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, 26 Drumsheugh Gardens, Edinburgh
Complainers

against

IAIN ROBERTSON care of Robertson & Ross Solicitors Limited, 7 Causeyside Street, Paisley
Respondent

1. A Complaint dated 11 August 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Iain Robertson, care of Robertson & Ross Solicitors Limited, 7 Causeyside Street, Paisley (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

2. The Secondary Complainer was Steven McGovaney of Flat J, 173 Hillend Road, Glasgow.

3. In accordance with the Rules of the Tribunal, 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 fixed a substantive hearing to be heard on 14 November 2014 and notice thereof was duly served on the Respondent.

5. At the hearing on 14 November 2014, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented himself. Prior to the hearing the Complainers had lodged a Record, List of Productions and List of Witnesses. The Respondent had lodged a List of Witnesses and a List containing one Production. At the hearing itself, a Joint Minute between the parties was lodged agreeing the majority of the Complainers' factual averments and all of the averments of duty. Both parties led evidence.

6. The Tribunal found the following facts established:-

6.1 The Respondent was born on 6 April 1953. He was enrolled as a solicitor on the Register of Solicitors Practising in Scotland on 1 November 1976. For various periods during his professional career he has been a partner or associated with a number of firms including Messrs Robertson & Ross Solicitors, Downie Aiton & Co Solicitors, Ghazala Ahmed, Robertson & Ross Solicitors and Blackwood & Co. Solicitors. From on or about 17 October 2005 he has been a director of the firm of Robertson & Ross Limited Solicitors to date. He was the founding partner of the firm of Messrs Robertson & Ross Solicitors which commenced practice in 1978. Since 1978 he has been a partner or director of that firm.

6.2 The firm of the applicant acted on behalf of the client Steven McGovaney. He is the secondary complainer. The client at the material time was a prisoner serving a sentence within a Scottish prison. He consulted with the firm of the Respondent in connection with a claim for damages against the Scottish Prison Service for their breach of certain rights afforded to Mr McGovaney in terms of the European Convention on Human Rights. An action was raised on behalf of Mr McGovaney. The background to the case is that this action was one of a considerable number of actions raised against the Scottish Ministers by prisoners and former prisoners in respect of prison conditions, with

the focus being on sanitation arrangements, since the Scotland Act 1998 came into force. The term "slopping out" is used to describe the situation where prisoners were held in cells which did not have integral in-cell sanitation. Broadly speaking, in these situations when prisoners were locked in their cells they required to use a receptacle to urinate or defecate in, which they later required to empty at a communal sluice along with other prisoners. "Doubled up slopping out" describes a situation where a prisoner was sharing a cell with another prisoner. "Single cell slopping out" describes a situation where a prisoner was not sharing a cell.

6.3 A large number of court actions were raised. The Scottish Ministers accepted that doubled up slopping out conditions were a violation of the prisoners' rights in terms of Article 3 of the European Convention on Human Rights. With a view to settling these claims offers of £2100 plus a fixed amount of expenses were made in satisfaction for that breach in all cases where prisoners had been detained in these conditions for a material period of time. In relation to single cell slopping out an authority, Greens Petitioner reported at 2011 SLT 549 held that the practice where prisoners had to queue to take receptacles containing their own bodily waste in front of other prisoners was a violation of the prisoners' rights under Article 8 of the European Convention on Human Rights and awarded damages of £500 for that breach. Following the decision of the Court of Session in this case the Scottish Ministers made offers of £500 plus a fixed amount of expenses in settlement of all cases where prisoners had been detained in these conditions for a material period of time.

6.4 In making offers to resolve matters, the Scottish Ministers had regard to their own detailed records of a prisoner's detention. This allowed them to decide whether prisoners had been held in doubled up slopping out conditions, single cell slopping out conditions or indeed had not been detained in slopping out conditions at all. The vast majority of prisoners were represented by solicitors. The offers were directed to

the solicitors involved. Each offer was made on the strict understanding that the action in which the offer was made was the pursuer's only action against the Scottish Ministers in respect of detention and slopping out conditions and a condition of the offer was that the pursuer enter into a joint minute disposing of the action on the basis of decree of absolvitor being granted with no expenses.

6.5 In Mr McGovaney's case an initial writ presented by the firm of the Respondent on his behalf referred to periods of detention between 1 July 1999 and 16 September 1999 in HM Prison Barlinnie and between 9 December 1999 and 8 May 2002 and 10 May 2002 through to 21 May 2003 in HM Prison Peterhead. There were no averments in the initial writ as to whether during these periods of detention Mr McGovaney asserted that he required to share a cell. In March 2011 Mr McGovaney instructed Messrs Taylor & Kelly to take over acting for him. A mandate was forwarded to Messrs Robertson & Ross on 21 March 2011. After an exchange of correspondence, the Respondent forwarded the file to Messrs Taylor & Kelly on 15 August 2011.

6.6 The records maintained by the Scottish Ministers revealed that Mr McGovaney was detained in single cell slopping out conditions between 1 July 1999 to 18 August 1999, 19 August 1999 to 20 August 1999, 9 December 1999 to 8 May 2002, 9 May 2002 to 21 May 2003 and 22 April 2005 to 30 May 2005. According to the records of the Scottish Ministers he was detained in doubled up slopping out conditions for two nights being 18 August 1999 to 19 August 1999 and 8 May 2002 to 9 May 2002. The position adopted by the Scottish Ministers was that such periods were de minimis and therefore not a violation of the Article 3 rights enjoyed by Mr McGovaney.

