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

DECISION

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

by

ALAN NIALL MACPHERSON MICKEL, 68 Wimbledon Park Road, London

Appellant

against

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

First Respondents

and

DAVID TURNER, Advocate, Advocates Library, Parliament House, Edinburgh

Second Respondent

1. An Appeal dated 27 February 2020 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Alan Niall Macpherson Mickel, 68 Wimbledon Park Road, London (hereinafter referred to as "the Appellant") against the Determination and Direction made by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the First Respondents") dated 30 January 2020. The First Respondents' determination upheld a complaint of unsatisfactory professional conduct made by David Turner, Advocate, Advocates Library, Parliament House, Edinburgh (hereinafter referred to as "the Second Respondent") against the Appellant. The First Respondents censured the Appellant and directed him to pay compensation to the Second Respondent.

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated upon the First Respondents and the Second Respondent. Answers were lodged for the First

Respondents. The Second Respondent intimated to the Tribunal Office that he did not wish to participate in these proceedings.

3. On 26 March 2020, the Tribunal sisted the case on its own initiative under Rule 44 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008. This was due to government advice regard COVID-19 (coronavirus). That sist was recalled by Interlocutor of 22 May 2020.

4. In terms of its Rules, having considered the Appeal and Answers, the Tribunal resolved to set the matter down for a procedural hearing to take place by video conference on 2 July 2020 and notice thereof was duly served on the Appellant and First Respondents.

5. At the virtual procedural hearing on 2 July 2020, the Appellant was present and represented by Iain Mitchell, Q.C. instructed by Michael Gallen, Solicitor, Glasgow. The First Respondents were represented by Grant Knight, Solicitor, Edinburgh. The Second Respondent was not present or represented. Parties agreed that the Appeal hearing could take place remotely and should be capable of being completed in one day. The hearing was to take the form of a legal debate on agreed facts. The Tribunal continued the case a remote hearing on a date to be afterwards fixed.

6. In terms of its Rules, the Tribunal resolved to set the matter down for a hearing to take place by video conference on 1 September 2020 and notice thereof was duly served on the Appellant and the First Respondents.

7. The remote hearing took place on 1 September 2020. The Appellant was present and represented by Iain Mitchell, Q.C. (Senior Counsel) and William Frain-Bell, Advocate (Junior Counsel) instructed by Michael Gallen, Solicitor, Glasgow. The First Respondents were represented by Grant Knight, Solicitor, Edinburgh. The Second Respondent was not present or represented. A signed Joint Minute of Admissions was before the Tribunal. Parties made oral submissions adopting their written submissions which had been provided to the Tribunal in advance of the hearing.

8. In accordance with the facts agreed by parties in the Joint Minute of Admissions, the Tribunal found the following facts established:-

8.1 The Appellant is a solicitor enrolled in the Registers of Scotland. His date of birth is 21 July 1968 and he was enrolled as a solicitor in Scotland on 13 June 1996. He was admitted as a Solicitor Advocate on 24th September 2008.

8.2 Between 1 June 2002 and 31 October 2014, the Appellant was a partner in the firm of Hamilton Burns, Carlton Buildings, 63 Carlton Place, Glasgow, G5 9TW.

8.3 Between 1 February 2008 and 30 September 2009 the Appellant was the designated Cashroom Partner at Hamilton Burns.

8.4 Between 14 October 2008 and 30 September 2009, the Appellant was the Anti-Money Laundering Partner of Hamilton Burns.

8.5 On 29 July 2014, Hamilton Burns WS Limited, company number SC483134, was incorporated as an incorporated practice, having its registered office also at Carlton Buildings, 63 Carlton Place, Glasgow, G5 9TW.

8.6 Between 1 November 2014 and 29 December 2015, the Appellant was a Director of Hamilton Burns WS Limited. He resigned as a director with effect from 29 December 2015.

8.7 Between 30 December 2015 and 23 May 2017, the Appellant was engaged as a Consultant with Hamilton Burns WS Limited.

8.8 From 22 March 2019 until the present, the Appellant has been engaged as a Consultant with Liu's Legal Solutions Limited, Unit 6, 42-46 New City Road, Glasgow, G4 9JT.

