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

INTERLOCUTOR

in Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended

by

ROBERT KIDD, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus (hereinafter referred to as "the Appellant")

against

THE COUNCIL OF THE LAW SOCIETY OF SCOTLAND, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent")

and

SCOTT ALLAN, Solicitor, c/o Shepherd & Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen (hereinafter referred to as "the Second Respondent")

By Video Conference, 8 February 2021. The Tribunal having considered the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Robert Kidd, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") dated 9 January 2020 not to uphold a complaint of unsatisfactory professional conduct made by the Appellant; Uphold the Appeal; Quash the Determination of the First Respondent in respect of head of complaint 3 and make a Determination upholding that head of complaint against Scott Allan, Solicitor, c/o Shepherd & Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen (hereinafter referred to as "the Second Respondent"); Continue the hearing to a date to be afterwards fixed; and Allow parties a period of 21 days from the date of intimation of these findings to lodge written submissions on compensation, publicity and expenses.

[redacted]

Ben Kemp

Vice Chair

THE SOLICITORS (SCOTLAND) ACT 1980
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DECISION

in Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended

by

ROBERT KIDD, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus

Appellant

against

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

First Respondent

and

SCOTT ALLAN, Solicitor, c/o Shepherd & Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen

Second Respondent

1. An Appeal dated 13 February 2020 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Robert Kidd, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") dated 9 January 2020 not to uphold a complaint of unsatisfactory professional conduct made in respect of head of complaint 3 against Scott Allan, Solicitor, c/o Shepherd & Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen (hereinafter referred to as "the Second Respondent").

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated upon the First Respondent and the Second Respondent. Answers were lodged for both Respondents. Following a case management discussion with parties on 17 April 2020, an adjusted Appeal dated 1 May 2020 was lodged with the Tribunal. Adjusted Answers were lodged for both Respondents. The Tribunal set the matter down for a preliminary hearing on 8 June 2020.

3. At the preliminary hearing on 8 June 2020, the Appellant was represented by Andrew Smith, Q.C. The First Respondent was represented by Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was represented by Roddy Dunlop, Q.C. The First and Second Respondents' motions were for the Tribunal to dismiss the appeal on the basis that it disclosed no valid ground of appeal. There was insufficient time for the Tribunal to complete its deliberations on 8 June 2020 so it met again on 24 June 2020. On that date, the Tribunal refused the First and Second Respondents' motions. An Interlocutor & Note with the Tribunal's reasons dated 24 June 2020 was issued to the parties. A procedural hearing was fixed for 30 September 2020.

4. At the procedural hearing on 30 September 2020, the Appellant was represented by Andrew Smith, Q.C. The First Respondent was represented by Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was represented by Roddy Dunlop, Q.C. An Interlocutor & Note dated 30 September 2020 was issued to the parties following the procedural hearing. The Tribunal set the matter down for a hearing on 14 December 2020.

5. At the hearing on 14 December 2020, the Appellant was represented by Andrew Smith, Q.C. The First Respondent was represented by Elaine Motion, Solicitor Advocate, Edinburgh. The Second Respondent was represented by Roddy Dunlop, Q.C. Parties made submissions. There was insufficient time for the Tribunal to complete its deliberations so it met again on 8 January 2021 and 8 February 2021.

6. Having given careful consideration to parties' submissions and the documentary productions lodged, the Tribunal upheld the Appeal, Quashed the Determination of the Council of the Law Society of Scotland, and made a Determination upholding head of complaint 3. It produced this written decision and invited submissions on compensation under s53ZB(2)(b), as well as publicity and expenses.

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

> By Video Conference, 8 February 2021. The Tribunal having considered the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Robert Kidd, 12 Mykinon, Germasogeia, Limassol 4045, Cyprus (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society of

Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondent") dated 9 January 2020 not to uphold a complaint of unsatisfactory professional conduct made by the Appellant; Uphold the Appeal; Quash the Determination of the First Respondent in respect of head of complaint 3 and make a Determination upholding that head of complaint against Scott Allan, Solicitor, c/o Shepherd & Wedderburn LLP, Commercial House, 2 Rubislaw Terrace, Aberdeen (hereinafter referred to as "the Second Respondent"); Continue the hearing to a date to be afterwards fixed; and Allow parties a period of 21 days from the date of intimation of these findings to lodge written submissions on compensation, publicity and expenses.

[redacted]

(signed)

Ben Kemp

Vice Chair

8. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant and First and Second Respondents by recorded delivery service on 25 FEBRUARY 2021 .

IN THE NAME OF THE TRIBUNAL

Ben Kemp

Vice Chair

NOTE

At the hearing on 14 December 2020, the Tribunal had before it the original Appeal and documents with the Appellant's covering letter of 13 February 2020; Answers for the First Respondent; Answers for the Second Respondent; the Adjusted Appeal dated 1 May 2020; Adjusted Answers for the First Respondent; Adjusted Answers for the Second Respondent; an Inventory of Productions for the Appellant containing "Inventory Z" which comprised 64 emails produced in separate but related proceedings in the Court of Session; an Inventory of Productions for the First Respondent, which included an affidavit from Kenneth Gordon produced for the Court of Session proceedings at Production 21(22) and the Second Respondent's statements produced during the First Respondent's investigation at Productions 2(b) and 2(j); the Tribunal's Interlocutors dated 24 June 2020 and 30 September 2020 with Notes; written submissions for the Appellant; written submissions for the First Respondent; written submissions for the Second Respondent; additional written submissions for the Appellant; a List of Authorities for the First Respondent; and a List of Authorities for the Second Respondent.

BACKGROUND

The report to the Sub Committee (Production 2(a) for the First Respondent) sets out the background to the case in more detail. Briefly, the Appellant was a party in a transaction involving a high value corporate share and purchase acquisition. He and his company (ITS) were represented in that transaction by a firm of solicitors, Paull and Williamsons (P&W). The Appellant was to sell a proportion of his shareholding in ITS, with the purchaser of his shares to invest a sum in ITS. An indicative proposal to purchase was submitted by Lime Rock Partners (LRP) in January 2009. Agreements were entered into between the Appellant, ITS and LRP in September 2009.

The Second Respondent and Kenneth Gordon (KG) were partners in P&W. KG had previously acted for LRP. The potential conflict of interest was recognised and steps were taken for LRP to be separately represented by another firm of solicitors, Ledingham Chalmers. However, KG retained a role in the transaction.

After ITS entered administration in April 2013, the Appellant raised a court action in the Court of Session against P&W seeking damages in respect of losses he claimed to have incurred as a result of P&W's representation. He also complained to the Scottish Legal Complaints Commission (SLCC) about the conduct of the Second Respondent. The SLCC referred that complaint to the Law Society of Scotland

(Law Society). The only part of that complaint relevant to this Appeal is that contained at head of complaint 3 (as set out in the SLCC's summary of the complaint), namely,

"Mr Allan failed to act in my best interests between approximately November 2008 and November 2009 as, despite being aware that a practitioner within Mr Allan's firm was providing advice to another party to the transaction. LRP, he did not inform me."

The practitioner referred to in that head of complaint, was KG. The Professional Conduct Sub Committee (Sub Committee) of the First Respondent did not uphold this complaint. The Appellant appealed to the Tribunal.

ADJUSTED APPEAL

The Appellant criticised as "manifestly wrong" the Sub Committee's finding that the Second Respondent was unaware of KG's conduct. The evidence plainly demonstrated that KG was not merely engaged in a "handover" (of LRP to Ledingham Chalmers) which would have been an essentially administrative exercise. The only reasonable conclusion to be drawn from the evidence was that the Second Respondent was aware KG was engaged far beyond any legitimate purpose and was improperly providing advice to another party (LRP) in the transaction. The Sub Committee's finding was therefore contradictory of the evidence.

The adjusted Appeal also contained grounds regarding what the Appellant referred to as the Second Respondent's "constructive knowledge" of KG's conduct. The Tribunal dealt with the question of constructive knowledge at the preliminary hearing on 8 June 2020 and its decision and reasons are contained in the Interlocutor of 24 June 2020 and the accompanying Note. In summary, the Tribunal decided that the nature and extent of the Second Respondent's professional obligations turned on the extent of his actual knowledge of the facts of KG's involvement. The Second Respondent was either aware of KG's involvement, to the extent at least necessary to put him under a duty of inquiry or disclosure, or he was not. "Constructive knowledge" had therefore already been ruled out by the Tribunal and was not a live issue at this appeal hearing.

