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

F I N D I N G S

in Complaint

by

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

Complainers

against

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

First Respondent

and

TASMINA AHMED-SHEIKH, 75 Newlands Road, Newlands, Glasgow

Second Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Alan Niall Macpherson Mickel, Flat 2/1, 13 Partickhill Road, Hyndland, Glasgow (hereinafter referred to as "the First Respondent") and Tasmina Ahmed-Sheikh, 75 Newlands Road, Newlands, Glasgow (hereinafter referred to as "the Second Respondent") were practitioners who may have been guilty of professional misconduct.

2. There was no Secondary Complainer.

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

4. In terms of its Rules, the Tribunal appointed the Complaint to be heard at a procedural hearing on 23 April 2018 and notice thereof was duly served upon the Respondents.

5. At the procedural hearing on 23 April 2018, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The First Respondent was present and represented by William Macreath, Solicitor, Glasgow. The Second Respondent was not present but was represented by Dorothy Bain, Q.C., instructed by Francis Gill, Solicitor, Edinburgh. On Joint Motion, the Tribunal fixed a procedural hearing for 17 August 2018.

6. On 25 July 2018, of consent and on the Second Respondent's motion, the Chair, exercising the functions of the Tribunal under Rule 56 of the Scottish Solicitors' Discipline Tribunal Procedure Rules 2008, discharged the procedural hearing fixed for 17 August 2018 and fixed a procedural hearing for 13 September 2018.

7. At the procedural hearing on 13 September 2018, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The First Respondent was not present but was represented by William Macreath, Solicitor, Glasgow. The Second Respondent was not present but was represented by Dorothy Bain, Q.C., instructed by Francis Gill, Solicitor, Edinburgh. The Tribunal allowed the parties until 31 October 2018 to adjust the pleadings. The Fiscal was ordered to lodge a fully adjusted Record with the Tribunal Office by 16 November 2018. A procedural hearing was fixed for 20 November 2018. A hearing was fixed for 14 January 2019 and the following four days.

8. At the procedural hearing on 20 November 2018, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The First Respondent was not present but was represented by William Macreath, Solicitor, Glasgow. The Second Respondent was not present but was represented by Dorothy Bain, Q.C., instructed by Francis Gill, Solicitor, Edinburgh. Both parties had made adjustments and the Fiscal had produced a Record. The Tribunal granted the Fiscal's motion to amend the First Respondent's address in the Complaint. The case was continued to the hearing fixed for 14 January 2019 and the following four days.

9. At the hearing on 14 and 15 January 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The First Respondent was present and represented by William Macreath, Solicitor, Glasgow. The Second Respondent was present and represented by Dorothy Bain, Q.C., instructed by Francis Gill, Solicitor, Edinburgh. An amended Record was received by the Tribunal. Joint Minutes were lodged on behalf of the Complainers and each Respondent admitting some of the facts

and averments in the Record as amended. No evidence was led. Of consent, the Tribunal granted the Fiscal's motion to amend paragraph 3.3 of the amended Record by inserting the words "either or both" between the words "of" and "the" where they appear in the first sentence of that paragraph.

10. Having given careful consideration to the terms of the amended Record and Joint Minutes, and the submissions of the parties, the Tribunal found the following facts established in relation to both Respondents:

10.1 (a) The First Respondent is a solicitor enrolled in the Registers of Scotland. His date of birth is 21 July 1968 and he was enrolled on 13 June 1996. Between 1 June 2002 and 31 October 2014 he was a partner in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow. Between 1 February 2008 and 30 September 2009 he was the designated Cashroom Partner at said firm, and between 14 October 2008 and 30 September 2009 he was the Anti-Money Laundering Partner of said firm. On 29 July 2014, Hamilton Burns WS Limited, company number SC483134, was incorporated as an incorporated practice and having its registered office at the said address. Between 1 November 2014 and 29 December 2015 he was a Director of the said incorporated practice. Between 30 December 2015 and 23 May 2017 he was a Consultant with said incorporated practice.

(b) The Second Respondent is a solicitor enrolled in the Registers of Scotland. Her date of birth is 5 October 1970 and she was enrolled on 3 September 1997. Between 17 October 2005 and 31 May 2006 she was an Associate in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow. Between 1 June 2006 and 31 October 2014 she was a partner in the said firm. Between 1 November 2014 and 8 May 2015 she was a Director in the said incorporated practice of Hamilton Burns WS Limited. Between 1 October 2009 and 8 May 2015 she was the designated Cashroom Partner, then designated Cashroom Manager of the said firm, then said incorporated practice. Between 1 October 2009 and 8 May 2015 she was the Anti-Money Laundering Partner then the Money Laundering Reporting Officer of the said firm, then said incorporated practice. Following her resignation as a

Director from said incorporated practice on 8 May 2015, she was elected as a member of the UK Parliament.

(c) The said incorporated practice, Hamilton Burns WS Limited, was incorporated on 29 July 2014. The First Directors appointed were the First and Second Respondents, William Lawson Criggie and Garry Christopher Moss. Two further Directors, Lorraine Kelly and Andrew Knox, were appointed on 2 March 2015. The First Respondent resigned as a Director on 29 December 2015 and the Second Respondent resigned as a Director on 8 May 2015. On 23 May 2017, the said incorporated practice entered administration and two members of FRP LLP, were appointed as Joint Administrators. An estimated Statement of Affairs prepared by said Administrators dated 1 June 2017 showed a deficiency of £511,084.00. The First Respondent is noted as a creditor to the extent of £241,400.00. Another substantive creditor is noted as HM Revenue & Customs to the extent of £210,400.00. The said Administration has been extended until 22 May 2019.

10.2 The Financial Compliance Department of the Complainers conducted an inspection of the financial records, books, accounts and documentation of the said practice unit of Hamilton Burns WS Limited on 13 and 14 October 2015. This inspection identified a number of concerns including inaccurate recording of the said practice's financial position; inaccurate, inadequate and inappropriate recording of borrowings from clients; inaccurate recording and review of client balances; and breaches of the Money Laundering Regulations. Following said inspection, the said Financial Compliance Department produced an Executive Summary. Said Executive Summary was produced as Production 3 in the First Inventory of Productions for the Complainers. The said practice unit was then invited to respond to the said matters raised in the said Executive Summary and duly responded. At a meeting of the Complainers' Client Protection Sub-Committee on 18 February 2016, the First and Second Respondents had been invited to attend and did so along with the said William Criggie. Said meeting was continued to allow the First and Second Respondents, and the said practice unit, to seek advice. The Complainers, and in particular the

Financial Compliance Department and the Client Protection Sub-Committee, despite responses from the First and Second Respondents, and the said practice unit, continued to have concerns and in particular in regard to the administration of a Trust. As a result of said concerns not being addressed, the Complainers raised a Complaint with the Scottish Legal Complaints Commission on 29 June 2016. Said concerns remained until the said practice unit entered administration on 23 May 2017.

10.3 In or around early 2012, the First Respondent instructed agents to prepare a Deed of Trust. The Beneficiary of said Trust was to be his sister, Jill Alison Macpherson Mickel. The Trustees appointed were the First and Second Respondents. Said Deed of Trust was executed by the First and Second Respondents on 24 February 2012 and registered in the Books of Council and Session on 28 February 2012. A copy of the said Deed of Trust (hereafter "DOT") was produced as Production 6 in the First Inventory of Productions for the Complainers.

10.4 A Trust is a tripartite relationship involving a Settlor, Trustees and Beneficiaries. The Settlor creates the Trust by giving property, assets or funds to the Trustees so that it can be utilised for the benefit of the Beneficiaries. The First Respondent is the Settlor and Trustee but he is not a Beneficiary in terms of said DOT. The Second Respondent is a Trustee but not a Beneficiary. The Beneficiary was the said Jill Mickel and her descendants.

10.5 Clause 3 of the said DOT states that the First Respondent as the Settlor "binds myself to make over to the Trustees the sum of £145,725 or property to that value to constitute the discretionary fund".

Clause 4 of the said DOT appoints the Beneficiaries of the said Trust to be the said Jill Mickel and her descendants.

Clause 10.1 of the said DOT states that "notwithstanding any provision of this Deed, no power shall be exercisable and no provision shall operate so as

to allow the Trust Fund or its income to become payable to or applicable for the benefit of me during my lifetime or my spouse in any circumstances whatsoever". The reference to "me" is a reference to the First Respondent.

Clause 13.11.1 of the said DOT states that "the Trustees may borrow or lend with or without security."

Clause 13.19 of the said DOT states that "the Trustees may enter into any transaction or do any act otherwise authorised by law or by this Deed not withstanding that any Trustee or might be acting with a conflict of interest between such Trustee and that Trustee as an individual or as Trustee or any other Trust or any partnership of which a Trustee is a partner or any company of which a Trustee is a Shareholder or Director or in relation to any combination of these capacities provided that the Trustee or Trustees with whom there is or may be any such conflict is or are not the sole Trustee or Trustees."

The said DOT accordingly permits the Trustees to enter into a transaction where a conflict of interest may be construed but only on the basis that there are other Trustees who are not similarly conflicted. The only Trustees were the First and Second Respondents.

10.6 On or around 28 May 2012, a client ledger card was opened by the said firm of Hamilton Burns. The name which appeared on the said ledger card was "The Jill Mickel Trust". The Trust was allocated an account number of 14363. The partner of the said firm allocated to the client and denoted on said ledger card was the Second Respondent. With effect from 28 May 2012, therefore, the said Trust became a client of the said firm and thereafter the said incorporated practice. A Standard Security was executed by the First Respondent in favour of the said Trust with said security being held over the First Respondent's property at Flat 2/1, 13 Partickhill Road, Glasgow, G11 5BC. The Second Respondent's reference is narrated in the Form 2 accompanying the said Standard Security for registration. The First

Respondent produced notes representing confirmation from Trustees of funds invested on behalf of the Trust on an interest-bearing basis to the firm of Hamilton Burns WS. The notes produced by the First Respondent were submitted to the Complainers by email on 4 December 2015. Said notes are unsigned. A further ledger card was submitted to the Complainers dated 8 June 2016 narrating 68 corrective entries. Following the posting of said entries the said firm exhibited a deficit of £108,274.85. A further ledger card was submitted to the Complainers dated 9 June 2016 narrating a further 9 corrective entries including three credit payments of £50,000; £50,000 and £10,000. The effect of all said further corrective entries was that the said firm exhibited a surplus of £1,725.15. The Complainers believed that the said firm had been exhibiting a deficit for a considerable period prior to 9 June 2016. The Complainers were unaware as to who instructed said corrective entries and on what basis those instructions were given.

10.7 The following entries appear on the said ledger card during the period from 28 May 2012 to 30 September 2015:-

Date	Narrative	Debit	Credit
28/05/12	From Mickel payment by Andrew CHAPS transfer.		£46,500.00
07/06/12	To paid O'Hara's re balance of NM Tax liability.	£ 1,500.00	
21/12/12	From Mickel payment by Andrew CHAPS transfer.		£50,000.00
28/12/12	Paid Niall Mickel payment due from Andrew Mickel which was included in funds received 21/12/12 as per NM email dated 28/12/12.	£ 3,000.00	
27/02/13	Transfer from Jill Mickel Trust 14363/1 to GEN EXPS to cover costs of various DD's due off RBS firm as		
	per NM instructions.	5,000.00	
01/03/13	Funds received back from 345 GEN EXPS which was given as loan until credit card funds received dated 27/02/13.		£ 5,000.00
26/03/13	From Royal Bank of Scotland uplift part investment account as per NM and TAS Trustees instructions to give Hamilton Burns loan (emails attached).		£50,000.00

27/03/13	To transfer from 14363/1 loan to Hamilton Burns as per NM/TAS as Trustees' email dated 26/03/13.	£26,000.00	
27/03/13	To transfer from 14363/1 loan to Hamilton Burns as per NM/TAS as Trustees' email dated 26/03/13.	£24,000.00	
27/03/13	To cancel previous entry posted incorrectly.		£26,000.00
27/03/13	To cancel previous entry posted Incorrectly		£24,000.00
27/03/13	From the Jill Mickel Trust on loan to Hamilton Burns as per NM/TAS as Trustees per email dated 26/03/13.	£50,000.00	
27/03/13	To cancel previous entry posted incorrectly.		£50,000.00
27/03/13	Paid Hamilton Burns – loan as per NM/TAS as Trustees email dated 26/03/13.	£50,000.00	
17/04/13	To paid Alan Mickel (NM father).	£ 4,500.00	
13/06/13	Funds received from Alan Mickel and Mrs D B Mickel.		£20.000.00
31/10/13	To paid Hacking & Paterson Factor's account.	443.22	
14/01/14	To paid Hacking & Paterson common charges.	282.14	
23/01/14	Transfer from 14363/1 to 15633/2 re removal costs as per NM instructions.	£ 3,600.00	
27/01/14	Transfer funds from 14363/1 to 303 wages account as per NM instructions.	£ 7,500.00	
27/01/14	Transfer from 15633/2 to 14363/1 to reimburse re removal costs.		£ 3,600.00
29/01/14	From Hamilton Burns funds borrowed on 27/01/14 returned.		£ 7,500.00
31/01/14	Transfer from 14363/1 to 808 NM drawings as per NM instructions.	£ 9,200.00	
03/02/14	Transfer from 14363/1 to 808 NM drawings re funds due for raising action against HB.	588.87	
27/02/14	Hamilton Burns as per NM		
	instructions.	£17,000.00	
07/03/14	To paid Paul Murphy (cash) for payment for boiler service, window cleaners and general end of tenant.	500.00	
11/03/14	Transfer funds back from 27/02/14 as per NM instructions from firm 303 to 14363/1.		£13,000.00
20/03/14	Transfer funds back from 303 wages to 14363/1 dated 27/02/14 as per NM instructions.		£ 4,000.00