Counsel's Fees

8.9 In September 2015, Hamilton Burns WS Limited instructed Drummond Miller WS to act as Edinburgh agents in the case of ZM.

8.10 Drummond Miller, as Edinburgh agents for the incorporated practice instructed Mr David Turner, Advocate as Counsel in said case by letter dated 23 September 2015. That letter stated inter alia that *"we are instructed through Glasgow*

Correspondents, Hamilton Burns. This is a private paying case and fee notes should be rendered directly to Hamilton Burns for their attention" and *"Niall Mickel of Hamilton Burns is dealing with this case principally so if there is any further specific detail required then it may be best to contact him in the first instance..."* A second letter of instruction by Drummond Miller to Counsel dated 8 October 2015 was in similar terms, stating that *"This is a private paying case and fee notes should be rendered directly to Hamilton Burns for the attention of Niall Mickel there."* At the date of instruction, the Appellant was a director of said practice.

8.11 At the date of instruction, responsibility for Counsel's fees rested with the said incorporated practice.

8.12 Counsel's fee note was subsequently issued on 14 December 2015.

8.13 Several reminder communications were issued by Faculty Services Limited to Hamilton Burns WS Limited between 10 March 2016 and 2 January 2017. In particular, Faculty Services sent to the incorporated practice: on 10 March 2016, a reminder stating that the fees were overdue; and on 16 March 2016; a copy of the Fee Note.

8.14 On 19 April 2016 at 11.15am, Faculty Services sent an email to the Appellant, who responded by email the same day at 11.49am. He intimated that he was no longer a director of the incorporated practice, having resigned in December of 2015, that he now consulted with the firm, and that all further correspondence on the matter should be directed to Andy Knox as the director of the incorporated practise who had taken over the daily management of the civil Department. By email dated 20 April 2016 at 9.56am, Faculty Services Ltd, acknowledged the Appellant's email of 19 April and stated that they would note the updated position on their file.

8.15 Thereafter, further reminders were sent by Faculty Services Limited as follows: 1 June 2016 to the incorporated practice; 5 July 2016 to the incorporated practice; 11 August to Mr Knox; 9 September to Mr Knox; and 20 September to Mr Knox. On 25 November 2016, the letter from the CEO of Faculty Services was sent in

error to a firm of solicitors in Annan and marked for the attention of the Appellant. The Appellant had and has no connection with the said firm. The letter was re sent on 1 December to the incorporated practice and marked for the Appellant's attention.

8.16 With the exception of the email of 19 April 2016 and the letter of 1 December 2016, the Appellant stated that none of these communications were seen by him personally. The First Respondents neither knew nor admitted this.

8.17 Following the service of the Complaint on the Appellant, he responded by email dated 31 May 2017 at 1:42pm, reiterating that he had resigned as a director of the company in December 2015, that the correspondence regarding the matter had not been forwarded to him by the incorporated practice, and that the practice were responsible for Counsel's fees.

8.18 Counsel's Fee remains unpaid by Hamilton Burns WS Limited.

Subsequent Procedure

8.19 Another sub-committee of the First Respondent considered whether the issues of the non-payment of Counsel's fee and alleged failure to provide a satisfactory explanation of such non-payment constituted professional misconduct by the Appellant.

8.20 The First Respondent's Fiscal advised that sub-committee that payment of the fee was a firm liability and not a personal duty owed by a particular solicitor, and that the conduct complained of was not comparable to conduct which had amounted to professional misconduct.

8.21 The sub-committee found that the said issues did not constitute professional misconduct.

8.22 In remitting the complaint to the second sub-committee, the first sub-committee found that there was only one instruction, that the solicitor ceased to be a principal

in the firm shortly after and the correspondence with Faculty Services in March 2016 appear to suggest that the firm itself was dealing with the matter by suing the client.

9. Having given careful consideration to the detailed submissions made by the Appellant and the First Respondents, together with the documents before it, the Tribunal quashed the Determination, the Censure accompanying the Determination, and the Direction of the Law Society of Scotland.