The Appellant's adjusted grounds of appeal also claimed that the Second Respondent was appraised of sufficient facts to know that KG was engaging in conduct which went far beyond legitimate handover to the new firm and which amounted to advising the other party (LRP) in the transaction. The Appellant

highlighted that the Second Respondent knew KG worked for a considerable number of months on a purported handover. The Second Respondent knew KG had regularly acted for LRP. The Second Respondent failed to enquire as to the precise ongoing role of KG. KG was included in correspondence that was inconsistent with his claimed limited role. The Second Respondent in the circumstances demonstrated a reckless approach when the only explanation for KG's continued engagement in the process led to a high risk he was doing so for the benefit of LRP and not the Appellant, giving rise to a conflict of interest because the Second Respondent's firm was acting for both the Appellant and his company as sellers and LRP, as purchaser/investor in the transaction.

SUMMARY OF WRITTEN SUBMISSIONS FOR THE APPELLANT

According to the Appellant, there were two questions for the Tribunal. Firstly, did the Sub Committee err by making a fundamental error in its approach to the case and secondly, did the Sub Committee err by making a finding contrary to the evidence?

The scope of the complaint was the expression of dissatisfaction expressed by the Appellant and sent to the SLCC and the First Respondent in various documents. The Appellant urged the Tribunal to bear in mind the Complaint as expressed to the SLCC and not the summary of complaint which he claimed narrowed the full expression of dissatisfaction. The scope of the complaint was not limited to "advice" provided by KG to LRP. It encompassed Paull & Williamson's acting covertly for LRP. It included the Second Respondent's awareness of KG's role in the transaction. The firm and the Second Respondent had caused a misleading and deceptive impression that LRP was being independently advised by Ledingham Chalmers and not by Paull & Williamsons and its lawyers. The Second Respondent was aware KG retained an improper and inappropriate role on behalf of LRP in the transaction which compromised the Appellant's interests. Any role created an actual and substantial conflict of interest. The Second Respondent should have informed the Appellant of it and taken immediate steps to terminate KG's involvement in the transaction.

There was a fundamental error in the Sub Committee's approach to the investigation of the complaint. It did not discharge its duty to investigate properly, for example by using its power to recover documents, request explanations or invite comment. The First Respondent improperly narrowed its investigation to focus on actual knowledge of advice given by KG. The Reporter accepted the Second Respondent's evidence at face value without further investigation or challenge. The Sub Committee appears to have accepted the Reporter's findings without requiring further information. The Sub Committee relied on the Reporter's analysis of Inventory Z which was fundamentally flawed. These emails, even the ones to

which the Appellant was not copied, show that the Second Respondent was aware of KG's conduct, and should have investigated. The Sub Committee only received the Reporter's summary of selected Inventory Z emails. They were not provided with copies of the emails themselves. The Sub Committee therefore did not have all the evidence before it when it made its decision.

The Sub Committee's finding was contrary to the evidence. All of the evidence was not before the Sub Committee. This was due partly to the insufficient investigation by the Reporter and the failure to ensure all evidence was before the Sub Committee. The Appellant drew attention to various documents which were said to support the Appellant's complaint. It was clear from these documents that the Second Respondent was aware of KG's inappropriate role, for example, by attending meetings concerning the transaction, involving the client in handover meetings, discussing key transaction documents with LRP and holding discussions with the Second Respondent about the transaction.

The Inventory Z correspondence showed that the Second Respondent and KG were discussing the transaction, that KG was sharing commercially sensitive information and the Second Respondent knew about that. KG's affidavit contained a number of relevant issues which the Reporter and Sub Committee failed to investigate. The affidavit was produced for Court of Session proceedings but was provided to the First Respondent during the investigation. KG stated in his affidavit that he understood his role was to lead the legal due diligence exercise and be a point of reference and resource in relation to LRP policy, process and precedence (a facilitating role). He repeatedly asserted that his actions were known and approved by the Second Respondent. They had conversations about the case. The Second Respondent was a party to the meetings KG attended with LRP and Ledingham Chalmers. The conflict between the evidence of KG and the Second Respondent regarding KG's role ought to have been investigated.

The Second Respondent's statements failed to address why he included KG in correspondence relating to the revisal of key documents and points for clarification by LRP. The Second Respondent continued to email KG about the transaction in September 2009. This contradicts the Second Respondent's explanation that KG was only concerned in the handover or due diligence as these would have been completed by then. Emails about fees also demonstrated that KG had a greater role in the transaction, demonstrating the extent of the work and role undertaken by him.

In conclusion, the Appellant asked the Tribunal to uphold his appeal. He said the Second Respondent should be found guilty of unsatisfactory professional conduct "at the very least".

SUMMARY OF WRITTEN SUBMISSIONS FOR THE FIRST RESPONDENT

The First Respondent said the Appellant was required to show that the decision of the Sub Committee was "manifestly wrong". Reference was made to Hood-v-The Council of the Law Society of Scotland [2017] CSIH 21 at paragraph 17 and Donaldson-v-The Council of the Law Society of Scotland [2018], a Tribunal case which followed the test set out in Hood. The First Respondent claimed that the Appellant had failed to show the Hood test had been met.

The allegation referred to the First Respondent by the SLCC was the only issue before the Sub Committee and the Tribunal. That complaint contains no reference to conflict of interest or that the Second Respondent ought to have recognised improper or inappropriate conduct.

The Tribunal had already identified in its Interlocutor & Note of 24 June 2020 that the question to be addressed and answered was whether the Sub Committee erred in that it was plainly wrong of it to find that the Second Respondent had no actual knowledge of KG's actions. The First Respondent could not have gone on a frolic of its own. The nature and extent of the Second Respondent's professional obligations turned on the extent of his actual knowledge of the facts of KG's involvement. The First Respondent confirmed that all papers pertinent to the Second Respondent's actual knowledge had been produced and lodged with the Tribunal.

The First Respondent noted the appeal had two grounds: firstly, that the decision was contrary to the evidence and secondly, that the Sub Committee was wrong not to find unsatisfactory professional conduct given it could assess constructive knowledge. Only the first issue was live before the Tribunal because the constructive knowledge issue had already been determined by the Tribunal. The "fundamental error" argument was not in the appeal. Therefore, it should not be considered by the Tribunal. However, even if the Tribunal was minded to consider it, the argument was ill-conceived. The First Respondent met its statutory obligations in terms of the 2007 Act. It sought input from the parties which was provided. It considered all the information provided, including that by the Appellant. The Appellant was kept up to date and he did not at the time raise any concerns.

With regard to the ground of appeal based on contradictory evidence, the First Respondent adopted the submissions made by the Second Respondent previously. According to both Respondents, for this argument to be successful, the appellate tribunal would be required to take the view that the evidence was "all one way". Where there is evidence pointing in both directions, the decision as to which is correct lies with the Sub Committee. What the Appellant submits is merely disagreement with that decision. He

has been unable to show that the decision is manifestly or plainly wrong. He had provided only inferences, assumptions and suggestions.

According to the First Respondent, the conclusions in the Appellant's submissions do not address the allegation before the Sub Committee. The First Respondent submitted that the appeal should be refused and the decision of the Sub Committee confirmed.

SUMMARY OF WRITTEN SUBMISSIONS FOR THE SECOND RESPONDENT

The Second Respondent noted that the Appellant required to show that the Sub Committee's decision was "manifestly wrong". Reference was made to Hood-v-The Council of the Law Society of Scotland [2017] CSIH 21 and Donaldson-v-The Council of the Law Society of Scotland [2018].

