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 STRAIN, formerly of 16/28 Lagoon Street, Sandgate, Queensland, 4017, Australia and now of 147 Baskerville Street, Brighton, Queensland, 4017, Australia

Appellant

against

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, 26 Drumsheugh Gardens, Edinburgh

First Respondents

and

DAVID HAMILTON KIDD, 11 Strathalmond Green, Edinburgh

Complainer

1. An Appeal dated 23 December 2013 was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42ZA(9) of the Solicitors (Scotland) Act 1980 as amended by Alan Strain, then of 16/28 Lagoon Street, Sandgate, Queensland, 4017, Australia and now of 147 Baskerville Street, Brighton, Queensland, 4017, Australia (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society, 26 Drumsheugh Gardens, Edinburgh (hereinafter referred to as "the First Respondents") dated 14 November 2013 upholding a complaint of unsatisfactory conduct made by David Hamilton Kidd, 11 Strathalmond Green, Edinburgh (hereinafter referred to as "the Complainer") against the Appellant and

the Direction of the same date made by the First Respondents ordering the Appellant to pay a Fine of £1,000.

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated to the First Respondent and the Complainer. Answers were lodged for the First Respondents. The Complainer did not lodge Answers.

3. On 3 February 2014 the then solicitor for the Appellant intimated a motion to amend the grounds of appeal and a motion to sist the cause. Having considered the Appeal, Answers and the terms of the motions for the Appellant, the Tribunal set the case down for a procedural hearing on 12 June 2014. In advance of this hearing, the First Respondents lodged a motion asking the Tribunal to ordain the Appellant to find caution in the sum of £5,000 as a condition precedent to the Appeal proceeding further.

4. At the procedural hearing on 12 June 2014, the Appellant was absent but was represented by Counsel, James Hastie, instructed by Campbell Normand, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh.

5. The Tribunal heard submissions from both parties in relation to all three motions before it. The Tribunal concluded that in the interest of fairness to the Appellant, the case would be continued to a further procedural hearing on 19 August 2014, with the Appellant given 28 days to amend the grounds of appeal, to make them more focussed and include all matters sought to be relied upon by the Appellant. Thereafter the First Respondents would have 21 days to lodge Answers. The motions to sist and find caution were continued to that date.

6. Amended grounds of Appeal and Answers were lodged with the Tribunal office.

7. On 19 August 2014, the Appellant was absent but was represented by Counsel, James Hastie, instructed by Campbell Normand, Solicitor,

Edinburgh. The First Respondents were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh.

8. The Appellant asked that the amended Appeal be allowed to be received by the Tribunal, and thereafter renewed his motion to sist the cause. The First Respondents opposed the motion to sist and renewed their motion for caution. Additionally, the First Respondents sought an award of expenses for the two hearings that had taken place. Having heard submissions from both parties, the Tribunal allowed the amended Appeal and the Answers thereto to be received, refused both the motion to sist and the motion for caution and reserved the question of expenses to the end of proceedings. The Tribunal ordered that the case be set down for a full hearing of all grounds of appeal to be heard on a date to be afterwards fixed.

9. The 18 December 2014 was identified as a suitable date for the hearing. In accordance with the Rules of the Tribunal the hearing was formally intimated to the Appellant and the First Respondents. The Complainer had not entered the process, but was advised of the date.

10. By letter dated 2 October 2014 the First Respondents lodged a Minute of Amendment of their Answers together with a Motion to allow the Minute to be received and to allow the Appellant to lodge Answers thereto within 21 days. On 13 October 2014 the Tribunal granted that Motion and continued the Appeal to the hearing previously assigned for 18 December 2014.

11. By email dated 20 October 2014 the Appellant lodged a Motion for the Appellant to be allowed to give evidence by videolink. By letter dated 24 October 2014 the Fiscal for the First Respondents indicated that this Motion was opposed. Accordingly, the Tribunal fixed a hearing for 24 November 2014 for the Motion to be argued. This hearing was formally intimated to the Appellant, the First Respondents and the Complainer.

12. At the hearing on 24 November 2014 the Appellant was absent but was represented by James Hastie, Advocate, instructed by Campbell

Normand, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. No appearance was made by the Complainer, who had at no stage entered proceedings.

13. Having heard submissions from both parties, the Tribunal refused the Motion for evidence by videolink, granted the Appellant's Motion to adjourn the hearing fixed for December, allowed the Record to be adjusted in terms of the Minute of Amendment and Answers thereto, and adjourned the Appeal to a full hearing to be heard on 5 March 2015. The Tribunal found the First Respondents liable to the Appellant in the expenses of the amendment procedure, and the Appellant liable to the First Respondents in the expenses of the Motion for evidence by videolink, the hearing of 24 November 2014 and the expenses attached to the discharge of the diet previously fixed for 18 December 2014 as set out in the Tribunal's Interlocutor of 24 November 2014.

14. The hearing of 5 March 2015 was formally intimated to all parties, including the Complainer.

15. At the hearing on 5 March 2015 the Appellant was present and represented by James Hastie, Advocate, instructed by Campbell Normand, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. The Complainer was absent, having continued to decline to enter the proceedings.

16. The Appellant asked the Tribunal to formally allow the Record to be received. This was not opposed by the First Respondents and granted by the Tribunal. The Appellant had lodged a List of Witnesses, Productions and Authorities. At the hearing the First Respondents lodged a List of Witnesses, Productions and a List of Authorities. Evidence was led from two witnesses for the Appellant and one witness for the First Respondents. The hearing was continued to the 12 May 2015 for submissions to be made.

17. Formal notices of the continued hearing on 12 May 2015 were sent to all parties, including the Complainer.

18. At the hearing on 12 May 2015 the Appellant was absent, but represented by James Hastie, Advocate, instructed by Campbell Normand, Solicitor, Edinburgh. The First Respondents were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. Mr Hastie made detailed submissions to the Tribunal. Mr Knight indicated he had lodged written submissions with the Tribunal, to which he had nothing to add.

19. Having carefully considered the Record, Productions, evidence and submissions, the Tribunal found the following facts established:-

19.1 The Appellant was the solicitor responsible for preparing and lodging a tender for legal services made by the firm of Biggart Baillie LLP in April 2009.

19.2 At that time, the Complainer had been suspended from sharing in the firm's profits but remained a partner of the firm.

19.3 At the time of completing the tender, the Appellant was advised by a partner of the firm who was involved in the negotiations with the Complainer regarding his status within the firm, that these negotiations included the possibility of the Complainer returning as a consultant.

19.4 The tender was divided into four areas of services with a team of personnel designed for each area. One of these teams was described as the core team and included in the list the name of the Complainer. A summary curriculum vitae attached to the list designed him as a partner in the firm. No specific function was allocated to the Complainer. The lead person for the team was specified as Ms B. It was stated that work should be directed to the lead person who would thereafter allocate it to the appropriate resource.

20. Having regard to the facts found, and the detailed submissions from both parties, the Tribunal Quashed the Determination and Direction of the Council of the Law Society of Scotland dated 14 November 2013.

