THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2005 & 2008)

DECISION

in Complaints

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, formerly at 26 Drumsheugh Gardens, Edinburgh and now at Atria One, 144 Morrison Street, Edinburgh

Complainers

against

JOHN GERARD O'DONNELL, formerly of 14 Winton Drive, Glasgow and now residing at Flat 1/2, 322 Kelvindale Road, Glasgow

Respondent

1. Five Complaints (reference numbers DC/11/05 dated 31 January 2011; DC/11/26 dated 19 September 2011; DT/15/29 dated 30 September 2015; DT/16/07 dated 1 March 2015; and DT/16/08 dated 1 March 2016) were lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that John Gerard O'Donnell, formerly of 14 Winton Drive, Glasgow and now residing at Flat 1/2, 322 Kelvindale Road, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There is a Secondary Complainer.

3. In accordance with in the Rules, the Tribunal caused a copy of the Complaints as lodged to be served upon the Respondent.

4. Complaint DC/11/05 called for a proof before answer on 16 May 2011. The case was adjourned and called again on 20 July 2011. On that occasion the Respondent was not present nor represented. A further hearing was fixed for 28 October 2011.

5. On 28 October 2011, the Tribunal rejected two preliminary pleas in relation to Complaint DC/11/05 by the Respondent to the effect that the Tribunal was potentially prejudiced

against him. One of these was on the ground that the reference in the Complaint to his previous conviction when referring to his practising certificate being restricted for a period of five years was prejudicial to the hearing of the case because the Tribunal would be aware that he had previous convictions before a finding of guilt had been made. Another preliminary plea was to the effect that as the legal members of the Tribunal had been nominated by the Law Society, there was potential prejudice because there was a connection between the Law Society and the two legal members sitting. A proof before answer took place with regard to the Respondent's plea that the Law Society were personally barred against proceeding with the Complaint. The Tribunal also repelled the plea regarding personal bar and ordered that a procedural hearing be fixed for 15 December 2011.

6. On 15 December 2011, Complaints DC/11/05 and DC/11/26 called for procedural hearings. A further procedural hearing was fixed for 23 February 2012.

7. On 23 February 2012, Complaints DC11/05 and DC/11/26 called for procedural hearings. The cases were adjourned to 30 April 2012.

8. On 30 April 2012, Complaints DC11/05 and DC/11/26 called for procedural hearings. The cases were adjourned to 10 September 2012.

9. On 20 July 2012, Complaints DC11/05 and DC/11/26 called for procedural hearings. On the Complainers' motion, the Tribunal sisted the cases in view of information received regarding the Respondent's health.

10. On 3 August 2016 Complaints DT/15/29, DT16/07 and DT/16/08 called for procedural hearings. The Complainers' motions to recall the sists in Complaints DC/11/05 and DC/11/2 were granted. All procedural hearings were continued to 20 September 2016.

11. On 20 September 2016, Complaints DC/11/05, DC/11/26, DT/15/29, DT16/07 and DT/16/08 called for procedural hearings. The Respondent sought leave to lodge six preliminary motions. This was opposed by the Complainers but granted by the Tribunal. Five preliminary hearings were fixed for 20 December 2016.

12. At the hearing on 20 December 2016, the Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was present and represented himself.

13. The Tribunal heard detailed submissions from both parties in relation to the preliminary matters raised by the Respondent. The Respondent referred to the various written preliminary motions he had lodged with the Tribunal. The Fiscal referred to a List of Authorities and an Inventory of Productions lodged with the Tribunal in advance of the preliminary hearing.

14. After carefully considering all submissions and the authorities referred to during the preliminary hearings, the Tribunal refused the Respondent's motions to dismiss the Complaints.

15. Of consent, the Tribunal granted the Fiscal's motion to conjoin the five complaints and ordered that a full hearing be fixed for 15 February 2017 at 10:30am.

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

> Edinburgh 20 December 2016. The Tribunal in respect of five Complaints, namely DC/11/05 dated January 2011, DC/11/26 dated 19 September 2011, DT/15/29 dated 30 September 2015, DT/16/07 dated 1 March 2015, and DT/16/08 dated 1 March 2016 all at the instance of the Council of the Law Society of Scotland against John Gerard O'Donnell, formerly at 14 Winton Drive, Glasgow and now residing at Flat 1/2, 322 Kelvindale Road, Glasgow; Refuse the motions by the Respondent to dismiss the Complaints on the basis of delay (Article 6 ECHR); the constitution of the Tribunal (Article 6 ECHR); freedom of association (Article 20 UDHR and Article 11 ECHR); equality of arms and lack of legal representation (Article 6 ECHR); mora, taciturnity and acquiescence; and res judicata; and Order that a hearing of the conjoined Complaints be heard on 15 February 2017 at 10:30am.