The Second Respondent rejected the Appellant's suggestion that the Tribunal should consider the scope of the complaint under reference to the extent of the expression of dissatisfaction, noting it was for the SLCC to sift the complaint and only send for investigation that which was appropriate. The only one of the SLCC's heads of complaint left before the Sub Committee and the Tribunal was head of complaint 3. The Second Respondent therefore objected to what he categorised as the Appellant's attempt to widen the scope of the appeal to include 'conflict of interest'. The Second Respondent considered this to be an attempt to include the conflict of interest issues contained in heads of complaint 1 and 2, which were rejected as time-barred by the SLCC. The Second Respondent noted that the Tribunal had already ruled on the question of actual knowledge and constructive knowledge. Any attempt to reintroduce the argument relating to constructive knowledge should be dismissed.

The Second Respondent noted that the Appellant's arguments regarding fundamental error were "wholly unheralded" in his note of appeal and thus not open to him. In any case, they were unfounded. The Second Respondent set out the timeline of the complaint. According to the Second Respondent, the fundamental errors founded upon by the Appellant amounted to no more than a disagreement with the investigatory process adopted by the First Respondent, rather than a genuine basis for appeal.

With regard to the argument that the decision was contrary to the evidence, the Second Respondent encouraged the Tribunal to bear in mind the complaint sent to the First Respondent by the SLCC. The Second Respondent reminded the Tribunal that the question is not whether a different view of the evidence might have been taken. In order to disturb the Sub Committee's determination the decision would have to be contrary to the evidence. That required the Appellant to show that the Sub Committee's

decision was perverse and without reasonable foundation. The question was whether the evidence before the Sub Committee as contained in its findings in fact was sufficient to support the decision. The evidence should be considered holistically rather than with reference to particular emails.

The Second Respondent rejected the contention that the pleadings in the P&W action suggested that the Second Respondent was aware KG had been acting for both parties and providing advice to LRP. The Second Respondent addressed various emails in Inventory Z and claimed these could not bear the interpretation ascribed to them by the Appellant. The Second Respondent's statements were consistent with the evidence and KG's affidavit does not provide evidence of the Second Respondent's knowledge.

SUMMARY OF ADDITIONAL WRITTEN SUBMISSIONS FOR THE APPELLANT

The Appellant noted that the First Respondent sought to restrict the analysis to the express wording of the summary of complaint. However, the Tribunal had already rejected this approach. In the Appellant's submission, his complaint encompassed allegations that the Second Respondent knew about KG's improper and inappropriate conduct, not just that he was "providing advice" to LRP. The Tribunal had said in its Interlocutor & Note that it had to assess the Second Respondent's knowledge of KG's "actions" and "involvement". The Appellant said the "fundamental error" argument was not a new basis of appeal but was a restatement of the grounds of appeal. If restatement of the argument was not permitted, the Appellant should be permitted to amend his grounds of appeal.

The First Respondent had not fulfilled its duty to investigate. Instead, the Sub Committee reviewed a selective summary of the evidence and simply accepted the Reporter's reasoning without further enquiry.

The Appellant rejected the "all one way" argument made by both Respondents. He noted that no authority was provided in support of this assertion.

The conflict of interest arguments are separate to those contained in heads of complaint 1 and 2. The complaint at issue in the appeal is that the Second Respondent knew of KG's improper and inappropriate involvement with LRP, that involvement giving rise to a clear conflict of interest. Acting in a conflict of interest can support a complaint of failing to act in the client's best interests. It remained unclear what legitimate role a conflicted solicitor could have in any handover. Despite being aware of an actual conflict, the Second Respondent allowed KG to lead the handover. The handover was not agreed by the Appellant but even if he had been informed, this was not determinative. It is the solicitor's duty to manage any potential or actual conflict of interest. The Second Respondent also failed to act in the

Appellant's best interests with regard to vendor due diligence. There was an obvious and actual conflict between the interests of the buyer and seller. For KG to retain any role was not in the Appellant's interests. The Second Respondent must have known that for KG to lead on this would involve him retaining a substantive role as legal advisor and would involve him giving legal advice to the detriment of the Appellant's best interests. The Appellant clarified that he did not seek to reintroduce arguments relating to constructive knowledge.

The Appellant noted that the Sub Committee did not have all relevant papers and evidence before it. Therefore, the full expression of dissatisfaction was not considered. The Sub Committee made a fundamental error in its approach to the case by failing to recognise that the Reporter was misdirected as to what was involved in the investigation of the complaint and the Sub Committee failed to rectify the deficiencies in the report.

The Appellant submitted that it was open to the Tribunal to make a finding of misconduct. He noted that the powers of the Tribunal were found in Section 53ZB of the Solicitors (Scotland) Act 1980. However, if the Tribunal chose to uphold the complaint, and decide that the Second Respondent's behaviour constituted professional misconduct, it could use its powers under Section 53 of that Act.

The Appellant noted that neither Respondent had addressed the issue regarding the purported handover and due diligence process and that neither should have taken place. He criticised the Respondents' approach to the evidence which he said failed to deal with the emails in detail.

APPELLANT'S ORAL SUBMISSIONS

Mr Smith said that on the evidence, the Second Respondent knew that KG was engaging in conduct in conflict with his professional responsibilities. The Respondents in their written submissions repeatedly construed the complaint in a very narrow sense as referring to "advice". However, the issue of the Second Respondent's knowledge of KG's conduct is misdirected by the Reporter and the Sub Committee because they failed to take into account the gravamen of the complaint. KG was doing something professionally unacceptable and against the rules and the Second Respondent knew that to be so. KG was acting for LRP in clear breach of the rules and in the knowledge of the Second Respondent. Mr Smith urged the Tribunal to focus on the gravamen of the complaint, identify the conduct of KG and consider if the Second Respondent knew he was doing these things in breach. There should be no artificial restriction of "advice". In the course of dealing with an instruction, a lawyer will advise. The

admitted facilitating role inevitably involves advice. If KG was providing advice, he was in conflict. The gravamen of the complaint is about conflict of interest even if that term is not used. This conflict is separate to the other conflict complaint, which the SLCC had ruled to be time-barred, in relation to P&W representing both the Appellant and ITS.

The evidence against the Second Respondent is in Inventory Z and in his own statements, although Mr Smith urged the Tribunal to be cautious when considering the statements which were unsworn and untested. In the emails the Second Respondent acknowledged that KG was acting for LRP. He knew KG was meeting Ledingham Chalmers and LRP. He knew that documents were being provided by KG. KG was acting for LRP and that involved advice. KG claimed to be providing "consultancy support" to Ledingham Chalmers and charged a fee for it. The Second Respondent knew he was doing that. The Second Respondent claimed due diligence and handover were not "advice" but advice is not the thrust, it is the acting.

Mr Smith questioned the necessity and length of the handover. He also identified problems with the due diligence exercise. Even the title, "vendor" due diligence, raises problems. An email from a foreign lawyer engaged by P&W specifically identifies the obvious (conflict) difficulties. The Appellant does not claim that the Second Respondent knew about all of these particular emails, but he should have been alive to the issue.

All parties were agreed that Hood v Council of the Law Society of Scotland [2017] CSIH 21 contained the standard by which the appeal should be judged. Mr Smith said the Sub Committee fell into an error of application of the law to the facts because the conflict of interest rule was not applied correctly to the case. The finding was contradictory of the evidence which pointed to KG acting for a counter-party. There was a fundamental error by asking the wrong question which was to focus on "advice" rather than "acting". No reasonable Sub Committee could have come to this decision and therefore the Tribunal should allow the appeal. In fact, the Tribunal should go further than this and find the Second Respondent guilty of professional misconduct. The hearing was an "inquiry" under section 53(1)(a) of the Solicitors (Scotland) Act 1980. The Tribunal could therefore find the Respondent guilty of professional misconduct and apply the powers of sanction available to it under section 53(2) of that Act.

In answer to questions by the Tribunal, Mr Smith confirmed that the Sub Committee only had a summary of the evidence from the Reporter. It reached an incorrect decision because certain documents were missing. Specifically, they did not have Inventory Z.

The Chair indicated that the Clerk's advice to the Tribunal was that its powers in relation to the appeal were contained in section 53ZB(2) of the 1980 Act and these were confined to a finding of unsatisfactory professional conduct. Mr Smith said this would create a surprising result, as a mistake by the Sub Committee in failing to refer a matter for prosecution could not be corrected by the Tribunal. He contended that there must be another route by which a Tribunal can consider misconduct complaints. Mr Smith asked the Tribunal, if it was against him on the interpretation of the Act, to make this clear in the decision as it might be relevant in later proceedings.