6.7 An offer of £500 was made in just satisfaction of an accepted breach of Mr McGovaney's Article 8 rights during his detention in single cell slopping out conditions. The offer was directed to Robertson & Ross who were the solicitors who had raised the action and who had

corresponded with the Scottish Ministers about the claim made by Mr McGovaney in 2008 under an alternative dispute resolution scheme which had been set up in an attempt to settle the subject matter of the court action. If agreement could not be reached under that scheme the court action remained live. The offer of £500 plus expenses of £2,640 was made by letter from the Scottish Ministers to Robertson & Ross dated 17 April 2012. At this stage the matter was being dealt with by the Respondent. By letter dated 19 April 2012 the Respondent intimated acceptance of the offer by returning the signed joint minute and accompanying joint motion. No file could be found for Mr McGovaney by the Respondent. Following on payment of the agreed settlement figure to Robertson & Ross decree of absolvitor with no expenses was granted at Peterhead Sheriff Court on 6 June 2012.

6.8 The Respondent accepted the offer on behalf of his client Steven McGovaney without checking any file for instructions. The Respondent accepted that offer without discussing or obtaining instructions of Mr McGovaney. The Respondent accepted the offer without making any communication at all with Mr McGovaney as regards to the offer. No slopping out administrative scheme – claim form had been completed by Mr McGovaney. The Respondent ought to have been aware that from 23 March 2011 Mr McGovaney was then represented by Taylor & Kelly and that the Respondent had no locus to act further on behalf of Mr McGovaney. In particular the Respondent had no locus to negotiate or accept any proposal which was advanced to resolve matters nor to sign any joint minute disposing of the court action. At the time the offer was accepted on behalf of Mr McGovaney the Respondent was the only qualified member of staff working at Robertson & Ross Solicitors. It ought to have been clear and obvious to the Respondent that he no longer enjoyed the instruction of Mr McGovaney. The Respondent had received and replied to ample correspondence from the new agents Messrs Taylor & Kelly who were acting on behalf of Mr McGovaney which should have alerted him that he was no longer instructed.

6.9 The Respondent received the settlement cheque in respect of Mr McGovaney's claim on 2 May 2012. The Respondent did not pay the monies to him until 1 March 2013, a delay of some ten months. Mr McGovaney remained a prisoner during that time. The Respondent met with his cashier on a weekly basis and was aware that the monies remained unpaid. On 23 August 2012 Messrs Taylor & Kelly wrote to the Respondent enclosing the earlier correspondence. Despite an exchange of correspondence the monies were not paid to Mr McGovaney until 1 March 2013. In several cases the offer of £500 for other prisoners was rejected and a higher award of £2100 was secured for clients who had spent less than 8 days in doubled-up conditions. This occurred late on in the settlement process when it was understood there were few outstanding cases left to be dealt with.

6.10 The action raised on behalf of Mr McGovaney was settled without his instructions. No inquiry was made to confirm that he accepted the record of his incarceration. He was deprived of his right to pursue his claim without instruction. He was caused loss, inconvenience and distress as a direct result of the Respondent's conduct.

7. After hearing submissions from both parties, the Tribunal found the Respondent guilty of Professional Misconduct. In relation to his contravention of Rules 1.4.1; 1.5.1; 1.9.1 and 1.9.2 of the Law Society of Scotland Practise Rules 2011.

8. Following further submissions by all parties, including the Secondary Complainer, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 14 November 2014. The Tribunal having considered the Complaint dated 11 August 2014 at the instance of the Council of the Law Society of Scotland against Iain Robertson care of Robertson and Ross Solicitors Limited, 7 Causeyside Street, Paisley; Find the Respondent guilty of Professional Misconduct in respect of his contraventions of rules 1.4.1, 1.5.1, 1.9.1 and 1.9.2 of the Law Society of Scotland Practice Rules 2011; Censure

the Respondent; Direct in terms of Section 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of 2 years with effect from 1 March 2015 any practising certificate held or issued to the Respondent shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer as may be approved by the Council of the Law Society of Scotland or the Practising Certificate Sub Committee of the Council of the Law Society of Scotland; Find the Respondent liable in the expenses of the Council of the Law Society of Scotland and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)
Dorothy Boyd
Vice Chairman

Edinburgh 14 November 2014. The Tribunal having considered the Complaint dated 11 August 2014 at the instance of the Council of the Law Society of Scotland on behalf of Steven McGovaney against Iain Robertson care of Robertson and Ross Solicitors Limited, 7 Causeyside Street, Paisley; and having considered whether it was appropriate to award compensation to the Secondary Complainer; Ordain the Respondent in terms of Section 53A(2)(d) of the Solicitors (Scotland) Act 1980 to pay to Steven McGovaney of Flat J, 173 Hillend Road, Glasgow by way of compensation the sum of £1,800 in respect of loss, inconvenience and distress resulting from the misconduct and that within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum from the due date until paid.

(signed)
Dorothy Boyd
Vice Chairman

9. 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

IN THE NAME OF THE TRIBUNAL

Dorothy Boyd
Vice Chairman

NOTE

At the hearing on 14 November 2014 the Tribunal had before it a Record, Productions for both parties, Lists of Witnesses for both parties and a Joint Minute agreeing the majority of the averments of fact and all of the averments of duty. The Complainers led evidence from one witness. The Respondent himself gave evidence and led one further witness.