(signed)
Nicholas Whyte
Chairman

17. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 14 FEBRUARY 2017.

IN THE NAME OF THE TRIBUNAL

[redacted]

Nicholas Whyte

Chairman

NOTE

On 20 December 2016 the Tribunal had before it the preliminary motions lodged by the Respondent, and an inventory of productions and list of authorities lodged on behalf of the Complainers.

Following submissions regarding the most appropriate way to manage these preliminary hearings, the Tribunal determined that it would hear the arguments on the oldest case first (DC/11/05) and would proceed to hear the arguments separately on each case thereafter although the parties would be allowed to adopt any arguments made earlier in the day and restrict themselves to the specific information for each individual Complaint. The parties agreed to this procedure. The Fiscal indicated that following the Tribunal's decision in relation to the preliminary motions, he might make a motion to conjoin the five Complaints. The Tribunal agreed to revisit this issue once a decision had been reached in relation to each Complaint.

SUBMISSIONS FOR THE RESPONDENT

The Respondent started by referring to his written arguments regarding his right to a fair trial under Article 6 of the European Convention on Human Rights as incorporated into domestic law in the Human Rights Act 1998. He noted that Article 6 provides that

"In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Respondent noted that a case should be heard within a reasonable time. He submitted that the Tribunal agreed to sist cases DC/11/05 and DC/11/26 for a year but that the sists were only recalled in 2016. He asked the Tribunal where the cases had been in the interim. He submitted that the Law Society were aware that his health had recovered by January or February 2015. He asked the Tribunal to consider why proceedings were not brought at that stage. He submitted that the passage of time had not helped him or his witnesses. The Respondent invited the Tribunal to look at the age of the various complaints. He asked whether it was reasonable to sist in 2012 and four years later to bring the cases back before the Tribunal. In his submission it suited the Law Society to overwhelm him with

Complaints. For these reasons he said that his argument with regard to delay under Article 6 should be upheld.

The Respondent submitted that the earliest cases were sisted because the Law Society obtained a medical report which indicated that he was not well. That report said that he would need to have the Complaint read to him and that he was not capable of self-representation but in the future he might recover sufficiently to manage this. However, in employing these reasons, the Respondent submitted that the Complainers had misled the Tribunal. He submitted that the Complainers were aware of the terms of that medical report but at the same time were involved in preparing a case at the Court of Session against him for breach of interim interdict. According to the Respondent, proceedings were endorsed by the Lord Advocate's office at the end of August 2012, five weeks after these proceedings were sisted on this basis of his inability to represent himself. The Respondent submitted that if he was unable to represent himself at the Tribunal, then he should also have been considered unfit to represent himself at the Court of Session. He said it was inconsistent and hypocritical of the Law Society to seek to sist the Tribunal case while continuing with the Court of Session case.

The Respondent submitted that with the greatest of respect, the Tribunal could not be regarded as independent and impartial because the prosecution was at the instance of the Law Society and the legal members of the Tribunal were nominees of the Law Society. The Tribunal noted that the Respondent had made this argument before in relation to case DC/11/05 on 28 October 2011. However, the Respondent was allowed to make the argument since he might wish to adopt the argument in relation to his pleas in the other complaints. The Respondent said that independent and impartial meant that something should be free from outside control, neutral and non-partisan. In his submission the Tribunal did not meet this definition. The Respondent also said that to continue with these prosecutions was contrary to the common law rule that no man should be a judge in his own cause. He submitted that as presently constituted, the Tribunal was a contradiction of that legal principle. Nominees of the Law Society were sitting in judgement on him and he submitted that this was manifestly unfair.

Turning to the more recent complaints, the Respondent noted with surprise that he was still a member of the Law Society of Scotland. He surrendered his practising certificate on 1 June 2009 and has not attempted to obtain a practising certificate since 1 June 2014, when he would have been at liberty to seek another. He submitted that he had no intention of applying for another practising certificate. He submitted that he was a member of an association but he didn't want to belong to it. This, he claimed

was contrary to his right to freedom of association under Article 20 of the Universal Declaration of Human Rights.