FIRST RESPONDENT'S ORAL SUBMISSIONS

Ms Motion noted that section 42ZA of the 1980 Act is headed "Unsatisfactory Professional Conduct: Council's powers" and section 53ZB is headed "Powers of Tribunal on Appeal: unsatisfactory professional conduct". According to her it was beyond doubt that the Tribunal's powers were limited to upholding the decision or quashing it. No other section is applicable to appeals. The Tribunal is bound to follow the Act.

She confirmed that all documents were now before the Tribunal. Inventory Z was not before the Sub Committee but this was not necessary as the report was extremely detailed. The appeal does not contend that any important email was omitted.

According to Ms Motion, the appeal did not foreshadow the Appellant's submissions. The Tribunal should not therefore consider the new submissions. She set out the First Respondent's investigatory process. This process was explained to the Appellant at the time and he raised no issues. To criticise the First Respondent for not investigating a conflict would be tantamount to saying that it could and should have gone on a frolic of its own. The Reporter's report to the Sub Committee contained only a recommendation. It is the Sub Committee's decision which is under scrutiny.

The only remaining applicable Hood test concerned whether the Sub Committee could reasonably make its decision on the evidence before it. The Sub Committee weighed the evidence in the balance and reached the view there was insufficient evidence on the balance of probabilities to support unsatisfactory professional conduct. This was a reasonable decision. The Appellant might not like it but the Sub Committee was entitled to reach it.

In answer to a question from the Tribunal, Ms Motion clarified she was asking the Tribunal to set aside the suggestion there was a fundamental error in the Sub Committee's approach and a flaw in the

application of the law to the facts. The case was not about conflict of interest. It was not about KG. It was about the Second Respondent's knowledge of KG's advice, not his acting.

SECOND RESPONDENT'S ORAL SUBMISSIONS

Mr Dunlop's motion was for the Tribunal to refuse the appeal and confirm the decision of the Sub Committee. He noted that the scope of the appeal was "ever shifting". However, the only complaint relevant to the Tribunal was that the Second Respondent knew KG was giving advice to a third party. To extend that to the handover and due diligence would go well beyond the original complaint. In any event it was not relevant because neither the handover nor the due diligence involved a conflict of interest. The Second Respondent has always been up front about KG's role in the handover and due diligence. It is within judicial knowledge of the Tribunal that vendor due diligence is prepared by the seller but addressed to the purchaser. This was never part of the Appellant's original complaint or appeal. His view in his correspondence to the First Respondent and in his appeal was that KG was going well beyond handover or due diligence but the Second Respondent did not inform him of this. The Appellant cannot now extend the scope of the appeal to include due diligence and handover. However, even if this is included, it gets nowhere near meeting the test. This was not the Appellant's complaint and if it is, it is plainly misconceived.

With reference to the Appellant's criticisms of the investigatory process, Mr Dunlop noted that just because some things could have been done does not mean that they should have been done, especially when the Appellant did not ask for them. This was a standard investigation. All parties have the opportunity to respond. The Reporter distils the issues. If the Sub Committee had concerns, it could have asked for more information.

The Appellant cannot meet any of the tests in Hood. In particular, the decision was not contradictory of the evidence. To be successful, there would have to be evidence the Second Respondent was aware of KG's clandestine actions. However, there is ample evidence he was not aware of KG's concealed behaviour.

The appeal is brought under section 42ZA(10) of the Solicitors (Scotland) Act 1980 which provides that a complainer may appeal to the Tribunal against "the determination". Section 42ZA(1) relates to unsatisfactory professional conduct. This is the only appeal to this Tribunal. The statute sets out two separate jurisdictions for the Tribunal, namely enquiring into a complaint and appeals. The powers in section 53(2) are applied following the inquiry referred to in section 53(1)(a). It would be against

regulatory law to say that in an appeal about unsatisfactory professional conduct, the more serious finding of professional misconduct is available. The powers on appeal are contained in section 53ZB(2). Those powers are to quash or confirm the determination. Mr Dunlop asked why compensation powers were contained in section 53ZB(2)(b) if the section 53(2) sanctions were available. While there is room for discussion as to whether the regulatory regime makes sense, the statute is quite clear on this point. The determination has to be that referred to in section 42ZA(1). However, this last point is academic because section 53ZB is only relevant if there was an error and this case gets nowhere close.

In answer to a question from the Tribunal, Mr Dunlop said the Tribunal should be precluded from looking at vendor due diligence and handover because it would deprive the Second Respondent of the protections of timebar and the other sifts carried out by the SLCC in terms of their statutory remit. However, he had otherwise no problem with the Tribunal looking at these elements because the argument was in any event without merit.

DECISION

Head of complaint 3 against the Second Respondent was categorised as a conduct complaint by the SLCC and referred to the Law Society's Sub Committee. A report and a supplementary report were produced. After considering the reports and the responses provided by the Appellant and the Second Respondent, the Sub Committee decided not to refer the matter to a Fiscal for prosecution of professional misconduct before this Tribunal. The Sub Committee also determined that the matter did not constitute unsatisfactory professional conduct.

Unsatisfactory professional conduct is defined in Section 46 of the Legal Profession and Legal Aid Scotland Act 2007 as *"professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor"*. It lies on a spectrum between inadequate professional services and professional misconduct.

The Appellant appealed to the Tribunal against the Sub Committee's determination to find the Second Respondent not guilty of unsatisfactory professional conduct. Section 42ZA(10) of the Solicitors (Scotland) Act 1980 provides that a complainer may, before the expiry of the period of 21 days beginning with the day on which a determination under subsection (1) or (2) not upholding the conduct complaint is intimated to him, appeal to the Tribunal against the determination. This is the only route of appeal provided for in the Act. There are no provisions allowing an appeal to this Tribunal against the refusal to prosecute a case for misconduct. This might be disappointing from a complainer's perspective, and

might represent a shortcoming in the statute, but this is the scheme created by the Act, as amended. The powers under section 53 are exercisable only in cases where a Complaint of professional misconduct has been prosecuted before the Tribunal and the Tribunal has found professional misconduct to be established. It is not open to the Tribunal to find professional misconduct established in the course of a section 42ZA appeal case.

The Tribunal's powers when considering an appeal under section 42ZA(10) are contained in section 53ZB(2) which provides that on an appeal to the Tribunal under section 42ZA(10), the Tribunal

(a) may quash the determination being appealed against and make a determination upholding the complaint;

(b) if it does so, may where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct;

(c) may confirm the determination.

The Tribunal considered the principles in Hood v Council of the Law Society of Scotland 2017 SC 386 which it has applied in other appeals cases. During submissions, parties indicated that they were in agreement that the principles set out in this case applied to the present appeal. In Hood it was said that the Court should be slow to interfere with the Sub Committee's decision on an evaluative question and should only do so in three main situations. The first is where the Sub Committee's reasoning discloses an error of law, which may be an error of general law or an error in the application of the law to the facts. The second is where the Sub Committee has made a finding for which there is no evidence, or which is contradictory of the evidence. The third is where the Sub Committee has made a fundamental error in its approach to the case by asking the wrong question, or taking account of manifestly irrelevant considerations or arriving at a decision that no reasonable Tribunal or Sub Committee could properly reach.

The Tribunal was of the view it should only disturb the decision of the Sub Committee if one of the Hood grounds was met. It should not interfere with the decision just because it might have come to a different decision. The ultimate question was what a competent and reputable solicitor ought to have done in the circumstances. Hood provided a useful framework to analyse the Sub Committee's decision making on this question. The standard of proof to be applied to the evidence was the civil standard of balance of probabilities.

The Tribunal had regard to the written and oral submissions made by all parties and the productions lodged. In view of the complexity of the issues raised and the volume of productions, it took time to consider the appeal carefully.

The Tribunal considered the scope of the appeal. The Respondents suggested that the Tribunal was constrained by the wording of the summary of complaint referred by the SLCC to the Law Society which was as follows:

"Mr Allan failed to act in my best interests between approximately November 2008 and November 2009 as, despite being aware that a practitioner within Mr Allan's firm was providing advice to another party to the transaction, LRP, he did not inform me."