EVIDENCE FOR THE COMPLAINERS
STEVEN McGOVANEY

Mr McGovaney confirmed that he had been released from prison on 7 May 2014 and was currently residing at 173 J Hillend Road, Glasgow. He had remained in custody from 1999 until the 7 May 2014 with no leave days. From the beginning of his incarceration he had been allocated the prison number 4615 which remained with him until his release in May. He had first instructed Robertson & Ross in Paisley in relation to Parole Board Tribunals in relation to his sentence. He had been sentenced to life imprisonment with a tariff of four years. He had then instructed the firm in relation to a "slopping out" claim. At first he had dealt with a solicitor called Mr A. He had had some involvement with a solicitor called Mr B but that was only on the telephone and they had never met. He had met Iain Robertson on one occasion at a Tribunal where Mr Robertson had represented him. Apart from some correspondence with Mr Robertson he had had no other dealings with him. He explained that the conditions in Barlinnie had led to a number of cases being taken seeking compensation. As a result of these cases, the Government had implemented a scheme whereby a prisoner who had been kept in single occupancy cells but had had to slop out was awarded £500 in compensation, and if the prisoner had been held in double occupancy cells and had had to slop out the figure was £2100. His claim had been assessed at the lower end of the scale and he had been awarded £500. If he had been given the opportunity to consider the offer he would not have accepted it. It was his position that for the whole time he was a prisoner in Barlinnie from March 1999 until August 1999 he was kept in doubled up conditions.

He accepted that there was correspondence from the Scottish Ministers disclosing that the prison records did not support this contention. It was his position that the records were simply wrong. He believed that the prison did not keep their records updated as prisoners were often moved from cell to cell if they asked to be moved. The prison was overpopulated and

bursting at the seams. Prisoners were locked up 23 hours a day with two men in a cell. Slopping out conditions sometimes were not hygienic.

He could only explain that the records were not accurate. It was certainly his recollection that if you asked to be moved to share a cell with someone you wanted to be with in order to keep the peace, the prison would do that.

At no point had he seen or received a copy of the Respondent's Production 1 – "Slopping Out Administrative Scheme – Claim Form".

During the currency of his claim, around about March 2011, he had gone to another firm of solicitors. He was asked to look at Production 11 for the Complainers and confirmed that this letter contained his prison number and date of birth and was from a firm of solicitors called Taylor & Kelly. It was dated 25 March 2011 and referred to a prison conditions case which he took to refer to his slopping out claim. His case had dragged on and on until eventually he had contacted Taylor & Kelly, a Miss C, and discovered that a payment had been made to Messrs Robertson & Ross. No one had contacted him about this settlement. He had given no instructions to settle. A court action had been raised on his behalf by Robertson & Ross and he was not aware that that court action had been disposed of. When asked what his reaction was to his case being settled he indicated that he was displeased. He confirmed that Production 1 at page 3 for the Complainers was a letter from him to Mr D of Robertson & Ross dated 21 January 2013. He confirmed that it was about that time that he learned that his claim had been settled months before. He referred to paragraph 2 of that letter and indicated that in his experience there was no difficulty in finding prisoners if you have their prison number. The prison number is kept by the prisoner throughout the whole time. That letter in paragraph 4 had confirmed to Mr D that he had dispensed with Robertson & Ross' services in 2011. He referred to Production 2 for the Complainers and confirmed that it indicated that Mr Robertson was dealing with his case. Production 3 was his letter to Mr Robertson. Production 5 was a letter to him dated 1 March 2013 enclosing a cheque.

He confirmed that his claim for compensation was for the difference between the two scale payments - £2100 and £500. He believed he could have proved his double occupancy by tracing his cell mates. If the matter had been taken to court then the prison could have been asked to list all of the prisoners who had been in the same cell number. He had not been given

the opportunity to argue his case. Additionally he had spent a lot of time, over a year, getting matters to this stage. He had felt frustrated. This whole thing had started so long ago and yet it was still ongoing.

CROSS EXAMINATION OF MR McGOVANEY

The Respondent confirmed to Mr McGovaney, the witness, that he accepted that no claim form had been signed by the witness. The witness accepted that he had dealt with Messrs Robertson & Ross from some time before 2004 up until 2011. He had been the subject of a life sentence with a tariff which had meant that he had to go before a Parole Board Tribunal in order to obtain his liberation. This process can take longer than the tariff that is fixed and can involve a number of Tribunals. Mr Robertson had dealt with him midway through the process when he was in Greenock.

The witness emphasised that his main complaint was that he had been denied the right to pursue his case as his claim had been compromised. He accepted that Miss C had explained to him that on the evidence produced by the prison authorities £500 was all that he was going to be offered. He was not aware that this might have affected his grant of legal aid. Just because the information came from the Scottish Ministers did not make it true.

When he had discovered that his case had been settled he had telephoned Robertson & Ross and Mr D had answered. Mr D had not been instantly familiar with the witness' case but had had to go and look and find out. Thereafter the witness wrote to Mr D.

He accepted that he only knew his cell mates by nicknames. He had not had the opportunity to trace cell mates. He had not asked Miss C to do that as this would have incurred expenses.

On re-examination, the witness confirmed that the reason he had telephoned Robertson & Ross was that he had been told by Miss C that his case had been settled. When he telephoned them he told them just to keep the money.