31/03/14	To paid Hacking & Paterson re 13 Partickhill Road, Glasgow as per NM instructions.	163.86	
01/04/14	From Royal Bank of Scotland uplifted from investment account as per NM instructions.		£12,000.00
01/04/14	Paid Hamilton Burns temporary loan by CHAPS	£12,000.00	
03/04/14	To paid Niall Mickel re house repairs.	£ 1,000.00	
16/04/14	From 303 to return temp transfer on 01/04/14.		£12,000.00
28/04/14	To paid Niall Mickel (cash) re house repairs.	250.00	
01/05/14	Paid Hamilton Burns temp transfer as per NM instructions.	£11,300.00	
27/05/14	From Royal Bank of Scotland uplifted from investment account.		£24,000.00
27/05/14	Paid Hamilton Burns temp loan as per NM instructions.	£24,000.00	
30/05/14	To paid Hacking & Paterson common charges (yellow slip auth by NM).	180.06	
12/06/14	Part funds received back from Mickel Trust Loan account 707 re funds used on 01/05/14 (£11300).		£ 7,300.00
12/06/14	Funds paid back from Mickel Trust loan account from 27/05/14.		£24,000.00
23/06/14	Transfer back balance of funds transferred 01/05/14 from 14363/1 to 707.		£ 4,000.00
07/07/14	Paid Hamilton Burns temp transfer as per NM instructions.	£ 5,000.00	
09/07/14	From Hamilton Burns return of temp transfer used on 07/07/14.		£ 5,000.00
16/07/14	To paid NM international payment as per NM instructions.	£ 2,000.00	
18/07/14	To paid Lesley Mickel as per NM instructions on the 18/07/2014.	250.00	
18/07/14	To paid NM as per NM instructions on 18/07/2014.	250.00	
24/07/14	To paid BOS credit card D/D as NM email on 24/07/2014.	3,737.00	
28/07/14	Paid Niall Mickel via BNP Paribas account 2500 euros.	2,032.36	
15/09/14	Paid Niall Mickel via BNP Paribas account in France as per his email dated 15/09/14.	2,005.00	
16/10/14	Paid Spey Building & Joinery for work done as per NM instructions.	569.75	
29/10/14	Paid Lyonnaise des aux re outstanding fee as per NM instructions and letter attached.	106.72	

29/10/14	To paid Southside Factoring re outstanding fees for common charges re Partickhill Road as per NM instructions.	117.07	
11/11/14	Paid Hamilton Burns loan re NM new car as NM instructions.	£10,000.00	
27/11/14	To paid Hamilton Burns loan as per NM instructions.	7,041.44	
28/11/14	Funds received from Hamilton Burns firm re funds due to Trust as per posting on 27/11/2014 as per NM instructions.		£ 7,041.44
28/11/14	Paid Hamilton Burns loan as per NM instructions – loan transferred twice in error once on 27th by HI and then again by SR on 28th.	7,041.44	
12/12/14	Funds paid to Lesley Mickel as NM instructions.	1,000.00	
13/01/15	To paid Hardy Macphail paid for 13 Partickhill Road ref number 4162 22 1 as per NM instructions.	250.64	
15/01/15	To paid Scott & Co, council tax re cheque written on 14/01/15.	1,094.57	
15/01/15	To paid Mr Billy Rothnie re painter for Herriet Street, Pollokshields.	600.00	
27/01/15	To paid Hamilton Burns cash for painter for Herriet Street as per NM instructions.	500.00	
27/01/15	To paid Scottish Gas for Partickhill Road as per NM instructions.	135.11	
29/01/15	To paid Hamilton Burns re loan for RBS Bank as per NM instructions.	5,000.00	
30/01/15	To paid SP Autobahn to pay NM car repairs.	603.60	
27/04/15	To paid MBFIN as per NM instructions .	1,594.95	
27/05/15	To transfer funds from 14363/1 to		
	account 303 wages and salaries as per NM instructions.	6,000.00	
01/06/15	Funds received from Hamilton Burns re loan taken on 27/05/2015 return of funds.		£ 6,000.00
24/06/15	To uplift funds from RBS client monies repayment to HB Credit Card NM mortgage payments (as per NM instructions 23/06/2015)		£ 5,748.60
24/06/15	To paid funds to credit card as payments re NM training centre paid by Hamilton Burns as per NM instructions on 23/06/2015 funds were to be uplifted 24/06/2015.	5,748.60	
29/07/15	To paid Hacking & Paterson – outstanding common charges per NM instructions.	387.92	

By 30 September 2015, the funds remaining at credit for the said Trust per the ledger were £159.10.

10.8 Sums totalling £116,500 were remitted to the said Trust per entries on the said ledger card. Said sums were not made over by the First Respondent personally. There was, accordingly, a shortfall totalling £29,225 of the said sums to be made over.

10.9 During the said period from 28 May 2012 to 30 September 2015, the said ledger card narrates (a) sums totalling £56,591.44 as being remitted to the First Respondent (b) sums totalling £151,441.44 being remitted to the said firm and said incorporated practice; and (c) sums totalling £98,941.44 being repaid by the said firm or said incorporated practice to the said Trust. The sums narrated as being remitted to the First Respondent were erroneous and should have narrated as being remitted to the said firm but also as being reflected in the First Respondent's drawings nominal ledger. Corrective entries were posted in June 2016.

All said transactions were authorised and instructed by either, or both, of the First and Second Respondents.

11. Having given careful consideration to the terms of the amended Record and Joint Minutes, and the submissions of the parties, the Tribunal found the following facts established in relation only to the First Respondent:

11.1 Accounts Certificates for the Firm for the periods ending 31 September 2012, 31 March 2013, 30 September 2013, 31 March 2014 and 30 October 2014 were signed by the First and Second Respondents. A further Accounts Certificate for the period to October 2014 was signed by the First Respondent and on behalf of the Second Respondent. An Accounts Certificate for the Incorporated Practice for the period from 1 November 2014 to 31 March 2015 was signed by the First Respondent on behalf of the Second Respondent and an Accounts Certificate for the incorporated practice for the period from 1

April to 30 September 2015 was signed by the First Respondent and signed by the then Cashroom Manager, William Criggie. Those Certificates were delivered to the Complainers in accordance with Rule 6.15.1. of the Law Society of Scotland Practice Rules 2011 and the Certificates made no disclosure of any deficits.

12. Having considered the foregoing circumstances, the Tribunal found the First Respondent guilty of Professional Misconduct singly and *in cumulo* in respect of:

(a) The First Respondent in his capacity as a regulated person and as a manager of the practice unit of Messrs Hamilton Burns & Company, and manager of the subsequent incorporated practice unit, Hamilton Burns WS Limited, failed to keep at all times properly written up such accounting records as are necessary to show all dealings of those practice units with the funds held on behalf of the client shown as The Jill Mickel Trust thereby in breach of Rule B6.7.1 of the Law Society of Scotland Practice Rules 2011;

(b) The practice unit of Messrs Hamilton Burns & Company and the subsequent incorporated practice, Hamilton Burns WS Limited, of which the First Respondent was a Manager, and during a period when the Second Respondent was Cashroom Partner or Manager, borrowed sums of money from the client ledger denoted as The Jill Mickel Trust in circumstances where the said Trust, being a client of the said practice unit and incorporated practice, was not in the business of lending money, or had not been advised independently in regard to the making of loans, all thereby in breach of Rule B6.20.1 of the Law Society of Scotland Practice Rules 2011;

(c) The practice unit of Messrs Hamilton Burns & Company and the subsequent incorporated practice, Hamilton Burns WS Limited, of which the First Respondent was a Manager, and during a period when the Second Respondent was Cashroom Partner or Manager borrowed money from the client denoted as The Jill Mickel Trust, or otherwise intromitted with the said Trust's funds in circumstances where a conflict of interest existed as between the said Trust of which the First Respondent was at all relevant times a Trustee, and the said practice unit and

incorporated practices of which the said Trust was a client thereby in breach of Rule B1.7.1 of the Law Society of Scotland Practice Rules 2011;

13. Having considered the foregoing circumstances, the Tribunal found the Second Respondent guilty of Professional Misconduct singly and *in cumulo* in respect of:

(a) The Second Respondent in her capacity as a regulated person and as a manager of the practice unit of Messrs Hamilton Burns & Company, and manager of the subsequent incorporated practice unit, Hamilton Burns WS Limited, failed to keep at all times properly written up such accounting records as are necessary to show all dealings of those practice units with the funds held on behalf of the client shown as The Jill Mickel Trust thereby in breach of Rule B6.7.1 of the Law Society of Scotland Practice Rules 2011;

(b) The practice unit of Messrs Hamilton Burns & Company and the subsequent incorporated practice, Hamilton Burns WS Limited, of which the Second Respondent was a manager, and during a period when the Second Respondent was Cashroom Partner or Manager, borrowed sums of money from the client ledger denoted as The Jill Mickel Trust in circumstances where the said Trust, being a client of the said practice unit and incorporated practice, was not in the business of lending money, or had not been advised independently in regard to the making of loans, all thereby in breach of Rule B6.20.1 of the Law Society of Scotland Practice Rules 2011;

(c) The practice unit of Messrs Hamilton Burns & Company and the subsequent incorporated practice, Hamilton Burns WS Limited, of which the Second Respondent was a manager, and during a period when the Second Respondent was Cashroom Partner or Manager, borrowed money from the client denoted as The Jill Mickel Trust, or otherwise intromitted with the said Trust's funds in circumstances where a conflict of interest existed as between the said Trust of which the Second Respondent was at all relevant times a Trustee, and the said practice unit and incorporated practices of which the said Trust was a client thereby in breach of Rule B1.7.1 of the Law Society of Scotland Practice Rules 2011;

14. Having heard the representatives for the Respondents in mitigation, the Tribunal pronounced an Interlocutor in the following terms:-

Perth, 15 January 2019. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Alan Niall MacPherson Mickel, Flat 2/1, 13 Partickhill Road, Hyndland, Glasgow and Tasmina Ahmed-Sheikh, 75 Newlands Road, Newlands, Glasgow; Find the First Respondent guilty of professional misconduct in respect of his breaches of Rules B6.7.1, B6.20.1 and B1.7.1 of the Law Society of Scotland Practice Rules 2011; Find the Second Respondent guilty of professional misconduct in respect of her breaches of Rules B6.7.1, B6.20.1 and B1.7.1 of the Law Society of Scotland Practice Rules 2011; Censure the First Respondent and fine him in the sum of £3,000 to be forfeit to Her Majesty; Censure the Second Respondent and fine her in the sum of £3,000 to be forfeit to Her Majesty; Find the Respondents jointly and severally liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the names of the Respondents.

(signed)

Nicholas Whyte

Chairman

15. 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 First and Second Respondents by recorded delivery service on 18 February 2019.

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chairman

NOTE

The Tribunal had before it an amended Record dated 11 January 2019 and Joint Minutes of Admissions signed by the Fiscal and each Respondent. The Joint Minute signed by the First Respondent contained more admissions than that contained in the Joint Minute signed by the Second Respondent. Specifically, the First Respondent admitted the averment of fact in the amended Record at paragraph 2.10 (reproduced above as paragraph 11.10). The Second Respondent made no admissions in relation to this paragraph. The First Respondent's Joint Minute also contained admissions at paragraph 10 in relation to a ledger card and the operation of a deficit by the firm due to accounting records failure. In addition, the First Respondent's Joint Minute at paragraph 21 admitted that the First and Second Respondent attended partners' meetings at which the loans by the Trust in favour of the firm were discussed, agreed and authorised. The Tribunal proceeded on the basis that the Answers contained in the Record were irrelevant when considering the merits of the case since the parties were presenting an agreed position to the Tribunal in their Joint Minutes.

The Tribunal also had before it two Inventories of Productions for the Complainers, three Inventories of Productions for the First Respondent and two Inventories of Productions for the Second Respondent. The Complainers and the First Respondent also provided Bundles of Authorities. No evidence was led. The Fiscal and Counsel for the Second Respondent read from written submissions which they supplemented with oral submissions. Said written submissions were provided to the Tribunal on the morning of the hearing on 14 January 2019 and are reproduced below. The solicitor for the First Respondent made oral submissions only. Although admissions had been made, it was for the Tribunal to be satisfied regarding professional misconduct. The Tribunal made clear that if it made findings of professional misconduct, the parties would be given an opportunity in due course to address the Tribunal on mitigation and sanction.

SUBMISSIONS FOR THE COMPLAINERS

The written submissions of the Fiscal in relation to the First Respondent were as follows:

"The Complainers and the First Respondent have entered into a Joint Minute whereby the facts as narrated within the Complaint as amended, the duties and two of the three averments of professional misconduct are all admitted. One averment of professional misconduct is not formally admitted at Statement 4.1(b) but the facts in support of it are, and parties will be presenting submissions on whether those facts amount to professional misconduct or not. The issue is a narrow one, namely was the Trust in the business of lending money?

It is a matter for the Tribunal if on the basis of the Joint Minute and the material provided to it, to determine whether the accepted actings or omissions of the First Respondent in Statements 4.1 (a), (b) and (c) do indeed amount to professional misconduct. It is the position of the Complainers that they do.

Statement 2.1 (a) narrates the records held by the Complainers in relation to the First Respondent and more particularly, narrates his positions and roles within the former firm of Hamilton Burns and incorporated practice of Hamilton Burns WS Limited. His Record card can be found as item 1 in the Complainers First Inventory of Productions. For the purposes of this Complaint, those two entities will be referred to as "the firm". The First Respondent was a partner and then Director of that firm between 1 June 2002 and 29 December 2015. He also had other roles with the firm until 23 May 2017.

Statement 2.1 (c) narrates the history of the incorporation of the firm and then sadly its demise on 23 May 2017 with a deficit of over half a million pounds.

The matter now before the Tribunal came to the attention of the Complainers during the course of an inspection of the firm by the Financial Compliance Department on 13 and 14 October 2015. That inspection identified a number of concerns which are detailed in an Executive Summary produced by that department and that summary is produced as production number 3 for the Complainers in the First Inventory. The terms of that Executive Summary are not disputed by the First Respondent. Whilst there were a number of concerns outlined within that Executive Summary the main concerns focussed on a particular ledger which is referred to throughout the Complaint as "The Jill Mickel Trust".

The position that the Society was able to ascertain was that in the early part of 2012 the First Respondent instructed agents to prepare a Deed of Trust on behalf of his sister, Jill Mickel. The First and Second Respondents were to be the Trustees and the Deed of Trust was finalised and executed and registered in February 2012. A copy of that Deed of Trust is number 6 in the Complainer's First Inventory and number 4 in the First Respondent's Inventory. Statements of Fact 2.4 and 2.5 set out some of the particular provisions of that Deed of Trust. Clause 13.11.1 of that Deed will be of particular relevance when considering the submissions being advanced by the First Respondent.

In terms of Statement of Fact 2.6 on 28 May 2012 a client ledger card was opened by the firm and the name which appeared on the ledger card was "The Jill Mickel Trust". It was allocated an account number and the Second Respondent is denoted on the ledger card as being the partner responsible. On that same date the first entry was a payment being made for the Trust's benefit.

It is accordingly the Complainer's position that with effect from 28 May 2012 given that a ledger card had been opened on the firm's client account, and funds paid in to the firm's client account that the Trust became a client of the firm from that date. It might also be helpful to suggest that had that ledger card been correctly opened it perhaps should have been entitled the Alan Niall Macpherson Mickel Trust given the title of the Deed of Trust. It is however a matter of agreement now that whatever the name on the ledger card should or could have been, the Trust itself and the Trust funds became a client of the firm and therefore client monies with effect from that date. The Complainers are however prepared to recognise that the First Respondent had previously advanced a position to the Complainers and their Financial Compliance Department that the Trust was not a client of the firm and that the

Trust funds were not client monies. The First Respondent had on several occasions maintained, albeit erroneously, that the funds were his and to deal with as he saw fit.