21. Having heard further submissions from the parties with regard to expenses, the Tribunal pronounced an Interlocutor in the following terms:-

> Edinburgh 12 May 2015. The Tribunal in respect of the Appeal by Alan Strain, formerly of 16/28 Lagoon Street, Sandgate, Queensland, 4017, Australia and now of 147 Baskerville Street, Brighton, Queensland, 4017, Australia ("the Appellant") against the Decision of the Council of the Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh ("the First Respondents") dated 14 November 2013 upholding a complaint of unsatisfactory conduct made by David Hamilton Kidd, 11 Strathalmond Green, Edinburgh ("the Complainer") against the Appellant and Directing the Appellant to pay a fine of £1,000; Quash the Determination and Direction of the First Respondents; Find the First Respondents liable in the expenses of the Appellant and of the Tribunal including the expenses of the Clerk, insofar as not already dealt with, chargeable on a time and line basis as the same maybe taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00 but restricted by 20%; and Direct that publicity will be given to this decision and the decision of 19 August 2014 and that this publicity should include the name of the Appellant and may but has no need to include the names of anyone other than the Appellant.
>
> **(signed)**
> **Alistair Cockburn**
> **Chairman**

22. 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, the First Respondent and Complainers by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

The full hearing of this Appeal was carried out over two days, the 5 March 2015 and 12 May 2015. On 5 March 2105 evidence was led from two witnesses on behalf of the Appellant – the Appellant himself and Mr C. Thereafter, the Fiscal for the First Respondents led evidence from one witness, Mr A. At the conclusion of the evidence, the Appeal was continued to the 12 May 2015 for the parties to make submissions to the Tribunal. On 12 May 2015 the Appellant made oral submissions. The Fiscal for the First Respondents had lodged written submissions and indicated that he had nothing to add to these.

The Tribunal had before it a Record, List of Witnesses for both parties, Productions for both parties and Authorities for both parties.

The Complainer was not present at either of the hearing dates. At no stage had he entered the proceedings.

SUMMARY OF EVIDENCE

EVIDENCE FOR THE APPELLANT

1. ALAN STRAIN

The witness gave evidence under affirmation.

He confirmed that he resides at the address given for him on the Record. He is employed with a job title of Special Counsel by Mullans Lawyers in Brisbane and has been so since 20 November 2014. In that position he advises and represents clients in relation to employment and industrial relations matters. From 4 September 2012 to 19 November 2014 he had a similar role with a different firm in Australia called Norton Rose.

He was admitted as a solicitor in Scotland in 1990 and was a partner with various firms including latterly, Biggart and Baillie LLP from 1 December 1997 until November 2010. From November 2010 until April 2014 he was one of the partners of DLA Piper Scotland. Between April 2014 and September 2014 he worked

predominately as a fee paid employment judge. In September 2014 he emigrated to Australia but he remains on the Roll of Solicitors in Scotland. He has no intention of practising in Scotland again having been admitted as a solicitor in Australia and now being resident there.

He commenced as a partner with the firm of Biggart and Baillie on 1 December 1997 in the litigation department. Although based in Edinburgh he did go to Glasgow on a frequent basis. There was one other litigation partner in Edinburgh at that time and that was David Kidd. David Kidd made the original complaint in this case.

He wanted to give some detail to put the tender to the Scottish Children's Reporter into context. In 2007 he was elected by the litigation partners of the firm, who by then numbered 9, as the head of the dispute management department. In that role he was responsible for all of the fee earners and support staff of that team. Mr Kidd was one of the team. Mr Kidd was off work due to ill health from April 2008. The Scottish Children's Reporter was one of Mr Kidd's main clients. With the agreement of the managing partner of the firm, Mr D, the witness had assumed charge of Mr Kidd's business together with Mr Kidd's then associate in the firm Ms B. It was considered appropriate that the associate would need partner support and so in March 2009 Mr Strain had a meeting with the Scottish Children's Reporter's agency. The agency was represented at the meeting by a Miss E and Mr Strain had attended together with Ms B. They had explained to the SCRA that Mr Kidd was off work due to ill health and they did not know when or if he would be back. It was explained that if necessary the SCRA could contact Mr Strain as partner support. It was felt that this message was consistent with Mr Kidd's period of absence from work. Mr Kidd wanted to return to work and the firm did not want to give any information that could be treated as repudiation of the partnership contract.

Ms B and the witness had conveyed this message to the clients in March 2009.

The contract with the SCRA was up for renewal in April 2009. Mr Strain was appointed as partner in charge of the tender process. The tender was divided into four parts. Mr Strain was partner in charge of the whole submission of the tender. He was also the lead partner of one of the parts of the tender – the employment part. Mr F was designed as in charge of the property section, Mr G for the commercial section, and Ms H in the statutory functions section. Ms H and her associates put the tender

together and submitted it to the witness as client partner. Miss H came to the witness and asked if the tender should include reference to David Kidd. Mr Strain had not been sure and so checked the matter with Mr D. At this point Mr Knight objected to the line of evidence on the basis that there was no Record to support what was being said. Mr Hastie argued that the Record included details with regard to the submission of the tender. Mr Knight continued objecting on the basis that it had previously been suggested that Mr Strain would only give evidence in connection with the first ground of appeal and not the remainder. Mr Hastie conceded that that had indeed been said but he felt that some background would be helpful. The Chairman allowed Mr Hastie to continue on the basis that questions were to be put to the witness and that the witness was not to continue simply with a monologue.

Mr Strain confirmed that Mr Kidd had been absent from work since April 2008. By the time of the tender Mr Kidd's absence had been dealt with principally by the senior partner of the firm who was Mr I. He had dealt with the matter in conjunction with Mr D. In February 2008 Mr Strain had met with David Kidd with regard to doing his performance review. The witness also recollected meeting with Mr Kidd after he became ill in April 2008. He thought the meeting took place in July or August of 2008 and was with Mr Kidd and his wife. Mr Strain felt that Mr Kidd's performance and engagement within the firm was sadly lacking and that it would be appropriate for him to cease to be a partner of the firm on some sort of agreed terms, probably retirement after a period of being a consultant.

Mr Strain was not clear how much involvement in the partnership situation with Mr Kidd Mr D had had. Any feedback given to the partners at the partner's meetings was given by Mr I. Mr D was involved in the background but Mr Strain could not say exactly to what extent. Discussions with regard to the SCRA tender were between Mr Strain and Mr D. Mr Strain was the client partner for the tender and the principal client partner dealing with the SCRA. The meeting with the SCRA was to give the client the agreed message that Mr Kidd was absent due to ill health and that the firm did not know whether or if he would be returning. Mr Kidd had been absent since April 2008, and the meetings took place in March of 2009. The firm could not see an end in sight.

The Chairman asked the witness if he was referring to an anticipated or historical absence.

The witness indicated that this was a bit of both. The witness knew that discussions had been taking place and that Mr Kidd had maintained the position that he wanted to come back to work. The message Mr Strain was to convey to the client was that he was to reassure them that Mr Strain was there as a partner contact. He was unable to give concrete information as negotiations were going on in the background surrounding Mr Kidd's retirement and the possibility of him becoming a consultant. It would have been quite wrong of him to give the SCRA a firm position.

Mr Kidd's participation in the firm's profits was suspended in November 2008. In about December 2008 or January 2009 a message was conveyed to the other partners by Mr I and Mr D that there was a refusal to negotiate by Mr Kidd. There were discussions on what the members of the firm could do in relation to the situation with regard to the partner's agreement. There was nothing in the partner's agreement preventing Mr Kidd from returning to work. The only option available was a two stage expulsion process. The first step was service of a notice of intention of expulsion proceedings and this required approval by 80% of the membership. That would be followed by the issue of the notice of intention. The second stage would be the actual notice of removal which would be served if there was 80% approval. Mr I wanted to get 80% approval for the notice of intention to remove Mr Kidd as a member in order to use it as a tool to make Mr Kidd negotiate. Mr I had some doubts about getting a majority for that step to be taken. There had been an attempt to negotiate with Mr Kidd to reach a settlement which was satisfactory to both sides but by January no dialogue was taking place.

By March, Biggart Baillie LLP had instructed Anderson Stathearn to represent them and Mr Kidd had instructed Brodies. In January, Anderson Strathearn intimated to Mr Kidd that there had been approval for notice of intention of removal to be intimated. The witness understood that thereafter Mr Kidd was prepared to negotiate.

The meeting with the SCRA in March took place with Ms J and another representative, a man the witness had never met before. The message that the witness conveyed to the client was based upon what he knew of the discussions that were ongoing between the firm and Mr Kidd.

