] explaining that he had not anticipated such a delay in the finalisation of the fees. More recently, the appellant paid out all monies to the beneficiaries [P58]. He had not 'refused to pay out' until payment was agreed.

4.3. Ground of Appeal 2iii) issue 4

*It failed to have regard to and give due weight to the terms of the emails dated 6 November 2015 and 27 November 2015. These emails did not state that the table of fees applied by default.*

Reference is made to the emails of 6 November 2015 [P26] and 27 November 2015 [P34] and to the appellant's response to this issue on 30 January 2017 [P47/ 9- 10]. It is clear from the correspondence referred that there was no assertion made that the 2004 table of fees applied by default. Rather, the correspondence explained that the (abolished) table of fees was used as a reference when assessing the fee. This was the conclusion in the Investigation Report, where it was recommended that no further action was taken in relation to this issue as the facts were not proved [P53/ 40 and 53/ 45].

#### 4.4. Ground of Appeal 2iv) issue 5

*Reference is made to Ground of Appeal 2i) above. The Council failed to have regard to and give due weight to the explanation in correspondence (particularly emails 11 September, 6 November and 27 November 2015) that the former Law Society guidelines were used as a method of calculating a reasonable fee and for that reason were included in the terms of business letter, that it was a matter of practice to so refer to such guidelines, that the law accountant prepared the executry account on that basis, and that the appellant relied on her in the preparation of the account.*

Reference is made to the emails of 10 and 11 September [P13 and 15], 6 November [P26] and 27 November 2015 [P34]. The appellant responded to this issue on 30 January 2017 [P47/10- 11]. Although the Law Society Guidance (December 2011) [A10/ 11] stated that it was not appropriate to refer to fees 'recommended by the Society', the Terms of Engagement dated 18 November 2014 [P1] did not do so. As explained by [Ms B], it was widely accepted practice in 2014/ 2015 to prepare fees with reference to the former Table of Fees, as a framework for a fair and reasonable fee for the work done (her affidavit P66; her report P46/2- 4; her breakdown of fees P14). [Ms B's] affidavit explains her professional expertise and experience (paragraphs 3- 5 at P66/ 1-2 ), her involvement in the feeing of this case (paragraphs 7 at P66/ 2), her understanding of reference to Law Society Guidelines and that the practice of other firms (paragraphs 10 at P66/ 2), her role as a law accountant (paragraph 11 at P66/ 2), how she calculated a fair and reasonable fee (paragraph 12 at P66/ 2- 3), and the normal practice of referring to the Table of Fees (paragraph 18 at P66/ 4). Reference is also made to the submissions in relation to Ground of Appeal 2iii) above.

#### 4.5. Ground of Appeal 2v) issues 6 and 7 in relation to the conveyancing for the sale of property

*It failed to have regard to and give due weight to the explanation in correspondence (particularly emails 11 September, 6 November and 27 November 2015) in response to the*



*query over fees, that the former Law Society guidelines were used as a method of calculating a reasonable fee and for that reason were included in the terms of business letter, that it was a matter of practice to so refer to the guidelines and to calculate fees on that basis, that the law accountant prepared the account for the sale/conveyancing on that basis, and that the appellant relied on her in the preparation of the account. There was no evidence that the complainer sought clarification of the basis on which fees would be charged in advance of the fees being prepared.*

Reference is made to the submissions above in relation to Ground of Appeal 2iv). Reference is also made to the appellant's response dated 30 January 2017 [P 47/ 11- 13].

## **5. Ground of Appeal 3- error in finding that the conduct amounted to UPC**

### 5.1. Ground of Appeal 3i)

*It erroneously assumed that some work may have been carried out by paralegals or non-qualified staff, with the fully hourly rate being applied in the accounts. [Ms C] referred to in the Complaints Investigator's report is a qualified solicitor.*

Reference is made to the Investigation Report (P53/ 36) where it is suggested that work done on the executry was not carried out by a solicitor. In the PCSC decision, reference was made to concern that work may have been carried out by paralegals or other unqualified staff but the fully hourly rate had been applied [P65/ 6]. In fact, the individual referred to is indeed a qualified solicitor [P64].

### 5.2. Ground of appeal 3ii)

*It failed to have regard to and give due weight to the evidence that the practice adopted by the appellant was one followed by other firms of solicitors, to the correspondence with the complainer once the dispute over fees arose, and to the early suggestion to resolve the matter by having the account assessed by an independent third party.*

Reference is made to the submissions above in relation to Grounds of Appeal 2iii), iv) and v). Reference is also made to the correspondence with the complainer from August 2015 (see P8-42) and to the appellant's suggestion in September 2015 to have the account assessed by an independent third party [P17].

When UPC is being considered, it is necessary to consider the standard of conduct which could reasonably be expected of a competent and reputable solicitor. The fact that the practice



adopted by the appellant was one commonly followed by other firms of solicitors is relevant, when considering that standard.