With regard to Complaints DT/15/29 and DT/16/08, the Respondent submitted that these contained allegations of criminal wrongdoing and that according to his Convention rights, he was entitled therefore to representation to preserve equality of arms between the parties as provided for as part of his right to a fair trial under Article 6 of the European Convention on Human Rights. He said it was manifestly unfair that he had to represent himself when to all intents and purposes he had been "charged" with a criminal offence. The Respondent submitted that the Tribunal should make an order that he should be legally represented because according to his rights, it should be given free where the interests of justice so require. He submitted that he no longer had the forensic ability to deal with complicated matters and was grossly out of his depth in these proceedings before the Tribunal. He said that he was not prepared.

The Respondent also relied on mora, taciturnity and delay. He drew attention to the age of the conduct and particularly the two older complaints. He was of the view that case DT/15/29 was only raised because he did not go to prison and so the Law Society had decided to "throw everything at him". He queried why it took until 2016 for the last Complaint to be raised. He said that if it was a personal injury case it would be time barred. He was of the view that the Law Society wanted to "have their cake and eat it." The Respondent invited the Tribunal to look at the age of each complaint in isolation and consider whether, as he submitted, there was considerable unwarranted delay.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal indicated his intention to deal with the question of delay. The Chairman asked the Fiscal whether he was dealing with delay under Article 6 of the ECHR or whether he was referring to the Respondent's plea with regard to mora taciturnity and delay. The Fiscal confirmed that he was dealing with Article 6 delay but was of the opinion that there was significant overlap between these two principles. The Fiscal reminded the Tribunal that the period to be assessed with regard to delay under Article 6 is when the petition was presented to the Tribunal. In support of this proposition he relied on the petition for judicial review by James Moore [2015] CSOH 182. In Moore the court discussed the earlier case of The Council of the Law Society of Scotland v Hall 2002 SLT 989 and noted that the "relevant period" starts on the date when the Law Society presented the Complaint to the Tribunal.

In support of assertion that there had not been an unreasonable delay, the Fiscal had prepared a chronology of events. He submitted that there were numerous occasions on which the Respondent had not appeared. The Fiscal noted that there had been problems with the Respondent's health. He noted that there had been a discussion with the Tribunal Chairman on one of those occasions. The Chairman had said that he did not want repeated callings of the case in the Respondent's absence. Given the terms of the medical report dated 15 June 2012 it would have been inappropriate to continue the case. It was this particular Fiscal's view that the cases should be sisted. However, it was the Tribunal's decision to sist the cases. When the cases were sisted before the Tribunal, the Fiscal was not aware of the Court of Session proceedings. When he was made aware of them, he noted that the Court of Session case was of the utmost gravity. He felt it best not to bombard the Respondent with processes and Complaints when he had to concentrate on the contempt case.

The Fiscal submitted that he returned to the Tribunal about October 2015 with a motion. This was about three months after the Court of Session case had finally ended. At that stage the Complainers had further Complaints to bring before the Tribunal. The Chairman agreed that the sist should remain in place while these cases were being processed. These cases involved Secondary Complainers which tend to take longer to prepare. The Fiscal also asked the Tribunal to consider the parties' conduct. In his submission the Law Society had behaved appropriately regarding the Respondent's health. However, the cases could have been dealt with faster if the Respondent had conducted himself differently. In the Fiscal's submission these proceedings have been lengthy in some part due to the Respondent's behaviour. He has made efforts to avoid service. There have been reports instructed regarding his health. He has made numerous motions and pleas which have delayed matters.

The Fiscal made submissions with regard to the impartiality of the Tribunal. He indicated that the Tribunal had already made a ruling on this issue with regard to Complaint DC/11/05 and therefore the rule of *res judicata* would prevent the Tribunal considering it again. He drew attention to paragraph 2.104 of the third edition of Sheriff McPhail's book "Sheriff Court Practice" which was included in his bundle of authorities:

"The rule may be stated thus: when a matter has been the subject of judicial determination pronounced in foro contentioso by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds. "The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that same issue should be litigated repeatedly between the same parties on substantially the same basis"."

The Fiscal had lodged copy findings of the decision taken in DC/11/05 on 20 October 2011. He submitted that the Respondent had used the same argument then and the Tribunal had rejected it.