EVIDENCE FOR THE RESPONDENT
IAIN ROBERTSON

The Respondent indicated that Robertson & Ross had acted on behalf of Mr McGovaney from 2004 onwards when the slopping out claims had begun. His firm had about 10 filing cabinets full of such claims. The cases were very labour intensive as the clients were all in confinement and these cases were their main concern. There was lots of correspondence and telephone calls. The cases had gone on for approximately seven years and were beginning to settle. A test case had established that there was no time bar for these claims and so Parliament had amended the Scotland Act to introduce a time bar which effectively for these cases was one year from the amendment of the Act. Thereafter there was a rush to raise claims in all of the pending cases. Eventually, many of the claims did not meet the appropriate criteria. Originally the cases had been dealt with by his colleague, Mr B, who had left the firm suddenly in February 2011. Thereafter Mr Robertson had supervised the cases. He and Mr D had got everything up to date following Mr B's departure.

He accepted that his firm had been mandated for Mr McGovaney's file. He stated that there had been mandates going in both directions between his firm and Taylor & Kelly in respect of a lot of cases. In these cases the fees were adjusted between the two firms. In Mr McGovaney's case Taylor & Kelly had accepted their share of the fee.

It was Mr Robertson's practice in a case where a mandate was received to set up a temporary file until the case was settled. Mr McGovaney's temporary file could not be located.

The slopping out claims were settled in batches with the Scottish Ministers sending Robertson & Ross a list of the client names together with Joint Minutes and Joint Motions. The work was all being done on the cashroom computer. When Joint Minutes were received they were signed and sent back. A BACS payment would come in and fees would be taken from the payment and then the balance paid to clients. Mr Robertson had been labouring under the misapprehension that he was still acting for Mr McGovaney. It had escaped his mind that his firm had been mandated. Messrs Taylor & Kelly had marked up the court process to show that they were now acting and had told the Scottish Ministers but correspondence had still come through to Robertson & Ross.

Most of the files, certainly all that he had seen, had on them the mandate, a copy of which was his Production, completed by the clients in order to cut down correspondence.

Often when the money was paid, clients had moved and had had to be traced through agents. Some could not be traced and the money required to be paid onto the Queen's and Lord Treasurers Remembrancer (QLTR). He had not liked doing that and in fact only three or four payments had had to be passed onto the QLTR.

Clients had instructed different ways to receive the money. If they wanted the money whilst they were in prison then the cheque required to be payable to the Scottish Prison Service. Some clients wanted the money to be paid to their mother or wife and some wanted the funds retained until they were released. Mr Robertson had regular meetings with Mr D when he would regularly ask Mr D what was happening with the various cases. Mr Robertson indicated that he had remembered Mr McGovaney and he remembered telling Mr D that Mr McGovaney was still within the prison system. He was advised that this was being looked into but that the file could not be found. Mr Robertson advised that he had erroneously assumed that he still acted for Mr McGovaney until he received correspondence from Messrs Taylor & Kelly. He had not kept on acting on purpose. This had been an accident.

CROSS EXAMINATION OF MR ROBERTSON

Mr Robertson insisted that his continuing to act for Mr McGovaney was an oversight or accident and not deliberate. The Fiscal asked Mr Robertson on what basis he took a fee following the receipt of payment in May 2012 if he could not find a file. Mr Robertson indicated that he had not been looking for the file. He had acted on the basis that they had a file and had assumed that he was still acting and that he was acting in terms of the mandate on the file. Money was paid by the Scottish Ministers in batches, with a print out naming the clients. If the case was a legally aided one, the money was sent to the Legal Aid Board. The Respondent denied concocting a fee. He stated that he had a ledger card with outlays on it. The fee was the same for all cases. It was not concocted. He had understood that he had a client and had laboured under the misapprehension that he still had the client's instructions. He had been acting for Mr McGovaney since 2004.

The Respondent was asked to explain why he had delayed until 2013 to pay on the money. The Respondent indicated that it had become clear to him that there were difficulties with the funds in that: 1) he should not have acted and 2) Mr McGovaney had told him to keep it. Mr Robertson had notified his insurers. The Firm's self insured amount was £9000 and he was

told he could deal with it himself. During the time he was double checking the position with regard to Mr McGovaney's claim. Taylor & Kelly had also checked the position. Factually Mr McGovaney did not fit the criteria for the higher figure. He denied that nothing had happened between July 2012 and March 2013. He accepted that there was correspondence. He accepted that he met with Mr D on a regular basis and stated that he had been advised the file was misplaced and that Mr McGovaney had to be traced. He accepted that it was not difficult to trace a prisoner. It was his understanding that Mr McGovaney was still in the system but then he had thought he might have been released as he had been told that his staff could not find him. He had left the matter to Mr D and his staff. Alarm bells had not rung as sometimes a trace could take three or four months. He had assumed that Mr McGovaney was out of the system and that the next step of instructing tracing agents had been required. His firm had a procedure in place to instruct a firm of tracing agents. He thought the firm was called Trace It and that they had been 90% successful. He accepted that Mr McGovaney had remained within HM Prison Greenock all of that time and suggested he could only apologise that his staff had not dealt with it and that he had not checked the position. He confirmed that Production 4 for the Complainers was a copy of his firm's ledger card showing that the funds had been received in July 2012 and not paid out until February 2013.