The First Respondent, now accepts that having received advice on these issues it is now agreed and accepted that his belief was indeed erroneous, albeit genuinely held. His acceptance of that seems to have occurred in December 2015 when he resigned as a director of the incorporated practice.

Statement 2.7 narrates the entries on the ledger card covering the period from 28 May 2012 to 30 September 2015 and the ledger card itself can be found as number seven in the Complainer's First Inventory.

There is a second ledger card which shows corrective entries which took place after September 2015 which is contained in the First Inventory for the First Respondent at item one. As is narrated and agreed in terms of Statement 2.7, as at 30 September 2015 the Trust funds had reduced to a sum of £159.10 and it was the number and nature of the entries on that ledger card and the reduction of the Trust funds to that balance which alerted the concerns of the Complainer's Financial Compliance Department.

A further concern which arose, and which is narrated at Statement 2.8, is that the Trust Deed provided for sums or property to the extent of £145,725 to be over the Trust. In terms of that ledger, sums totalling the amount £116,500 had been remitted to the ledger card which was a cash shortfall of £29,225. At that point the Financial Compliance Department had not acquired any knowledge of a security having been granted in favour of the Trust by the First Respondent which it subsequently transpired appeared to rectify any shortfall due to the Trust. That security and its recording details are items one and two in the Complainers Second Inventory.

In terms of Statement 2.9, what the ledger card narrates in summary is that amounts totalling £56,591.44 are being made over to the First Respondent, sums totalling £151,441.44 are being made over to the firm and only the sum of £98,941.44 being repaid back to the Trust by the firm. Those figures and the potential shortfall to the Trust funds were again matters which raised concerns with the Complainers. The inspectors who attended for that department were unable to reconcile the entries in that ledger card with other entries held by the firm in its nominal ledgers. The accounting records were, in simple terms, inadequate and not properly written up.

Following the more detailed investigations undertaken after that inspection, and also during the course of these proceedings, Trust funds were made over and utilised for the benefit of the firm and significant sums were lent by the Trust to the firm to allow it to continue trading. Certain sums that were, on the face of it, made over to the First Respondent personally were narrated as such but they were liabilities of the firm to him and should have been recorded through the First Respondent's drawings account rather than having been shown as being paid over to the First Respondent personally.

Following further investigations being undertaken by the Complainers, the First and Second Respondents and the Second Respondent's successor as Cashroom Manager provided further information to the Complainers in December 2015 and in due course provided a ledger card in June 2016 which corrected the erroneous errors made on the ledger card and also took steps to also correct

the corresponding cross-entries in the firm's nominal ledgers so that all sums which were transferred out of the Trust to the firm and also via the First Respondent, were properly recorded as such. A cumulative interest payment was calculated by the firm's Accountant and also credited to the Trust ledger. This corrective ledger card, number one in the First Respondents First Inventory, on page 1/1/10 shows a figure on 8 June 2016 being a deficit of £117,414.88. Sums credited on 9 and 17 June bring about a surplus. This is narrated in Statement 2.9 and is admitted.

During the Complainer's initial investigations, and once it was clarified that loans had been made by the Trust to the firm, it was not made clear if any of those loans had been interest free or otherwise. It was maintained by the First Respondent that an agreed rate of interest of 6% would be paid on all loans but those interest payments or accrued sums were not narrated within the ledger card nor indeed the accounting records of the firm until June 2016. It now accepted by the First Respondent that as a result of his obligations as a partner and director he should have taken steps to have all of the entries on the ledger card including interest payments properly and accurately recorded but they were not.

The effect of these entries not being properly recorded and only thereafter being corrected in June 2016 is that during the period from May 2012 through until September 2015, the firm submitted Accounts Certificates to the Law Society of Scotland as they are required to do in terms of the Accounts Rules. Those Certificates were signed by both the First Respondent and Second Respondent with the Second Respondent signing again as Cashroom Manager. As the entries on the Trust ledger had not been properly recorded, it is the position of the Complainers Financial Compliance department is that during that period of the ledger card, May 2012 to September 2015, the firm must have at some point in that period been operating a deficit on its client account. It is not possible to identify an exact period or date when that deficit occurred but there is no doubt from the Complainers perspective that a deficit occurred. The certificates do not reflect any deficit. The corrective entries made in June 2016 effectively cured any such deficit retrospectively as mentioned. The certificates can be found at items eleven to seventeen in the Complainers First Inventory.

It is also important to stress to the Tribunal that whilst the First Respondent is accepting the accounting failures that were present during his tenure as a Partner and Director, there is no suggestion at all of dishonestly or impropriety on his part in relation to the intromissions with the funds from the Trust ledger. The First Respondent, during the Complainers investigation, suggested his actions or omissions were "amateurish". Whilst that may be a frank admission, the Complainers view it as more serious than that.

The averments of duty narrated in Statements 3.1 through to 3.4 are all now admitted by the Joint Minute. The First Respondent in particular accepts these duties and now accepts that they have been breached. The First Respondent also by accepting those duties and their breaches, also now accepts that his actings or omissions *in cumulo* amount to professional misconduct, in respect of 2 of the three sub-paragraphs of Statement of fact 4.1, but obviously again subject to the proviso that that determination is ultimately one for the Tribunal.

Appropriate at this point to address the averments at sub-paragraph (b) of Statement 4.1. In this respect it is a matter of agreement that the firm borrowed sums from the Trust, that the Trust was a

client and that the Trust funds were client monies. The terms of Rule B6.20.1 are agreed. It is also agreed that no independent advice was given to the Trust when making the loans. The question is whether the Trust was in the business of making loans.

No evidence is to be led or agreed in support of the First Respondents submission. What the Tribunal is being invited to do is take a view by considering Clause 13.11.1 of the Deed of Trust whereby the Trust can lend sums without security. There is no evidence that this Trust was set up with a specific power to lend sums with interest. No evidence as to what type of Trust it was, whether that be a Discretionary Trust or an Accumulation and Maintenance Trust, which might have a bearing on the submission. The First Respondent has lodged a letter from a Mr Kerrigan in a Third Inventory but that letter is not agreed per the joint minute and its opinions are not accepted by the Complainers. The Tribunal can read it but it is of no value evidentially. His opinions are irrelevant and it is a matter for the Tribunal to consider the matter on the material presented excluding this letter.

The First Respondent has to establish that the client was in the business of lending money, and it is not necessary for the Complainers to establish that it was not.

The Complainers position is in short compass. In the absence of any supporting evidence to suggest it was in that business, the Tribunal cannot determine that it was, to negate a finding of professional misconduct.

The First Respondent accepts that during his tenure as a Partner and Director of the firm, the firm failed to keep at all times properly written up accounting records to show all dealings between the practice unit and the firm with the funds held on behalf of The Jill Mickel Trust and that in breach of Rule B6.7.1, and for the avoidance of doubt that period runs from May 2012 to September 2015. This was not an isolated incident and it was not a short period of time.

He also accepts that in borrowing sums of money from the Trust whilst a Partner in the firm and a Trustee in the Trust, the First Respondent was acting in a conflict of interest and that in breach of Rule B1.7.1.

Again it is important for the Tribunal to be aware that the Complainers whilst advancing that primary position, accept that at the time when the loans were made and when the particular entries on the ledger card were processed, the First Respondent held the erroneous belief that the Trust was not a client and that the funds were not client monies. He now accepts those were erroneous beliefs and admits his error in those respects and recognises retrospectively that his actings were as is now being accepted and admitted.

It has transpired that there does not seem to have been anything untoward in the firm borrowing sums of money from the Trust to allow it to continue trading. There is a general prohibition on a firm borrowing money from a client unless the terms of Rule B6.20 are complied with. The First Respondent accepts that that Rule has been breached, subject to the submissions advanced on his behalf, but there has been no loss occasioned to the Trust. Indeed the Trust it seems has now to a degree gained from the loans made to the firm as it has belatedly received a return of interest.

There are in summary three Accounts Rule breaches. Those breaches have taken place over a period of in excess of three years. They are not trivial breaches and it is a concern that at least at some point during that period the firm may have been operating a deficit.

The Tribunal has on many occasions stated that the Complainers Accounts Rules are in place to protect the public and clients monies, and solicitors who breach them undermine public confidence in the profession. Not to make findings of professional misconduct against solicitors who breach them, further undermines that public confidence.

The Complainers issue guidelines to the profession in respect of these rules to assist solicitors in understanding them, and it is not acceptable for any solicitor to advance a position that they were ignorant of the rules or their import. A copy of the latest guidelines are provided for the tribunal as an illustration and the sections in relation Rules B6.7 and B6.20 are on pages 5-6 and 20. The note in relation to Rule B6.20 confirms that personal and business loans are not covered by the Guarantee Fund so in lending to a struggling legal firm, it might be suggested the loan was not free from risk.

The Complainers accordingly would invite the Tribunal to make a finding *in cumulo* of professional misconduct against the First Respondent in terms of all three sub-paragraphs of Statement 4.2 as amended and to make the usual order for expenses and publicity."

The Tribunal asked Mr Knight to clarify the apparent ambiguity between the admitted paragraph 2.9 of the amended Record and the written submissions regarding a deficit. Mr Knight referred the Tribunal to paragraph 3.6 of the Record which states that *"The Complainers believe that the said firm had been exhibiting a deficit for a considerable period prior to 9 June 2016."* He also referred to paragraph 10 of the First Respondent's Joint Minute which noted that on 9 June 2016, as a result of corrective entries, the firm exhibited a surplus on its client account but prior to the posting of said entries, due to the failure to keep properly written up accounting records, *"it was impossible for the Society to determine when the firm had been operating a deficit due to the accounting records failure"*. The Complainers' position was that it was impossible to establish if the account was in surplus or deficit at any time. He noted that there was no averment of professional misconduct in relation to a deficit and it was included simply as an illustration of the inadequacy of the accounting records.

In answer to a question by a Tribunal member, the Fiscal made plain that the "shortfall" of money the First Respondent paid into the Trust was not part of the Complainers' case. They were content that the standard security was effective to cover the balance. The Chair raised a doubt about whether it secured the amounts borrowed by the firm post incorporation as a limited company. The security could have explicitly covered the company but does not. The Fiscal indicated that Mr Macreath might be able to assist with this question.

The written submissions of the Fiscal in relation to the Second Respondent were as follows:

"The Complainers and the Second Respondent have entered into a Joint Minute whereby the facts as narrated within the Complaint as amended, the duties and two of the three averments of professional misconduct are all admitted. One averment of professional misconduct is not formally admitted at Statement 4.2(b) but the facts in support of it are, and parties will be presenting submissions on whether those facts amount to professional misconduct or not. The issue is a narrow one, namely was the Trust in the business of lending money ?

It is a matter for the Tribunal if on the basis of the Joint Minute and the material provided to it, to determine whether the accepted actings or omissions of the Second Respondent in Statements 4.2 (a), (b) and (c) do indeed amount to professional misconduct. It is the position of the Complainers that they do.

Statement 2.1 (b) narrates the records held by the Complainers in relation to the Second Respondent and more particularly, narrate her positions and roles within the former firm of Hamilton Burns and incorporated practice of Hamilton Burns WS Limited. Her Record card can be found as item 2 in the Complainers First Inventory of Productions. For the purposes of this Complaint, those two entities will be referred to as "the firm". The Second Respondent was a partner and then Director of that firm between 1 June 2006 and 8 May 2015 and between 1 October 2009 and 8 May 2015 she was in addition, perhaps more importantly, the designated Cashroom Partner and designated Cashroom Manager. In assuming that role she then became responsible for the supervision of the staff and systems employed by the firm to implement and secure compliance by the firm of the Accounts Rules namely the Law Society of Scotland Practice Rules 2011.

Statement 2.1 (c) narrates the history of the incorporation of the firm and then sadly its demise on 23 May 2017 some two years after the Second Respondent resigned her position.

The matter now before the Tribunal came to the attention of the Complainers during the course of an inspection of the firm by the Financial Compliance Department on 13 and 14 October 2015. That inspection identified a number of concerns which are detailed in an Executive Summary produced by that department and that summary is produced as production number 3 for the Complainers in the First Inventory. The terms of that Executive Summary are not disputed by the Second Respondent. Whilst there were a number of concerns outlined within that Executive Summary the main concerns focussed on a particular ledger which is referred to throughout the Complaint as "The Jill Mickel Trust".

The position that the Society was able to ascertain was that in the early part of 2012 the First Respondent instructed agents to prepare a Deed of Trust. The First and Second Respondents were to be the Trustees and the Deed of Trust was finalised and executed and registered in February 2012. A copy of that Deed of Trust is number 6 in the Complainer's First Inventory. Statements of Fact 2.4 and 2.5 set out some of the particular provisions of that Deed of Trust. In terms of Statement 2.6 on 28 May 2012 a client ledger card was opened by the firm and the name which appeared on the ledger card was "The Jill Mickel Trust". It was allocated an account number and the Second Respondent is

denoted on the ledger card as being the partner responsible. On that same date the first entry was a payment being made for the Trust's benefit.

It is accordingly the Complainer's position that with effect from 28 May 2012 given that a ledger card had been opened on the firm's client account, and funds paid in to the firm's client account that the Trust became a client of the firm from that date. It might also be helpful to suggest that had that ledger card been correctly opened it perhaps should have been entitled the Alan Niall Macpherson Mickel Trust given the title of the Deed of Trust. It is however a matter of agreement now that whatever the name on the ledger card should or could have been, the Trust itself and the Trust funds became a client of the firm and therefore client monies with effect from that date. The Complainers however accept that the Second Respondent had previously advanced a position to the Complainers and their Financial Compliance Department that the Trust was not a client of the firm and that the Trust funds were not client monies. The First Respondent had on several occasions maintained, albeit erroneously, that the funds were his and to deal with as he saw fit, and the Second Respondent understood from him that that was in fact the position. This despite there being a client ledger card with her reference on it.

Both Respondents, and specifically the Second Respondent, now accept that having received advice on these issues that it is now agreed that their belief was indeed erroneous, albeit genuinely held.

Statement 2.7 narrates the entries on the ledger card covering the period from 28 May 2012 to 30 September 2015 and the ledger card itself can be found as number seven in the Complainer's First Inventory. It is appropriate to clarify at this point that as the Second Respondent resigned from the firm on 8 May 2015, the entries from that date to 30 September 2015 do not arise from her actings or omissions.