The witness was asked to look at page 75 of the Appellant's Productions, which he confirmed was an email from Miss J outlining her recollection of events. Mr Strain confirmed that Miss J did not seem to particularly remember with any clarity what had actually been said. He accepted that paragraph 4 of her email said she assumed Mr Kidd would return to work. He was insistent that he had not given her any case to assume that Mr Kidd would be involved in the contract with the SCRA. Mr Strain had been unable to say either way whether Mr Kidd would be returning to work. Mr Strain did not know what other information could have been given to Miss Short since the meeting in March 09. Her email did not give any timeframe for her assumptions.

Mr Strain was unable to remember the exact date in April when the tender was submitted. He thought it was the second week. He was the partner who signed the tender off. Ms H put the tender together and the inclusion of David Kidd's name had been discussed between Mr Strain and Mr D. He knew that discussions had been taking place between the senior partner, Mr I, and David Kidd surrounding the proposal that Mr Kidd would return to work as a consultant on fee paid work and that in all probability that work would include work with the SCRA.

Mr Knight objected to this line of evidence indicating that this was straying into matters for which there was no record. Mr Hastie indicated that the line of evidence related to both grounds 3 and 4 of the Appeal. In particular ground 4 concerns the state of the Appellant's knowledge at the time of the tender. The Appellant was allowed to continue and confirmed that the information with regard to negotiations with Mr Kidd was information that he received from Mr I.

The witness was asked by Mr Hastie how he felt about signing off the tender. Mr Knight objected to this question on the basis that at the procedural hearing the Tribunal was advised that Mr Strain would give evidence only in connection with ground 1. Mr Hastie agreed to re-phrase this question and asked the witness what the state of his knowledge was at the time of the tender. Mr Knight repeated his objection indicating that the Appellant's state of knowledge was going beyond any averment. Mr Hastie rephrased the question and asked the witness what he was aware of. The witness responded that he was aware that discussions were taking place regarding a consultancy. These discussions were disclosed in correspondence with the Law Society. Mr I had corresponded with the Law Society with regard to the Complaint and had emailed Mr Strain in early December.

The Complaint had a long history. Mr Strain had been absolutely astonished at the Practice Sub Committee's decision. He had read through it and had identified a number of issues which later formed a number of the grounds of his Appeal. He had discussed the prospect of appealing the decision with Mr I and had taken legal advice. He considered that the decision was so wrong he had to challenge it. The Reporter had recommended to the Sub-Committee that there was no case to answer and Mr Strain had anticipated that the Sub-Committee would endorse that recommendation. Mr Strain had been a reporter for the Law Society and had made such reports. He had worked with Philip Yelland and Mary McGowan as a reporter in 1999 or thereabout. He knew the process and had therefore expected a particular outcome. He lodged the Appeal himself. He could not understand what could have happened between the investigator's report and the Sub Committee meeting to cause such a fundamental change. He then remembered that a solicitor he knew from Area 1, Mr A had told a mutual client of theirs that Mr A sat in judgement of other solicitors in conduct cases. Mr Strain had reason to believe that Mr A does not particularly care for him and thought that if Mr A had sat on the Committee he could have turned the Committee against him. Mr Strain had discussed the matter with his wife and decided to contact Mr Ritchie of the Law Society to ask who had been sitting on the Committee at the time of the meeting. Mr Strain found that Mr A had been a part of the meeting.

The witness confirmed that he moved to Area 1 in May of 1998 and resided there until he moved to Area 2 in February 2011. He had known Mr A pretty well and Mr A knew him pretty well. He believed he had met Mr A in 1999 although he had known of him since 1998. Mr A had participated in one of the village festivals called the Beltane Festival. He had met him in 1999 through their children. Mr A's daughter Miss K and Mr Strain's daughter Miss L went to the same school. Mr Strain's wife knew Mr A's wife Mrs A. Mr A knew that Mr Strain was a partner in Biggart Baillie and Mr Strain knew that Mr A was a partner in Company 1. Mr Strain had met Mr A on quite a few occasions. Area 1 is a small community and both of them were members of the golf club.

The Chairman asked Mr Hastie to clarify the question of bias and to get to the point of the evidence where the client focused on the question of bias. The Chairman indicated to Mr Hastie that it did not matter how the issue built up, in due course the Appellant would require to establish on what basis one would consider there to be

bias. The Chairman asked Mr Hastie to clarify what it was that the Tribunal had to concentrate upon.

Mr Strain continued that he felt that they had a normal relationship and that this changed in about 2001. He accepted that the Record indicated that the change occurred in 2003 but he had seen correspondence produced by Mr A that suggested otherwise.

An individual called Mr C approached Mr Strain as Mr C's then partner was concerned about her brother Mr M. Mr M had been accused of assault. Mr Strain was not a criminal lawyer and had recommended to him Mr A. Mr Strain was aware that Mr M had consulted Mr A and had been advised to plead not guilty and take the matter to trial. Mr Strain believed that on the morning of the trial that advice changed. Mr C and his partner Mrs C were concerned and sought Mr Strain's advice.

Mr Strain had counselled them to have a meeting with Mr A and he gave them "a steer with kinds of questions to understand why the advice had changed".

Mr and Mrs C had had the meeting which had been acrimonious. Mr A had said to Mr C that he seemed to be well informed and Mr C told Mr A that he had spoken to Mr Strain about the matter. Mr A had continued to represent Mr M with regard to the assault and in connection with his matrimonial affairs. He believed that the plea was tendered on the day of the trial so the meeting with Mr C must have been a post mortem meeting. On being asked to clarify the nature of the meeting the witness indicated that he was unclear given the lapse of time since but believed there must have been some ongoing relationship in order for the meeting to take place.

Mr Strain accepted that the documents produced suggested that the meeting took place before an intermediate diet. Mr Strain indicated that he was trying to remember what he had been told by Mr C. Mr Strain said that Mr C had told him that he had had a meeting with Mr A where he had mentioned Mr Strain's involvement. Mr Strain understood that this had been a particularly acrimonious meeting and that Mr and Mrs C were particularly upset at Mr M being told something different.

Some months later after the assault case had been dealt with, Mr and Mrs C were concerned about Mr A's representation again and the fee position with regard to

Company 1. Mr C had asked Mr Strain to write to the firm with a complaint and Mr Strain had agreed to do so – to write setting out the complaint and to ask for a reduction in fees. Mr Strain had received a response from Mr A which he forwarded to Mr and Mrs C. Mr A had said that what was indicated in the letter was preposterous. Mr A did not accept any criticism and would not reduce the fees charged. They then parted company. Mr Strain could not recall exactly the time frame concerned but knew that months had passed between the assault case and the letter of complaint. At the time of the letter of complaint Mr Strain was still living in Area 1 and had encountered Mr A. Things were not good when he did encounter Mr A. Previously they had not been friends but they had had a good relationship. Mr Strain always tried to engage with Mr A when he met him. After this incident with the complaint Mr A gave Mr Strain the cold shoulder or cut him short.

The witness went on to attempt to describe an incident in Property 1 in Area 1, but Mr Knight objected to this line of evidence on the basis that there was no Record to support it.

The witness went on to confirm that it was clear to him that Mr A was not happy with him and that Mr A did not particularly like him. Mr Strain had attempted to engage with Mr A but Mr A had almost completely ignored him. The witness went on to describe one occasion when he had tapped Mr A on the shoulder. Mr Knight objected to this line of evidence on the basis that there was no Record. Mr Hastie indicated that there was Record to support this. The Chairman indicated that he would allow the line of evidence.

The witness went on to explain that Mr A's cold attitude did not change even before Mr Strain went to Australia. Their daughters were in the same year at school. He saw Mr A at parents evenings and Mr A's disposition did not change.

When he discovered that Mr A had been on the Sub-Committee that seemed to explain why things had changed so dramatically. This was consistent with a lot of what had been said in the Sub-Committee decision. Mr Strain believed that Mr A influenced the outcome of the Committee.