The mandate (Slopping Out Administrative Scheme – Claim Form) was something he had inherited from a colleague. He accepted one had not been signed by Mr McGovaney. He accepted that the claim form stated that the client would be expected to complete and sign a discharge in exchange for any cheque in settlement but explained that things had moved on since the signing of that form and matters were then settled by way of Joint Minutes. He accepted that he had not obtained Mr McGovaney's instructions. It had been his understanding that all clients had completed the mandates (Slopping Out Administrative Scheme – Claim Forms) and that if they fulfilled the criteria the firm was authorised to accept an offer. He had opened the temporary file for Mr McGovaney after receipt of the mandate from Taylor & Kelly but had lost this. Losing the file did not help him. It was his position that the temporary file would have supported his evidence. He was asked on what basis he could take a fee if he had no client, no file and no instructions. The Respondent explained that even if two firms were acting all that would be paid was one fee shared in an agreed formula between the two. In this case the majority of the fee was Robertson & Ross's anyway. Latterly the fee had been shared with Taylor & Kelly. He was asked by the Fiscal how he could have accepted the claim if he had no knowledge of the criteria met by the

client. The Respondent indicated that it was his understanding in dealing with Mr McGovaney that he was in open conditions. Barlinnie is not for long term prisoners. Life sentence prisoners would go to a prison with a programme of progression such as Glenochil, Peterhead, Perth or Dumfries. He had operated under the understanding that Mr McGovaney only fulfilled the criteria for the lesser payment as a result. He had not appreciated that Mr McGovaney was in Barlinnie. He had simply assumed that he was still acting.

He could not confirm that Mr McGovaney was in Barlinnie for five months but he had no reason to doubt anything that Mr McGovaney said. However, the Scottish Ministers were quite clear that Mr McGovaney was not doubled up for more than eight nights. He now accepted that Mr McGovaney was remanded in Barlinnie and that there was a time when that prison was grossly overpopulated.

Mr Robertson stated that a number of files had been passing between his firm and Taylor & Kelly. The Fiscal drew the Respondent's attention to Production 24, a letter from Messrs Taylor & Kelly that suggested there was an overlap in only nine cases. Mr Robertson conceded that he could not tell how many cases there had been. He was referred to Production 8, a telephone note and accepted a telephone conversation had taken place between himself and Miss C of Messrs Taylor & Kelly on 10 October 2012. He had delayed thereafter in paying on the money because Mr McGovaney had said to keep it and Mr Robertson had been unable to resolve what to do with the funds as he should not have accepted them. Additionally, he got further information from the Scottish Ministers. If that information had said that Mr McGovaney was entitled to the higher figure then Mr Robertson would have paid the money to Mr McGovaney.

The Respondent accepted that the settlement was offered on the basis of the Scottish Ministers' criteria and that it was open to Mr McGovaney to challenge that. He was unable to explain an entry on Production 4 of the ledger card which indicated that this case was still active even though a mandate had been received. He indicated he had never noticed that entry before. He went onto explain that although in theory it was open to the client to challenge the offer, in reality it could not be argued. Decided cases had shown that the maximum to be paid was £2100. In other words, a successful claim fell into a category of a summary cause at that time and legal aid was not available for that. A report would have had to have been submitted to the Legal Aid Board indicating that the most the client could succeed in claiming was

£2100 and as a result the Legal Aid Board would not have authorised further proceedings. Additionally, he would have had to complete a stage report for the Legal Aid Board and would have had to indicate to the Legal Aid Board that on the basis of the prison records there would be no chance of success. To proceed with the action a client would have had to fund it privately or reach some alternative arrangement with the solicitor regarding the fee.

In response to a question raised by the Tribunal, the Respondent confirmed that although there was no appeal process as such it was open to the claimant to recall the sist that was in place in connection with the court action. If the person said they did not accept the offer then it was possible to re-enrol for further procedure. This of course would be subject to funding and if the case had been legally aided the Legal Aid Board would be likely to refuse permission for further procedure as this was the maximum he was likely to win and there was no chance of success.

Mr Robertson accepted that no efforts were made to trace other cell mates because the offer of £500 had been accepted.

To clarify earlier evidence at the request of the Tribunal, the Respondent confirmed that he had received the mandate from Messrs Taylor & Kelly in March 2011 and that he had dealt with the mandate. He had forgotten that the mandate came in and the penny had not dropped until the letter of 20 August 2012. He accepted he sent the file in August 2011 but said he could not find the temporary file and had forgotten about the mandate until the letter of 23 August 2012. He clarified that he had attended a Parole Board hearing for Mr McGovaney in 2006/2007 in Greenock. He had understood that Mr McGovaney was still in the prison system and had thought they should be able to find him. He had asked for it to be done. The last thing he had wanted to do was hold onto money due to Mr McGovaney.

MR D

Mr D gave evidence that he is qualified as a Scottish law accountant. He has been employed by Robertson & Ross since April 2000. His job title could be referred to as “cashier”. He had dealt with the slopping out cases prior to 2011 along with Mr B. On a weekly basis when payments came in, Mr B would give Mr D the details of clients to whom money was to be paid. If clients could not be found then a trace would be instructed. If the trace was

unsuccessful then the funds would be passed onto the QLTR. Cases were settled by joint minute. The funds were received directly from the Scottish Ministers by BACS transfer. Mr B left the firm in February 2011 and the slopping out cases were in a bit of a mess. There were ten filing cabinets full of files in no particular order. Mr D had had to sift through all of the files.

The money that came in in Mr McGovaney's case was fees plus £500. Payments came in from the Scottish Ministers in a batch of four or five at a time. An email would be sent by the Scottish Ministers listing each client, principal sum and expenses. The money would be put through onto the client's ledger card. Thereafter Mr D would get the file and contact the client to arrange for payment. In Mr McGovaney's case his payment came through and was put onto the ledger card but Mr D could not find the file, which was not unusual. They would contact the prison to ask if the prisoner was there and if not they would do a search. With specific reference to Mr McGovaney, Mr D indicated "we contacted the prisons we thought he was in which confirmed he was not there but would not confirm if he was in any other establishment". He then went on to say that his practice was to meet with Mr Robertson once a week to discuss outstanding balances as this showed who had not yet received the money. It was the girls at reception who would phone the prison. If that was unsuccessful they would do a trace. The tracing company only charged a fee if they could find an address for the client. He remembered Ms E being on the phone to Shotts and Peterhead prisons. He confirmed that he instructed a search using All Trace who could not trace Mr McGovaney.