There is a second ledger card which shows corrective entries which took place after September 2015 which is contained in the First Inventory for the First Respondent at item one. As is narrated and agreed in terms of Statement 2.7, as at 30 September 2015 the Trust funds had reduced to a sum of £159.10 and it was the number and nature of the entries on that ledger card and the reduction of the Trust funds to that balance which alerted the concerns of the Complainer's Financial Compliance Department.

A further concern which arose, and which is narrated at Statement 2.8, is that the Trust Deed provided for sums or property to the extent of £145,725 to be over the Trust. In terms of that ledger, sums totalling the amount £116,500 had been remitted to the ledger card which was a cash shortfall of £29,225. At that point the Financial Compliance Department had not acquired any knowledge of a security having been granted in favour of the Trust by the First Respondent which it subsequently transpired appeared to rectify any shortfall due to the Trust. That security and its recording details are items one and two in the Complainers Second Inventory. The Second Respondents reference appears on that form and it is her firm signature adhibited on that form. It appears that this is something else she overlooked when considering as Cashroom Manager if the Trust was a client.

In terms of Statement 2.9, what the ledger card narrates in summary is that amounts totalling £56,591.44 are being made over to the First Respondent, sums totalling £151,441.44 being made over the firm and only the sum of £98,941.44 being repaid back to the Trust by the firm. Those figures and

the potential shortfall to the Trust funds were again matters which raised concerns with the Complainers. The inspectors who attended for that department were unable to reconcile the entries in that ledger card with other entries held by the firm in its nominal ledgers. The accounting records were, in simple terms, inadequate and not properly written up.

Following the more detailed investigations undertaken after that inspection, and also during the course of these proceedings, Trust funds were made over and utilised for the benefit of the firm and significant sums were lent by the Trust to the firm to allow it to continue trading. Certain sums that were, on the face of it, made over to the First Respondent personally were narrated as such but they were liabilities of the firm to him and should have been recorded through the First Respondent's drawings account rather than having been shown as being paid over to the First Respondent personally. It should be stressed that there are no entries which would tend to suggest that any sums were made over personally to the Second Respondent. Nevertheless in her role as the Cashroom Partner or Manager, she should have been aware that sums were being provided by the Trust to assist with the cash flow issues which the firm had periodically over the period of three years, and how these were being recorded by the firm's cashroom. It appears she took no steps to review that particular ledger despite it being clearly marked as a client ledger.

Following further investigations being undertaken by the Complainers, the First and Second Respondents and the Second Respondent's successor as Cashroom Manager provided further information to the Complainers and in due course provided a ledger card which corrected the erroneous errors made on the ledger card and also took steps to also correct the corresponding cross-entries in the firm's nominal ledgers so that all sums which were transferred out of the Trust to the firm and also via the First Respondent, were properly recorded as such. A cumulative interest payment was calculated by the firm's Accountant and also credited to the Trust ledger. Statement 2.6 is admitted and that narrates the deficit on 8 June 2016 of £117,414.88 before funds were credited to create a surplus. All of this corrective action of course took place after the Second Respondent had left the firm.

During the Complainer's initial investigations, and once it was clarified that loans had been made by the Trust to the firm, it was not made clear if any of those loans had been interest free or otherwise. It was maintained by the First Respondent that an agreed rate of interest of 6% would be paid on all loans but those interest payments or accrued sums were not narrated within the ledger card nor indeed the accounting records of the firm until June 2016. Again insofar as the Second Respondent is concerned, as mentioned all of these corrective actions were taken on a date after she had departed the firm but the position she finds herself in is that those entries should have been made on the correct basis during the period when she was with the firm and in her role as Cashroom Partner or Manager. It now accepted by the Second Respondent that as a result of her duties in that respect she should have taken steps to have all of the entries on the ledger card including interest payments properly and accurately recorded but they were not.

The effect of these entries not being properly recorded and only thereafter being corrected in June 2016 is that during the period from May 2012 through until September 2015, the firm submitted Accounts Certificates to the Law Society of Scotland as they are required to do in terms of the Accounts Rules. Those Certificates were signed by both the First Respondent and Second Respondent with the

Second Respondent signing again as Cashroom Manager. Given the date of her resignation, the last certificate signed by her was for the period ended 31 March 2015, albeit it seems on her behalf by her successor. As the entries on the Trust ledger had not been properly recorded, it is the position of the Complainers Financial Compliance department that during the period of time when the Second Respondent was Cashroom Manager, the firm must have at some point in that period been operating a deficit on its client account, and no deficit is disclosed on any of the certificates. It is not possible to identify an exact period or date when that deficit occurred but there is no doubt from the Complainers perspective that a deficit occurred. The corrective entries made in June 2016 effectively cured any such deficit retrospectively. The certificates can be found at items eleven to seventeen in the Complainers First Inventory. It should also be made clear that there are no averments of professional misconduct against the Second Respondent, not indeed the First Respondent, in relation to any such deficit.

It is also important to stress to the Tribunal that whilst the Second Respondent is accepting the accounting failures that were present during her tenure as a Partner and Cashroom Manager, there is no suggestion at all of dishonesty or impropriety on her part in relation to the intromissions with the funds from the Trust ledger.

The averments of duty narrated in Statements 3.1 through to 3.4 are all now admitted by the Joint Minute. The Second Respondent in particular accepts these duties and now accepts that they have been breached. The Second Respondent also by accepting those duties and their breaches, also now accepts that her actings or omissions *in cumulo* amount to professional misconduct, in respect of 2 of the three sub-paragraphs of Statement of fact 4.2, but obviously again subject to the proviso that that determination is ultimately one for the Tribunal.

Appropriate at this point to address the averments at sub-paragraph (b) of Statement 4.2. In doing so it is proposed to adopt the submissions made in respect of the First Respondent. It is a matter of agreement that the firm borrowed sums from the Trust, that the Trust was a client and that the Trust funds were client monies. It is also agreed that no independent advice was given to the Trust when making the loans. The question is whether the Trust was in the business of making loans. For the reasons given in relation to the First Respondent, and as the First Respondent has failed to establish that the Trust was in that business, there is no basis for the Tribunal to sustain the position advanced by the First Respondent and adopted by the Second Respondent.

The Second Respondent accepts that during her tenure as a Partner, Manager and in particular the Cashroom Partner or Manager of the firm, the firm failed to keep at all times properly written up accounting records to show all dealings between the practice unit and the firm with the funds held on behalf of The Jill Mickel Trust and that in breach of Rule B6.7.1, and for the avoidance of doubt that period runs from May 2012 to May 2015.

She also accepts that in borrowing sums of money from the Trust whilst a Partner in the firm and a Trustee in the Trust, the Second Respondent was acting in a conflict of interest in that in breach of Rule B1.7.1.

Again it is important for the Tribunal to be aware that the Complainers whilst advancing that primary position, accept that at the time when the loans were made and when the particular entries on the ledger card were processed, the Second Respondent held the erroneous belief that the Trust was not a client and that the funds were not client monies. She now accepts that erroneous belief and admits her error in those respects and recognises retrospectively that her actings were as is now being accepted and admitted. She also accepts that these acts and omissions are primarily her responsibility given the position that she held within the firm as a Partner, as Cashroom Manager. She should in that particular role made more of an enquiry regarding the ledger in question, the intromissions on it and their consequences. She recognises that she did not do that.

It has transpired that there does not seem to have been anything untoward in the firm borrowing sums of money from the Trust to allow it to continue trading. There is a general prohibition on a firm borrowing money from a client unless the terms of Rule B6.20 are complied with. The Second Respondent accepts that that Rule has been breached, subject to the submissions advanced on her behalf, but there has been no loss occasioned to the Trust. Indeed the Trust it seems has now to a degree gained from the loans made to the firm as it has belatedly received a return of interest, and its interests are also now protected in terms of a security which is held over the First Respondent's property which security had been put in place during the period when the firm acted for the Trust and intromitted with its funds.

There are in summary three Accounts Rule breaches. Those breaches have taken place over a period of three years. They are not trivial breaches and it is a concern that at least at some point during that period the firm may have been operating a deficit.

The Tribunal has on many occasions stated that the Complainers Accounts Rules are in place to protect the public and clients monies, and solicitors who breach them undermine public confidence in the profession.

The Complainers issue guidelines to the profession in respect of these rules to assist solicitors in understanding them, and it is not acceptable for any solicitor to advance a position that they were ignorant of the rules or their import. A copy of the latest guidelines are provided for the Tribunal as an illustration and the sections in relation Rules B6.7 and B6.20 are on pages 5-6 and 20. It is also not acceptable for a solicitor acting as Cashroom Manager to attempt to deflect the responsibilities of that role by blaming another member of staff or fellow partner. The ultimate responsibility rests with her.

The Complainers accordingly would invite the Tribunal to make a finding *in cumulo* of professional misconduct against the Second Respondent in terms of all three sub-paragraphs of Statement 4.2 as amended and to make the usual order for expenses and publicity."

The Tribunal asked the Fiscal to clarify whether he was seeking findings singly or *in cumulo* as there appeared to be a discrepancy between the averments of misconduct in the Record and his written submissions which were read out to the Tribunal. The Fiscal said that he sought individual and *in cumulo* findings.

In answer to a question from a Tribunal member the Fiscal indicated that the balance of the ledger reproduced at paragraph 2.7 of the Record, would be the sum of £159.10 at 30 September 2015 and £547.02 at 8 May 2015.

The Chair asked the Fiscal to confirm that the basis of the case comprised two separate issues. Firstly, there was the failure to keep proper accounting records. Secondly, acting in conflict and borrowing from the client, both of which seemed to stem from what had been stated to be the genuine but erroneous belief that the Trust was not a client. The Fiscal submitted that when the loans were made, both Respondents appear to have been proceeding on the misunderstanding that the money was not client monies and that the Trust was not a client. They now accept this was an erroneous belief. In one sense there was an artificial situation whereby breach of the rules has taken place between May 2012 and September 2015 for the First Respondent and between May 2012 and May 2015 for the Second Respondent. However, while all that was going on, neither Respondent realised at that point that they were doing anything wrong.

The Chair asked the Fiscal whether he was submitting that the Respondents' belief that the Trust was not a client was unreasonable. The Fiscal said he was not suggesting that. The Complainers concede that there was a genuinely held belief at the time. It features consistently throughout the whole period of the investigation. However, it ought not to have been their view. They should have known the correct position. The Chair asked therefore whether it was the Fiscal's submission that the belief was unreasonable. The Fiscal noted that he had not used the word "unreasonable". The Chair asked whether he would make any categorisation of the belief. The Fiscal said he would categorise it as "wrongly held but genuine".

SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Macreath proposed to deal with the standard security issue first. He highlighted that the Complainers had taken the view that the standard security provided an undertaking to pay the Trust all sums due. However, the Trust is not identified by its date or the parties to it. No certified copy of the Deed of Trust is attached. The standard security does not say whether it relates to the sums due by the First Respondent or all sums due. Mr Macreath noted that such a bond would normally identify the other parties covered by the security.

Mr Macreath said he had lodged John Kerrigan's opinion (Production 16 in the Third Inventory of Productions for the First Respondent) to show that he had taken expert advice at the earliest possible stage. This production was only lodged once the plea was agreed. He did not tender the contents as expert evidence.

Mr Macreath noted that the solicitor-client relationship can be established in various ways. The relationship can be constituted by actings, orally or in writing and depends on all the circumstances. There may be Accounts Rules compliance ramifications whether or not the party is viewed as a client. He referred to Mr Kerrigan's opinion.

Mr Macreath said that the original Complaint contained five averments of professional misconduct against each Respondent. These had been reduced to three. The averment regarding the failures with accounting records did not contain any assertions about a deficit. The record-keeping issues are restricted to the circumstances of borrowing money from a family Trust. The second and third averments of misconduct arise out of the same circumstances. He acknowledged that the Complainers had properly conceded that there was no suggestion of dishonesty or impropriety by the Respondents. He noted the description given at interview by the First Respondent that his conduct had been "slightly amateur" (Production 5, First Inventory of Productions for the First Respondent) and he did not demur from that assessment. The First Respondent cooperated with the Complainers and gave full information. He explained why the Trust was a family Trust.

The First Respondent was the settlor of the Trust. His sister was one of the beneficiaries along with her descendants or others assumed by the Trust. The First Respondent's parents had wished their children to benefit from their investments. The siblings agreed to buy a property abroad. However, the First Respondent's sister changed her mind. The First Respondent agreed to put money to be held in a Trust for her. The Trust was prepared by a solicitor from Gillespie McAndrew. Mr Macreath noted that it would be usual in a discretionary Trust for a small figure to be applied but in this case the First Respondent inserted the large figure which represented his sister's half of the property. Their cousin also put money into the Trust when he acquired an interest in the property in 2012.

Law Society inspectors knew of the existence of the loans to the firm following their inspection in 2013. It was confirmed through the firm trial balance that there was a Trust loan. There was reference in the balance sheet to money due back to the Trust. The loan ledger was reviewed in the January inspection. The firm's trial balance detailed the loan under "Mickel Trust Loan". A client ledger for the Trust was requested but no loan agreement was seen. There was no file. This is in keeping with the Respondents'

views that the Trust was not a client. The First Respondent essentially viewed the money as his money. The Complainers' financial compliance inspectors made no further inquiry. It was not until October 2014 that the Trust loans became a live issue. With reference to Productions 10 and 11 in the First Inventory of Productions for the First Respondent, Mr Macreath noted that as soon as the matter arose, and having taken advice from Mr Macreath and senior counsel, the First Respondent acknowledged the problem and took steps to rectify it by resigning from the practice.

Mr Macreath noted that the Complainers accepted that the First Respondent had acted in the "genuine but mistaken belief" that the Trust was not a client. Mr Macreath said that the question for the Tribunal was whether this conduct met the conjunctive test in Sharp meriting the stigma of a finding of professional misconduct. He noted that "the Sharp test" is now followed by the legal regulators and disciplinary bodies for English solicitors and barristers. He made reference to Number 4 in the Bundle of Authorities submitted on behalf of the First Respondent. This was an article by Marc Beaumont, Barrister discussing the English test for professional misconduct following the case of Howd v Bar Standards Board [2017] EWHC 210 which was included at Number 3 in the Bundle of Authorities submitted on behalf of the First Respondent. He submitted that a failure of record keeping in breach of Rule B1.7.1 does not of itself amount to professional misconduct. The English and Scottish authorities were clear that the concept of professional misconduct should not be applied to trivial lapses and should only arise if the misconduct is serious and reprehensible. This view was supported by McMahon v Council of the Law Society of Scotland 2002 SC 475 and Bolton v Law Society [1994] 1 WLR 512 (found at items 5 and 6 in the First Respondent's Bundle of Authorities).