The Appellant on the other hand, suggested a wider view, in keeping with the gravamen of the complaint and reflective of the wider concerns he had shared with the SLCC and the Law Society throughout the complaints process. The Tribunal was persuaded by the Appellant's argument on this point. As the Tribunal set out in its Interlocutor and Note of 24 June 2020, while a solicitor must have fair notice of the "charge", the gravamen of the complaint ought to be examined, with reference to the original complaint if required. "Complaint" includes any expression of dissatisfaction and this must be capable of encompassing the original complaint.

The original complaint at paragraph 1.5 stated that the Second Respondent was *"aware of Ken Gordon's improper activity on behalf of Lime Rock at least to a substantial extent but did not alert me."* The Eligibility Decision Report at paragraph 2.22 stated that the SLCC considered an investigation was required *"which may seek to establish precisely what Mr Allan knew about [KG's] involvement in the transaction and on that basis, whether or not he knew or ought to have known. that such involvement was inappropriate."*

"Improper activity" and "involvement" are wider terms than "advice" although there is a great deal of overlap. The terms "advising", "acting for" and "involvement" by lawyers will frequently entail specific advice. These terms are however frequently used in this broader sense to describe the professional relationship between an engaged solicitor and their client. The Tribunal considered that the Sub Committee ought to have had regard to the wider gravamen of the expression of dissatisfaction in this case. It was not appropriate or in the public interest to restrict consideration of the appeal to an artificially narrow interpretation of "advice", when the intent and gravamen of the complaint in this case were

perfectly clear, relating to the extent of KG's involvement, the appropriateness of that involvement and the knowledge of the Second Respondent in relation to that involvement.

The First and Second Respondents objected to what they said was the changing nature of the Appellant's arguments in his appeal, written submissions and oral submissions. The Tribunal noted that the adjusted appeal contained arguments that the decision was contradictory of the evidence and that the Sub Committee had been wrong to exclude "constructive knowledge". The question of constructive knowledge was no longer live before the Tribunal following its preliminary hearing decision. The written submissions focussed on the decision being contrary to the evidence but also referred to the Sub Committee falling into a fundamental error of approach regarding the investigation. The written and oral submissions also sought to include the handover and due diligence as areas of concern. The Appellant was of the view that the submissions were merely a restatement of the grounds of appeal but if the Tribunal was not with him on that, he should be allowed to amend his appeal. The Tribunal was content to hear the arguments on the day of the hearing and to consider these issues during deliberations.

The Appellant's appeal and submissions raised two questions. Firstly, did the Sub Committee make a fundamental error in its approach to the case by asking the wrong question, or taking account of manifestly irrelevant considerations or arriving at a decision that no reasonable Sub Committee could properly reach? Secondly, did the Sub Committee make a finding for which there was no evidence, or which is contradictory of the evidence? Although reference was made by the Appellant during the hearing to the Sub Committee falling into an error of law by failing to apply the rules relating to conflict of interest, this argument was not developed and the Tribunal was of the view that this was best considered as part of the second question, namely whether the Sub Committee had come to a decision properly based on all the evidence, including any evidence that the Second Respondent knew KG was acting in a conflict of interest situation.

The question of conflict of interest was relevant to the appeal from the point of view of establishing the "improper activity" of which the Second Respondent was said to be aware. Heads of complaint 1 and 2 concerned a conflict which was said to have arisen when P&W acted for both the Appellant and ITS. These issues were not before the Tribunal. However, the summary of complaint and the wider expressions of dissatisfaction are clearly about the Second Respondent's knowledge of KG (and therefore the firm) acting in a conflict of interest situation, even if that particular term is not used. This was the essence of the improper activity referred to. Although the Appellant's concern was that he was not informed, professional duties regarding conflicts are for solicitors to resolve. The prohibition on

acting in a conflict of interest situation and the requirement to take steps where there is a potential conflict are well known.[1]

The "fundamental error" appeal issue is based on what the Appellant says was insufficient investigation by the Reporter and the Sub Committee's reliance on the report without testing the evidence. The Tribunal noted that this ground did not feature at all as part of the appeal as amended. However, the question having been raised, the Tribunal nonetheless considered the Appellant's submissions in relation to the investigation.

The procedure adopted in the investigation, namely gathering evidence, analysing it and collating a report for the Sub Committee's consideration, was familiar to the Tribunal and was ultimately a matter for the discretion of the Law Society and its appointed Reporter. It was true that the investigation could have been more rigorous, for example, by the Reporter asking the Second Respondent to address evidence which contradicted his statements and by giving more consideration to the totality of the emails in Inventory Z, rather than focusing on the ones to which the Second Respondent was specifically copied. The Reporter did appear to approach the matter fundamentally from the Second Respondent's position and to consider whether any specific email might be sufficient evidentially to disturb his account, rather than looking objectively at the totality of the evidence and weighing it on the balance of probabilities. The investigation appears also to have proceeded on the assumption that the purported handover and due diligence were legitimate activities for KG to be involved in, rather than at least questioning these assumptions. This was relevant to the gravamen of the complaint; to the expression of dissatisfaction in this case. While however these may have been factors in the decision ultimately reached, the investigation itself, and the way in which it was conducted, do not, in the Tribunal's opinion, of themselves provide a sufficient basis for appeal in the circumstances of this particular case.

Responsibility for the determination lay with the Sub Committee. It was its duty to assess the evidence and make a determination. In doing so it had regard to the investigation report. It adopted entirely the reasoning and recommendation of the Reporter. It did not have before it all of the actual evidence, including in particular the critical email correspondence in Inventory Z. This meant that it was not itself in a position to assess the evidence, and was entirely reliant on the summary provided in the report.

[1] The Rules in force during the period in question are contained at Rules 3-5 of the Solicitors (Scotland) Act 1986 which came into force on 1 January 1987 and Rule 6 of the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 which came into force on 1 January 2009.

The Tribunal considered all the available relevant evidence. Considering together the Second Respondent's statements, KG's affidavit and the contemporaneous evidence contained in the emails in Inventory Z (which was not before the Sub Committee) there was clear evidence that the Second Respondent was indeed aware at least to some extent of KG's improper activity and involvement on behalf of LRP. In short, the evidence, considered overall, clearly suggests that the Second Respondent was aware that KG was continuing to act for (that is, "advise") LRP. The Second Respondent failed to act in the Appellant's best interests between approximately November 2008 and November 2009 as, despite being aware that KG was providing advice to another party to the transaction, he did not inform the Appellant. Fundamentally, he failed to take appropriate steps to address what was plainly a conflict of interest situation because of the ongoing involvement for LRP of KG.

Having identified the conflict and arranged for Ledingham Chalmers to represent ITS, the Second Respondent took a clear risk in agreeing to KG being involved in any way in this transaction. KG had worked consistently for LRP for many years, and indeed, during the period in question, represented them in other matters (Email 8 of Inventory Z and paragraph 7 of KG's affidavit). He was "their man". He had extensive commercial knowledge of LRP which meant it was unwise for him to be involved in representing the interests of ITS in any capacity. Leading the handover and "vendor due diligence" seems to have been considered a practical solution to assist the parties to complete the transaction quickly and with reduced expense. However, with hindsight, the potential pitfalls are clear.

The Second Respondent claims his knowledge of KG's role was limited to a handover and "vendor due diligence". The Tribunal considered that even these limited roles created a risk, given the inherent conflict. Best practice would have been to refer both parties to other solicitors, or if the Second Respondent was to continue to represent ITS and/or the Appellant, to have locked out KG from any involvement in the transaction at all. However, if KG's actions had been limited simply to facilitating a handover to Ledingham Chalmers and a limited and appropriate role in vendor due diligence, properly so called, the Tribunal considered that, while not best practice, knowledge of this involvement alone would have been unlikely to constitute unsatisfactory professional conduct on the part of the Second Respondent in these particular circumstances. However, during the life of this case, the terms "handover" and "vendor due diligence" came to encompass an extent of involvement on the part of KG which went far beyond anything which might have been considered appropriate.