10. Having heard further submissions in relation to expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

> By Video Conference, 1 September 2020. The Tribunal having considered the Appeal under Section 42ZA(9) of the Solicitors (Scotland) Act 1980 by Alan Niall Macpherson Mickel, 68 Wimbledon Park Road, London ("the Appellant") against the Determination of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh ("the First Respondents") dated 30 January 2020 upholding a complaint of unsatisfactory professional conduct made by David Turner, Advocate, Advocates Library, Parliament House, Edinburgh (hereinafter referred to as "the Second Respondent") against the Appellant, censuring the Appellant and directing him to pay compensation; Quash the Determination, Quash the Censure accompanying the Determination, and Quash the Direction of the First Respondent; Find the First Respondents liable in the expenses of the Appellant 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 3 of the last published Law Society's Table of Fees for General Business with a unit rate of £14.00; Certify the cause as suitable for the employment of Junior Counsel; and Direct that publicity will be given to this decision and that this publicity should include the name of the Appellant and may but need not name any other person.
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> **(signed)**
> **Beverley Atkinson**
> **Vice Chair**

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant and First and Second Respondent by recorded delivery service on 26 OCTOBER 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Beverley Atkinson

Vice Chair

NOTE

At the hearing on 1 September 2020, the Tribunal had before it the appeal dated 27 February 2020, the Sub Committee's letter dated 10 February 2020, the Sub Committee's Determination dated 30 January 2020, Answers for the First Respondents, a Joint Minute of Admissions, a Joint Bundle of Productions, a Joint Bundle of Authorities, a Note of Argument for the Appellant and Submissions for the First Respondents.

SUBMISSIONS FOR THE APPELLANT

Mr Mitchell adopted his written note of argument in his oral submissions. The basis of the appeal was that the Sub Committee had erred in fact and in law in holding that non-payment of Counsel's fee and failure to provide a satisfactory explanation for non-payment amounted to unsatisfactory professional conduct.

The note of argument set out the pertinent facts and the relevant law. With reference to Thomson v Glasgow Corporation 1962 SC (HL) 36 and Hood v Council of the Law Society of Scotland 2017 SC 386, Mr Mitchell submitted that the Tribunal should not take too narrow an approach. As a specialist Tribunal itself, it did not have to give deference to the Sub Committee's decision in the same way as the Court. However, he also said that even if the Tribunal was to apply the principles described in Hood, the appeal should still succeed.

Mr Mitchell noted that responsibility for Counsel's fees at the pertinent time was determined by the 2008 Edition of the Faculty of Advocates Scheme for Accounting For and Recovery Of Counsel's Fees ("the Scheme"). He said that professional responsibility lay in terms of the Scheme, on the incorporated practice and not the Appellant as an individual. Finding that the Respondent had a personal responsibility for Counsel's fees was an error of law by the Sub Committee. He said that although an individual solicitor (who might be a trainee or associate) might "give instruction", that did not import liability to them. It created a professional responsibility on the firm which had a direct responsibility. The Sub Committee had wrongly conflated the Appellant and the firm.

Mr Mitchell criticised the Sub Committee's reasons with regard to their naming the Respondent as the "instructing solicitor" and the suggestion that he had changed his status as a means to avoid responsibility for Counsel's fee. He said the Sub Committee's finding that the Respondent ought to

have put in place arrangements for payment was erroneous since it proceeded on the incorrect basis that he had a personal responsibility. He said no reasonable Sub Committee could have reached the view that a solicitor cannot resign as a director of an incorporated practice without putting in place arrangements for payment of Counsel's fee. This would mean effectively that a retired partner had to become a guarantor of fees.

Mr Mitchell said that if the failure to pay the fee was not unsatisfactory professional conduct, the Respondent was under no obligation to explain that conduct. However, even if he was under such an obligation, the Sub Committee erred in fact and law in respect of this decision. He noted there was some disagreement between the parties regarding the Respondent's knowledge of the correspondence from Faculty Services Limited. However, he submitted that this was not material. The Sub Committee had proceeded on the basis there was eleven communications by Faculty Services Limited to the Appellant. None of this correspondence was before the Sub Committee. Mr Mitchell said only one letter was properly addressed to the Respondent, and one email. It is agreed that the Appellant responded on 19 April 2016 and 31 May 2017. Accordingly, the complaint can only be that those responses did not constitute a satisfactory explanation for non-payment of Counsel's fees. Mr Mitchell said the explanations were objectively satisfactory and accepted by Faculty Services Limited. Mr Mitchell criticised the Sub Committee's reasons as lacking in specification and failing to set out what would have been a satisfactory response.