Mr Macreath noted that compliance with the Accounts Rules is paramount because of the trust of clients placed in solicitors. However, this case is unusual. It involved a family Trust. When he became aware of the potential wrongdoing, the First Respondent immediately resigned from Hamilton Burns. The Complainers noted in their Interview Panel Report of the interview on 18 February 2016 that *"they did not consider there to be any conspiracy here, or any intention of dishonesty, and were persuaded that the genuine intention had been to try to protect Jill Mickel..."* Mr Macreath said that he had corresponded with Jill Mickel's agents and that they were content with the way matters had resolved.

The Tribunal had to be satisfied that the Sharp test was met. Mr Macreath accepted that previous authority was not always helpful when making that assessment. However, he made reference to paragraphs 18-19 of McMahon and the facts of Bolton. He noted that the Courts were slow to replace the views of the Tribunal. They will only do so if the decision is irrational. The Tribunal could be justified in taking a lenient view where the conduct was "explicable if not excusable" or where there was

"misfortune or mitigating circumstances". He noted that the conduct in the present case was not dishonest. There was no lack of integrity or probity. There was a genuine belief. It was mistaken and amateurish. However, was it so reckless as to be serious and reprehensible? Mr Macreath asked the Tribunal to consider the First Respondent's conduct in the context of two recent Tribunal decisions, namely Law Society of Scotland v John Adam and Law Society of Scotland v Michael Inkster. He suggested that these were cases where the Tribunal took the view that not all breaches of the Accounts Rules constituted professional misconduct. Despite some serious breaches of the Accounts Rules, the conduct of the Respondents in those cases was not considered to be reprehensible.

In 2013 the Firm prepared a standard security in the firm belief that it covered all relevant matters. It bound the First Respondent as Trustee. The First Respondent has provided the search and valuations. The standard security is still in place and the property is unencumbered. The ledger was restored with interest. Mr Macreath noted again the First Respondent's total cooperation in the present case. The corrective ledger before the Tribunal was accepted by the Complainers. The financial risk to the Trust was nil. The Rules were not systematically ignored. The First Respondent had cooperated. He had resigned from Hamilton Burns immediately, placing himself at significant risk by leaving his firm. The First Respondent is a solicitor-advocate. Almost all his work is in litigation or arbitration. He is not involved in Trust work. It is unsurprising that he misinterpreted his powers under the Deed of Trust. It is conceivable that someone unskilled could misinterpret the meaning of clause 13.19.

Mr Macreath asked the Tribunal to consider John Kerrigan's letter. The Chair asked what the Tribunal was to make of the status of Mr Kerrigan's opinion. He is known to be an expert in trusts but he was not set up as an expert before the Tribunal and did not give evidence. His opinion appears in the main to address breach of trust rather than misconduct. Mr Macreath agreed that the breach of trust issue was no longer before the Tribunal.

Mr Macreath noted that it was always grave to act in a conflict situation. However, the Fiscal's "narration and concessions" were useful to the First Respondent. Mr Macreath asked the Tribunal whether it accepted that a mistaken belief did not pass the serious and reprehensible Sharp test.

With reference to the second allegation of professional misconduct, Mr Macreath noted that the Deed of Trust (Production 4 of the First Inventory of Productions for the First Respondent), granted an entitlement to the Trust to make loans. On a plain reading of paragraphs 13.1.1 and 13.11.2, there was an entitlement to lend. Rule B6.20.1 provides that a solicitor cannot borrow from a client unless the client is in the business of lending money or has been independently advised. He stated that the purpose

of the rule was obvious. He made reference to two cases, one from Missouri, U.S.A., and one from England (copies of which were not provided) which he said pointed to the purpose of the rule being to protect clients while allowing solicitors to borrow from lenders for their business or others who had been independently advised. The Tribunal would have to decide whether the Trust was in the business of making loans. He conceded that, "One swallow maketh not a summer." The Trust had an entitlement to lend. How would the average reader construe this term? The only recipient of loans from the Trust was the practice unit. It was a matter for the Tribunal whether this constituted the course of business. His view was that this was a stateable argument for the Tribunal to consider. The Chair asked whether the interpretation of "business" suggested that the activity should be undertaken for profit. Mr Macreath noted that interest of 6% was offered to the Trust. He said it was a stateable argument that there was a business purpose for the Trust to lend money. The rule exists to stop solicitors risking clients' money. This was not the case here. The First Respondent was labouring under the erroneous but genuine belief that the Trust was not a client of the firm. He had made a mistake. Mr Macreath made reference to McKinstry v Law Society of Scotland (no copy was provided) which was a judicial review of the Law Society's finding against Mr McKinstry without hearing from him. Sometimes solicitors will form a view but they are mistaken. They should not be pilloried for that. The Fiscal had conceded that there was no dishonesty or lack of integrity and the Respondents had proceeded in an erroneous belief. The matter for the Tribunal was whether the threshold was crossed from something venial to something which passed the Sharp conjunctive test.

The Chair remarked that the thread of the submissions seemed to be that the First Respondent did not apply his mind to the issues. Mr Macreath said there was a complete misunderstanding regarding his responsibilities to the Trust. This can be seen in his approach to the Deed of Trust. The draft Trust deed contains no figure but the First Respondent was so adamant to get this correct and that there should be no dubiety that he made it clear that he bound himself to make over £145,725 to it.

The Chair asked Mr Macreath what consideration the First Respondent had given to whether the Trust was a client. After all, the money was put in the client account and it was taken into account in the trial balance and the Accounts Certificates. On what basis did he think a client relationship did not exist? Mr Macreath noted that the First Respondent thought it was a private family matter. Part of the problem was that the First Respondent construed the ledger as just a general ledger of "debits and credits". It was essentially a running position but not a client ledger. The Chair noted that despite that interpretation, the balance of funds was held in the client account. Mr Macreath urged the Tribunal to look at Mr Kerrigan's letter. As soon as he was aware of the problem, the First Respondent resigned immediately.

The Chair noted that the firm was under financial pressure. The partners must or should have been looking at the financial position. They were having to make transfers to pay salaries. Should the Respondents have paid more attention to the finances? Mr Macreath said that the starting point was the erroneous belief of the First Respondent. He was in discussions with the Scottish Legal Aid Board (SLAB) regarding monies due and HMRC regarding repayment of VAT. He backed up the Trust with a standard security. Each and every case must be looked at on its own facts and circumstances. The Tribunal must remember that the issues live before it are the failure in record keeping, conflict and borrowing. It had been difficult to bring an agreed factual matrix before the Tribunal. The issue for the Tribunal was this – Is the conjunctive test of serious and reprehensible met? In Mr Macreath's submission, the test is not met. The Tribunal cannot surmise what was in the First Respondent's head in relation to other matters. Mr Macreath submitted that the biggest loser had been the First Respondent. He had to inflate the Trust and had lost his business.

The Chair asked about the "corrective ledger" contained at Production 1 of the First Inventory of Productions for the First Respondent. He noted that it was created on 8 June 2016 which was the same day on which the First Respondent repaid money to the Trust. Mr Macreath confirmed that the ledger was a "re-statement" taking into account the money the First Respondent had paid in to the Trust. It took some time to persuade the Complainers as to the source of funds. However, it was the First Respondent paying money into the Trust.

In response to a question from another Tribunal member about whether the Trust was in the business of lending money, Mr Macreath said that the Deed of Trust conveyed an entitlement to lend money. However, the First Respondent had arranged that the loan would be made at 6% interest. The interest was paid in June 2016. The question was whether the Trust was "in business". Mr Macreath said that many trusts lend on a regular basis. Part of being a Trustee is not to take unnecessary risk but that the breach of trust was not an issue the Tribunal could take into account.

SUBMISSIONS FOR THE SECOND RESPONDENT

Counsel for the Second Respondent began by reminding the Tribunal of the decision in Sharp v Law Society of Scotland 1984 SC 129. She noted that a failure on the part of a solicitor to comply with a relevant rule *may* be treated as professional misconduct. Whether such a failure should be treated as professional misconduct must depend upon the gravity of the failure and a consideration of the whole circumstances in which the failure occurred including the part played by the individual solicitor in question. There are certain standards of conduct to be expected of competent and reputable solicitors.

A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. It is essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made. Ms Bain submitted that in the whole circumstances, it was not proper to categorise the Second Respondent's conduct as professional misconduct and the case should be remitted to the Law Society to deal with as appropriate.

The written submissions of Counsel for the Second Respondent were as follows:

"1. As has been explained in or about early 2012, Mr Mickel, the First Respondent, instructed Mr John Stirling of Gillespie MacAndrew to prepare a Deed of Trust. The beneficiary of this was his sister. Mrs Ahmed-Sheikh understood that the purpose of the Trust Deed was to be protective of the First Respondent's sister because she had some personal difficulties.

2. Mrs Ahmed-Sheikh considered Mr Mickel to be her trusted colleague. She had worked for and progressed with Hamilton Burns successfully under his guidance for a period of about seven years, starting with the firm in 2005 when Mr Mickel was already a a partner. Mr Mickel was Mrs Ahmed-Sheikh's Managing Partner and through working with him, she came to know, and very much like and respect his mother and father. It was explained to Mrs Ahmed-Sheikh by both Mr Mickel and his father, Mr Alan Mickel, that he, Mr Alan Mickel, had cashed in an insurance policy which had produced a lump sum that he wished to divide equally between his two children, Niall and Jill. Both Niall and Jill decided to buy a property in Chamonix, France. However, after the property was purchased, Jill changed her mind and indicated that she would rather have the money in cash. This, Mrs Ahmed-Sheikh was told deeply concerned both Jill's mother and father. It was explained that they very much wished Niall to look after Jill's money and that is why the Trust was to be set up. It was in these circumstances that Mrs Ahmed-Sheikh was asked to be a Trustee.

3. The Trust was the Alan Niall Macpherson Mickel Trust. Although Mr Knight has referred to the Jill Mickel Trust – there is no such thing in fact or law.

4. Mrs Ahmed-Sheikh agreed to become a Trustee. No fees were issued or paid to Hamilton Burns; no legal advice was given to the Trust or Trustees in respect of the creation of the Trust and no fee was payable to Mrs Ahmed-Sheikh for acting as a Trustee. Indeed, no fee was paid to Gillespie MacAndrew. It was explained to Mrs Ahmed-Sheikh by Mr Niall Mickel and his father that the aim of the Trust was to ensure that Jill received the value of the cashed in insurance policy when she reached retirement age, less any payments to her before that date. Mrs Ahmed-Sheikh also understood that the Trust funds that Jill was entitled to were secured by virtue of the property purchased in Chamonix, Mickel family funds held at a bank and subsequently, and additionally, over property at Partickhill Road, Glasgow, which was owned by the First Respondent and which had a value in excess of £175,000.

5. Mrs Ahmed-Sheikh derived no personal benefit of any kind from her role as Trustee of the Trust and no one involved in the Trust, including the beneficiary and her family, have raised any

concerns about the running of the Trust. The Tribunal will note there is no secondary complainer. At no time did Mrs Ahmed-Sheikh instruct that money should be borrowed from the Trust funds and be made available to the firm Hamilton Burns and at no time prior to the matter being raised by the Financial Compliance Department did she understand that Mr Mickel was in fact doing this. As has been made clear from the narrative presented by Mr Knight, the First Respondent had on several occasions maintained that the funds were his and he could deal with them as he saw fit, and the Second Respondent understood from him that that was in fact the position. This is reflected in the fact that the complaint against Mrs Ahmed-Sheikh, quite properly makes no reference to her either instructing or directing any payments. However, as has also be explained by Mr Knight the Second Respondent now accepts that having received advice on this issue and in addition, the issue of the Trust being correctly classified as a client of the firm (which I will turn to in a little more detail later), that it is now agreed that her belief in both these respects was erroneous, albeit genuinely held. It was following on these issues being brought to the attention of Mrs Ahmed-Sheikh by the Financial Compliance Department and receiving legal advice that Mrs Ahmed-Sheikh appreciated that Trust funds had been used in the way described by Mr Knight and that she now accepts that her culpability lies in her failure to keep properly written up accounting records in terms of complaint a, and the further and consequential failings in relation to complaints b and c on page 41 of the Record. The Tribunal should be clear that but for her erroneous belief, the Second Respondent would not now be facing these proceedings. Everything stems from that one, albeit important mistake. In addition, I would also ask that the Tribunal appreciates that she is only subject to these proceedings because she held the important position of Cashroom Partner. It is clear now to Mrs Ahmed-Sheikh that she should have analysed the status of the Trust *viz a viz* her firm with more vigour; which she would have done if she had considered the Trust to be a client of the firm and not, as she did, a matter primarily for the Managing Partner, the First Respondent. It was in her desire to assist her colleague's family that Mrs Ahmed-Sheikh did not consider carefully enough the implications of the way in which the Trust was being operated.

6. I would ask however that this Tribunal views the circumstances of this case within the whole context. As has been explained, Mrs Ahmed-Sheikh was the Cashroom Partner at Hamilton Burns from 1 October 2009 to 8 May 2015. The firm was inspected by the Society on two occasions following on the creation of the Trust. Neither of these inspections raised any issues such as the Society's inspection team recommended that matters required to be addressed by any of the Society's conduct committees. Mrs Ahmed-Sheikh co-operated fully with the Society's inspection visits which took place while she held the post of Cashroom Partner. From the material that has been made available to the Tribunal, in particular the email sent by Mrs Sharon Brownlee dated 7 April 2016 timed at 9.08 and entitled, *"Hamilton Burns, Glasgow 920441) – Compliance Inspection – Updated Executive Summary"* there is some record of these visits in so far as they impact on the inspections undertaken in relation to the Mickel Trust Loan. In her email Mrs Brownlee has written as follows; -

"December 2013 Inspection (Records reviewed to 30/11/2013) 1. Mickel Trust Loan – The loan ledger was reviewed, and it was confirmed through the Firm Trial balance that the sum of £50,000 (obtained on 27/03/13) was due by Hamilton Burns under: "Mickel Trust Loan". No loan agreement was seen, and no further enquiry was made by the Compliance team. 2. Alan Niall Mickel Trust (Jill Mickel Trust) – the Trust Client Ledger and/or file were not requested or reviewed as part of the 2013 inspection.

January 2015 Inspection (Records reviewed to 30/11/2014) 1. Mickel Trust Loan – The loan ledger was reviewed, and it was confirmed through the Firm Trial Balance that the sum of £71,333.31 was now due by

Hamilton Burns under "Mickel Trust Loan". Sums were seen to be transferred to and from the Mickel Trust Loan account and the Alan Niall Mickel Trust (Jill Mickel Trust) Client Ledger. The Client Ledger for the Trust was therefore requested. No loan agreement was seen. 2. Alan Niall Mickel Trust (Jill Mickel Trust) – the client ledger and client file were requested for review. Activity through the client ledger up to 30/11/2014 predominantly showed sums being transferred between the Mickel Trust Loan account and the Trust Client ledger as loans to Hamilton Burns per Mr Mickel's instructions, and the subsequent repayment by Hamilton Burns of the sums loaned. Mr Mickel advised the two Compliance Inspectors during the inspection that there was no file held for the Trust, and that it was his own money. The Trust Deed was not seen. Due to the activity through the Trust ledger being predominantly in relation to loans to Hamilton Burns (recorded through the records) and Mr Mickels's comments, no further enquiry was made by the Compliance Team."