However, the Fiscal submitted that if the Tribunal was not with him on this matter then they should consider Michael Robson-v-The Council of the Law Society of Scotland [2004] Scot CS 252 as the matter had also been dealt with in that case. He referred the Tribunal to paragraphs 26 and 27 of the judgment. In that case the court had set out the relevant test which was whether the fair-minded and informed observer, having considered the facts, would conclude that there was real possibility that the Tribunal was biased. Further, in order to establish whether the Tribunal can be considered to be independent, regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. It had been submitted on behalf of Mr Robson that the members of the Scottish Solicitors Discipline Tribunal did not have security of tenure. However, each solicitor member was appointed by the Lord President on the recommendation of the Law Society of Scotland for a period of five years and was eligible for reappointment. The solicitors were recommended as representatives of the solicitor's profession throughout Scotland and did not receive any remuneration. It was of significance that the Law Society did not have the power to terminate an appointment once it had been made. In those circumstances and in the context of the statutory provisions for the constitution of such Tribunals in Scotland the Court did not consider that solicitor members could be said to lack the required degree of security of tenure. The Court was not persuaded that the payment of expenses detracted from the independence or impartiality of the Tribunal. The court also rejected an argument that a solicitor had aspirations to be a member of the Law Society's Council might be influenced by the consideration of his prospects would be enhanced if he became a member of the Tribunal and gave decisions in favour of the Law Society of Scotland. In the court's opinion the only submission which had any merit was the fact that the prosecuting authority had effective control over the solicitor members of the Tribunal. However in the circumstances and having considered the submissions, they were not satisfied having regard to the fact the statutory provisions created a self-regulatory disciplinary procedure, that the solicitor members of the Tribunal must be knowledgeable and experienced, and that the actual appointments are made by the Lord President, that the appointment procedure founded on by Mr Robson could properly be regarded as detracting from the independence and impartiality of the Tribunal. The court also considered that the appeal function of the Court of Session constitutes subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6.

The Fiscal also dealt with the Respondent's arguments with regard to freedom of association. Firstly, he noted that the Universal Declaration of Human Rights is not law. It is merely a statement of principle. The closest enforceable law he could find is Article 11 of the European Convention on Human Rights as enacted by the Human Rights Act 1998. He referred the Tribunal to paragraph 762 on page 749 of Reid and Murdoch's book, "The Law of Human Rights in Scotland". He invited the Tribunal to look at line 6 in particular which noted that freedom of association does not apply to institutions with a public law nature which pursue public interests. The Fiscal went on to discuss Le Compte-v-Belgium [1982]. In that case the statutory body charged with the professional regulation of medical practitioners in Belgium through administrative disciplinary and rule making means was not considered to be an "association" covered by the ECHR Article 11. In the Fiscal's submission, the Law Society of Scotland was in an identical position. The Fiscal also referred the Tribunal to the Michael Karus-v-SLCC [2014] CSIH 59 which involved a solicitor who wished to have his name removed from the Roll of Solicitors. The Inner House identified at paragraph 12 that the correct procedure would be for the solicitor concerned to apply to the Law Society for this purpose. If the Law Society refused or failed to take action the appropriate remedy would be a Judicial Review of their decision. The Court was of the view that the Law Society had been fully entitled to refuse to remove Mr Karus' name from the Roll. If it were possible to resign from the Roll and thus avoid disciplinary procedures this policy could readily be evaded by a solicitor who knew that he/she faced disciplinary proceedings. In the Fiscal's submission this case explains why the Respondent's name has not been removed from the Roll of Solicitors. He submitted that the Respondent's plea should be repelled.

The Fiscal went on to discuss the Respondent's plea regarding lack of legal representation and equality of arms. The Fiscal referred the Tribunal to the case of Pine-v-The Law Society [2001] EWCA Civ 1574. The Fiscal noted that as an English authority, this case was not binding on the Tribunal but should be afforded respect. The case dealt with the question of availability of legal aid. The Fiscal noted that provision of legal aid is not an absolute right in civil proceedings and depends on the complexity of the case and whether the Respondent required representation. If the Respondent required legal aid or legal advice and assistance it might be difficult for him to obtain but not impossible. The Fiscal urged the Tribunal to consider the way in which the Respondent had conducted himself. The Fiscal submitted that he had the capacity to advance arguments and lodge motions. The Respondent is an experienced court practitioner. He has previously conducted litigations. He is familiar with advancing motions and pleas. If he wants legal aid he can apply for it. However, he can do the job himself without representation. The Fiscal noted that in 2012 the Respondent was the subject of favourable feedback from Lord Stewart with regards to his handling of the case (2014 CSOH 167 at paragraph 15). The Judge said that,

"In presenting his submissions Mr O'Donnell has demonstrated presentational skills, an understanding of procedure and a grasp of the substantive issues which are, as you would expect, better than average for a litigant in person. So far as I am able as a lay person to judge, his mental state does not impact on his self-representation".