Mr Mitchell said if the Tribunal was with him on the first question then that was an end to the matter. However, if the Tribunal believed the Appellant ought to have given an explanation, it is contained in the email of 19 April 2016. He asked the Tribunal to be careful about the word "satisfactory". The only satisfactory explanation to Faculty Services Limited would have been a letter enclosing Hamilton Burns' cheque.

Mr Mitchell invited the Tribunal to uphold the appeal in respect of both issues, and to quash the determination, the accompanying censure and the award of compensation.

SUBMISSIONS FOR THE FIRST RESPONDENTS

The Fiscal adopted his written submissions in his oral argument. He reminded the Tribunal of the two issues that were before the Professional Conduct Sub Committee and noted that the wording of those issues is set by the Scottish Legal Complaints Commission. He noted the facts which were not in

dispute. He said there was disagreement about the number of reminders seen by the Appellant. However, in his view there was no real discrepancy regarding the facts, just the interpretation of those facts.

The Fiscal maintained that the Sub Committee reached its decision after a full consideration of all relevant facts and material. He said there was no error of law. There was no finding for which there was no evidence or which was contradictory of the evidence. There was no fundamental error in its approach. A reasonable Sub Committee could have reached this decision. Reasons were set out. He said that the tests set out in Hood v Council of the Law Society of Scotland 2017 SC 386 were met and that these were the appropriate principles for the Tribunal to apply in this appeal.

The Fiscal noted the different terminology applied in this case – "liability", "responsibility" and "obligation". The Fiscal said the Scheme set out that every solicitor who instructs Counsel has a professional obligation so far as reasonably practicable to pay Counsel. However, it does not attract a personal liability to a solicitor unless that solicitor is a sole practitioner and has all the "hats" on as solicitor, instructing solicitor and firm. He said an instructing solicitor in any firm had a professional obligation to ensure fees were paid.

According to the Fiscal, the Appellant has to have a responsibility. He instructed an Edinburgh agent who instructed Counsel. Mr Mitchell suggested that the Appellant was not the instructing solicitor. On the strict wording of the Scheme that might be correct. However, he was a principal of a firm that had that responsibility. The appellant was the solicitor in charge of the case. It is clear from the letter of instruction that fee notes were to be sent for his attention. As a solicitor he had a professional obligation to ensure Counsel was paid. He received at least two communications from Faculty Services Limited. These were the email of 19 April 2016 and the letter of 1 December 2016. The fee was never settled.

The Fiscal said it could not be the position that where a solicitor instructs Counsel he can walk away without responsibility saying he had no control over it. Following the instruction, the Appellant was a principal for several months and was thereafter a consultant with the firm. The Fiscal referred to previous decisions of this Tribunal where the Tribunal had found professional misconduct established when solicitors failed to pay Counsel's fees. However, he noted that these cases involved sole practitioners who were in a slightly different position.

The Chair asked if the Fiscal said the Appellant would have had the same ongoing professional responsibility or obligation if he had retired and left practice. The Fiscal said he could not say that. If the Appellant was sitting at home or playing golf he would not be responsible. However, before he left, he should have paid the bill or provided a satisfactory explanation for it not being paid. In answer to a number of questions from the Chair, the Fiscal said this responsibility fell on all principals. Before a principal retires or moves on, they must arrange to pay all fees or make an explanation to Faculty Services Limited. The responsibility was limited by being so far as practicable. The Fiscal said a solicitor ought to get the client to pay or ensure they have a funding source, for example, legal aid or securing a payment to account for Counsel's fees. A solicitor must be able to evidence what has been done. It was not enough to hand the file over to another solicitor and remind them about the outstanding fees. More was required. If the former partner refused to pay this might be a reasonable explanation for non-payment.