7. In her role as Cashroom Partner and in seeking to ensure that the firm was operating correctly in this regard, the firm of Hamilton Burns also employed the services of Mrs Marjorie O'Hara a former member of the Law Society's inspection team to review the firm's cash room operations on a six-monthly basis and the firm also ensured that their head cashier had a SOLAS qualification.

8. As has also been made clear, and accepted by Mr Knight before this Tribunal, it was never understood by Mrs Ahmed-Sheikh that the Trust was a client of the firm; she had formed this view because neither she or the First Respondent had in fact instructed Hamilton Burns in their capacity as Trustees, there were no Terms of Business entered into, there was no advice offered to the Trustees by the firm at any time, no fee was rendered to the Trust, no Letter of Engagement was created, there was no progress report, no correspondence from the firm to the Trustees and the Solicitors in question and the Trustees of the Trust were under the view that there was not a Solicitor/client relationship. This was a genuinely held belief – albeit a mistaken one. This issue has been touched upon by Mr McCreath in his own submissions and the Tribunal have been shown the letter written by Mr John Kerrigan, Partner in the firm of Morisons LLP dated 1 April 2016. In this respect, I adopt Mr McCreath's submission and make my own respectful submission that this issue was not at all clear cut, as exemplified by the need for the Law Society to take expert legal advice on this matter and from more than one source including Senior Counsel. That being so I would respectfully suggest that the Tribunal views the level of culpability in these proceedings against that background.

9. I would also ask that, in viewing the whole context of this case, and again in assessing the level of culpability, the Tribunal fully appreciates and gives appropriate weight to the following factors;-

- There was no intent on Mrs-Ahmed Sheikh's part to breach any of the Society's Accounts Rules or to act in any way improperly.
- There was no dishonesty by Mrs Ahmed-Sheikh in connection with the Trust.
- There was an honest and genuinely held belief, albeit a mistakenly held one that the Trust was not a client of the firm.
- There was an honest and genuinely held belief, albeit a mistakenly held one that the money that was being lent to the firm was the First Respondent's own money.
- There was an honest and genuinely held belief, albeit a mistakenly held one that the Trust funds were not client monies.

- The Society's inspection team had previously carried out inspections of the Firm without raising any concerns about the Trust being a client of the Firm or any concerns about the loans which the trust had made to the Firm.
- The Trust ledger was specifically reviewed by inspection teams on two previous occasions, supporting the position that the mistaken belief that the Trust was not a client was not an unreasonable one.
- The Trust sustained no loss or other prejudice as a consequence of the second Respondent's inadvertent breach of rules B6.7.1, B6.20.1 and B1.7.1.
- The Trust received a commercial rate of interest on the loans it made and, as was explained by Mr Knight, it has to a degree gained from the loans made to the firm as it has received a return of interest.
- The Trusts interests were also fully protected in terms of a security which had been put in place.
- The Trust has not lost any of its capital.
- The Second Respondent's breach of the rules B6.7.1, B6.20.1 and B1.7.1. were not deliberate.
- The Law Society in their own narrative have confirmed that *"there is no suggestion at all of dishonesty or impropriety on her part in relation to the firm's finances in general but more particularly the intromissions with the funds from this Trust ledger"*.
- Whilst reference has been made to the firm operating with a deficit on its client account, there is no suggestion made of misconduct on the part of the Second Respondent in this regard and I respectfully suggest that the Tribunal disregards this issue when reaching its determination. The LSS have also confirmed that they cannot say with any certainty either that there would have been no deficit on the firm's client account during the period when the Second Respondent was the cashroom manager if the records had been properly maintained."

Counsel for the Second Respondent noted that the Tribunal should not take any deficit into account. She noted that she would come back to the Second Respondent's personal circumstances in due course and went on to read from the third part of her written submissions as follows:

"In his submissions to the Tribunal Mr Knight explained that it was the Complainer's view that the breach of the rules in this case, *in cumulo*, merited a finding of professional misconduct on the part of the Second Respondent. He also correctly explained that the decision as to whether these breaches *in cumulo* merited a finding of misconduct was one for this Tribunal and the Tribunal alone to determine. In this regard I would invite the Tribunal to consider the powerful explanation and mitigation that I have presented on behalf of the Second Respondent and to consider whether this indeed is a case of professional misconduct or in fact the justice of the situation should be reflected more appropriately by the conduct being classified as unsatisfactory professional conduct; that is conduct falling below the standard of conduct to be expected of a competent and reputable solicitor but falling short of meeting the test for professional misconduct. In my

submission I would suggest that this would be the correct categorisation of the Second Respondent's role in this matter, and, in this regard, I would finally refer the Tribunal to the views expressed by the Law Society's Complaints Investigator who was appointed in June 2017. Following a thorough and detailed investigation that lasted approximately a year the Law Society's Inspector concluded and recommended that a complaint alleging professional misconduct should not be made against the Second Respondent to this Tribunal but rather that her conduct should be classed as unsatisfactory professional conduct."

The Chair clarified with Counsel that the Trust Deed did not name the Trust. The Chair also noted that in her submissions Counsel had said that at no time did the Second Respondent instruct the transfer of funds. He asked her to look at paragraph 3.3 of the Record which is admitted by the Joint Minute. Following a discussion between parties, of consent the Tribunal granted the Fiscal's motion to amend paragraph 3.3 of the amended Record by inserting the words "either or both" between the words "of" and "the" where they appear in the first sentence of that paragraph.

The Chair noted that there was some suggestion of a higher onus on the Second Respondent as Cashroom Manager, particularly at a time when the firm was under financial pressure. Counsel for the Second Respondent accepted that the Second Respondent's position as Cashroom Manager was significant. However, it was a circular argument because at no stage did she consider the Trust to be a client or the Trust ledger to be a client ledger. That is where the difficulty fundamentally arose. The Chair noted that the Second Respondent knew that money was going from the client ledger to the firm ledger. She was the Cashroom Manager. However, her position was that she didn't know that the money was client money. Counsel noted that the "ledger" doesn't look like a proper ledger. It is a list of credits and debits. That is because it is not organised like a client ledger because parties did not consider the Trust to be a client. It is because of her position as Cashroom Manager that the Second Respondent appears before the Tribunal. Counsel referred to paragraph 5 of her written submissions where she said it was accepted that the Second Respondent should have analysed the situation with more vigour. She would have done so if she had considered the Trust to be a client. Culpability was accepted but there was a question regarding the degree of culpability.

The Chair noted that the Cashroom Manager is responsible for checking the monthly reconciliations. He asked Counsel whether the Second Respondent thought it possible for a person to have money in a client account but not be a client. There was also the issue of the registration of the standard security which was submitted by the Second Respondent. Counsel for the Second Respondent noted that the

standard security was submitted by the First Respondent of his own volition. Reference was made to the Form 2 which is contained at Production 1 of the Second Inventory of Productions for the Complainers. The Form 2 was not completed by the Second Respondent but was signed by her as the conveyancing partner. The Form 2 does not denote the Trust as a client. It was recorded through the firm but no fee was charged to the Trust. The Second Respondent did not consider she was acting for the Trust or for the First Respondent. The security was granted in good faith by the First Respondent in order to secure sums for the Trust over property. The Second Respondent was the only person in the firm who dealt with conveyancing.

A Tribunal member asked about a comment which had been made regarding the adjusted accounts and the possibility of finding a deficit. Counsel for the Second Respondent said that she had enquired of the Fiscal whether if the records had been kept properly, there would have been a deficit. The Chair noted that it was earlier suggested that the updated ledger was a re-statement rather than a correction. Its purpose was to restate the accounts after a sum had been repaid. Counsel for the Second Respondent said that the Tribunal should have no regard to this matter. The Chair said that the Fiscal had claimed it was not possible to say if there was a deficit due to the state of the accounts. Specifically in relation to the first averment of misconduct, there was an allegation of a failure to keep accounts of all dealings regarding the Trust and this becomes circular if you accept that the Respondents did not consider the Trust to be a client.

The Tribunal asked about the source of funds for the Trust. Counsel for the Second Respondent had said that the Second Respondent knew that originally the money had come from the First Respondent's father and was to go equally to his two children. A property had been bought in Chamonix but the First Respondent's sister wanted her share out. Counsel had also said that the Second Respondent genuinely believed that the money belonged to the First Respondent. Ms Bain said that Mr and Mrs Mickel Senior wished to protect funds for their daughter. Insofar as these funds were the subject of the Trust, the Second Respondent believed that these funds came from the bank, the standard security and the Chamonix property. Separate and distinct to this were the funds being used for the loans which she thought constituted the First Respondent's own money and was not Trust money. The Chair asked how the Second Respondent could hold that view in the knowledge of the "Mickel Trust Loan" ledger. The Second Respondent said this was a genuine misunderstanding. She thought the source of funds was the First Respondent's own money as this is what he had told her. The Chair pointed out that at the Law Society Inspection in January 2015, the Second Respondent was present when the inspectors asked for the client ledger for the Trust and the Mickel Trust Loan ledger. He asked whether these loans were keeping the firm afloat. Counsel for the Second Respondent accepted that they were. However, her

client's genuine understanding was different. She referred to the Fiscal's submissions in relation to the Second Respondent, namely that, *"The First Respondent had on several occasions maintained, albeit erroneously, that the funds were his and to deal with as he saw fit, and the Second Respondent understood from him that that was in fact the position."* The Chair asked whether therefore the position was that the Second Respondent believed that the funds belonged to the First Respondent and were not part of the Trust over which she had responsibility. Counsel for the Second Respondent agreed.

FURTHER SUBMISSIONS FOR THE COMPLAINERS

The Fiscal said he wished to counter the submissions that the Trust was in the business of lending money. He noted that the draft Trust Deed and the final Trust Deed both contained the same basic provisions regarding the entitlement to loan money. However, there was no material before the Tribunal to allow it to conclude that the Trust was "in business". He reiterated his position that John Kerrigan's letter was "just a piece of paper" and "evidentially worthless".

He said that it was the Tribunal's role to determine whether the Respondents' conduct fell into the serious and reprehensible category. Both Respondents should have known the Accounts Rules. The First Respondent had been a Cashroom Manager in 2008. The Second Respondent was the Cashroom Manager at the relevant time. A client ledger was opened and funds paid into the client account. The ledger card tells you it is a "client ledger". This should have made both Respondents put aside their belief that the money was not clients' money. If the First Respondent had put the money in a separate bank account not linked to the firm, and loaned money to the firm this prosecution might never have taken place. Unfortunately for them, they put together this procedure, or ledger, or system in breach of the rules for a concerted period of time. Although trivial breaches can be overlooked, these breaches are not trivial. McMahon refers to "misfortune". This is not misfortunate. It is a disregard of solicitors' Rules. The Complainers recognise that the Respondents' belief did not alter until someone in knowledge pointed out the issues and there followed a "lightbulb moment" certainly for the First Respondent. This was not the situation where someone had "taken their eye off the ball".

The Fiscal noted that Counsel for the Second Respondent had referred to an email from a financial compliance officer which related to an earlier inspection. Both Respondents had mentioned funds being part of the firm's trial balance. The Cashroom Manager should be aware of what is included and what is surplus. If there is money there that shouldn't be there then the Cashroom Manager should be alerted and do something about it. The Respondents did nothing for three years.

The Fiscal said that the Complainers accept that the Respondents' views were genuine through a period of time and erroneous through that entire period of time, but the position he had to advance was that "they should have known better". All the material was available for them to have known better. The Chair noted the Fiscal's acceptance of a genuine and erroneous belief. He said he thought that earlier on the Fiscal had indicated that he wouldn't have said they were unreasonable. The Chair asked whether this was a fair summary as he was trying to tie the Fiscal's categorisation of their beliefs and views into the tests which have to be applied under Sharp. He asked whether the Fiscal wished to expound any further or wished to leave it at genuine and erroneous but not unreasonable. The Fiscal said he wished to leave matters there but noted the phrase he had used was "should have known better" and the Tribunal should take account of the period over which they should have known better.

The Chair asked the Fiscal if he was distinguishing between the positions of the Respondents. The Fiscal said that there was marginally more responsibility on the Second Respondent as Cashroom Manager.

FURTHER SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Macreath started by saying he was obliged for the concession made in response to the Chair's question regarding the genuine belief which was erroneous but not unreasonable. That was his understanding of the concession made. He noted that errors of judgement can fall into the sphere of negligence. Solicitors can make mistakes. However, the test was quite different for professional misconduct. The Trust had an entitlement to lend. There was no dishonesty, no lack of integrity and no lack of probity. The criticism was just that they should have known better. If the starting position is a genuine but erroneous belief which was not unreasonable, the Tribunal must proceed carefully. In this case two individuals proceeded on the wrong foot from the very beginning. The First Respondent was advised to set up a discretionary Trust with a nominal sum. He actually sets up an accumulation and maintenance Trust for the full figure. The "ledger" is not a ledger. The Fiscal concedes that the belief was not unreasonable. This does not meet the Sharp test. The matter can be referred back to the Law Society.

The Chair noted the importance of the Accounts Rules. Mr Macreath accepted this saying they were the "byword of professionalism". Part of the responsibility of being a solicitor is compliance. However, the Complainers predicated their case on a genuine and erroneous belief on the part of the Respondents which was not unreasonable.

FURTHER SUBMISSIONS FOR THE SECOND RESPONDENT

Ms Bain said that she acknowledged the important concession by the Fiscal regarding the characterisation of the belief as genuine and erroneous but not unreasonable. No dishonesty or impropriety is alleged. Breach of the Accounts Rules is concerning but that is only one of the many factors to take into account. The Tribunal must take into account the whole circumstances. The Complainers accept that the Second Respondent from the beginning did not consider the Trust to be a client or the monies involved to be client money. The Second Respondent thought the money was the First Respondent's to do with as he thought fit. This was a genuine and erroneous belief which was not unreasonably held.