Also relevant is the terms of Practice Rule B4.2 [A11/ 11] and the Law Society Guidance (October 2011) relating to Practice Rule B4 [A10/ 08]. This Guidance states that an occasional failure to send the information required, or sending information that does not fully comply with the rule, is likely to be dealt with in the first instance as a matter of professional practice guidance, not professional misconduct. Similar wording appeared in the Guidance to the Solicitors (Scotland) (Client Communication) Practice Rules 2005 [P60/4- 5], contained in the Scottish Law Directory Fees Supplement 2014. This Guidance to the Solicitors (Scotland) (Client Communication) Practice Rules 2005 is reproduced in the Scottish Law Directory Fees Supplements for the following years including 2015 and 2018 (P61 and 62). The 2005 Rules and the relative Guidance were in fact revoked when the 2011 Practice Rules came into effect in November 2011 (Rule 6.1 and Schedule 3) [A11/ 5 and A11/12], which makes the continued inclusion of the 2005 Rules and Guidance in the Scottish Law Directory Fees Supplement surprising.

Practice Rule 4 [A11/ 5] states that failure to comply with the rules may be treated as professional misconduct or UPC. That has to be understood, however, by reference to the Law Society Guidance (October 2011) already referred to in relation to Practice Rule B4, which states that an occasional failure to send the information required, or sending information that does not fully comply with the rule, is likely to be dealt with in the first instance as a matter of professional practice guidance, not professional misconduct. This was not argued before the PCSC.

There were no previous findings of UPC or Professional Misconduct against the appellant [see P63]. There was no evidence before the PCSC that there were repeated complaints against the appellant in respect of failure to send the necessary information to comply with Practice Rule B4.

In the circumstances, it was unreasonable of the PCSC to determine that what occurred amounted to UPC.

### 5.3. Ground of appeal 3iii)

*It failed to have regard to and give due weight to the lack of any criticism over the standard of the work carried out.*

Reference is made to the complainer's letter dated 9 February 2017 [P49/1] and the appellant's reference to the lack of any criticism over the standard of the work carried out in his letters of 30 January 2017 [P47/ 1], 5 June 2018 [P54/ 1] and 13 August 2018 [P57/ 2]. This is relevant, as it makes clear that the criticism is of the communication over the level of fees to be charged not the quality of the work. The PCSC did not take due account of this.

#### 5.4. Ground of appeal 3iv)

*Reference is made to Ground of Appeal 1ii) above.*

The submissions made above in relation to Ground of Appeal 1ii) are referred to.

Communication over fees is properly regarded as matter of service, not an issue of professional conduct. Reference is also made to the PCSC's decision, where it suggested a method for re-assessment of the fees payable and also directed that its determination should be brought to the notice of the Professional Practice Committee because of the potential issues of the proper basis of charging of fees and of the court auditors' practice in assessing fees [P65/ 7]. It is submitted that this supports the appellant's position that really this dispute has been over the level of fees payable, not conduct. Where there is a complaint in relation to communication over fees, this is not a conduct matter.

### **6. Ground of Appeal 4- error in decision to order payment of fine and compensation award**

- 6.1. The PCSC had a discretion as to whether or not to apply any of the sanctions set out in section 47ZA (4) of the 2007 Act. The Guidance (see P53/47- 54) explains that the primary purpose of a sanction was not to be punitive but there was a need to maintain confidence in the profession [P53/48]. It sets out the principles by which the PCSC were to apply sanctions and the three-step process to be followed when deciding whether or not to impose a fine [P53/ 49- 52].
- 6.2. The process which the PCSC followed in determining to impose the sanction of a fine is not clearly articulated in its decision. Reference is made to the submission in relation to Ground of Appeal 1iii) above. The fine of £1,000 was not a proportionate outcome in the public interest, and the PCSC did not explain its reasons both in ordering a fine or in fixing it at £1,000.
- 6.3. The Guidance states that fines are a method of deterring UPC by those directed to pay them and others, and that fines should be a proportionate outcome in the public interest. Had the



correct approach been followed, the PCSC should have considered carefully the seriousness of the UPC. Relevant to that was the complainer's satisfaction with the work, and his statement that he did not seek to have the appellant punished (his letter dated 9 February 2017, P49/3 and 49/8). The PCSC did not explain why it regarded the UPC as 'significant'. It is submitted that it should not have been regarded as 'significant'.

- 6.4. The PCSC was required to consider adjusting the basis penalty for aggravating or mitigating circumstances. It did not appear to take any account of the appellant's clean disciplinary record, his co-operation in the investigation or the fact that his reference to the Table of Fees was common practice among solicitors at the time. Had it done so, the basic penalty would have been adjusted downwards.
- 6.5. The process which the PSCS followed in determining to impose the sanction of a compensation order was not clearly articulated in its decision. It required to consider what losses were directly attributable to the UPC and any vouching of such losses, and what if any inconvenience and distress had been suffered by the complainer [P53/ 52- 53]. The PCSC appears to have made the order for inconvenience and distress only, and stated that a significant level of inconvenience and distress had been occasioned, just short of exceptional. There was no evidence of distress on the part of the complainer, far less distress which was just short of exceptional. The PCSC's order for compensation of £2,500 was unreasonable and excessive.

## **Conclusion**

On behalf of the appellant, I invite you in terms of section 53ZB(1) of the 1980 Act to quash the determination and censure, and to quash the direction that a fine of £1,000 and a compensation award of £2,500 be paid.

In the event that you confirm the determination and censure, I invite you to quash the direction, or at least vary it downwards, in terms of section 53ZB(1)(c).

In answer to a question from a panel member, Ms Docherty confirmed that Ms C, although qualified, was not on the Roll of Solicitors at the time the work was completed. Ms Docherty was asked whether the average person would understand that a reference in the terms of business letter to fees being charged "in terms of Law Society guidelines" would mean charges for the disputed items. Ms



Docherty said that the explanation given by the law accountant and the Appellant was that these tables are used only as a source of reference. Fees would be issued with regard to the table.