Mr Strain was asked by Mr Hastie what he felt when he was told that there had been a discussion at the outset of the Committee meeting where Mr A had indicated that he

simply knew of Mr Strain. Mr Strain indicated that he had felt incredulity. He had had a number of dealings with Mr A. This was not a full and fair disclosure of Mr A's knowledge of Mr Strain. It did not reflect the dealings they had had. It disclosed an agenda on the part of Mr A and was consistent with Mr A having a grudge against Mr Strain.

Mr Strain made a complaint to Mr A's firm regarding his actions. He had quickly put together grounds of appeal. In response to his complaint he received an email from Ms N which had attached a statement from Mr A. This statement confirmed that Mr A did not and did not need to declare any conflict of interest. This was a stonewall response from Mr A.

Mr Strain intimated a complaint to the SLCC explaining that the two men had had personal and professional dealings with each other. They had met socially. Mr Strain had referred clients to Mr A. They had mutual clients. Mr Strain had met Mr A, his wife and daughter.

Mr Strain had instructed Mr A on behalf of a firm called Company 2. This was in relation to a court case in Area 1 Sheriff Court in 2000 or 2001. This was to cover an options hearing on behalf of Mr Strain's client. Mr A had indicated that he was not attending the court on that date but that his colleague Mr O was. Mr Strain had sent instructions.

In his Appeal Mr Strain had kept things general and did not raise matters specifically. He had wanted simply to keep things moving.

Mr Strain confirmed that it was his reading of the pleadings that Mr A was denying everything. The only conclusion was that Mr A had something to hide and that he had influenced the Sub-Committee. It was ridiculous for Mr A to say that he only knew of Mr Strain as a solicitor living and working in Area 1, given the contact that they had had while Mr Strain was living in Area 1.

CROSS EXAMINATION

Mr Strain stated that the Sub-Committee's decision was fundamentally wrong. The outcome had no significance to his career. He has never been afraid to come forward and say so. He has advised the Law Society in Queensland of the details of this case.

The decision was wrong on two fronts. The decision as he read it, before he knew about Mr A's involvement, didn't set out a proper basis for the conclusion. It did not deal adequately with the question of evidence or credibility. There are gaps in it. He could not see what had changed between the investigator's report and the Sub-Committee meeting. Some of the members of the Sub-Committee had even viewed his conduct as possible professional misconduct. It had completely disregarded the evidence from him and Ms H regarding the meeting with SCRA in 2009.

He did not expect the Sub-Committee's decision to be outlined in the same way as an employment tribunal decision. He did however expect the decision to be appropriately justified. If the Committee was to prefer someone's evidence he expected that to be set out in the decision. He had been a reporter for one year. He did not receive notes of the outcomes of the Committee Meetings. He did not sit on any of the Complaint Committees. He had been on an Industrial Law Committee. He was astonished that the Committee had disagreed with the reporter. He had smelled a rat.

SCRA were not misled by the tender and they have never claimed that they were. Mr Kidd's original complaint was dismissed by the SLCC as vexatious. Mr Kidd appealed that decision and it was overturned by the Inner House. He had read the Inner House decision and putting it in context, it had decided that the SLCC should have at least allowed the matter to be investigated. Mr Strain did not see the appeal decision as a criticism of his own actions. Biggart and Baillie had not been a party to the appeal nor had Mr Strain. The Inner House was not in possession of all the facts.

He did not accept that the tender mentioned Mr Kidd as available. The mention of him in the tender was consistent with the meeting that Mr Strain had had with the SCRA, that Biggart and Baillie could not say if Mr Kidd would return or not.

The lead person of each team listed in the tender was responsible for allocating work. Potentially if Mr Kidd had returned to work he could have done work for SCRA. Mr Strain's view was informed by Mr I. Mr Strain knew that discussions were ongoing

and that Mr Kidd might return as a consultant performing remunerative work and that that could involve work for SCRA. Mr Strain's personal view was that the firm should negotiate Mr Kidd's retirement. The partnership view, which was reported to Mr Strain by Mr I was quite different. The notice of intention to remove Mr Kidd as a member was never served. The process was a tactic to get Mr Kidd to negotiate.

At the time the tender was submitted, although the 80% authority to initiate the expulsion process had been obtained, the notice was never actually served. It was a threat which had been communicated in about January.

He did not accept that he needed to mention Mr Kidd within the tender. Mr Kidd had not been doing any work since April 2008 and even before that date Ms H had been undertaking more responsibility. His involvement was not crucial but he was included after discussion with Mr D. There was a concern that if he had been excluded from the tender then that could be founded upon as repudiation of the member's agreement. Mr Kidd was firm in saying that the firm should not be saying anything to suggest that he was not a partner or member of the firm. The mention of him within the tender was consistent with what had been said to SCRA and with the position of Mr Kidd that there should be no suggestion of any repudiation. Even in hindsight Mr Strain could not have given any more clarity. The tender had to be fair to Mr Kidd and to accurately reflect the position to the client. What he had said at the meeting was an accurate reflection of the position. He thought he had left SCRA with a clear picture. He was not sure what had been said to SCRA since the date of the tender with regard to Mr Kidd. The email from Miss E was after Mr Kidd's departure in 2010. He believed he had conveyed a clear message to SCRA and that was confirmed to Ms H. The witness went on to confirm that what Miss J said in her email was actually consistent with the position that the firm could not say whether or not Mr Kidd was going to be returning to the firm. Mr Kidd could well have returned.

Mr Strain confirmed that he marked his Appeal on 23 December 2013 and made no reference of potential bias in the Appeal. At that stage he was not aware of the involvement of Mr A. He did however suspect something was awry. His understanding was that he couldn't find out who had been on the Sub-Committee until he had actually marked his Appeal. Mr Strain had had it in his mind that Mr A might have been on the Sub-Committee because of the "poorness" of the decision.

The Appellant was asked to look at the Respondent's Production 2(a). He confirmed that there was no mention of Mr M or Company 2 within that document. He explained that as the Appeal was late he wanted to lodge what he could as soon as possible and then do due diligence with full particulars later. There were the restraints of time and he was in Australia at the time the Appeal was being marked. He had to work out details of events from over 17 years ago. He believed that the Mr M's incident was the catalyst to his relationship with Mr A breaking down, even though Mr A hadn't actually said that.

He had not mentioned the Mr M incident in his application to amend the Appeal because of the constraints of time. He had wanted to get the Appeal in as quickly as possible. It was not just the Mr M incident that wasn't mentioned, there were all sorts of other things not within the grounds. He had wanted to speak to Mr C to clarify timeframes regarding the Mr M complaint.

Mr A had not declared an interest at all. Mr Strain's application to amend his grounds of Appeal reflected his complaint to Mr A's firm and the response from Mr A denying the various grounds. His grounds of Appeal were rewritten following the involvement of Mr Hastie, when he had been asked to provide further specification of his concerns regarding Mr A. He had given Mr Hastie the additional information that was then set out in the Appellant's Answers to the Respondent's minute of amendment listed as 3(a) of the Respondent's Productions. The witness was referred to 3(b) of the Respondent's Productions and was asked to confirm if this was the first time they had been specifically made known in the appeal proceedings. The witness indicated that they were communicated to the SLCC in February 2014. The information had also been given to Mr Hastie as he was copied into the correspondence to the SLCC. Mr Strain had sought to have the Tribunal proceedings put on hold pending his complaint against Mr A. The outcome of the complaint against Mr A could have affected the Appeal but not vice versa. In fact the SLCC put Mr Strain's complaint on hold pending the Appeal. The Tribunal had decided to proceed with the Appeal and as a consequence the Appeal had to be amended.

Mr Knight asked the witness to explain why he had not instructed Mr Hastie to include the averments to do with Mr M at the time his grounds of appeal were originally reframed. After various exchanges Mr Hastie interrupted and pointed out

that the reframed grounds of appeal did include mention of Mr M. Mr Knight accepted that position.