The Fiscal noted that the Respondent had referred to some of the Complaints as "charges". The Fiscal indicated that these are civil, not criminal cases. The Law Society have no indication from the prosecuting authorities that they are interested in the Respondent.

The Fiscal went on to consider the Respondent's plea with regard to mora, taciturnity and acquiescence. The Fiscal adopted his previous arguments in relation to delay under Article 6 and asked the Tribunal to consider the Respondent's conduct. He also submitted that the Tribunal proceedings were sisted for good reason. The Respondent's ill-health coincided with the Court of Session proceedings. The Tribunal proceedings were not as important as those in the Court of Session. It was the Tribunal which had decided that all cases should call together.

QUESTIONS FROM THE TRIBUNAL

The Chairman noted that when considering a plea with regard to delay under Article 6, the Tribunal should have regard to a two part test. Firstly, was there unreasonable delay and secondly, is the Respondent unable to receive a fair hearing? The Chairman noted that following the course set in Moore it is difficult for a Tribunal to make such a determination until the facts are established. The Fiscal responded that he did not consider the delay to be unreasonable but suggested that the Tribunal could reserve its position until the end of the evidential hearing. Both parties agreed that the Article 6 delay point was strongest with the oldest cases.

The Chairman asked the Respondent whether his written submissions were in fact preliminary pleas or motions and whether this terminology mattered. The Fiscal was of the view that it did not matter what label was put upon these written submissions. The Respondent had no view on this matter.

The Chairman asked the Respondent whether he had any comment to make on the Fiscal's authorities. The Chairman noted in particular that the Fiscal said precedents applied and the Tribunal must follow these. The Chairman asked whether the Respondent was of the view that these did not apply. The

Respondent responded by saying that he did not have the capacity to make these arguments and that he might try to apply for legal aid for future diets.

The Chairman asked the Respondent whether he wished to adopt his arguments for the other Complaints and he answered in the affirmative. The Chairman asked him whether he had any other specific arguments to make for any of the other Complaints and he said that he did not.

The Chairman queried whether the Complaints were to be conjoined and if so whether this was of consent. Both parties indicated that this was the case.

DECISION

The Tribunal considered the Respondent's preliminary motion with regard to delay under Article 6 of the ECHR. The Tribunal considered that it was bound by the decision in Hall. Therefore it could only consider delay from the point the Complaint was submitted. The Tribunal recognised that it must consider whether there was unreasonable delay and whether as a consequence of that delay the Respondent was unable to obtain a fair hearing or for some other reason it could not proceed. The arguments in this case were very similar to that in the Moore case which was referred to in submissions. In Moore the Court indicated that it was appropriate for the Tribunal to hear evidence on this matter before making a ruling. The solicitor involved would then be able to raise that issue as a ground of appeal. The Tribunal noted that the Fiscal's view was that the Respondent could not pass the unreasonable delay test. The Tribunal considered that it did not have enough information before it to make a decision about whether the delay was reasonable or unreasonable and was of the view that it would be desirable to have the factual position properly before the Tribunal before classifying any delay as reasonable or unreasonable. The Tribunal was also hesitant to make a decision about this on the basis of submissions rather facts. The Tribunal was of the view that it would not be appropriate to come to a decision regarding this particular preliminary plea until the end of the case, following the course set by the Court in Moore. This plea would therefore be refused at this stage. However, the Tribunal wished to make it clear that the Respondent could raise this issue again during the evidential hearing.

The Tribunal discussed the motion that the Complaints should be dismissed on the basis that it was not an independent and impartial Tribunal. The Tribunal's decision was that this matter had already been determined in case DC/11/05 on 28 October 2011. The Tribunal did not think that it was free to

consider that matter again. It was the same argument which had been advanced. There was no new material. However, even if that were not the case, the Tribunal considered that this matter had been determined by the Scottish Courts in the Robson case referred to in the submissions for the Complainers. Even if there was an argument that the Tribunal was not properly constituted, any defect would be cured by the supervisory jurisdiction of the Court of Session. However, the Tribunal believes that it is independent and impartial. Its members have security of tenure. The Law Society have no control over Tribunal members when they are carrying out their Tribunal functions.