It is clear from the available evidence that KG was engaged beyond his identified limited role in that he was advising or acting for LRP. Evidence of this is found in many of the emails in Inventory Z which show that he was acting for LRP. He revised key documents for them. He advised them on a stamp

duty issue. He attended all parties meetings. He provided tactical advice and on occasion explicitly referred to himself being on LRP's side. His affidavit, while seeking to minimise his involvement, confirms various instances of inappropriate conduct. It was not in dispute during this appeal that KG had not acted in accordance with his professional duties.

However, this appeal relates to a complaint about the conduct of the Second Respondent. KG's inappropriate and improper actions were only of concern to the extent that the Second Respondent knew about them. The evidence available to the Tribunal to make this assessment was contained in KG's affidavit, the Second Respondent's statements provided to the Reporter in the course of the First Respondent's investigation, and the contemporaneous emails available in "Inventory Z" produced by the Appellant and other emails contained in the First Respondent's Inventory of Productions.

KG's affidavit and the Second Respondent's statements differed as to the precise role KG had been asked to undertake and the Second Respondent's understanding of what KG was doing. The Tribunal treated all the statements with care. It recognised that both solicitors had an interest in minimising their involvement in any wrongdoing. All the statements were produced a very long time after the events in question. The Tribunal considered that the most compelling evidence was contained in the contemporaneous emails contained within Inventory Z and emails contained in the Inventory of Productions for the First Respondent.

According to his affidavit (Production 21(22) for the First Respondents), KG was doing other work for LRP while this transaction was ongoing (paragraph 7). He says there was no ignoring the fact he had acted for LRP. On occasion, the easiest way to get an answer was to ask him what the LRP policy was (paragraph 17). Everyone involved in the transaction was aware he was usually LRP's lawyer. He saw his role as firstly being a point of reference and resource regarding LRP policy, process and precedents (a facilitating role) and secondly, due diligence (paragraph 17). The due diligence was a "necessary evil" but was not central to the transaction. His impression was that there was a wider acceptance of his participation. Any discomfort was allayed in his mind by the fact he understood everyone to have accepted his role. According to him, there had to be a reason for him attending the meetings on 5 March 2009 and no-one questioning that (paragraph 22). He did not invent the role for himself. The Second Respondent was aware of at least some of his involvement with Ledingham Chalmers and LRP (paragraph 26). KG met the Second Respondent on 26 February 2009. He met Malcolm Laing and LRP on 3 March 2009 so he could go though the documents and explain the differences between the Second Respondent's draft and LRP's usual starting point. He also attended the all parties meeting on 5 March 2009 (paragraph 27). KG suggested additional warranties should be provided by ITS to LRP when

issues arose out of the legal due diligence reports which could not be resolved within the required timeframe. He saw this as acting in his facilitative role (paragraph 68) but he was in reality plainly acting for the benefit of LRP. The Tribunal noted that KG's affidavit was provided to the Sub Committee but only a small part of it was referred to in the supplementary report.

According to the Second Respondent's statement of 26 March 2019, it was his understanding that KG would facilitate a handover, passing the historic information to the new lawyers who were to act for LRP in this matter. KG would then "step away" and allow the new lawyers to advise LRP in relation to the transaction. According to the Second Respondent the "handover" was restricted to an initial meeting between himself, KG and Ledingham Chalmers and a follow-up meeting between KG, Ledingham Chalmers and LRP. Following these meetings he expected KG to "step out" and LRP would be advised exclusively by Ledingham Chalmers. Ledingham Chalmers would prepare the list of points for discussion at the all parties meeting.

The Second Respondent admits that he met Ledingham Chalmers and KG to talk through the approach taken on the transaction documents. He knew that KG would thereafter meet LRP (paragraph 5.12). It was the Second Respondent's understanding that the handover meeting had taken place before the all parties meeting (paragraph 5.13). He understood that the list of points for discussion had been drafted by Ledingham Chalmers. The Second Respondent concedes that he discussed the transaction documents with KG (paragraph 6.3.3). He "suspects" that he had a discussion with KG about how the transaction was progressing (paragraph 6.8.18). However, he claims not to have been aware of KG playing a role on behalf of LRP in the transaction beyond that identified as to facilitate a "handover" and "vendor due diligence". According to the Second Respondent's supplementary statement of 25 November 2019 (Production 2(j) for the First Respondent), *"as partners working together on a transaction, we would regularly update one another on the status of our respective parts"* (paragraph 6.1). He confirmed that KG did attend the all parties meeting. He says this was not surprising as he had to play a material role in vendor due diligence. The Sub Committee was provided with both of the Second Respondent's statements and the reports covered these in detail.

Inventory Z contains many of the emails pertinent to this transaction, although it is not a complete record. Inventory Z was provided to the First Respondent by the Appellant but was not put before the Sub Committee. Some but not all of the emails were summarised in the report and supplementary report which the Sub Committee had in its papers.

Email 4 of Inventory Z is an email from KG to Lawrence Ross of LRP dated 13 January 2009 at 1126 hours. In this email, KG notes *"I don't remember Scott Allan saying that the 3i info I imparted was embargoed – he has been pretty good at delineating what may and what may not be passed on."* The 3i information relates to a previous aborted investment in ITS by another company. It would not on the face of it be appropriate for KG (who was supposed to be working for ITS) to disclose information about this deal to LRP. The Second Respondent is not a party to the email. However, it is contemporaneous evidence from KG that he was involved in ongoing discussions with the Second Respondent about what might and might not be disclosed by him to LRP. According to KG, the Second Respondent did not prohibit him from passing on the 3i information. This email sets the scene of an ongoing dialogue between the Second Respondent and KG going beyond handover or due diligence. A summary of this email was provided in the report to the Sub Committee.

Email 7 of Inventory Z is an email from KG to Malcolm Laing of Ledingham Chalmers dated 16 January 2009 at 1603 hours. The Second Respondent is not a party to the email. In this email KG invites Mr Laing to a meeting and notes that *"I thought it was only going to be on diligence but it has grown a few arms and legs."* The email attaches the LRP term sheet. The email shows that KG has become too involved in the transaction. However, it also reflects on the Second Respondent's knowledge of KG's involvement. For KG to know the meeting is "growing arms and legs" suggests there has been communication between the Second Respondent and KG. More than that, the email clearly suggests KG is attending meetings about the transaction. The Second Respondent is also present at these meetings. If the subject of the meeting is "growing arms and legs" beyond diligence, this is not likely to be a handover meeting as suggested by the Second Respondent. This email was not summarised in the report for the Sub Committee. Therefore, the Sub Committee did not consider it at all.

Email 15 of Inventory Z is an email from the Second Respondent to KG and Malcolm Laing dated 23 February 2009 at 1612 hours. In this email the Second Respondent notes that *"we probably need an all parties meeting on the docs next week"* although he appreciates there will have to be meetings and reviews before that. The fact the Second Respondent addresses this email to both KG and Mr Laing suggests that he knows KG is involved in this transaction beyond a handover or due diligence and is in fact representing LRP. He is not proposing a handover meeting (which had already taken place in January). Parties would not ordinarily be at a handover meeting. The transaction has moved to the stage of consideration of the substantive transaction documents and KG should not be involved at this stage, even on the basis of the limited role ascribed to him. This email was summarised in the report provided for the Sub Committee.

Email 17 of Inventory Z is an email from KG to Lawrence Ross at LRP dated 24 February 2009 at 1438 hours. The Second Respondent is not copied into this email. In this email KG proposes a timetable which includes on 26 February 2009, *"Scott Allan briefs me and malcolm on the changes he has made to the LRP style IA and Arts and the approach he has taken in SPA."* KG notes that on 3 March *"I meet with Malcolm, Jason and Lynn to walk through the IA and Arts in detail and SPA at high level."* There is also reference to *"an all parties meeting to go through the IA and Arts"* on 5 March 2009. The contemporaneous evidence therefore shows KG being involved in several meetings involving key transaction documents. He expects to be briefed by the Second Respondent on transaction-specific changes before attending an all parties meeting at which the Second Respondent would be present, representing ITS. This would not be necessary if KG was only involved, to the Second Respondent's knowledge, in a handover and due diligence. This email was summarised in the report provided for the Sub Committee.