The Chair noted that the sanctions in the Scheme appeared to be against firms, not individuals. The Fiscal noted that the Appellant was a principal in his firm when he instructed Counsel via an Edinburgh agent. As a principal he had liability for the whole firm to pay the fee. Sanctions are imposed on the firm. The member noted that it appeared from the email of 19 April 2016 that Faculty Services Limited appeared to accept the Appellant's explanation. A member asked whether that tended to suggest the Appellant had met his obligations. The Fiscal said that Faculty Services Limited acknowledged that the Appellant was now a consultant. The firm liability remained but the Appellant's ability to enforce payment lapsed when he retired. The appellant also received a letter of 1 December 2016 reminding him the fee was outstanding. After his retirement he still had an obligation to provide a satisfactory explanation for non-payment in his role as consultant. His explanation that he was no longer a consultant was not satisfactory.

Another member asked if the Fiscal said the professional obligation extended to trainees, associates and consultants. The Fiscal said the Scheme provides that every solicitor has a professional responsibility but liability lies with the firm or corporate body. Any solicitor has a professional obligation so far as is reasonably practicable to make sure the fee is met. A trainee, associate or consultant cannot ensure the fee is paid but there is an obligation to ensure the client pays up front. A principal's obligation extends to solicitors and trainees working for the firm.

The Fiscal invited the Tribunal to refuse the appeal and uphold the Sub Committee's decision and confirm that the Appellant's conduct met the test for unsatisfactory professional conduct.

Mr Mitchell noted the Fiscal's concession that if a Director or Partner resigns and retires, he has no continuing obligation. If that is so, why should there be an obligation on the Appellant when he resigns as a Director but continues to do some "light litigation" as a consultant? The liability was the firm's.

DECISION

The Appellant was a partner in Hamilton Burns between 1 June 2002 and 31 October 2014. He was a director of Hamilton Burns WS Limited between 1 November 2014 and 29 December 2015. He became a consultant with the company between 30 December 2015 and 23 May 2017.

Hamilton Burns WS Limited instructed Edinburgh agents in a case. The Edinburgh agents instructed Counsel by letter of 23 September 2015. That letter said fee notes should be rendered directly to the company. The Appellant was identified as the person dealing with the case. A second letter of instruction from the Edinburgh agents said that fee notes should be rendered directly to the company and marked for the Appellant's attention. It was a matter of agreement that at the date of instruction responsibility for Counsel's fee rested with the company. Counsel's fee note was issued on 14 December 2015, two weeks before the Respondent retired. Several reminders were sent to the company between 10 March 2016 and 2 January 2017. On 19 April 2016 Faculty Services Limited sent an email to the Appellant. He responded on the same day intimating that he was no longer a director of the company having resigned in 2015 and was now a consultant. He directed Faculty Services Limited to the director in charge of the civil department. Faculty Services Limited acknowledged this email and said they would update their file. The Appellant also received a letter dated 1 December 2016. He did not issue a response. He responded to the letter of complaint by email of 31 May 2017.

The complaint made against the Appellant had two heads which were as follows:-

"Mr Mickel has failed to settle Mr Turner's fee of £2,580 inclusive of VAT (fee note H055/MU150195) which was issued to them on 14 December 2015.

Mr Mickel has failed to provide a satisfactory explanation for the non-payment of Mr Turner's fees despite Faculty Services Limited having contacted them on 11 occasions by telephone, email and letter between 10 March 2016 and 18 January 2017."

The Professional Conduct Sub Committee of the Law Society of Scotland ("the Sub Committee") made a Determination that the conduct of the Appellant amounted to unsatisfactory professional conduct. The Sub Committee censured the Appellant and directed him to pay £2,750 to the Second Respondent.

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.

Section 42ZA(9) the Solicitors (Scotland) Act 1980 provides that a solicitor may, before the expiry of the period of 21 days beginning with the day on which are determination or, as the case may be, the direction is intimated to him, appeal to the Tribunal against the determination and/or direction of the Sub Committee. The Appellant appealed to the Tribunal against the determination and direction of the Sub Committee. The Tribunal's powers when considering an Appeal under Section 42ZA(9) are contained within Section 53ZB(1) which provides that it may quash or confirm the determination being appealed against. If it quashes the determination, the Tribunal shall quash the censure accompanying the determination. It may also quash, confirm or vary the direction being appealed against. There are other provisions with regard to training, fines and compensation.