DECISION

It was admitted by both Respondents in terms of their Joint Minutes that they were regulated persons and managers of the practice unit of Messrs Hamilton Burns & Company and thereafter of Hamilton Burns WS Limited. The Second Respondent acknowledged that she was the Cashroom Manager of the practice unit between 1 October 2009 and 8 May 2015. It was a matter of admission that in those capacities, the Respondents failed to keep properly written up accounting records to show all dealings of the practice unit with the funds held on behalf of "The Jill Mickel Trust". The Trust was a client of the practice unit. It was also a matter of admission that the practice unit borrowed sums of money from the Trust. It was admitted that the Trust was not advised independently regarding the making of the loans. However, both Respondents argued that the Trust was in the business of lending money and so the rule regarding borrowing from clients was not breached. It was admitted that the practice unit borrowed money from the Trust or otherwise intromitted with the Trust's funds in circumstances where a conflict of interest existed between the Trust of which the Respondents were Trustees and the practice unit where the Trust was also a client of the practice unit. The Tribunal noted that there were no averments of misconduct relating to breach of trust or the circumstances related to the demise of Hamilton Burns WS Limited and money owed to its creditors. The Tribunal therefore had no regard to these matters.

Rule B6.7.1 provides that a practice unit shall at all times keep properly written up such accounting records as are necessary to show all its dealings with clients' money and any other money dealt with by it through a client account. The records must show separately in respect of each client all money dealt with through a client account which is received, held or paid by it on account of that client and distinguish all money received, held or paid by it from any other money received, held or paid by it. "Clients'

money" is money (not belonging to him) received by a regulated person whether as a regulated person or as a Trustee in the course of his practice. "Client account" is an account in the name of the practice unit in the title of which the word "client", "trustee", "trust" or other fiduciary term appears (Rule B6.1.1).

The Tribunal was satisfied beyond reasonable doubt on the basis of the admitted facts that the Trust was a client of the practice unit and its funds were "clients' money" within the definitions provided above. The relevant funds ceased to belong to the First Respondent as soon as they were made over to the Trust. When the Trust's money was paid into the client account it became clients' money and subject to the Accounts Rules. Both Respondents knew that a ledger was opened for the Trust and allocated to the name of the Second Respondent. Money was credited to the client account and the ledger for the "Jill Mickel Trust". However, the records were in such disarray that it was not possible to demonstrate that there was a surplus on the client account during the relevant period. The Respondents therefore failed to keep properly written up such accounting records as were necessary to show all the practice unit's dealings with clients' money in breach of Rule B6.7.1.

Rule B6.20.1 provides that a regulated person shall not borrow money from his client unless his client is in the business of lending money or his client has been independently advised with regards to the making of the loan. Rule B6.20.1 provides that in this rule, "client" means a person for whom a regulated person or another regulated person in the same practice unit is currently acting or for whom either of such persons have acted on at least one previous occasion.

The Tribunal was satisfied beyond reasonable doubt based on the admitted facts that the practice unit borrowed sums of money from the Trust. It was admitted that the Trust was not advised independently regarding the making of the loans. However, both Respondents argued that the Trust was in the business of lending money and so the relevant rule regarding borrowing from clients was not breached. The Tribunal rejected this argument. The Tribunal took into account the purpose of the Rule which was to protect clients while allowing solicitors to borrow from those in the business of lending money. Although the Trust had an entitlement to lend money, the Tribunal did not accept that it was "in the business of lending money". There was no evidence that the Trust was "in business", for example tax liability or registration. Its purpose was not to lend money. There was no evidence that it was subject to oversight by regulatory bodies which deal with lenders. The implication of a client "in the business of lending money" would be that there would be more than one borrower. However, the only loans the Trust made were to the practice unit. The Trust received interest (belatedly) from the practice unit. However, an investment return is different to lending with a view to profit as would generally be

expected from a client in the business of lending money. There was no written loan agreement. No terms appeared to have been agreed regarding repayment or what action would be taken if repayments were not paid. Therefore, the Tribunal was satisfied that the Respondents had breached Rule B6.20.1.

Rule B1.7.1 provides that a solicitor must not act for two or more clients in matters where there is a conflict of interest between the clients or for any client where there is a conflict between the interests of the client and the solicitor's interest or that of the solicitor's practice unit.

The Tribunal was satisfied beyond reasonable doubt on the basis of the admitted facts that the practice unit acted in a conflict situation where the conflict existed between a client and the practice unit itself. The practice unit borrowed money from the Trust. The loans were essential for the viability of the firm. The Respondents were both Trustees of the Trust and managers of the practice unit. There was an inherent conflict in lending and borrowing in these circumstances. The Respondents were therefore in breach of Rule B1.7.1.

According to Rule 4 of the 2011 Practice Rules, failure to comply with the rules may be treated as professional misconduct or unsatisfactory professional conduct. The test in Sharp v The Law Society of Scotland 1984 SLT 313 provides that there are certain standards of conduct to be expected of competent and reputable solicitors and a departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. It follows therefore that not every breach of rules will constitute professional misconduct and that every case must be assessed in the light of its own facts and circumstances. Only conduct which represents a serious and reprehensible departure from the standards of conduct expected of competent and reputable solicitors will meet the test for professional misconduct

The Tribunal was placed in an unusual position in this case. Both Respondents formally admitted the first and third averments of misconduct in the amended Record by way of joint minutes. Nevertheless, they invited the Tribunal to assess the conduct in the light of the test in Sharp along with the second averment of misconduct which was not admitted. This Tribunal has repeatedly held that the assessment of professional misconduct is for it to determine. On occasion it has found Respondents not guilty of misconduct even when they have indicated that they are pleading guilty to the Complaint. However, the Tribunal found it difficult to reconcile the admission of professional misconduct with the assertion that the conduct really represented unsatisfactory professional conduct. Nevertheless, the Tribunal followed its usual practice of independently assessing professional misconduct according to the test laid out in Sharp.

The Tribunal considered carefully the admitted conduct against each Respondent, noting the differences in the matters agreed in each Joint Minute of Admissions. The Tribunal also had regard to the submissions of all parties that the Respondents had been proceeding on the basis of a genuine but erroneous belief that the Trust was not a client, which had obvious implications in relation to the accounting records, borrowing and acting in conflict. The solicitor for the First Respondent and Counsel for the Second Respondent had both referred to a "concession" made by the Fiscal that the Respondents' belief in this regard was "not unreasonable". However, this description was suggested by the Chair in an exchange with the Fiscal. The Fiscal did not accept or use this term. He repeatedly stated that the Respondents "should have known better". This was not consistent with a concession that the belief was reasonable. The Tribunal considered that a "reasonable belief" was a belief based on reason. No reasons were advanced for the Respondents' genuine but erroneous beliefs except that they did not apply their minds properly to the situation. This cannot constitute a belief based on reason.

Therefore, the Tribunal considered whether the Sharp test was met when the Respondents had proceeded on the basis of a genuine but erroneous belief. The Tribunal noted that there was no suggestion of dishonesty or lack of integrity. The First Respondent had granted a standard security over his property with the intention of safeguarding the Trust (although the Tribunal had doubts about whether it covered sums due by the practice unit after incorporation as opposed to by the First Respondent himself). The Law Society had not drawn the issue to the Respondents' attention at earlier inspections. All sums had been repaid to the Trust with interest in June 2016. No Secondary Complainer had made a complaint. The First Respondent had resigned from the practice unit shortly after receiving advice that the Trust was a client. The Respondents had explained from an early stage that they genuinely had not considered the Trust to be a client.

However, both Respondents were experienced solicitors. They were partners and directors of the practice unit. They had both been Cashroom Managers at various times. The Second Respondent was the Cashroom Manager during the period covered in the averments of misconduct against her. They were both Trustees of the client Trust. Competent and reputable solicitors would have made the necessary enquiries to satisfy themselves with regard to compliance. The Respondents ought to have understood the relationship which existed between the Trust and the practice unit. They had responsibilities to both and were uniquely placed to make that assessment. The Tribunal accepts that neither Respondent was experienced in the area of trust law. However, they were partners and directors of the practice unit and therefore ought to have known the Accounts Rules and been able to apply them to these circumstances. Solicitors are obliged by their profession to comply with the Rules. Ignorance

of the Rules is insufficient to absolve solicitors of their responsibilities. Adherence to the Rules is essential to maintain public trust in the profession.

The First Respondent was aware that Trust money was being loaned. Some of it went to him. It was a matter of admission that he attended meetings at which the loans were discussed, agreed and authorised. The Second Respondent claimed to have accepted the First Respondent's assertion that the monies borrowed by the practice unit belonged to him. In the Tribunal's view, she should certainly have appreciated the true position when she had been informed of the background to the establishment of the Trust and was a Trustee of the client Trust. She failed to consider the matter even when the firm started borrowing from the Trust. She must have known this borrowing was essential to the viability of the firm. This is particularly serious in light of her position as Cashroom Manager. The lack of investigation and inquiry into these most basic facts is a significant failing. The client ledger and accounts showed money leaving the Trust and going to her firm and the First Respondent. The Second Respondent must have known that she signed the Form 2 for a security which had been granted by the First Respondent in favour of a Trust in which she and the granter were both Trustees. Both Respondents completely failed to apply their minds to the status of the funds and the nature of the relationship of the Trust with the firm. Receiving money into a client account, creating a client ledger and registering a security on behalf of the Trust were all indicators that the Trust was a client. It would have been obvious from the firm balance sheet that the firm was being supported by loans from the Trust. The Respondents were Trustees of that Trust. In financially difficult times, when the practice unit was living day-to-day, and the loans were required to pay staff salaries, all partners and the Cashroom Manager in particular should have been examining the accounts of both the Trust and the practice unit very carefully, if for no other reason than to satisfy themselves that loans could continue to be made if the practice unit's finances did not improve. To continue for so many years without making any investigation into the Trust's status was a serious and reprehensible departure from the standards of competent and reputable solicitors. The Tribunal had difficulty in understanding why, if the Respondents thought the Trust was not a client, they arranged for the Trust funds to be placed in the clients account of the firm and thereby to be taken into account in the clients' trial balance and to be included in the figures in the Accounts Certificates. As the Fiscal stated, they ought to have known better. It appeared to the Tribunal they had completely failed to consider the matter and their responsibilities. It appeared to have suited the personal interests of the Respondents and the firm to make essential funds available to enable the firm to continue in business. This may explain why both Respondents allowed the position to continue for a lengthy period. The Tribunal found this behaviour of the Respondents a serious breach of the Accounts Rules that amounted to professional misconduct in terms of the Sharp test.

If solicitors are to continue to enjoy the public trust in regard to their financial affairs, they must have careful regard to all the requirements and obligations incumbent on them as contained in the Accounts Rules. Maintaining detailed records allows the solicitor to demonstrate that he or she can account for all funds held by clients. The management of clients' funds is an essential part of the administration of a solicitor's practice. Solicitors are privileged to enjoy this degree of trust. However, they also have an obligation to take the utmost care of clients' money. An essential part of this is to consider what funds are clients' funds and then to deal with them according to the Accounts Rules. This is particularly important where there are conflicts of interest or potential conflicts of interest between the solicitors and the owner of the funds or client. Honesty and propriety are only a part of this duty. The essential feature of the responsibility is that the solicitor is in a position to account to every client at all times. This requires the solicitor to maintain full and accurate records. The Accounts Rules are onerous because of the importance attached to affording the public maximum protection against the improper and unauthorised use of their money. The Respondents' failure to demonstrate this in the accounting records held for the Trust was a serious and reprehensible departure from the standards of competent and reputable solicitors. The Second Respondent, as Cashroom Manager has to bear particular criticism for the firm's non-compliance with the Accounts Rules but both Respondents were responsible. They allowed a situation to arise whereby they could not demonstrate that there was a surplus on the client account. Accordingly, both Respondents were guilty of professional misconduct in relation to the accounts record keeping for the Trust (paragraphs 4.1(a) and 4.2(a) of the amended Record).

Solicitors must only borrow from clients if they are in the business of lending or have been separately advised as per Rule B6.20.1 and B6.20.2. Solicitors are privileged to enjoy the trust of their clients and to have knowledge of their financial affairs. The potentially serious consequences of inappropriate borrowing or lending demonstrate why careful adherence to this rule is essential. Failure to comply with this rule puts clients at risk. Breach of this rule was a serious and reprehensible departure from the standards of competent and reputable solicitors. Accordingly, both Respondents were guilty of professional misconduct in relation to borrowing from a client (paragraphs 4.1(b) and 4.2(b) of the amended Record).

Solicitors must not act in a conflict of interest situation. This is particularly so when one of the connected parties is the solicitor or his/her practice unit. This Tribunal has previously held that the profession condemns any course of action by a solicitor which is for his own personal benefit and adverse to the interests of his client. The public are entitled to know that the profession regards it as an important principle that every client has a right to independent advice and that a solicitor has a duty to ensure that his client is separately advised where the solicitor's personal interests are involved. The Respondents

acted in a clear conflict of interest situation. In their roles as Trustees of the client Trust and managers of the practice unit they were at the same time borrower and lender. Competent and reputable solicitors would recognise the obvious conflict in that situation. The Respondents' personal interests and that of the practice unit were prioritised over that of the Trust. The Trust was not properly advised regarding the standard security. The Respondents' conduct clearly fell below the standard to be expected of competent and reputable solicitors to a degree that could only be considered serious and reprehensible. They were therefore guilty of professional misconduct in relation to acting where a conflict of interest existed (paragraphs 4.1(c) and 4.2(c) of the amended Record).

The Tribunal was satisfied that individually, each of the three heads of misconduct was capable of constituting professional misconduct. It therefore found both Respondents guilty of professional misconduct singly and *in cumulo*.

Both representatives for the Respondents asked the Tribunal to consider remitting the matter to the Law Society to deal with as unsatisfactory professional conduct. Mr Macreath noted that this had been the Tribunal's approach in Law Society of Scotland v John Adam and Law Society of Scotland v Michael Inkster. The Tribunal considered that the Respondents' conduct in the present case was much more serious than that described in those cases. Each case turns on its own facts and circumstances, but the particularly serious and reprehensible features of the present case included the length of time over which the conduct occurred and the conflict of interest situation which involved the personal and business interests of the Respondents.

In coming to its decision, the Tribunal had no regard to the content of the letter dated 1 April 2016 by John Kerrigan (Production 16 in the Third Inventory of Productions for the First Respondent). The letter was not agreed by parties or spoken to in evidence. Also, the Tribunal gave no credence to the suggestion it should be influenced by the fact that the Complainers' case investigator recommended no proceedings for professional misconduct.

SUBMISSIONS FOR THE COMPLAINERS ON SANCTION, PUBLICITY AND EXPENSES

The Fiscal confirmed that he had nothing to say with regard to sanction but that he was seeking an award of expenses against the Respondents on a joint and several basis and the usual order for publicity.