## **SUBMISSIONS FOR THE FIRST RESPONDENT**

Mr Reid made oral submissions to the Tribunal based on written submissions which were as follows:-

### Introduction

1. This is an Appeal against a Decision of the Law Society of Scotland Professional Conduct Sub Committee dated 28 June 2018.

In that Decision the PCSC made a finding of Unsatisfactory Professional Conduct (Appellant's Production 65).

2. Unsatisfactory Professional Conduct is defined in the Legal Profession and Legal Aid (Scotland) Act 2007 Section 46 and in particular at Section 46(1)(d) as

"In respects a practitioner who is a Solicitor, professional conduct which is not of the standard which could reasonably be expected of a competent and reputable Solicitor." (Appellant's Authority 9/3).

3. That definition can be contrasted with the definition of inadequate professional services contained within Section 46(1)(b) to the effect "As respects a practitioner who is a Solicitor, professional services which are in any respect not of the quality which could reasonably be expected of a competent Solicitor."

4. The Law Society's powers, acting through its Council, in respect of Unsatisfactory Professional Conduct, can be found in the Solicitors (Scotland) Act 1980 Section 42 ZA (AA 6/1 and 6/2).

5. The Definition and Approach can be seen in Hood v Council of the Law Society of Scotland 2017 SC386 (AA 5).

In refusing the Appeal in that particular case the views of the Court can be seen in summary on page 387 (AA 5/2).

The Legal analysis behind these views can be seen on pages 392 to 394 (AA 5/7 to 5/9).

### Professional Conduct Sub Committee Decision

6. The Decision is AP65.
7. AP65/2 lists the papers which were considered by the Sub Committee. These are available as AP53 to AP56 (inclusive).

8. AP53 is the Report compiled on behalf of the Law Society and in that Report 53/4 to 53/19 sets out the extensive communications.
9. AP54 is a detailed eight page letter from the Appellant.
10. Seven Issues were considered of which Issues 2 to 7 (inclusive) were held to amount to Unsatisfactory Professional Conduct at 65/6.

The Issues themselves are set out at 65/1 and 65/2.

#### Letters of Engagement

11. Essentially the entire matter revolves round the Letters of Engagement.
12. AP1 is a Letter of Engagement dated 18.11.14 in respect of the Executry.  
  
As can be seen it refers to fees and outlays being carried out in terms of Law Society of Scotland guidelines.
13. At the material time there were no Guidelines. AP4 is a Table of Fees for General Business but this Table was abolished as at 1 July 2005 ie, more than nine years earlier. There were accordingly no such "guidelines" as at November 2014.
14. AP2 is a Letter of Engagement of 5 January 2015 in respect of a conveyancing transaction. Again this Letter of Engagement refers to Law Society of Scotland guidelines.
15. The reference to non-existent guidelines is completely inappropriate.  
  
There is nothing to prevent a Solicitor seeking to charge, for example, posts and incidents, total investigation and responsibility fee or commission if any or all are properly set out in a Letter of Engagement.
16. AA10 is an Extract from the Law Society of Scotland guidance of December 2011.  
  
At 10/7 Guidance is provided on fees. This makes it clear that there are no Law Society Tables of Fees and it is not appropriate to refer to fees recommended by the Society.  
  
The Guidance points out that if commission is to be charged that should be included ie, included in the appropriate Letter of Engagement.
17. AP66 is the Affidavit of [Ms B].  
  
It would appear from the Affidavit that [Ms B] considered it was appropriate to fee using non-applicable guidelines.  
  
What she chose to do and apply is however completely irrelevant in considering what the Letter of Engagement entitled the Appellant to charge.
18. AP9 is described as an initial breakdown of the assessed Accounts.



At 9/5 can be seen fee entries in respect of "post and incidents 10%", "commission allowed as per terms and conditions" and "total investigation and responsibility".

19. AP11 is an email from a beneficiary [Mr A]. Not surprisingly [Mr A] queries the two sets of fees and makes particular reference to "investigation and responsibility fees" and "posts and incidents" pointing out that neither is set out in the Terms of Business Letter.
20. AP14 is an email of 11 September 2015 from [Ms B] with an amended breakdown of the assessed Accounts.

14/1 sets out the position in respect of Responsibility and Commission both with reference to the "General Table of Fees in 2005" although there is also reference to "the dissolution of the General Table of Fees in 2005."

The particular items already discussed can again be seen on 14/7.

21. There does not appear to be any question of anyone stopping to think about the validity of these charges despite [Mr A's] queries.

The position as per the Auditor's explanation in AP14 is simply repeated to [Mr A] in AP15 an email of 11 September 2015.

22. [Mr A] responds as can be seen in AP16.

He makes specific reference to the fact that none of the three fee heads are in the Letter of Engagement or as he says, the Terms of Business.

He then refers the firm to the 2011 Rules and the Guidance to Rule B4. That is the reference already referred to in AA10 at 10/7.

23. The Report which is AP53 makes reference at 53/36 and 53/37 to Paterson and Ritchie.

Paterson and Ritchie make it clear that fees to be charged over and above the hourly rate must be expressly stated either in terms of the business letter or another document which is clearly referred to in the terms of the business letter. They go on to say that items such as posts and incidents, commission and investigation and responsibility can't be charged unless they are stated within the Letter or document.