The Tribunal noted that it should apply the "balance of probabilities" standard of proof to appeals. The evidence in this case had been agreed by Joint Minute. It used the agreed facts in the Joint Minute as the basis for its own findings in fact.

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. In that case 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 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 Fiscal said the Tribunal ought to apply these principles to this appeal.

Mr Mitchell had some hesitation with the Tribunal using this approach. He referred the Tribunal to Thomson v Glasgow Corporation 1962 SC (HL) 36 at page 66 where it was stated that in general an appellate court or tribunal will be slow to interfere with the decision of a lower body. Circumstances where it will interfere is where an irrelevant factor has been taken into account, an important relevant factor has been left out of account or the decision was unreasonable. In his submission, this was the correct approach to take to appeals. He noted that the Hood principles applied to the Court giving deference to an expert body's view. He suggested that the Tribunal could make its own decision as it was also an expert body. However, in his submission, even if the Tribunal were to follow the Hood principles, the decision to find unsatisfactory professional conduct was so wrong, that the appeal should still be upheld.

The principles in Thomson and Hood overlap to a certain extent. The Tribunal noted that the Court approved of the Tribunal's approach in Hood which had been to consider whether the Sub Committee had considered the relevant guidance and applied the correct test. The Tribunal then made a decision about whether it was reasonable for the Sub Committee to reach the conclusion it did. The Sub Committee's decision is therefore the correct place to start. Hood provides a useful framework for analysing the Sub Committee's decision making. However, the Tribunal also bore in mind that following Hood, the ultimate question was what a competent and reputable solicitor ought to have done in the circumstances. The finding or refusal to find unsatisfactory professional conduct follows on from that evaluative question.

In relation to the first head of complaint, the Sub Committee was wrong to say that the Appellant was the instructing solicitor. In terms of the Scheme, the firm was the instructing solicitor. To say otherwise was an error of law. The Scheme provides that *"every solicitor who instructs Counsel has a professional obligation so far as reasonably practicable to ensure payment of Counsel's fees"*. However, it also provides that where the letter of instruction includes the name of the correspondent firm in Scotland from whom the instruction originates, "the instructing solicitor" *"means the correspondent firm in Scotland from whom the instruction originates"*. Therefore, the instructing solicitor was Hamilton Burns WS Limited, not the Appellant. Particular consequences may arise for Edinburgh solicitors who instruct Counsel directly in terms of the Scheme. However, the circumstances of this case did not require the Tribunal to consider these.

The Sub Committee was wrong to say there was a professional responsibility on the Appellant to pay Counsel's fees. No such responsibility arose in terms of the Scheme or any wider ethical duty. Paterson and Ritchie's *Law Practice and Conduct for Solicitors* paragraph 13.13 reflects the terms of

the Scheme. There is no reference to a solicitor having a duty "so far as is reasonably practicable". The responsibility for the fee was with the firm. The Sub Committee's decision on this point therefore constituted an error of law. The First Respondents' position did not reflect the reality of practice. Solicitor pass on work and leave firms all the time. Trainees get qualified positions and individuals take maternity or paternity leave or career breaks. Solicitors retire and return to practice. It cannot be the case that through every change of hands the individual "instructing solicitor" has a personal obligation for Counsel's fees. The liability is the firm's. To put a duty on solicitors in these circumstances is contrary to the wording of the Scheme. The point in having a named person is so that Faculty Services Limited has someone to contact regarding queries. The Fiscal conceded that a solicitor who retires and does not practice could not have a continuing responsibility for fees. However, he submitted that this case was different because the Appellant had a continuing relationship of consultancy with the firm. However, consultants have no power to enforce payment. Therefore, this was not a legitimate distinction.