The Tribunal went on to consider the Respondent's argument with regard to freedom of association. The Tribunal considered that Article 20 of the Universal Declaration of Human Rights was of little assistance. It instead referred to Article 11 of the European Convention on Human Rights. The Tribunal was of the view that this matter had been determined on at least two separate occasions, firstly in the Karus case in domestic law and in the Le Compte case with regard to the ECHR. The Tribunal were of the view that there is a difference between being a practising certificate holder and being on the Roll of Solicitors. Le Compte was authority for the fact that being a member of a professional body did not curtail your freedom of association. These cases were clear authority in support of the Complainers' authority to keep the Roll of Solicitors and to maintain the Respondent's name upon it.

Next, the Tribunal went on to consider the lack of legal representation for the Respondent and the potential impact on equality of arms. As far as the Tribunal is aware there are no criminal proceedings outstanding against the Respondent. There are allegations within the Complaints which could amount to a suggestion of embezzlement. However, proceedings before the Scottish Solicitors' Discipline Tribunal are of a civil nature. The Tribunal did not consider the lack of legal representation to breach the Respondent's Article 6 rights. The Tribunal considered it was relevant that the Respondent's liberty was not under threat. They were also of the view that he was a solicitor and therefore the lack of representation would not have the same impact on him as it would on a lay person. The Tribunal considered the facts of the case, the situation of the Respondent, the seriousness of the allegations against him and the severity of the penalty at stake. In making this assessment, the Tribunal found the case of Pine highly persuasive although it was not binding upon the Tribunal. The Tribunal noted that there was nothing to prevent the Respondent engaging a solicitor to represent him in these proceedings. The Tribunal noted that it appeared that the Respondent had not actually tried to engage a solicitor to appear on his behalf for this preliminary hearing or to apply for legal aid. Rather, the problem appeared to be that he could not find a solicitor willing to act for him.

The Tribunal went on to consider the preliminary plea relating to delay under the common law test of mora taciturnity and acquiescence. The Tribunal noted that the Respondent had made some submissions regarding mora. However mora is only one part of the test. There had been no submissions on taciturnity or acquiescence. On the information before it, therefore, this preliminary plea could not be upheld. It was difficult to see how this plea could succeed. The Tribunal had regard to Somerville v Scottish Ministers 2006 SLT 96 and the Penman application for judicial review [2015] CSOH 106 which were not on all fours with this case but did demonstrate the problems faced when trying to make out a case on the basis of mora taciturnity and delay.

The Tribunal considered the suggestion which was made by the Respondent but not pursued to any great extent, that the Law Society was attempting to "have their cake and eat it". The suggestion was that in the Complaints before the Tribunal there was an allegation that the Respondent was holding himself out as a solicitor when this behaviour was covered the breach of interdict case in the Court of Session. The Tribunal considered that these two proceedings were very different. In the interdict case the Complainers were trying to put a stop to the Respondent holding himself out as a solicitor. There was a particular sanction for breaching it thereafter. Professional misconduct proceedings before the Tribunal were of a quite different nature. The Tribunal considered that these were not similar enough to uphold a plea of *res judicata* if that was what the Respondent was attempting to make out and accordingly this motion was refused.

After hearing submissions from both parties, the Tribunal refused the Respondent's preliminary motions to dismiss all five complaints on the basis of the constitution of the Tribunal (Article 6 ECHR); freedom of association (Article 20 UDHR and Article 11 ECHR); equality of arms and lack of legal representation (Article 6 ECHR); mora, taciturnity and acquiescence; and res judicata. The Respondent's preliminary motion regarding delay under Article 6 of the ECHR was refused on the basis that the Tribunal was not in a position until the facts were established, to assess either part of the two stage test, namely whether (a) the delay was unreasonable and (b) whether the Respondent could not receive a fair hearing or whether it would be unfair to the Respondent to proceed. In doing so the Tribunal followed the course which found favour in the Court of Session in the James Moore application for judicial review. The Respondent can therefore lead evidence on this ground and make further submissions regarding delay under Article 6 of the ECHR at the Hearing.

Of consent the Tribunal granted the Complainers' motion under Rule 17 of the Scottish Solicitors' Discipline Tribunal Procedure Rules 2008 to conjoin the Complaints. A Hearing was fixed for 15 February 2017. The matter may take more than one day to conclude and the Tribunal will fix other

dates as required. The Tribunal allowed the Respondent a period of one month to lodge further Answers and the Fiscal is to lodge a Record by the end of January 2017.

Nicholas Whyte

Chairman