He explained that the "Y" on the ledger card at Production 4 does not indicate that this an active file but only an active job meaning that there was still a balance on it.

CROSS EXAMINATION OF MR D

Mr D insisted that he had instructed All Trace to trace Mr McGovaney as at the time there was no up to date address for him. He was asked if what had been done was all guesswork. He accepted that no file could be found and stated that Mr B had dealt with the case. He said that the process was the same for all of the slopping out cases and that there would have been a mandate on the file. He conceded that this was something that Mr B dealt with.

It had not occurred to him to go to the Scottish Government to trace Mr McGovaney. He was only aware of phone calls to Shotts and Peterhead prisons. He did not know what process All Trace went through to trace a client and could not explain why there was no report in existence from the tracing company. The company only received a fee if they were successful in finding the client, which explained why there was no outlay on the ledger. It was his practice to give the tracing agents some two or three months to find the client. In this case his only explanation for the seven month delay was that the file was lost. It was his recollection that Mr Robertson knew of Mr McGovaney and thought that he was still within the prison system. Therefore they were still trying to trace him. They did not phone every prison.

The fee was the same for every case as it was set by the Scottish Ministers.

In response to an enquiry from the Tribunal, Mr D confirmed that he was handed the role of sorting out the outstanding slopping out cases after Mr B left the firm. He indicated that he had spent days and weekends sorting out the files, sifting out the already settled cases. He was unable to confirm when it was discovered that Mr McGovaney's file was missing. It had taken a good couple of months to go through the filing cabinets. When asked if he believed that the practice was chaotic, he indicated that he thought that Mr B had not dealt with the files particularly well and that they were all in a 'guddle'. It had been left to him to sort them out. He believed he had sorted them out and that the majority of the cases had been settled and he had traced all the clients.

The Tribunal asked him to confirm the procedure when an offer was received when there were files in existence. He indicated that a joint minute would come into the office which would be signed by the solicitor and sent back to the Ministers. The payment would come in by BACS transfer. He would take out the file from the cabinet and look for an address and instructions of where to pay the monies.

He was specifically asked if he would check the file for a mandate authorising settlement. His response was that it would have been done in the process.

He accepted that the joint minute was meant to reflect an agreement between the parties. He was asked how he would confirm that it did so and indicated that they would if the file was there.

It was his position that to trace a client within the prison system he required to phone round all of the prisons and presumed that they would not disclose the location of the prisoner because of data protection. He eventually found out that Mr McGovaney was still in prison when a letter came in from him. Mr D had not been aware that Taylor & Kelly were instructed.

In response to a query from the Tribunal, Mr D confirmed that the only basis on which he knew that Mr McGovaney was his client was from the client ledger on the firm's software. He conceded that he could not find the file and only had the ledger card. He stated that instructions would have been on the file but that could not be checked because he could not find the file.

He was asked by the Tribunal if the firm scanned correspondence into a computer system. He indicated that the only correspondence kept on the computer system was letters issued by the firm. Letters from the firm to Mr McGovaney would be on the computer. He did not recall checking the computer for any copy correspondence when he could not find the file. The Tribunal asked Mr D if it would not be normal when trying to find a client where the paper file was missing, to look at the computerised file as a source of information. He responded that he thought that they had checked and that the prison concerned was either Shotts or Peterhead. He conceded that not many prisons have life sentence prisoners but could not say how many prisons he or his staff contacted. He was asked to look at Production 19, a letter from Robertson & Ross to Messrs Taylor & Kelly. He confirmed that the letter was signed by Mr Robertson but could not say who generated the letter. It was possible that this letter was not stored onto the system. (At this juncture, Mr Robertson intervened and indicated that correspondence was not automatically scanned into the system. He had only discovered in the last six or seven months that an extra step was required to save correspondence into the computer system and that some staff did not do that.)

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal invited the Tribunal to find that professional misconduct had been established. He indicated that the Respondent's behaviour was contrary to a number of practice rules.

Mr McGovaney had dismissed Robertson & Ross on 21 March 2011. The Respondent corresponded back with Messrs Taylor & Kelly as could be seen from Productions 10 and 11. Thereafter in May 2012 the Respondent engaged with Scottish Ministers and accepted an offer. Production 7 was a letter from the Scottish Government dated 10 October 2013 confirming that an offer was made on 17 April 2012 and accepted by letter of 19 April 2012. The offer was accepted with no instructions and no communication. There was no clarification with regard to the amount offered. There had been no file. Mr McGovaney was unaware of all of this going on. He had been denied his opportunity to argue his case.

The Fiscal questioned the manner in which a fee could be taken without a file. Thereafter the money paid lay on the client ledger for 10 months. Today had been the first mention of the Respondent employing tracing agents. Even if that were true, the Tribunal were still faced with seven months where little or nothing had been done. Life prisoners are restricted to a limited number of prisons. A firm of experienced criminal practitioners would know that.

The Respondent's defence had been fluid.

This could well be a case of the procedure being chaotic. However, whilst the files may well have needed to be sorted out it should be borne in mind that although there were 400 files these were not all actively litigated files. They had been raised as a matter of urgency and then were lying dormant awaiting the outcome of the outstanding test cases.