The Sub Committee's language around the Appellant's "choice" to become a consultant suggested a moral judgement which was not supported by any evidence. It therefore took into account an irrelevant consideration. The Appellant never had a personal responsibility. It was always the firm's. Any change of status was beside the point.

The Sub Committee was wrong to say the Appellant could not resign without putting in place "arrangements" to ensure the fee was paid. Short of paying the fee before he resigned, there were no other arrangements he could have made. He never had a duty to make payment and so no duty to make arrangements for payment arose. The Sub Committee failed to state what a competent and reputable solicitor would have done in these circumstances. He was not obliged to pay the fee himself. A consultant has no power to force a firm to make payment. The Sub Committee's decision on this point was therefore not reasonable. If taken to its conclusion, no principal could leave a firm until all fees owed to Counsel by the firm are paid.

The Tribunal considered cases where it had found professional misconduct when solicitors had failed to pay Counsel's fees. It noted that in all the cases it considered, the solicitors were sole practitioners. They have a personal professional obligation to pay Counsel's fees because they and their firm are the one and the same for this purpose. Conduct issues can arise from non-payment of Counsel's fees, particularly when principals have responsibilities in relation to their firms. However, no responsibility or obligation arose in the particular circumstances of this case.

In relation to the second head of complaint, if the Appellant was under a duty to make an explanation to Faculty Services Limited, the response he gave was satisfactory. The Sub Committee's decision proceeds on the erroneous basis that there were eleven communications by Faculty Services Limited to the Appellant. However, only two were addressed to the Appellant. The evidence before the Sub Committee and the Tribunal was not sufficient to draw the inference that the Appellant knew about this other correspondence. In any case, he had no personal professional obligation to make payment. Faculty Services accepted his explanation. He responded to the first piece of correspondence noting that he was no longer a director and was now a consultant. He referred Faculty Services Limited to the director who was head of the civil department and copied him into the email. He explained the firm's difficulties in getting money from the client. This explains the factual circumstances, although the difficulties with the client would not be Faculty Services Limited's concern since the fee was a firm liability. Failure to respond to the second letter in itself could not be a departure from the standards of competent and reputable solicitors, particularly when an explanation had been made in April 2016. The Sub Committee therefore erred in law, reached a conclusion for which there was no evidence, took into account irrelevant matters, failed to take relevant matters into account and reached a decision which was unreasonable.

The Tribunal considered that a competent and reputable solicitor could have acted in the same way as the Appellant. Therefore, the Tribunal quashed the determination of the Sub Committee. Having done so, it also quashed the censure accompanying the determination and the direction that the Appellant pay £2750 compensation to the Second Respondent.

Mr Mitchell moved for expenses on the agent and client, client paying scale and indicated he was content about the matter was given publicity. Mr Knight indicated he could not oppose the motion for expenses or and was content that the matter was given publicity. He noted the usual scale the Tribunal used was the agent and client, client paying scale. Mr Mitchell moved for sanction for the employment of Junior and Senior Counsel. He said this had been a matter of some difficulty involving interpretation of the faculty scheme. The matter had not arisen before. It was a matter of importance and delicacy. The issue was important to the public because of the implication of open ended professional liability of solicitors for Counsel's fees. Considerable care had been taken by both sides in formulating agreed facts which went slightly beyond the Sub Committee's information. Employment of Counsel had been important in the assistance of the Tribunal. Mr Knight opposed the motion. He said the appeal raised nothing novel or requiring expertise of Junior or Senior Counsel. There were no complex issues. The Authorities relied upon were well known and had been primarily identified by the First Respondents.

The facts were capable of agreement by the parties and there was nothing complex about them. He said it was always helpful to have Counsel involved but did not justify the expense.

The Tribunal found the First Respondents liable in the expenses of the Appellant. It certified the cause as suitable for the employment of one Junior Counsel only. The matter had a degree of complexity and was very significant to the Appellant as well as having some interest to the profession. However, it was not unusual to have a Joint Minute in these circumstances, the authorities were not extensive or complex and the majority of those concerned the Tribunal's own responsibilities. The Tribunal directed that publicity should be given to the decision and that publicity should name the parties but need not name any other person as identifying them might be likely to damage their interests.

Beverley Atkinson

Vice Chair