Again it is made clear that while firms can refer to their own separate Table of Fees and state these charges in the Letter of Engagement, no Table should be described as "the Law Society Table".

24. Interestingly Paterson and Ritchie also point out that the Society of Law Accountants have made it clear to their Members that they wouldn't be entitled to refer to any external document other than the Terms of Engagement or a document setting out the basis for charging.

Again it is said that if there is no mention of posts and incidents or commission then these could not be included by a Law Accountant.



25. Thereafter, as can be seen from the Appellant's Inventory, there is about three and a half months of email correspondence with the Appellant maintaining the same position ie, that he is entitled to charge for these heads.

#### Grounds of Appeal

26. The first ground is to the effect that the Council erred in law in failing to provide a properly reasoned decision. Several factors are set out in support of this claim. It is not accepted that there was any error in law.

27. There was no failure to explain why the Issues were found to be "factually accurate".

The Report AP53 set out the email history. As already mentioned the Appellant sent a detailed letter of 5 June 2018 AP54.

That letter challenged the views expressed in the Report, not the factual accuracy of, for example, the email exchanges.

28. There was no failure to explain why the Issues amounted to Unsatisfactory Professional Conduct.

The "stance adopted by the Solicitor" was and is absolutely clear from the email correspondence.

29. The Sub Committee did not require to specify exactly what correspondence it took into account. As can be seen from the emails virtually everyone was effectively stating the same view ie, that the Appellant was entitled to apply charges under the three particular heads.

30. It is said that communication over fees is properly regarded as professional service rather than an issue of professional conduct.

This is incorrect and displays a failure to understand the true position in this particular matter.

As narrated in the Issues, what was set out was a failure to communicate effectively. The Appellant was communicating but certainly not effectively. He was maintaining an untenable position.

31. The second ground is to the effect that the Council erred in making certain findings on the Issues before it. This is not accepted.

32. Whether or not [Mr A] had sought clarification of the fees which would be charged in advance of the fees being prepared is neither here nor there.

The basis of the complaint was that the fees charged did not align with the Terms of Business letter. There was nothing for [Mr A] to clarify. The Committee correctly gave no regard nor weight to the absence of any such queries.

33. The Committee had regard to and gave due weight to the Appellant's position that he had retained funds pending the resolution of the dispute over fees. That was the basis of this

particular Issue. The Committee found that the Appellant's actions amounted to Unsatisfactory Professional Conduct against a background where he had withheld £46,000 pending the resolution of a dispute over fees totalling £11,621.80.

34. Payments to beneficiaries, the length of delay anticipated by the Appellant and [Mr A's] immediate need for funds were irrelevant considerations. They were properly not taken into account by the Committee.

The Appellant's suggestion for a resolution didn't entitle the withholding of client's funds in the circumstances. He failed to act in the client's best interests.

35. In respect of Issue 4 the emails of 6 November 2015 (AP26) and 27 November 2015 (AP34) may not have stated in so many terms that the Table of Fees applied by default. However that is effectively what is being said in these emails. The Table had been abolished but the Appellant was using it by default.
36. Issue 5 was and is factually accurate. Previous submissions referred to why it was completely inappropriate to refer to the guidelines and to use them. The Letters of Engagement/Terms of Business made no reference to the three particular heads of charging. Even if it was a matter of practice to refer to the guidelines it was a completely incorrect practice.

Reliance on the Law Accountant is irrelevant. The complaint was in respect of the Appellant's failure to communicate effectively and comply with the Law Society Practice Rules. The Appellant had a duty to ensure his Terms of Business letter complied with Law Society Rules.

37. The guidelines had been abolished, they didn't exist. There was no attempt to be specific and issue a Letter of Engagement/Terms of Business providing for example that commissions, etc. would be charged.
38. If it was a matter of practice it was a very poor one. It referred to guidelines which had been abolished and neither Letter of Engagement attempted to even say when these guidelines existed.

It was up to the Appellant to issue a proper Letter of Engagement, not the Accountant.

39. The Committee was entitled to consider that some work may have been carried out by Paralegals or non-qualified staff but in any event considered that the Auditor may have misled the Appellant.
40. The practice of other firms, even if that practice was the same as that of the Appellant, does not mean that the practice was acceptable. The Committee gave due weight and regard to the correspondence between the Appellant and [Mr A] following the dispute arising.
41. The standard of work was irrelevant. The complaint was related to the Appellant's conduct in the circumstances and not his level of service.



### Fine and Compensation

42. The Report AP53 sets out the position and sanctions at 53/47 to 53/53.
43. The Committee considered the position at 65/6.
44. In respect of the fine the Committee took the view that what had occurred was at the higher end of the scale.

This was not surprising. There was no authority to take payment of the charges levied under the three particular heads.

Having done that the Appellant then repeatedly failed to consider his conduct even after [Mr A] had referred him to the 2011 Guidance.

45. Compensation is considered by the Committee at 65/6 and 65/7.
46. They took the view there was a significant level of inconvenience and distress.

What is several months of emailing and banging your head off a brick wall, if not significant?

47. In all the circumstances the Committee were entitled to impose a fine of £1,000 and a compensation award of £2,500.

There was no requirement to make express reference to the Guidelines. It was quite clear from the email correspondence that [Mr A] was "getting nowhere" against a background where there was no entitlement to charge fees under the relevant heads.