SUBMISSIONS FOR THE FIRST RESPONDENT ON SANCTION, PUBLICITY AND EXPENSES

Mr Macreath noted that the First Respondent is 50 years old. He is a notary public. He has been qualified since 1996 and a solicitor-advocate since 2008. He is married but separated and has three children. The First Respondent has appeared in courts all over the country and as a solicitor-advocate in the Court of Session. He specialised in immigration cases. He has dealt with judicial reviews and child cases in this context. Hamilton Burns was one of the biggest civil legal aid firms in Scotland. By any gauge this was a successful firm. The First Respondent did not deal with the cashroom function but was a manager in the practice.

The publicity surrounding this case and the Law Society's investigations have been damaging professionally and personally to the First Respondent. The pressures led partly to the breakdown of his marriage and alienation from his family, particularly his parents. There was excessive negative publicity following leaks to the press that the Law Society's investigation related to financial impropriety at Hamilton Burns. This led to an internal investigation by the Law Society. However, the First Respondent's professional reputation was publicly tarnished and as a court practitioner he has found it difficult to recover from this.

In December 2015, the First Respondent resigned from Hamilton Burns as soon as he was advised there was a conflict. The firm has subsequently gone into administration. He is a creditor to the firm to the tune of a quarter of a million pounds. He has put substantial funds back into the Trust and created a security over his property. He has obtained valuations of that property for the Tribunal's information. The First Respondent gave his full cooperation to the Complainers. He resigned two months before his appearance before the interview panel. He has resolved all the Trust issues. It is fully inflated by cash and the standard security. The First Respondent's sister's representatives are satisfied. There is no Secondary Complainer in this Complaint.

Since leaving Hamilton Burns the First Respondent has been working in England. In May 2016 he was retained by a firm called England Palmer. He has provided expertise in non-reserved matters mainly in commercial arbitration. He has undertaken a part-time Masters course in international commercial arbitration and dispute resolution. This should be completed this year. He has been accepted on to a part-time PhD course. Prior to these proceedings, the Respondent had been intending to apply for cross-qualification as an English barrister. Mr Macreath made reference to his bundle of authorities which contained the Bar Standards Board guidance notes on applications. The First Respondent feels that due

to the damage to his reputation in Scotland, it is unlikely that he will be able to practice here. Mr Macreath asked the Tribunal to consider the reference provided by Adrian England of England Palmer and the First Respondent's prospects in England. The First Respondent must be able to provide a certificate of good standing to the Bar Standards Board. It is only if he is prohibited from practising or suspended that he would not be eligible for acceptance.

The Tribunal found professional misconduct with regard to the breaches of the Accounts Rules, borrowing from a client and acting in a conflict of interest situation. However, the Complainers did make significant concessions in their submissions. It was accepted that there was no lack of honesty, integrity or probity. There was no hint of a conspiracy. There was a genuine not unreasonable belief that the Trust was not a client. The First Respondent had "taken his eye off the ball" when it came to the Accounts Rules. Mr Macreath accepted the paramount importance of the Accounts Rules. The Courts give a high priority to Accounts Rules breaches. The First Respondent placed an over-reliance on others in his firm. However, the Trust deed was drafted by a firm with expertise in this area. The First Respondent does not claim to have any expertise or understanding of trust law.

Mr Macreath noted that the Tribunal would be interested at this stage in insight, contrition and the risk of repetition. This case involves a family discretionary Trust. The First Respondent indicated to the Complainers long before the procedural hearings that he wished to agree a plea. Following very lengthy discussions there was an agreement in principle by the November procedural hearing. The First Respondent had insight at an early stage. He cooperated during the inspections and investigation. He sought advice from a recognised Trust expert. The Complaints system takes a long time and this is not the fault of the First Respondent. It was not within his control to bring the matter before the Tribunal at an earlier stage. On his representative's advice, he entered into a Joint Minute accepting two of the three averments of misconduct. While the conduct was not trivial or venial, the Complaint was not about deficits or accounts certificates. There is no suggestion of personal benefit.

The First Respondent was opposed to the Fiscal's motion for expenses. Mr Macreath noted that the Fiscal had conceded that the Joint Minute would have been signed at an earlier stage if the First Respondent had appeared on the Complaint alone. Mr Macreath submitted that the Respondents should be jointly and severally liable for the expenses up to 20 November 2018 and beyond that, each Respondent should be liable only for the expenses they caused. He said that on 20 November 2018, the Second Respondent indicated that she was still to obtain an expert report. If that report differed from Mr Kerrigan's opinion, the First Respondent would have had to take further action. Mr Macreath noted that the terms of the 1980 Act means that publicity of the Tribunal's decision was inevitable.

SUBMISSIONS FOR THE SECOND RESPONDENT ON SANCTION, PUBLICITY AND EXPENSES

Counsel for the Second Respondent read from her written submissions as follows:

"1. Can I now turn to the personal circumstances of Mrs Ahmed-Sheikh. In doing so, I hope to be able to show the members of the Tribunal that she is an individual who has a significant track record of integrity and honest dealing and has demonstrated a great capacity for hard work and a desire to help others.

2. Mrs Tasmina Ahemd-Sheikh was born on the 5 October 1970. She first graduated from the University of Edinburgh with a MA degree in Economics, English Literature and International Law in 1991. She married that same year. She suffered a miscarriage in 1992 and finding it difficult to cope, left for Pakistan in 1993 with her husband. In 1992 when she was aged between 22 and 23 years, she was cast in her first of many television serials and embarked upon a successful acting career in both television and film in the Asian subcontinent, in respect of which she acted in many leading parts. The extent of her success can be understood by appreciating that many of her television roles were aired on the National Television channel in Pakistan to an audience of over 100 million, as well as being viewed around the world and online.

3. In 1993, after the success of her first tv serial, Mrs Ahmed-Sheikh returned to the UK after deciding to study law and raise a family. Part of her motivation for undertaking a law degree was that she wished to be an advocate for women's rights at home and abroad. Mrs Ahmed-Sheikh undertook her law studies from 1993 to 1995 via the accelerated LLB degree course, and in 1995 she graduated from Strathclyde University with an LLB degree when she was 10 months pregnant, giving birth to her first daughter 4 days after her graduation ceremony. She embarked on a Diploma in Legal Practice in 1995 to 1996, whilst raising her newborn daughter and successfully completed this in 1996. Mrs Ahmed-Sheikh considers herself most fortunate to have gone on to have had three further children. In 1998, whilst working a trainee solicitor with BMK Wilson, she had her son. In 2005, whilst working with Golds solicitors she had her second daughter, and in 2008 whilst working with Hamilton Burns she had her fourth child, another daughter, returning to work when she was six weeks old. It is great testament to Mrs Ahmed-Sheikh's hard work and determination that she was able to combine study for her LLB degree course, her law traineeship and her successful career with raising her four children.

4. As touched on above, Mrs Ahmed-Sheikh undertook a traineeship with BMK Solicitors, Glasgow between 1996 and 1998 and was admitted to the Law Society at the end of her traineeship. After her traineeship, she worked as a Solicitor with Murray & Co in Glasgow until 2000 and then left the legal profession for around 2 years in order to bring up her young family and work in television. She returned to Glasgow in 2002 and worked for Golds in their commercial conveyancing department until 2005. In October 2005 she was employed by Hamilton Burns as an Associate and was made a salaried partner of the firm in May 2006. She remained in that position until June 2010 when she became an equity partner in the firm with a 15% share and the other 85% share was owned by her Managing Partner, Mr Niall Mickel.

5. Between 2006 and 2010 Mrs Ahmed- Sheikh was the firm's nominated anti-money laundering partner. During the same period Mr Niall Mickel was the firm's nominated cash room partner. In 2010 Mr Mickel became the Managing Partner of the firm and Mrs Ahmed-Sheikh stopped her role as anti-money laundering partner and took over the role of Cash Room Partner.

6. Mrs Ahmed-Sheikh practiced as a solicitor from 1996 to 2015. In that period, she had an unblemished professional career; her Solicitor's Record Card which is produced as the second document in the First Inventory of Productions by The Council of the Law Society of Scotland confirms this to be the position. She also contributed to the legal profession in Scotland in a number of ways including through her membership of the Council of the WS Society, a position she was nominated for by the then Deputy Keeper of the Signet, Mrs Caroline Docherty. In addition, at the invitation of the Law Society, she has spoken in the recent past at a number of events organised by the Society on the topics of Europe and the 2014 Independence Referendum.

7. Her main practice areas were commercial and residential property in which she required on a day to day basis to deal with borrowers and lenders often in transactions involving large sums of money. She acted and had to act at all times with honesty and integrity.

8. As mentioned above, a large part of Mrs Ahmed Sheikh's motivation for being a lawyer was that she wished to help women. In the period 2005 onwards, she regularly worked with a number of community-based projects in Glasgow helping to look after women from deprived communities who were, for example, being housed in refuges consequent on fleeing domestic abuse situations and struggling to understand and access their legal rights. Many of the young women she helped were from the Asian community who she was able to connect well with because of the profile her previous film and TV work and also because she was fluent in the Urdu, Hindi and Punjabi languages.

9. Mrs Ahmed-Sheikh was named Scottish Asian Businesswoman of the Year at the 2010 Scottish Asian Business Awards in Glasgow.

10. Mrs Ahmed-Sheikh was a Board member and Chair of the International and Commercial Development Committee of the City of Glasgow College from 2011 to 2015. She was also a Trustee of the charity Scottish Women in Sport in the same period. In 2012 she won the UK award of Asian Woman of Achievement in London, and in 2014, principally because of the work that she had undertaken in assisting women from deprived communities, she was awarded an OBE in the 2014 New Year's Honours List for services to business and the Asian community in Scotland. Mrs Ahmed-Sheikh received this award from Her Majesty the Queen at Holyrood Palace in July 2014.

11. Mrs Ahmed- Sheikh was the first Muslim and Asian woman from Scotland to be elected to any Parliament following on the General Election in May 2015 when she was elected Member of Parliament for Ochil and South Perthshire. She served as the Scottish National Party Trade and Investment spokesperson, Deputy Shadow Leader of the House in the House of Commons, and the SNP's National Women's and Equalities Convener. She was defeated at the UK General Election in 2017, however in the 2 years that she served as a member of the UK Parliament she took on her role with great pride, endeavour and success. Mrs Ahmed-Sheikh was appointed by the Foreign Secretary to be a Board Member for the Westminster Foundation for Democracy, a UK

public body dedicated to supporting democracy around the world. She was also appointed by the then Prime Minister as a UK representative on the Parliamentary Assembly of the Council of Europe and served as a UK Parliament Representative on the Council of Europe's Legal Affairs and Human Rights committee.

12. In support of Mrs Ahmed-Sheikh the Speaker of the House, the Right Honourable Mr John Bercow MP has provided a reference. A copy of this reference is produced in the Second Inventory of Productions for Mrs Ahmed-Sheikh and I would refer to that. It is glowing in its terms.

13. Currently Mrs Ahmed-Sheikh is working in television as a producer and presenter and continues in her unremunerated roles as a Charity Trustee for Scottish Women in Sport and as an advisor to the Parliament Project."

Counsel for the Second Respondent read out a letter of reference from John Bercow, MP dated 10 January 2019.

Ms Bain noted that the Second Respondent wishes to continue her legal career. She is immensely proud to be a solicitor. She has demonstrated insight into her conduct. She acknowledges that she should have analysed the transactions of the Trust vis-à-vis her firm more strongly. She would have done so if she considered the Trust to be a client. It is accepted entirely by the Complainers that there is no suggestion of dishonesty or impropriety in general or in respect of these intromissions. There were highly compelling and significant factors in mitigation. She asked the Tribunal to take account of these and the extraordinary personal circumstances of the Second Respondent. She has achieved a great deal in her public and private family life.

Ms Bain made a motion that no expenses should be due to or by either party. She noted the significant alteration of the Complaint before the eventual Joint Minute. She was not advised of any plea negotiation between the First Respondent and the Fiscal. She was only advised a day or so before the Tribunal that any agreement had been reached between the First Respondent and the Complainers. However, their dealings are not relevant to the Tribunal. What is significant is the change in the terms of the Complaint and the way matters resolved. She had no objection to the decision being given publicity.

FURTHER SUBMISSION BY THE COMPLAINERS ON EXPENSES

The Fiscal said he was content to leave the matter of expenses in the hands of the Tribunal. He said that there was a difference in approach by the Respondents after 21 November 2018. However, extra-judicial discussions continued with both parties up until Friday 11 January 2019. There was an agreement with the First Respondent before that but both Joint Minutes were signed on Friday. The prosecution was

ultimately successful. There had been a fourth averment of professional misconduct regarding a lack of integrity. There were also averments regarding the Accounts Certificates. These remained on the Record until finalised in the week prior to the Hearing.

DECISION ON SANCTION, PUBLICITY AND EXPENSES

The Tribunal considered each Respondent separately but found there was little to separate them when it came to the consideration of sanction. The averments of misconduct against them were very similar. There were no previous conduct findings against either Respondent. To an extent, both had accepted their guilt before the Tribunal (while inviting the Tribunal to consider professional misconduct independently). They had both cooperated with the Tribunal and entered into Joint Minutes. They had expressed remorse and demonstrated insight. Both Respondents were found guilty of a course of conduct which had gone on for a long period of time. However, that course of conduct extended only to one client. Both Respondents produced positive references.

The First Respondent was a Trustee and Settlor of the Trust. He had previously been a Cashroom Manager and as a manager of the practice unit, had a responsibility to ensure that proper records were maintained. He could have been in no doubt as to the source of funds for the Trust which he and his practice unit borrowed from the Trust. He instructed the transfer of the sums. He derived a personal and business interest in the loan monies borrowed in a conflict of interest situation. He had, however, attempted to make good the problems caused by his misconduct.

The Second Respondent was a Trustee of the Trust and the Cashroom Manager of the practice unit. The position of Cashroom Manager is an onerous one and solicitors undertaking this function must secure compliance with the Rules. She was Cashroom Manager for many years. She ought to have been aware of the loan transfers and the circumstances. She derived no personal benefit from the misconduct (apart from the financial benefit to the practice unit in the form of the loans).

The Tribunal considered its indicative sanctions guidance. There was no requirement for supervision. The Tribunal considered that there was no risk to the public if the Respondents practised unrestricted. The misconduct was at the lower to middle end of the scale. Censure alone would be insufficient. A fine was necessary to show the seriousness with which the Tribunal viewed the Respondents' conduct. In all the circumstances, the appropriate fine for each Respondent was £3,000.

The appropriate award of expenses was one in favour of the Complainers. Although there had been extensive plea negotiation, the Complainers were the successful party and there was no reason why the usual rule should not apply, namely that expenses should follow success and both Respondents should be jointly and severally liable for those expenses. The Tribunal ordered that publicity should be given to the decision and that publicity should include the name of the Respondents. Publicity will be given to the decision in accordance with paragraphs 14 and 14A of the Solicitors (Scotland) Act 1980.

Nicholas Whyte

Chairman