The witness accepted that Mr A's client was Mr M, although Mr and Mrs C had met with him. Mr Strain was asked to confirm on whose instructions the letter of complaint about Mr A was made. Mr Strain confirmed that the complaint was authorised by Mr M. Mr Strain confirmed that Biggart and Baillie were unable to trace Mr A's response to the complaint. Mr Strain has been acting pro bono, for a friend. He did not open separate files for such correspondence but kept copies on a miscellaneous or personal file. He had asked Biggart and Baillie on three separate occasions to try and find the correspondence but they were unable to. Mr C had not kept a copy either. The only one who would have a copy now would be Mr A.

Mr Knight questioned Mr Strain about the area in which the complaint was made and Mr Strain confirmed that it was to do with service in relation to a matrimonial matter. Mr Hastie interjected to confirm that the amended grounds of appeal stated that the complaint was to do with matrimonial affairs.

The witness was asked to clarify if he had ever met Mr M. Mr Strain indicated that he thought he had met him once at a meeting attended also by Mr and Mrs C at the outset, when Mr M had been charged with the assault. Mr Strain believed that Mr M was still in Area 1.

The witness was asked by Mr Knight to explain why Mr M was not a witness. Mr Strain explained that he had not approached Mr M regarding giving evidence as it was Mr C who was the one he had dealt with. It was his view that Mr C was the material witness and he had been duly authorised to act and issue instructions on Mr M's behalf. Mr Strain could only tell the Tribunal what Mr C told him.

The witness was asked to look at Productions 4(a) to 4(l) for the Respondent. He confirmed that 4(l) was a file note confirming Mr M's instructions on 5 October 2001; 4(j) was a file note dated 11 January 2002 that made reference to Mr M; 4(f, g &h) was a letter from Mrs C to Mr A; 4(i) was a file note referring to a meeting at the Sheriff Court; 4 (d & e) were a letter from Mr A to Mrs C; 4(c) was a response from Mrs C to Mr A; 4(b) was a letter from Mrs C to Mr A and 4(a) was a file note dated 30 January 2002. The fiscal put to the witness that there was no reference of

complaint within these items. Mr Hastie interjected to confirm that the complaint made was not about the assault case but about matrimonial matters.

Mr Knight was asked by the Chairman to rephrase his question with precision.

Mr Knight rephrased his question and asked the witness if reading these documents there appeared to be any concerns raised regarding the service provided by Mr A. Mr Strain indicated that there were a number of references which suggested such a concern. In particular, item 4(d) corroborated their unhappiness. It was put to the witness that ultimately Mr M was happy with the conclusion of his case and the witness was referred to item 4(a). It was suggested to Mr Strain that the Mr M incident was a fabrication. The witness denied that.

The witness was asked whether Mr P might have something relevant to tell the Tribunal. Mr Strain confirmed that Mr P was a mutual client of Mr A and Mr Strain. Mr Strain and Mr A had attended numerous social occasions as his guest. Mr Strain has spoken to Mr A with regard to the options hearing on behalf of Mr P. Mr Strain accepted that Mr A admitted that they had met at some social functions but he insisted that Mr A had played that down. Mr Strain did not think there was any need to produce Mr P as a witness – he had to draw the line somewhere. He had spoken to Mr P about his recollection of Mr Strain instructing Company 1 to clarify the time frame. He had also asked him about the attendance at social functions by both Mr Strain and Mr A. It was not the case that Mr P had said he did not want to assist as he did not want to be involved. From Mr A's denials the witness suggested that it was almost as if they had never met. It was quite ridiculous to suggest that Mr A just knew of him. Relations had been pretty amicable until the Mr M situation. Mr Strain and Mr A had had some pretty open discussions, including the profits of Mr A's business, Mr A's sponsorship of the rugby club, which he had had to pay out of his own pocket. All of that changed after the Mr M incident. Mr A had never expressly explained that to Mr Strain but the change had happened after the Mr M situation.

Mr Strain was adamant that Mr A must have influenced the Sub-Committee's decision. He explained that Mr A is a pretty senior lawyer and Mr Strain knew what influence a senior and respected lawyer could have. Mr Strain could not confirm what was said as a matter of fact as there was no verbatim account of the Committee meeting. Just as in fact there was no mention of Mr A having this suggested

conversation before the meeting with the convener. The document produced after the Committee meeting is not a record of the meeting at all. It was Mr Strain's perception that Mr A had influenced the decision of the Committee which meant that the ridiculous decision would make sense.

Mr Strain was adamant that the Mr M "thing happened – that is the truth".

In response to questions from the Tribunal, Mr Strain confirmed that although he had done some duty criminal work when he was in Aberdeen, by the time Mr C had spoken to him about Mr M he was out of date. He confirmed that he had never had a direct blow by blow account of events from Mr M. Mr M needed a bit of assistance regarding communication, guidance and support. Mr Strain was asked if he had accepted what he was told by Mr C and the witness said that that was absolutely correct. When it came to the matrimonial complaint the client was Mr M, through a duly authorised representative, Mr C.

In response to a question from the Tribunal, the witness confirmed that at the time of the tender, David Kidd was still a partner and member of the firm of Biggart and Baillie. He was off due to ill health and suspended from profit sharing from around November 2008. In terms of the LLP agreement the firm could not suspend Mr Kidd from anything other than that. The firm could not stop him from returning to work. At the time of the tender it was Mr I who was dealing with Mr Kidd.

In response to a question from a member of the Tribunal, the witness accepted that in a letter to the SLCC from Mr I dated 9 February 2011 at page 101 of the Appellant's Productions, Mr I stated that Mr Kidd was "suspended from work". The witness went on to say that in other correspondence Mr I clarified that. Although it was said in the letter that Mr Kidd was suspended from work, the firm did not have the ability to do that and this was loose terminology.

The Chairman asked the witness to confirm if it was his perception that there was bias on the part of Mr A as a result of a complaint by Mr Strain on behalf of an individual some 12 years previously. The witness confirmed that it was the complaint and the assistance he had given Mr C.

The Chairman asked the witness if he was praying in aid of the question of bias any other matter. The witness explained it was the perception of his meetings with Mr A subsequently. The Chairman asked the witness if this was not an indicator of bias rather than the cause of bias. The Chairman asked the witness to explain what circumstances he said occurred that led him to believe that there was bias on the part of Mr A. He was asked if there was anything else that he was founding upon.

The witness explained that he was making an assumption. He said Mr A made it clear in his statement and in his submissions that he had little knowledge of Mr Strain. That was not correct. The Chairman suggested to the witness that what he was describing were not factual circumstances that were the cause of the bias. Mr Hastie interjected stating that the allegation was that there was an appearance of bias. The Chairman responded that the test was one of a risk of bias.

The Chairman asked the witness to clarify if he was saying that the sole circumstance he was relying upon was the complaint he had made on behalf of Mr M. The witness confirmed it was the complaint and the assistance he had given Mr C.

The Chairman asked the witness if he thought that in giving the name of Mr Kidd in the tender he was allowing for the possibility of Mr Kidd being involved in SCRA work. The witness indicated that it was his view that the inclusion of Mr Kidd in the tender was consistent with the representation he had made at the meeting in March that Mr Kidd might or might not return. The Chairman asked the witness if this was at odds with the statement previously referred to from the senior partner, that Mr Kidd was suspended from the practice. The witness indicated that Mr Kidd was never suspended from the practice.

The Chairman asked the witness if he had appreciated that Mr Kidd might not be available to provide advice to SCRA, given his long term sick absence. The witness said he had.

RE-EXAMINATION

Mr Strain confirmed that Mr Kidd was never suspended from work. He stated that that option was not legally open to the members of the firm. Under the terms of the business agreement they could not suspend Mr Kidd from the business, only suspend

him from participating in the profits. The reference by Mr I was loose terminology. Mr Kidd was suspended in November 2008 from sharing in the profits.