Email 18 of Inventory Z contains an email from Malcolm Laing of Ledingham Chalmers to the Second Respondent and KG dated 24 February 2009 at 0809 hours. Mr Laing indicates he could attend a meeting on Tuesday but does not have much time for review and discussion with LRP. He therefore says he will *"speak to Ken/Lime Rock today and then get back to you."* This is evidence of the Second Respondent's awareness of KG's continuing involvement in this case. At the stage where key transaction documents are being issued, he is on notice that LRP's solicitor is still discussing matters with KG and that KG intends to attend an all parties meeting. This email was summarised in the report provided for the Sub Committee.

Email 19 of Inventory Z contains two emails. The first is an email from the Second Respondent to Malcolm Laing. KG is copied in to the email. It is dated 24 February 2009 at 1743 hours. It attaches the investment agreement, articles and share purchase agreement for review. There is no proper reason or justification for including KG in this email. It is evidence that the Second Respondent knew of KG's involvement with another party in the transaction and clearly beyond his ascribed, limited role. The second email in Email 19 is from KG to Lawrence Ross and others forwarding the first email. It is dated 25 February 2009 at 1016 hours. The Second Respondent is not a party to this email. KG notes that the attached transaction documents are the clean version of what is effectively the ITS mark-up of the LRP styles. These documents are therefore no longer the LRP styles. They have been altered to take account of transaction-specific issues. The Second Respondent provided these to KG. The Second Respondent must therefore have been aware of KG's continuing involvement beyond the limited role claimed. The only reason to include KG in the first email is to give him the documents to discuss with Malcolm Laing and LRP. These emails were summarised in the report provided to the Sub Committee.

Further evidence that the Second Respondent knew that KG intended to meet LRP and make up a list of items to discuss is contained in Production 2b(14) for the First Respondent. This is an email from the Second Respondent dated 25 February 2009 at 0955 hours. It says that *"I have issued the docs am meeting Malcolm and Ken tomorrow to talk them through the approach taken on the docs. They are then to meet Jason and Lynn on Tuesday next week to run through the docs with a view to making up a list of key issues for discussion."* The Second Respondent was therefore aware that KG was involved in taking instructions and giving advice to LRP on proposed amendments to the documents. This email is summarised in the report provided to the Sub Committee and was with their papers.

Email 25 of Inventory Z contains an email from KG to Rod Hutchison and Malcolm Laing and others dated 4 March 2009 at 1609 hours. The Second Respondent is not a party to this email. However, this contemporaneous record notes that KG intended to *"explain to Scott that we did not get into the detail of the SPA in the same way as we did with the other docs hence the different approach between the lists."* There is therefore evidence that KG intended to discuss with the Second Respondent the result of his discussions with LRP regarding key documents (although the Second Respondent denies any such conversation). There then follow two more emails in which KG confirms that he will forward the lists to the Second Respondent. The picture is highly suggestive of KG and Ledingham Chalmers working together. The email requires to be treated with some care since the Second Respondent was not copied into the email. However, it is consistent with the overall picture of KG's involvement in this case and the Second Respondent's knowledge of that involvement. This email was not summarised in the report for the Sub Committee. Therefore, the Sub Committee did not consider it at all.

Email 26 of Inventory Z is an email from KG to Lawrence Ross, Malcolm Laing and others dated 4 March 2009 at 1831 hours. In it KG reports having had a discussion with the Second Respondent about the Investment Agreement and Articles list. He reports that they agreed some of the points could simply appear in the next drafts rather than be the subject of discussion at the meeting on 5 March 2009. This email ought to have been sent by the Second Respondent. It is another piece of evidence demonstrating that KG was known to be involved in this transaction to the extent of agreeing points for discussion in relation to the transaction documents. This email was summarised in the report provided for the Sub Committee.

KG attended the all parties meeting on 5 March 2009 (paragraph 43 of KG's affidavit, paragraph 5.13 of the Second Respondent's first statement and paragraph 13.3 of the Second Respondent's second statement). As is demonstrated by the email evidence, KG helped to formulate the list of points for

discussion at that meeting. Transaction documents were discussed at that meeting. The Second Respondent says that KG "played no active role" in the meeting. That however does not explain why KG required to attend at all, other than because he was clearly involved far beyond his supposed limited remit, consistent with the overall picture clearly portrayed by the correspondence and to the knowledge of the Second Respondent.

Email 39 of Inventory Z is an email from the Second Respondent to KG dated 9 April 2009 at 0018 hours asking how much of the Indigo fees LRP are going to pick up. While the Reporter suggests this is restricted to the fees for due diligence, the email is headed "Indigo Fees". This email is not conclusive but is suggestive of the Second Respondent treating KG as LRP's solicitor. This email was summarised in the report provided for the Sub Committee. The Tribunal noted the Second Respondent's position in his first statement (at paragraph 6.8.19) that the background to this was that LRP was asking for more overseas due diligence than was justified and it was becoming extensive and expensive. The Second Respondent says that he did not expect KG to pass the information on to LRP. Be that as it may, it is unclear what legitimate or appropriate purpose the Second Respondent had in discussing the matter with the Second Respondent at all. The question was naturally one for discussion with LRP's solicitor and should more appropriately have been put by the Second Respondent to Ledingham Chalmers.

Email 59 of Inventory Z is an email from KG to Rod Hutchison at Ledingham Chalmers dated 22 September 2009 at 1919 hours. The Second Respondent is copied into the email. Although the start of the email is about warranties required for the due diligence exercise, the second paragraph relates to additional work KG has carried out for LRP which does not relate to a handover or due diligence. Both suggest an administrative role. However, in this email, KG is offering input and advice and the Second Respondent knows about this. The Second Respondent knew this was inappropriate because of the conflict identified at the beginning of the transaction. This email was summarised in the report provided for the Sub Committee. The Second Respondent says in his first statement (at paragraph 6.8.28) that he believed this email was sent with the approval of ITS. There is no evidence of this and in any case, it is not for ITS to approve the firm acting in a conflict of interest situation.

Email 63 of Inventory Z is an email from KG to Jason Smith dated 25 September 2009 at 1232 hours. It notes that the Second Respondent emailed KG *"to say they wanted the DL agreed today"* and therefore KG has had a preliminary look at the disclosure letter and provided comments on it. On the face of it, this email is evidence of the Second Respondent continuing to communicate with KG about matters outside of handover or due diligence quite close to the end of this transaction. This email was summarised in the report provided for the Sub Committee.

The Tribunal also had regard to various emails contained in the Inventory of Productions for the First Respondent. Summaries of all of these emails were provided to the Sub Committee in the reports prepared for it.

Email 1 contained at Production 2d(4) for the First Respondent is an email from the Second Respondent to KG dated 26 January 2009 at 1110 hours. This is fairly early in the transaction. While not compelling in itself, it is background to the overall picture. The Second Respondent's question is not about LRP's standard procedure regarding payment of stamp duty. Rather, the Second Respondent asks KG whether LRP were expecting to pay stamp duty and whether they were expecting the proposal regarding equity incentive. These questions relate to the specifics of the transaction.

Production 12 for the First Respondent is a series of emails between KG and an overseas lawyer he approached to do some of the due diligence work. The pertinent ones took place on 5 February 2009 at 1226 hours and 1623 hours. The overseas lawyer raised the conflict issue with KG saying *"Our concern therefore is that we could find ourselves in a position whereby we are conflicted between our client for the purposes of this transaction (ITS) and our existing client. Lime Rock – e.g. if during the course of our dd review we were to identify an issue which ITS would consider not to be relevant to the investors but that, given our knowledge of their business and our existing close relationship, we felt would be of interest to Lime Rock."* KG notes in his response at the time that this point is well made and ought not to have escaped him. The Second Respondent was not a party to these emails so the issue was not flagged to him in the same way as it was to KG. However, the issue should have been considered by them as it was by the overseas lawyer. This email does not appear to have been made available to the Sub Committee although the pertinent parts were referred to in the report (at paragraph 2(i)).