All of the claimants were prisoners and all had prison numbers. The Respondent was clearly aware of all that had gone on. All of the correspondence bore his reference.

The Respondent engaged in signing a joint minute without any knowledge of the client's instructions.

The Fiscal drew the Tribunal's attention to the second edition of Paterson & Ritchie, Law, Practice and Conduct for Solicitors. At page 21 stress or overwork is no excuse in a case of professional misconduct. At page 108 reference is made to two cases before the Discipline Tribunal in 1996 and 2006 where cases were settled without the knowledge or consent of the clients and page 109 relating to the termination of the solicitor's authority to act.

He submitted to the Tribunal that Mr McGovaney had restricted his claim to compensation to the difference between the upper and lower figures offered by the Scottish Ministers together with a limited amount for frustration.

SUBMISSIONS FOR THE RESPONDENT

Mr Robertson submitted to the Tribunal that misconduct had not been made out by the Fiscal, although perhaps unprofessional conduct had been. He indicated that this was not a deliberate attempt to deprive Mr McGovaney of his rights. In hindsight he conceded that he should have checked the position more thoroughly. In the majority of the files he dealt with there was a mandate authorising settlement on the file. The aim of this mandate was to enable the firm to receive money for the clients as soon as possible. Cases were settled in batches. He had understood that there was a mandate for Mr McGovaney allowing settlement and it was on this basis that he was dealing with the outstanding claims.

He accepted that the compensation was received on 17 July but was not sent to Mr McGovaney until the following February. In between these dates he said he was trying to trace Mr McGovaney. It was not unusual or abnormal to have money on the client ledger where a client could not be traced immediately. He had been relying on the people who worked for him to do the work.

In between times he received the letter from Taylor & Kelly pointing out that they had been instructed. This had come as a shock to him. Thereafter Mr McGovaney had phoned the firm and had said to Mr D to keep the money.

He referred to Production 20 of the Complainers' List of Productions, a letter from July 2012 from Taylor & Kelly. He said that it was at this point that he had realised he had made an error. He had not taken on board the fact that he had been mandated.

Thereafter the money was frozen as he was not sure what to do with it. Mr McGovaney had said keep it. He was not sure if he should send it back to the Scottish Ministers or whether he should pay Mr McGovaney the extra compensation. After checking and rechecking all of the records showed that Mr McGovaney did not meet the criteria for the larger payment. He now

knew from checking the firm's file that had been returned to them by Taylor & Kelly that there had been no mandate authorising settlement on the file.

The Tribunal asked him to clarify what steps he had taken between Mr B's departure in February 2011 and the file leaving his office to go to Messrs Taylor & Kelly, to confirm that a mandate authorising settlement was on the file. Mr Robertson could not recollect checking the file at all. He accepted he had had at least two opportunities to check the position – when Mr B left the firm and when the mandate was received from Messrs Taylor & Kelly. He explained that when the mandate came into the firm all he was concerned about was implementing it. Thereafter he felt it was important to settle all of the claims expeditiously.

The failures here were not done on purpose. Clearly the system within the firm had broken down. This was the only case where there had been a problem.

DECISION

Little of the factual basis of the allegation of professional misconduct was disputed.

The Respondent accepted that at no stage had Mr McGovaney given any instruction to settle his case. He had not signed one of the Slopping Out Administrative Scheme – Claim Forms, used by the firm in the administration of these cases. A mandate was received by Messrs Robertson & Ross from Messrs Taylor & Kelly in March 2011. The Respondent had forwarded Mr McGovaney's principal file to Messrs Taylor & Kelly in August 2011.

An offer of settlement was received by the Respondent in April 2012, by which time his firm no longer held the principal file, and had misplaced any temporary file for the client. The style claim form, Production 1 for the Respondent, refers to the upper figure of £2100. The offer received was the lower figure of £500. A joint minute agreeing that court proceedings be disposed of by decree of absolvitor was signed by the Respondent without any reference to a file, or any attempt to contact the client for instructions. Payment of the compensation to the client was received by the Respondent on 2 May 2012 and not passed onto the client until 28 February 2013. Throughout this time Mr McGovaney remained a prisoner in HM Prison Greenock. Mr McGovaney disputed the information given by the Scottish Government

regarding his history within the prison system. No attempt appears to have been made to confirm the accuracy of this information with Mr McGovaney.

The test for the Tribunal to be able to hold that professional misconduct has been established is that as set out in the case of Sharp. In short, it states that conduct that falls below the standard to be expected of a competent and reputable solicitor, that would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. The case goes on to say "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 is properly to be attached to the individual against whom the complaint is to be made."

In the case of Sandeman, the test for professional misconduct was described as conduct which has sufficient gravity and culpability to be capable of bringing the profession into disrepute.

The onus of proof lies with the Complainers who must prove beyond reasonable doubt that the Respondent is guilty of professional misconduct.

The Tribunal found Mr McGovaney to be an honest and straightforward witness. The evidence of Mr Robertson and Mr D however, had been less than satisfactory, on occasion evasive and contradictory. In his submissions the Respondent stated that when he had received the mandate from Taylor & Kelly his only concern was to implement the mandate, and yet it had taken 4 months for that to be done. The first mention of track and trace agents had been made in evidence today. And yet there was no supporting documentation or correspondence.

The Tribunal was satisfied, beyond reasonable doubt, that the Respondent

1. Had not acted in the best interests of his client (contrary to rule 1.4.1 of the Practice Rules 2011)
2. Did not have the authority of Mr McGovaney to accept the offer of settlement (contrary to rule 1.5.1 of the 2011 Rules)

3. Had not communicated effectively with his client, including providing him with any relevant information the Respondent had, or accounting sufficiently for funds passing through his hands (contrary to rule 1.9.1 of the 2011 Rules) and
4. Had not advised his client of significant developments in relation to his case (contrary to rule 1.9.2 of the 2011 Rules).