Mr Hastie began to ask the witness a question about bias and the Chairman interrupted to indicate that he believed that Mr Strain thought that the only circumstances relevant to bias was the complaint made by Mr C. Mr Hastie responded that that might have been the witness' submission but it was not his. The Chairman clarified that the witness had restricted his evidence with regard to the question of bias. At that point Mr Strain was asked to leave the room for legal discussion.

The Chairman indicated to Mr Hastie that the whole purpose of his questioning was to try and restrict the question of what caused the issue of bias and Mr Hastie's client had said it was the complaint made by Mr C. Mr Hastie responded that there were other facts and circumstances that the witness had given evidence about that raised the real possibility of bias. The Chairman responded that perhaps his questioning had caused the witness to forget but he did not want to be thought oppressive. However the Tribunal might have some difficulty in subsequently accepting what the witness said.

Mr Hastie asked Mr Strain about a Mr Q. The witness explained that he was a client of Mr A. Mr Strain had offered to purchase his house and had discussed this with Mr A. Mr Strain had also discussed with Mr A putting his own house on the market. On the basis of the current state of the pleadings, Mr A denied that.

With regard to the Mr M issue, the witness went on to state that he had written authority for Mr C to issue instructions on Mr Mr M's behalf. He believed that the complaint related to the matrimonial affairs. With regard to the criminal matter, it was his position that he had given Mr C pointers to be passed on at the meeting with Mr A.

When the case was raised in the Inner House the complaint was framed against all of the partners of Biggart Baillie. One of the issues raised there was that a complaint cannot be against a firm. The complaint was subsequently recast against Mr Strain, Mr D and Ms H.

2. MR C

This witness gave evidence under affirmation and having said that his name was Mr C then went on to explain that he was in fact Mr C, known as Mr C. He lives at Property 2, is 60 years old and works as an IT security and architectural consultant.

He knows Mr Strain because initially their children attended the same primary school. Then they became friends. Mr C's son is now 19 and so he would guess that he had known Mr Strain for approximately 15 or 16 years. Mr M is the brother of Mr C's former partner Mrs C. Mr Strain's involvement was not directly with Mr M but through Mr C. Mr M was not verbal or comfortable with people being verbal with him. Mr and Mrs C helped him after his arrest as Mr M wasn't able to cope with dialogue. Mr C made sure Mr M was able to be heard. Mr M is in his 50's.

This all arose out of a marital dispute. It was round about 2002. If papers before the Tribunal suggested that a bail undertaking took place in October 2001 then the witness accepted that that was a reasonable suggestion. After the criminal matter Mr C eventually went on to broker their divorce.

The criminal case involved an allegation of assault on Mr M's wife. By Mr M's request, Mr C accompanied him and was being his mouthpiece to make sure he was heard and listened to. Mr C was more a spectator. Mrs C said that she needed to get someone. Mr M was indecisive. Mr C could not remember if it was him or Mrs C who asked Allan Strain if he could recommend someone. Mr M did not have a lot of money. The most common legal aid practitioner in the area was Mr A. Mr C did not really know him at that time. Mr M was represented by Mr A thereafter.

They had several councils of war involving Mr M, his sister and Mr C. There were one or two long consultations with Mr A.

The common feeling was that they were not getting all the value they could have done from the representation of Mr M. Mr C sought direction or pointers from Mr Strain to try and draw out a proper defence for Mr M. He in fact raised a good number of these pointers with Mr A. Mr C refused to be diverted when seeking answers. If Mr A didn't want to answer something then he would slide off on to something else. Mr

C's background meant that he was blunt and direct. That was what led to the correspondence referred to in the Respondent's Productions.

The witness was asked to look at the Respondent's Production, page 4 (j). He confirmed that this was a memo dated 11 January 2002 and was an attendance note including Mrs C and himself. He did not accept that this memo reflected the tone of the meeting. He did not believe that he produced that level of antagonism. Mr C was aware that Mr A was irritated about being pressed to precognosce the police and to undertake medical enquiries. Mr C had received pointers from Alan Strain – they were general things not detailed. To the best of Mr C's recollection Mr A had said "you seem remarkably well informed" to him. Mr C had responded "that's because I am a friend of Alan Strain and have received pointers from him". The meeting was 13 or 14 years ago so it was difficult for Mr C to be 100% sure of what was said but it was his recollection that he raised the name of Mr Strain. Mr A just harrumphed and carried on. The meeting was concluded but it was not very satisfactory.

With regard to the matrimonial matters, Mr C's involvement was in trying to verbalise Mr M's requests and eventually persuading Mrs M that she needed to talk rather than have lawyers simply sending letters to Mr M. The matrimonial affair had started with Mr A and carried on with him. There were precious few direct consultations between Mr M and Mr A. Communication was either correspondence or telephone calls. Mr C could not remember how long matters continued but it did get to the stage where no progress was being made. He had had a discussion with Mr M to discuss getting his case moved to Mr R of Drummond Miller.

A letter was written by Mr Strain on our behalf to Mr A. This is to the best of Mr C's knowledge, although this did happen in the distant past. Mr C asked Mr Strain if they could challenge Mr A's fees. Mr Strain had explained that the Law Society would simply look at the amount of work done and not the quality of work in determining a dispute about a fee. The complaint was mainly instructed by Mr M and Mrs C, Mr C was more peripheral. He confirmed that he was aware of the complaint. The instruction to complain was probably from all three of them. Mr M, Mrs C and Mr C had got together and made a joint request. He could not honestly say whether or not Mr M attended the meeting with Mr Strain about the complaint. He did not know whether they got written authority from Mr M. To the best of his recollection he could remember seeing a letter from Mr A. He was almost certain that he did. There

was no response of any great import, he think it simply dismissed the complaint. He could not remember exactly what was said in the letter. Obviously the letter would go to Mr M as he was the prime person.

The witness was asked how well he knew Mr A. He indicated that their children all attended the same school and he would see Mr A when he was seeing his children off to a school trip. Once in a blue moon he would see Mr A in the local public houses that Mr C used to frequent. Mr C had spoken to Mr A today, only in passing conversation.

On occasion when he met Mr A in Area 1 he got the reaction that Mr A was still resentful of the way Mr C had spoken to him with regard to Mr M's case. He would give a glance or a stare.

The witness was asked how he knew Alan Strain. Mr C indicated that they used to go to the pub together. Given Mr Strain's professional expertise, Mr C had asked him for advice personally and once or twice for a company that he was working for. Many a time they put the world to rights over a pint or six. The most formal involvement he had was in 2004 when he took advice because he was at risk of being made redundant.

Since Mr Strain left Area 1 they had corresponded sporadically by email. They had perhaps had one or two telephone conversations.

With regard to the Mr M matter, as far as the witness was aware, he could not verify the dates but the principal of what was being said is what happened. He had checked but didn't have any copies of the paperwork. Details discussed might be wrong but not the general position. This was not an entire fabrication. Some of the details he did not recall but not it all.

CROSS-EXAMINATION

The witness confirmed that Mr M had given instructions to accept instruction from either Mrs C or Mr C. Mr C had tried to represent Mr M's views.

Mr C confirmed that there had been a discussion with Mr A about what to do. If he had been going to plead guilty they didn't need to do any of that. The first time Mr A raised the issue of Mr M's statement to the police was when Mr C was sitting in the waiting room at Selkirk Sheriff Court waiting to be called. This statement said that Mr M had continued to restrain Mrs M after she was no longer attacking him and so this meant he was guilty of assault. Mr M was told he would be found guilty. This was five minutes before he was due to go into court. He was being told he should plead guilty and was advised that if he was found guilty the punishment would be greater. If all of this was as clear cut as being put forward, Mr C was horrified that Mr M had had to wait for months after the whole thing started to be told that he had no alternative but to take this advice.