Email 5 contained at Production 2d(10) for the First Respondent is an email from the Second Respondent to KG dated 31 July 2009 at 1152 hours. It comes at a time when the deal between ITS and LRP was back on, having reached a brief hiatus. The Second Respondent asks various questions of KG. He asks KG to drop LRP a line about their actions and their instruction of Ledingham Chalmers. However, to the Second Respondent's knowledge, he is actively engaged with LRP, and at the Second Respondent's suggestion. As the Reporter notes in the supplementary report, this at the very least conflicts with the Second Respondent's explanation that, from the point of the handover onwards, Ledingham Chalmers ought to have been dealing with the case with no input from KG.

Email 10 contained at Production 2d(12) for the First Respondent is an email from the Second Respondent to KG dated 22 September 2009 at 1312 hours. The Second Respondent says, *"I don't want to respond to Malky without there being a Lime Rock position that is "set in stone" per our earlier discussion. This shouldn't just hang on the disclosure letter, as per our discussion, that will simply become a discussion about that document along which won't benefit anyone. It would be better to highlight a number of areas, and also LR review time. Hopefully I'll catch you before you go."* The Second Respondent is in this email involving KG in discussions about the deal. This is inappropriate given KG's knowledge of LRP. There is an expectation that KG is to liaise with LRP about these issues, rather than the Second Respondent dealing with Ledingham Chalmers direct. The email also confirms that KG and the Second Respondent are continuing to discuss this case outside of the email correspondence.

Email 11 contained at Production 2d(14) for the First Respondents is an email from the Second Respondent to KG dated 14 September 2009 at 1329 hours. In it, the Second Respondent forwards an email chain about the position of an ITS shareholder. It addresses commercial concerns, not handover or due diligence. There is no justification for KG being involved in this.

Email 16 contained at Production 2d(26) for the First Respondent is an email from the Second Respondent to Scott Milne of ITS dated 30 September 2009 at 1503 hours. The subject of the email is the fees for the transaction in question. The Second Respondent proposes a fee of £165,000 to P&W and an additional £175,000 for vendor due diligence. The Ledingham Chalmers fee is £40,000. The Second Respondent notes that *"It would have been significantly more had other lawyers been involved and you picked up the tab for both parties on a full basis."* It is noted in the documents attached that KG provided "document and consultancy support" to Ledingham Chalmers for which a fee of £14,745 was charged. This is separate to the due diligence work. The work is said to have taken place between January and September when the handover was said to be completed by March. This indicates work was undertaken which was neither initial handover or vendor due diligence.

Email 17 contained at Production 2d(17) for the First Respondent is an email from the Second Respondent to KG dated 23 September 2009 at 1255 hours. In it, the Second Respondent acknowledges an email which KG has forwarded to him from LRP. KG is sharing information with the Second Respondent he is receiving from LRP. It does not relate to vendor due diligence or handover, but rather KG provides the Second Respondent with LRP's views regarding readiness and timing of completion.

Email 23 contained at Production 2d(18) for the First Respondents contains an email from the Second Respondent to ITS dated 9 March 2011 at 0947 hours. ITS were comparing a different deal from that which is the subject of this appeal. The Second Respondent notes that, *"We don't consider that comparisons with the LR investment are helpful here – that was a different deal done on a "friendly basis" where we were able to exert a considerable level of control on the process, in particular around the documents and diligence – in other words Ledingham Chalmers pretty much fell into line – so much so that their fee was on[ly] £40,000."* Email 23 also contains an email from the Second Respondent to ITS dated 9 March 2011 at 1703 hours. The email chain is about a fee which is separate to this transaction, but comparison is made to the present deal. The Second Respondent notes that *"The point I was making about control was that we knew how Lime Rock would approach matters (we act for them on every deal) and we considered that we'd be able to exert control on Ledingham Chalmers by virtue of them acting in this case at our instance – which we did."* The Second Respondent does not say that in a general sense, P&W knew what investors wanted. He specifically says they had particular knowledge about LRP. These emails show that the Second Respondent knew KG was involved for LRP to the extent of exerting a degree of control over Ledingham Chalmers.

In conclusion, therefore, the Second Respondent was alive to the issue of conflict of interest in this case. He arranged for LRP to be represented by Ledingham Chalmers. Despite this he allowed KG to remain involved in the transaction which, as noted above, was a risky strategy. He claimed that he only ever understood KG to be undertaking a "handover" and "vendor due diligence". A handover is usually an administrative exercise where files and styles are handed over to the new solicitor. It might be reasonable during a handover for KG to give general background to Ledingham Chalmers about how LRP usually operated in this kind of transaction and provide their usual styles. However, the handover should essentially be an administrative process between lawyers where the styles are "handed over". It should not include revisal of key transaction documents and attendance at meetings with the parties. A handover meeting took place in January 2009. There was no need for any continuing involvement beyond that date unless it related to vendor due diligence. Vendor due diligence is also a largely administrative exercise which involves collating reports and information on the vendor for the purchaser's consideration and responding to enquiries on same raised by the purchaser. It should not include revisal of key transaction documents and attendance at meetings with the parties. KG's involvement went substantially beyond any legitimate role in a handover and vendor due diligence, and the Second Respondent knew this.

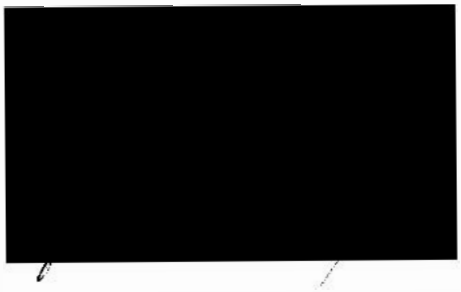
Therefore, the Sub Committee's decision that the Second Respondent was unaware of KG's actions beyond handover and due diligence was contrary to the evidence. The Tribunal rejected the submissions

of the Respondents that in order for it to make that finding, the evidence would have to be "all one way". The evidence on the balance of probabilities was that KG clearly exceeded his appropriate remit and the Second Respondent was aware in this respect of at least some of KG's activities, to the extent set out above. The Second Respondent may not have been aware of everything KG was doing. It is clear that he was not a party to the emails demonstrating the worst of KG's conduct. However, knowing that a conflict existed (hence the referral to Ledingham Chalmers), the Second Respondent allowed KG to retain a restricted role in the transaction. He knew that KG was exceeding that role and on occasion, encouraged KG's involvement. The only evidence to the contrary is contained in the Second Respondent's statements in which he sought to minimise his knowledge of KG's actions. However, the statements do not adequately address the emails set out above. Considered overall, the only reasonable conclusion is that the Second Respondent was aware at least to some extent of KG's conduct, as is supported by KG's affidavit.

It would have been desirable for the Sub Committee to have access to all the available relevant evidence as it clearly shows that the Second Respondent was aware of some of KG's "improper activity". While it may be possible to question or challenge the interpretation of a single email, the correspondence, when considered in its entirety along with all of the other evidence, depicts a very clear picture. However, even on the summary provided in the report, the Sub Committee's decision is contrary to the evidence. This is not a case where the Tribunal merely disagreed with the decision of the Sub Committee. The Second Respondent failed to act in the Appellant's best interests between November 2008 and November 2009. He knew that KG was in fact acting for and thereby advising LRP and he did not take steps to prevent this from occurring or alert the Appellant to the situation. There was plainly a conflict of interest situation, for the Second Respondent as for his firm. The Second Respondent was the lead partner and solicitor acting for the complainer and his company, ITS. It was professionally incumbent on the Second Respondent to avoid such a situation arising and to protect the interests of his client, in accordance with Law Society Rules. This was professional conduct which was not of the standard which could reasonably be expected of a competent and reputable solicitor and therefore constituted unsatisfactory professional conduct.

Therefore, the Tribunal upheld the appeal, quashed the determination being appealed against and made a determination upholding the complaint. It decided to issue its decision to parties in writing in respect of this part of the matter at this stage. It noted that it had not received any information regarding whether the Appellant had been directly affected by the conduct such as to allow it to consider making a decision on compensation under section 53ZB(2)(b) of the Solicitors (Scotland) Act 1980. It decided to invite

written submissions on this issue, and on publicity and expenses. The case will be continued to a date to be afterwards fixed to hear parties on these issues following which a final interlocutor will be issued.



Ben Kemp

Vice Chair