However the Tribunal was not satisfied that it had been proved beyond reasonable doubt that the Respondent had acted deliberately in the clear knowledge that he no longer enjoyed the client's instructions to act. Dishonesty, therefore, had not been established.

It was quite clear that the facts demonstrated that the Respondent had acted in a reckless and cavalier manner in signing a joint minute, without referring to a file or communicating with his client. The office system appeared to have broken down on a number of occasions in this case. The temporary file appears to have been mislaid and no effort made, during the whole time it was missing, to clarify the position and in particular the client's instructions. The firm continued to act despite receiving a mandate. A joint minute agreeing a decree of absolvitor, bringing a complete end to the client's claim was signed without any authority. A man, who was known to the Respondent as being subject to a life sentence, was not traced for a period of nearly four months, despite the fact that he remained in the same prison throughout the period. The Respondent was aware through his regular meetings with his cashier that funds had not been forwarded to the client. Nor were they until March 2013.

The firm's position with regard to computerised correspondence / files appears to have been haphazard at best.

In all of this and in particular with the signing of the joint minute, the Respondent demonstrated a clear disregard for the interests of Mr McGovaney.

The evidence, at its most favourable to the Respondent, disclosed a chaotic and culpably sloppy approach to the matter. The Respondent had expressed shock at being reminded by Taylor & Kelly on 23 August 2012 that a mandate had been sent to him previously. This contention itself seemed surprising to the Tribunal, given the correspondence that had taken place between the two firms previously.

The Tribunal had no hesitation in holding that the conduct amounted to professional misconduct.

On reconvening the Tribunal asked parties if they wished to make any further submissions regarding disposal.

Mr McGovaney emphasised that he had been denied the right to pursue his claim. Mr Reid, on his behalf, clarified that Mr McGovaney sought £1600 plus a modest amount to reflect the degree of frustration he suffered. He also asked the Tribunal to have in mind that Mr McGovaney had had to engage in correspondence from prison and that the cost of a stamp in those circumstances was more significant to the prisoner than it might normally be in ordinary circumstances. Mr McGovaney suggested to the Tribunal that £400 was an appropriate figure to reflect this.

The Fiscal referred the Tribunal to Messrs Taylor & Kelly's letter at Production 24. He advised the Tribunal that the Respondent had been before the Tribunal on a previous occasion and had been found guilty of professional misconduct for failing to supervise an assistant regarding conveyancing transactions, although these transactions predated this case. The Respondent confirmed he was fined £1500 in that case and that he had no other cases before the Tribunal.

The Respondent indicated that he was 61 years old and that next year would be his 40th year in practice. He was concerned that he would be removed from the approved panel of solicitors by building societies once they were aware of this finding. He employs 12 members of staff. His income at the moment is approximately £20,000 per annum. He expected the expenses in this case to be at least £5000.

The Fiscal asked the Tribunal to make the usual order for expenses and indicated that the usual order for publicity was appropriate. The Respondent asked the Tribunal to consider making no award of expenses. He asked the Tribunal to accept that he had not disputed anything factually in connection with the Fiscal's case and that he had given full cooperation to the Law Society.

The Tribunal considered the question of compensation to the Secondary Complainer first.

The Tribunal accepted the evidence of Mr McGovaney and in particular accepted that he would not have accepted the offer of £500 if his instructions had been sought. No effort was made to take Mr McGovaney's instructions in relation to the history of his incarceration described in the Scottish Ministers' letter, despite the conflict between that, the dates provided within the initial writ raised, and the difference as expressed by Mr McGovaney in the hearing. The Tribunal considered that it was appropriate that the Secondary Complainer be awarded compensation for the difference in the two figures being £1600. Additionally the Secondary Complainer had been caused inconvenience, worry, concern and frustration. The Respondent had done little or nothing to rectify matters. Accordingly, the Tribunal decided that it was appropriate to include in the award of compensation a figure of £200 to reflect the inconvenience and frustration suffered by the Secondary Complainer as a direct result of the Respondent's misconduct.

Thereafter the Tribunal went on to consider the penalty appropriate to reflect the gravity of the conduct here. The Respondent's cavalier approach to this client's case, suggests that he presents a danger to the public. He clearly would benefit from being supervised whilst in practice. Such supervision would limit the risk to the public. The misconduct in this case was considered at the higher end of the middle of the scale of misconduct. The Respondent, in the course of proceedings, had not demonstrated any insight into his conduct. There was no suggestion that he had taken any corrective steps. Additionally, the Respondent already has a finding of professional misconduct on his record. The Tribunal therefore considered that it was appropriate to impose a Restriction on the Respondent's practising certificate, to restrict him to acting as a qualified assistant under the supervision of someone else. The Tribunal imposed an aggregate restriction as the Tribunal consider it important that the Respondent learns from the two year period of supervision. The Tribunal, being aware of the consequences of such a direction, considered that it would be appropriate to delay the commencement of the restriction until 1 March 2015 to allow the Respondent an opportunity to put his affairs in order.

Nothing had been said by the Respondent to justify interfering with the normal position that expenses go with success. Therefore the Tribunal found the Respondent liable for the expenses of the Council of the Law Society of Scotland and the Tribunal.

The usual order for publicity was made.

Dorothy Boyd
Vice Chairman