The witness confirmed that he had seen copies of extracts from Mr A's file. He said he received these copies by email from Alan Strain's solicitor. He looked at Production 4(a) and confirmed that this was a file memo dated 30/1/02. Mr C took no dispute with regard to the fourth paragraph of the memo but would still ask why Mr A had waited until that point to raise the issue. He did not think that anyone was particularly happy about the outcome. Mr M was certainly not satisfied. He had a feeling of injustice. Mr M had been attacked after finding his wife in bed with another man, although not on the same day. Mr M was not impressed at being found guilty on what he saw was a technicality. He was not impressed at being found guilty when it was his view he had been defending himself.

With regard to the letter of complaint, Mr C indicated that the authorisation for that complaint would have come from the triumvirate If it was signed it would be by either Mr M or Mrs C. He was not certain whether Mr Strain actually met Mr M. Either they would have gone to see Mr Strain in his home or Mr Strain would have come to Mr C's home. Mr M probably would have been there.

The witness confirmed that Mr M still resides at the same address and he sees him occasionally when Mr M comes out from the back shop when Mr C passes where Mr M works.

The witness was asked if Mr M could be called to the Tribunal to give information. The witness suggested that if "you do so, you should not do it in this format". Mr C stated that he was 80%-90% certain that the letter of complaint was sent. With regard

to the response from Mr A, it was possible that the letter was read out to Mr C but it was probably shown to him as well.

The witness conceded that he really could not remember that much of the detail.

In response to a question by the Tribunal, the witness agreed that Mr A was a local solicitor who did legal aid court work. Mr C said he was not well versed in this type of case. He accepted that Mr A was an experienced criminal court lawyer and that Mr C's only experience had been on the periphery of cases such as Mr M's.

The witness went on to confirm that he had taken pointers from Mr Strain which were more in the nature of general guidance. The witness was asked if he had any medical experience and indicated that he had been a drug salesman. A member of the Tribunal asked the witness if he had taken any medical advice in relation to Mr M's case. The witness said he had a personal friend who was a doctor but he could not say if he consulted with him or not. The witness was asked by the Tribunal to look at Production 4(j) at the ninth paragraph. He was asked if he would express that opinion on his own. The witness indicated that he had picked up more than a passing knowledge in his work as a drug salesman. He stated that he was not medically qualified. In response to a question from a member of the Tribunal he confirmed that he was not legally qualified.

The member of the Tribunal asked Mr C if he was able to explain in any way why there was a reduced plea. The Chairman asked the witness if he was aware that it was not always easy to have meaningful discussions with a fiscal until the date of the trial. The witness said he was not aware of that.

The witness indicated that their dissatisfaction with the service of Mr A was a combination of the timing of the advice and the fact that it had not been considered before the trial. The Chairman asked the witness if the complaint was in relation to the quality of the advice or the timing of the advice. The witness responded that if the matter was as clear cut as was being presented, why had there been no indication of that until the eleventh hour. He was again asked by the Chairman if his objection was to the timing of the advice. The witness responded that he thought that he had answered that.

The witness confirmed that Mr Strain's involvement in the Mr M situation was at an earlier stage than the complaint.

Mr Hastie concluded the evidential part of Mr Strain's Appeal.

The fiscal indicated that he was leading only one witness.

EVIDENCE FOR THE FIRST RESPONDENTS

1. MR A

This witness gave evidence under oath. He confirmed that he is a partner in the firm of Company 1 and had held a practising certificate since 1978. He was what would be considered a High Street general practitioner doing a variety of work including conveyancing, executries, employment tribunals and civil and criminal court work. The firm does not undertake legal aid work now but it did previously.

The witness has been a Council member for 15 years and has sat on several regulatory committees. He has been a convener for some of the Professional Practice Sub-Committee meetings. He sat on the Committee meeting dealing with the complaint against Mr Strain. He believed two other solicitors sat on the meeting in addition to the convener Mr T and himself. In other words there were 4 solicitors. It was normal practice for the agenda and papers for the meetings to be issued 2 weeks in advance. There was nothing different he could recall in connection with this Committee meeting and so he would have said that he got the papers 2 weeks in advance. The agenda lists the names of all of the individuals involved. He recalled seeing Mr Strain's name. He always looks at the agenda to see if there are any cases that he would want to step back from. Other than knowing who Mr Strain was, he saw no reason at all not to be involved. He only knew of Mr Strain as another solicitor who lived in Area 1. He had met Mr Strain on occasion but they were not friends or colleagues. Mr Strain was simply another solicitor who happened to live in Area 1.

In particular he knew of Mr Strain from Mr Strain's involvement in resurrecting the local games. Mr Strain and someone else had been involved in that and had got a lot of press as a result. He knew of Mr Strain as a solicitor and it was a small legal world. He had no kind of relationship with Mr Strain either social or professional.

He might have been in Mr Strain's company at largish events but had never been in his particular company.

Prior to these committee meetings he reads the papers thoroughly. He recollected that there had been 380 pages of papers relating to Mr Strain's matter. If he recalled correctly it was a big case volume wise although he hadn't seen these papers since November 2013. He recalled that was a complaint against another of Mr Strain's partners. He remembered that there were two partners. He remembered that there were two partners who were subject to the same complaint but they were separate complaints against each over the same matter. He had not recalled until the convener, Mr T, had reminded him, that they had had a discussion just prior to the meeting, just outside the committee meeting room. Mr T had come up to Mr A and said that there was an interesting matter on the agenda. He had said the case of Biggart Baillie appeared interesting. Mr A had responded that he knew of Mr Strain as he lived down his way. Mr T asked if Mr A knew him well and asked if Mr A had wanted withdraw. Mr A had said that he did not think he needed to as he only knew him because he lived in Area 1. In fact he had been wrong because at that stage Mr Strain was living in Area 2. Mr T had reminded Mr A of this discussion. Mr A had forgotten about this discussion until the current situation arose.

Mr A was asked what part he had played within the Committee meeting. He stated that he did not recall taking a particularly active part. He did remember one of the members of the Committee – a Mr S – actually thumping the table and saying that in his view what had happened in this case was fraud. Mr A could not remember which way he voted, whether it was for professional misconduct or unsatisfactory conduct. Even to this day he could not remember the view he had taken. He could say that he did not vote for no action to be taken. It was his recollection that there were three lay people of the Committee. He could remember that because he had since discussed matters with the Committee's secretary. The secretary reminded Mr A that the vote had been split 3/3 and the convener had cast the deciding vote in favour of unsatisfactory conduct. That had not surprised Mr A and it accorded with his own recollection. He remembered that it had gone to a split vote, although he could not recall the precise detail. He could not see how Mr Strain had a perception that he had influenced the Committee, unless he had spoken to other people who had been at the Committee meeting.

Mr A stated that he had not taken any part in trying to influence the Committee in any way. He could not remember what the actual vote was but was sure that his own vote did not eventually matter.

He stated that he was aware of the Law Society's guidelines regarding declaring an interest and having convened Committee meetings himself, had had to advise members regarding declaring an interest. The rules now have more detail than they did. In the early days the rules simply said the member had to declare an interest and that was it. Now the rules say the member has to state what the conflict is and give more detail.

Even with the benefit of hindsight he was still 100% happy that he was entitled to take part in the meeting of 14 November 2013.

Mr A was aware that Mr Strain had raised issues to do with Mr M. He had no idea how Mr Strain had come to that conclusion. Their relationship had been insignificant. Mr A had rarely seen Mr Strain before or after the Mr M case. It made no difference to their relationship. If he had seen Mr Strain in the High Street he would have nodded or smiled. He did not think he had ever said more than a sentence to Mr Strain. In his view there was no difference since the Mr M case. Mr A had no idea that Mr Strain had anything to do with Mr M.

Mr M was someone that Mr A knew locally. His nickname was C and he worked in the local butchers. He played football for the local team. Mr A had acted for him in a court matter before this. Mr M came to see him in late 2001 because he had been charged with assaulting his then wife. There was no suggestion that Mr M had been referred to him. There was no letter of referral. Production 4(l) was a copy of an original memo that was contemporaneous with the meeting with Mr M and made no mention of Mr Strain.