### Conclusions

48. The Appeal should be refused and the Committee Decision upheld.
49. The conduct meets the 2007 Act Section 46 definition.
50. As outlined in Hood the Committee concentrated on what a reputable and competent Solicitor ought to have done in respect of the Letters of Engagement.
51. It is quite clear that the Committee had sufficient information before it and took all that information into account.

The additional documents available here simply reinforce the Committee Decision.

### **DECISION**

The Second Respondent was one of two residuary beneficiaries of an estate. The Appellant was the executor and acted as solicitor. The Second Respondent made a complaint about the Appellant which was investigated and determined by the First Respondent. There were seven heads of complaint. The

first five related to the way the Appellant had acted and communicated in relation to the executry. The last two related to the Appellant's communication concerning the sale of a heritable property. The heads of complaint were as follows:

1. *Mr Hodge failed to communicate effectively with me as, having been instructed in relation to this matter on 15 November 2014, he delayed to issue me with a terms of business letter for the executry work involved until 11 September 2015.*
2. *Mr Hodge failed to communicate effectively with me as, having issued me with terms of business letters dated 18 November 2014 for the work involved in the executry of the estate which set out the basis upon which the fees and costs would be charged, he included in his fee additional costs, such as commission, posts and incidents and an investigation and responsibility fee which had not been referred to in the terms of business letter.*
3. *Mr Hodge failed to act in my best interests as he refused to pay out significant excess funds from the estate until such time as payment of his fee had been agreed.*
4. *Mr Hodge failed to communicate effectively with me in that he has made repeated assertions, notably in email correspondence dated 6 November 2015 and 27 November 2015 that the 2004 general table of fees should apply by default to this matter, whereas they were abolished in 2006.*
5. *Mr Hodge failed to communicate effectively with me as the terms of business letter dated 18 November 2014 made reference to charges being made according to LSS Guidelines whereas there are no current LSS guidelines which govern fee arrangements between solicitors and clients.*
6. *Mr Hodge and/or Wallace Hodge & Company Limited failed to communicate effectively with me as, having issued me with terms of business letter dated 5 January 2015 for the work involved in the conveyancing for the sale of the heritable property forming part of the estate which set out the basis upon which the fees and costs would be charged, he included in his fee additional costs such as commission, posts and incidents and an investigation and responsibility fee which had not been referred to in the terms of business letter.*
7. *Mr Hodge and/or Wallace Hodge & Company Limited failed to communicate effectively with me as the terms of business letter dated 5 January 2015 made reference to charges being made according to LSS Guidelines whereas there are no current LSS guidelines which govern fee arrangements between solicitors and clients.*



Head of complaint 1 was not upheld by the First Respondents' Professional Conduct Sub Committee ("the Sub Committee") because the guideline relating to provision of copies of terms of business letters to beneficiaries did not come into force until October 2015. The Sub Committee made findings of unsatisfactory professional conduct in relation to the remaining six heads of complaint. Unsatisfactory professional conduct by solicitors is professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor (Section 46 of the Legal Profession and Legal Aid (Scotland) Act 2007). Unsatisfactory professional conduct lies on a spectrum between inadequate professional services and professional misconduct (Hood v Council of the Law Society of Scotland 2017 S.C. 21). The Sub Committee directed the Appellant to pay a fine and awarded compensation to the Second Respondent (Section 42ZA(1) and (4) Solicitors (Scotland) Act 1980).

The Appellant appealed to the Tribunal against both the determination and direction of the Sub Committee (under Section 42ZA(9) of the Solicitors (Scotland) Act 1980). The Tribunal's powers in relation to these appeals are found in Section 53ZB(1) of the Solicitors (Scotland) Act 1980. The Tribunal can quash or confirm the determination. If it quashes the determination it shall quash the censure accompanying the determination. It can quash, confirm or vary the direction being appealed against. It can direct the solicitor to undertake education or training. It can fine the solicitor an amount not exceeding £2,000. Where it considers the complainer has been directly affected by the conduct, it can direct the solicitor to pay compensation not exceeding £5,000 for loss, inconvenience or distress resulting from the conduct.

When considering an appeal under section 42ZA of the Solicitors (Scotland) Act 1980, the Tribunal is slow to interfere with the decision of the Sub Committee which is itself a specialist professional body. It generally follows the principles laid down in Hood v Council of the Law Society of Scotland 2017 S.C. 21 and examines the Sub Committee's decision to ascertain whether there has been an error of law, a finding for which there is no evidence or which is contradictory of the evidence, or where there has been a fundamental error in approach and the decision reached was one which no reasonable committee could properly reach.

The Appellant lodged additional material before the Tribunal to that which was available to the Sub Committee. The Tribunal had regard to the terms of the Joint Minute which recorded the parties' agreement that all copy documents lodged were to be held as equivalent to the originals and that all documents and copy documents lodged may be referred to and treated as evidence without the

necessity of being spoken to by a witness. The Tribunal also received the affidavit of Ms B (Production 66 in the Appellant's List of Documents). The First Respondent had no objection to its use in the proceedings. The Tribunal decided that it should have regard to the affidavit and all productions lodged in the parties' inventories of productions when considering the Appeal. It recognised that the appropriate standard of proof to be employed in appeals in relation to matters of fact was the civil standard.

The first ground of appeal was that the Sub Committee had erred in law by failing to provide a properly reasoned decision. Ground 1(i) referred to the Sub Committee's failure to explain why it found the issues "factually accurate". The Tribunal noted that the Sub Committee made a decision on the papers before it. There was no requirement as there would be following oral evidence to explain why one set of witnesses was preferred over another. Although there was voluminous correspondence between the Appellant and the First Respondent, it was very clear what the dispute was about, namely the use of the Table of Fees and whether that was made clear in the Appellant's terms of business letter. There was no disagreement on any factual issues. The Tribunal found that the Sub Committee had acted reasonably when it found the issues factually accurate. There was no error of law. The Tribunal refused ground of appeal 1(i).

Ground 1(ii) covered the Sub Committee's failure to justify the finding of unsatisfactory professional conduct. The Tribunal considered that it was clear from the determination that "the stance adopted by the solicitor" referred to his attitude towards the Second Respondent and his insistence that he had done nothing wrong, coupled with retention of money until the fees were paid. It was recorded that the Sub Committee had considered all the correspondence. The papers considered by the Sub Committee are listed on page two of the determination. The Case Investigator's report and supplementary report (Productions 53 and 56 of the Inventory of Productions for the Appellant) lay out in detail the correspondence both between the Appellant and the Second Respondent, and the Appellant and the First Respondent. While the correspondence is lengthy, the issue is in short compass, namely the use of the Table of Fees and whether that was made clear in the Appellant's terms of business letter. Having been provided with information that he was incorrect in his analysis of the situation, the Appellant continued to challenge the Second Respondent despite his untenable position.



The Tribunal considered that the Sub Committee's reasons given in paragraph three of page six of the determination are sufficient to justify the finding of unsatisfactory professional conduct. In that paragraph, the Sub Committee notes that,

*"It did not appear to the Sub Committee that the solicitor was being actively dishonest and indeed it appeared that the solicitor had genuinely convinced himself that he was correct. It also took into account the fact that the fees had been prepared by an independent party who had also clearly misunderstood the legal effect of the Terms of Business Letters. The Sub Committee were very concerned that a court auditor considered it appropriate to prepare accounts on a basis for which there was no contractual entitlement and used tables and guidelines that had been expressly abolished."*

The Sub Committee noted that the conduct was not deliberate and therefore could not amount to professional misconduct but was satisfied that it fell well below the standard of conduct to be expected of a competent and reputable solicitor and therefore constituted unsatisfactory professional conduct. These reasons set out succinctly and clearly the Sub Committee's justification for making a finding of unsatisfactory professional conduct in what appeared to the Tribunal to be a straightforward case. This was not a case where the Appellant had produced various terms of business letters from other firms in similar terms and the Sub Committee had to explain its reasons for making a finding of unsatisfactory professional conduct against the weight of that evidence. Although references were made before the Sub Committee and Tribunal that other businesses operate in this way, no examples were provided to either body. The Tribunal also observes that just because some other solicitors may follow a particular practice, this does not necessarily make that practice acceptable. The terms of business letter is the contractual basis of the relationship between solicitor and client. The Tribunal also had regard to paragraph 4.03.05 of Paterson and Ritchie's "Law, Practice and Conduct for Solicitors" (2<sup>nd</sup> Edition). Paterson and Ritchie make reference to an executor who challenged fees which included commission and noted that,

*"The letter of engagement referred to "the following fee scale" but this did not include a rate for commission. It would not therefore be possible to charge separately for commission unless the firm and the client subsequently agreed such a rate. The inclusion of undefined "commissions" in a letter of engagement adds nothing, nor does "documentation...trouble and responsibility". If the only figures included in or sent out with the letter were hourly rates, the rest of the work will be deemed to be included in those rates. Saying that the file will be assessed by a law accountant does not of*



*itself present any difficulty. However, the Society of Law Accountants have made it clear that their members would not be entitled to refer to any external document other than the terms of engagement or a document referred to within those terms of engagement for a basis of charge. Accordingly if the only basis of charge which the firm has formally intimated is an hourly rate for various staff members, with no mention of telephone calls, posts and incidents, nor indeed commission, separate charges for these could not be included by a law accountant.”*

The reference to “Law Society of Scotland guidelines” in the Appellant’s terms of business letter was insufficient to incorporate the abolished table to fees into the fee charging agreement between the Appellant and the Second Respondent.

The Second Respondent requested that payment be made to him and the Appellant’s assistant responded that *“The final payments will be transferred once matters are resolved and you have signed and returned the principal Form of Receipt”* (Production 12, Inventory of Productions for the Appellant). The Appellant’s course of action in retaining £46,000 over a dispute of fees amounting to less than £12,000 is clearly conduct which falls short of that of a competent and reputable solicitor. Little additional justification is required in terms of reasoning. The Tribunal rejected the suggestion that communication over fees is properly regarded as a professional service, rather than an issue of professional conduct. Communication issues can be found across the spectrum of solicitors’ wrongdoing. Cases turn on their own facts and circumstances. Sometimes minor failures will not constitute unsatisfactory professional conduct. However, communication about fees is of great importance. The Appellant’s terms of business were unclear and he did not promptly remedy the situation when the matter was drawn to his attention, although the Tribunal was pleased to note that the beneficiaries had been paid on the advice of Counsel. The Tribunal refused ground of appeal 1(ii).

Ground 1(iii) related to an absence of reasons for choosing the level of fine and compensation. The level of fine was mid-range of those available. More detail on the reasoning of how the Sub Committee reached the figure of £1,000 would have been preferable. However, the conduct was serious within the context of unsatisfactory conduct. The Sub Committee explained that a substantial fine was therefore appropriate. This was sufficient justification of a fine within the “significant” category in the Complainers’ Indicative Sanctions Guidance (Production 53/51 of the Appellant’s Inventory of Productions). However, the Tribunal had concerns about the level of compensation to be paid in this case. The Sub Committee noted that a significant level of inconvenience and distress



had been caused to the Second Respondent and “*that level of distress only just fell short of being exceptional.*” The Tribunal considered that insufficient reasons were given to support this finding and therefore the Sub Committee had fallen into an error of law. A degree of inconvenience could be inferred from the length of time the complaint took to resolve, the amount of correspondence and the fact the Second Respondent was deprived of funds. It took persistence for the Second Respondent to get anywhere with his complaint. However, the Tribunal could find no evidence of distress. No reasonable Tribunal would therefore have made an award this high on the facts before it. The Tribunal considered that an award of £1,500 was more appropriate in the circumstances. This lower award reflected that there was no evidence of distress, but there was a significant degree of inconvenience involved. The Tribunal therefore varied the direction that the Appellant pay compensation of £2,500 by reducing the award to £1,500.

The second ground of appeal was that the Sub Committee had erred in finding that the terms of issues 2-7 were factually accurate. The Tribunal refused this ground of appeal. In relation to Ground 2(i) the Sub Committee gave regard and weight to the terms of the business letter. Before the fee was issued, the Second Respondent was unable to clarify the basis upon which fees would be charged because the terms of business letter made no reference to the three heads of fees which were contested, namely commission, investigation and responsibility, and posts and incidents. The residuary beneficiary had an interest in the fee as it would effect the extent of the residue of the estate. Feeing should be clear. The Appellant should have ensured that the terms of business letter accurately reflected the way fees would be charged as it is the contractual basis for taking fees.

In relation to Ground 2(ii), the Sub Committee had regard to the Appellant’s position which was repeatedly detailed in the correspondence referred to in its report. While retention of some funds pending resolution of a dispute over fees may in some circumstances be appropriate, it was not justified in this case because the sum retained was so much greater than the disputed fees. The fact that significant payments to account were made, that the Second Respondent anticipated the issue would be resolved swiftly or that the Second Respondent did not need the funds are all irrelevant considerations.

In relation to Ground 2(iii), the Sub Committee notes that it had regard to the Report of 15 May 2018. The author of that Report considered the solicitor’s files and included a summary of much of the correspondence within the report, including the emails of 6 and 27 November 2015 (Productions 26 and 34 of the Appellant’s Inventory of Productions). The Tribunal also considered those emails.

While it is true that there is no reference to the word “default” in either of those emails, as a matter of fact, the 2004 Table of Fees was applied by default. The terms of business letter noted that *“our fees and outlays for this transaction will be carried out in terms of Law Society of Scotland guidelines”*. There is no reference to the Table of Fees. The application of the Table of Fees was therefore not stipulated to be the basis of the charge. Ms B interpreted this as a reference to the Table of Fees. However, the Tribunal considered that this interpretation was unjustified. The basis of the charge was not sufficiently clear to a client or beneficiary in the Second Respondent’s position. If the Appellant had wanted the Table to Fees to apply, he should have included it in the terms of business letter.

In relation to ground 2(iv), the Tribunal considered for the reasons given above that the Sub Committee did have regard to the terms of the correspondence, the case investigator’s report and the Appellant’s response to the complaint as has been noted earlier in this decision.

The Tribunal gave careful consideration to the affidavit of Ms B. Ms B is a self-employed law accountant, Depute Auditor of one of the Sheriff Courts and an Auditor for her local faculty of solicitors. The affidavit recorded her evidence that on or about 3 July 2015, she received instructions from the Appellant’s firm to fee files and provide a certificate of assessment for the executry and sale of a house which later became the subject of the complaint which led to this appeal. She was provided with the files. The files contained terms of engagement letters. At paragraph 10 of the affidavit it is noted that,

*“The Terms of Engagement letter for both conveyancing and executry files referred to Law Society Guidelines. I interpreted this at the time as being a reference to the Law Society’s former Table of Fees for General Business (the Table of Fees) which albeit abolished was and still is available as a reference tool. It was not unusual to see such a reference. Firms who have instructed me would have had Terms of Engagement letters in similar terms or have terms of business letters framed around some or all of the former Table of Fees.”*

At paragraph 12 it is noted that Ms B refers to the former Table of Fees in order to have a framework for determining what constitutes a fair and reasonable fee for the work which has been done, particularly where a solicitor’s Terms of Engagement letter is not precise about every aspect and element of the basis upon which fees will be charged. At paragraph 18 she notes that,



*“My practice of referring to the former Table of Fees is normal practice among Law Accountants who are members of the Society of Sheriff Court Auditors.”*

No evidence was put before the Sub Committee or the Tribunal that as a matter of practice individuals other than the Appellant and Ms B calculated fees on the basis of the Table of Fees based on a reference to “Law Society of Scotland guidelines”. Paragraph 10 of Ms B’s affidavit notes that,

*“Firms who have instructed me would have had Terms of Engagement letters in similar terms or have terms of business letters framed around some or all of the former Table of Fees”* (Tribunal’s emphasis).

The Tribunal considered that these are two different ways of proceeding. The first way describes the Appellant’s approach and is not correct. The second way is an acceptable way of proceeding. Terms of business letters which explicitly refer to the Table of Fees (so long as they are not referred to as the Law Society’s “recommended” fee), or incorporate the Table of Fees into the terms of business letter or adapt it for use, cannot be criticised if it is clear to the client or beneficiary the basis for the fee charging. Competent and reputable solicitors issue terms of business letters which clearly set out the basis for fee charging. The Sub Committee as an expert decision-making body was entitled to hold that the Appellant’s approach did not represent general practice among solicitors.

Ground 2(v), referred to the factual accuracy of issues 6 and 7. The Tribunal considered that the Sub Committee did not err in holding that the terms of these issues were factually accurate. As explained above, it did have regard to the explanations given by the Appellant in correspondence. As an expert body, the Sub Committee was entitled to reject the Appellant’s claim that it was a matter of practice to refer to the guidelines and calculate fees on the basis of the Table of Fees, particularly when no evidence of his position was provided. The Appellant should not have relied upon the Law Accountant. The fee arrangement is between the solicitor and client (although in this case, the beneficiary also had an interest in the matter). The Second Respondent could not seek clarification of the basis on which fees would be charged in advance of the fees being prepared as it was not clear from the terms of business letter that the Respondent intended to charge for commission, investigation and responsibility, and posts and incidents.

Ground of Appeal 3 challenged the Sub Committee’s finding of unsatisfactory professional conduct. In relation to Ground 3(i) the Appellant states that it was *“erroneously assumed that some work may*

*have been carried out by paralegals or non-qualified staff*". Counsel for the Appellant conceded that Ms C was not practising as a solicitor and did not have a practising certificate when this work was carried out. The Sub Committee were therefore correct in their assessment that "*much of the work may have been carried out by paralegals or other non-qualified staff*". This was based on information in the Report that the Complaints Investigator noted from Law Society records that Ms C was "*not a solicitor*" (para 9, page 36, Production 53 of the Appellant's Inventory of Productions). Therefore, this ground of appeal was refused.

In relation to Ground 3(ii), the Appellant states that the Sub Committee failed to have regard to and give due weight to the evidence that the practice adopted by the appellant was one followed by other firms of solicitors, to the correspondence with the Second Respondent, and the early suggestion that the account was taxed. As noted above, the Tribunal is content that the Sub Committee had regard to all the evidence and correspondence before it. The Sub Committee as an expert body was entitled to balance the evidence provided by the Appellant and Ms B of the practice followed by other solicitors with its own knowledge and experience. It was entitled to bring its own professional expertise to bear. The Sub Committee properly notes that a solicitor is bound by the terms of business he/she issues. This is the contractual basis of a solicitor's engagement. The suggestion of an independent assessment need not have arisen had the Respondent taken care over his terms of business letter or engaged properly with the Second Respondent when its deficiencies were drawn to his attention.

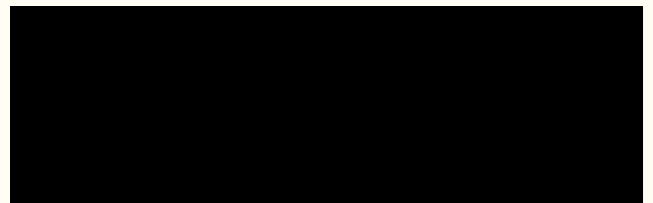
In relation to Ground 3(iii), the Tribunal considered that the lack of criticism over the standard of work carried out was irrelevant. By all accounts it was clear that the Second Respondent was content with the quality of the work. This, however, does not justify taking fees for items which were not set out in the terms of business letter. The complaint related to communication.

The issues raised in Ground 4 have been dealt with in relation to Ground 1(iii) and the Tribunal has varied the award of compensation to £1,500. As noted above, the Tribunal found that the fact the Second Respondent was satisfied by the standard of work was irrelevant. The complaint was about communication. The fact the Second Respondent had indicated he did not want to see the Appellant punished was relevant to some extent in mitigation. The Appellant's cooperation was relevant but that cooperation was limited to repeated assertions of his untenable position coupled with a complete lack of insight into the complaint. There was no evidence other than that of the Appellant and the Law Accountant that the Appellant's practice was consistent with other solicitors' practice. The Sub



Committee was entitled to use its own professional expertise when assessing this evidence which was rejected. The fact that this was the first conduct complaint against the Respondent was relevant to sanction. A fine was a proportionate outcome in the public interest. This issue is of great importance to the public which must be able to depend on clarity of solicitors' terms of business. The Sub Committee noted that the behaviour fell short of professional misconduct but was serious in terms of the behaviour which can constitute unsatisfactory professional conduct. The fine was therefore appropriate to mark the seriousness of the offence and to provide a deterrent to other solicitors, even when taking into account the mitigating factors.

Following submissions on publicity and expenses, the Tribunal awarded expenses to the First Respondent. However, the expenses relating to preparation for and attendance at the hearing on 26 February 2019 were excluded from the award as that hearing was aborted due to reasons which were not attributable to either party. The Tribunal did not consider that the Appellant's very limited success in reducing the award of compensation was sufficient to depart from the usual rule that expenses should follow success. Publicity will be given to the decision in accordance with paragraphs 14, 14A and 23 of Schedule 4 to the Solicitors (Scotland) Act 1980. However, there is no requirement to name any other person.



**Alan McDonald**  
**Vice Chair**