Production 4(j) was a memo from 11 January 2002. Mrs C referred to was Mr M's sister. The Mr C referred to was Mrs C's partner. Mr A now knows this to be Mr C. Both Mr and Mrs C were closely involved as they were keen to help Mr M. This had been a legal aid case. This had not constrained Mr A in what work he could do. He had given Mr M a full and comprehensive service. He accepted that the 6th paragraph of the memo indicated that Mr C had been critical. Mr A stated that around that time

he was getting a bit fed up with Mr and Mrs C. Initially he had been happy for them to be involved but then Mr C, who was not his client, was becoming critical of what he was doing.

He confirmed that Production 4(d) was a letter setting out his position and 4(c) was Mrs C's response.

At the meeting on 11 January, set out in Production 4(j), Mr C made no mention of receiving pointers from Mr Strain. His note was very full. If Mr C had said he had been taking advice or getting pointers Mr A would have asked what he had got to do with this. He would have recorded that within his memo. Professionally one is on ones guard if another solicitor is giving advice to one's client. He would take a step back. There was no mention of this in his memo.

The matter did not proceed to trial. On the morning of the trial there were discussions between Mr A and the fiscal and a reduced plea was agreed. Mr and Mrs C were at court. All three of them were there at the same time. No one raised any concerns at the hearing that day. In fact Mr M seemed to be satisfied.

There was a civil matter running at the same time. Mr A was involved in bringing that matter to a conclusion. He had no memory of the matter being transferred to Drummond Miller. It may have ground to a halt. He had submitted a civil legal aid account and did not know what happened after that.

He did not receive any letter from Mr Strain, that suggestion was absolute nonsense. He did not receive any letter from anyone with regard to his representation of Mr M. Nor did he respond. Such a suggestion was absolute nonsense. He had his file and there was nothing on it in the nature of incoming or outgoing. If Mr Strain and Mr C say there was a letter then they are both lying.

The first thing that happened was when Mr Strain made a complaint to Mr A's firm. He had made a conduct complaint to his firm. There was no reference to Mr M. The nature of the complaint was simply that Mr A should have declared an interest. One of Mr A's partners dealt with it. He had given her a statement. She had then replied to Mr Strain's complaint, rejecting it. Mr Strain had taken the matter to the SLCC and the complaint was intimated to Mr A again. There was still no reference to Mr M.

The witness was asked to look at Production 21 for the Appellants. He confirmed that the statement attached headed Mr A was his statement. That is in fact his full name. M is a contraction of his middle name.

He did not think Mr M was mentioned even in the first Appeal by Mr Strain. This only came into the frame very late in the day. The whole thing was complete nonsense. Mr A had no knowledge or information to connect Mr Strain to Mr M. The complaint simply did not happen. Mr Strain has made some astonishing comments without foundation, including that Mr A was professionally jealous. Even the Mr M thing was astonishing. Their relationship could not change because they did not have a relationship. To suggest that he bore a grudge was farcical. This beggars belief and is an affront to his personal integrity and he was quite upset.

Mr A sees Mr M occasionally as he still works in the local butcher shop. He also occasionally meets him in the local pub. He has never had a problem with Mr M. Mr M has never hinted at a complaint regarding his representation of Mr M for the assault matter or the separation.

Mr A's recollection of Mr C from the time was that he was very driven and had particular views. It did not surprise Mr A that he was coming forward now.

Mr A stated that the whole thing was fictitious. They had never had a fall out. He had never had any dealings with Mr Strain. He accepted that Mr C was the mouthpiece for Mr M. He stated that Mr M rarely got a word in edgeways. Mr A had been content with this at an early stage but then his patience wore thin.

Even if Mr Strain had sent a letter to Mr A, how would Mr C have seen it. There was no letter and therefore no response. This was a complete fiction, the client was satisfied.

Mr P is a local chap who is a quantity surveyor. Mr A had first met him when there was a development going on at the local golf club. Mr A and Mr P are still friends. He had done work for Mr P over the years. He had not known that Mr P was connected to Alan Strain until this case arose. He now knew that to be the case. In recent weeks he had been speaking to Mr P and Mr P had said he had taken a call from Mr Strain. Mr Strain had asked Mr P to confirm that both he and Mr A had been

at a social event. Company 2 had sponsored a rugby event. Mr P had told Mr A that he told Mr Strain that he did not want to get involved in the matter. Mr P had said that both of them had likely been on the guest list. Mr P operates in lots of ways. Mr P could not remember if both Mr Strain and Mr A had been there at the same time. Mr P said he was not prepared to be involved.

Mr A conceded that it was possible that both he and Mr Strain had been at the event along with another couple of hundred people. Even if he had known about this event when the meeting was taking place in November 2013, it would not have influenced his view. He now knows that Mr P was a client of Mr Strains but he did not then.

CROSS-EXAMINATION

The witness was asked if he accepted that some of the things stated by Mr Strain were correct.

It was accepted that their daughters were at school together. Mr Knight took objection to this line of questioning, indicating that there no evidence to support it. Mr Hastie answered that these matters related to credibility.

Mr Hastie asked the witness if he had seen everything that had been lodged and if he was aware that if he had told the Law Society everything, in the pleadings it was stated that anything other than knowing Mr Strain as a solicitor was denied. The witness was asked to look at page 5 of the Record. The witness confirmed that he admitted item 2 on the list. He denied item 7 on the list. He accepted that he may have been at Mr P's rugby event at the same time as Mr Strain. He did not deny that they were both in the room at the same time. He did not know that Mr P may have been a mutual client. He did not know Mr Strain well enough to say they had good relations. He had never been in Mr Strain's house and Mr Strain had never been in his house. They had not been at the same dinner table. He had no recollection of seeing Mr Strain at Area 1 Golf Club. He had never golfed with Mr Strain.

He accepted that he had represented a Mr Q. He had no recollection of Mr Strain making an offer to buy Mr Q's home. He accepted that he had acted for Mr Q in the sale of his home.

With regard to Company 2, Mr A was not personally instructed by Mr Strain. Mr Strain may have instructed his colleague Mr O. He has never received an instruction from Biggart Baillie directed to him as "Dear Mr A" and signed by Alan Strain.

He said he still had the criminal file for Mr M. He accepted that all that had been produced was extracts. He said he still had the whole file. He said he still had the matrimonial file. If Mr Strain said that he recommended that Mr M see him he was not aware of that. He had previously acted for Mr M and he knew Mr M. Mr M had not said that Mr Strain had told him to come to Mr A. He accepted that there had been a meeting attended by Mr C and Miss C. Mr A had not been happy. Mr C was suggesting things and criticising him. He had been questioning why he had not precognosed this policeman or that policeman and why he hadn't done other things. Mr C was going too far. He could not comment on whether they had received pointers from Mr Strain. The letter listing details of what Mr A should do was one from Mrs C not from Mr C.

If Mr C had said he had been speaking to Alan Strain Mr A would have recorded that on his file and would have taken a step back. In response to a question from the Tribunal, he confirmed that that meant he would resign agency.

The witness was asked to have particular regard to his memo of 11 January and was asked whether or not his letter had dealt with all of the issues raised at the meeting. He was asked in particular if it had dealt with the question of additional witnesses. He was asked if he could remember who the various people were who were referred to as additional witnesses. He indicated that he did not recollect. He was asked if his memo therefore was not as full as he recollected. He accepted that his memo was not a verbatim note. It was more of a summary of a meeting that lasted for one and a half hours. He insisted however that if Mr Strain's name had been mentioned that would have gone into the memo. He accepted that he hadn't put in his memo the witnesses names but he was insistent that he would have put in Mr Strain's involvement.

To begin with he had been content to deal with all three because Mr M appeared happy with that. Then things became strained and Mr A was not happy with the others involvement. He felt that if Mr M was not happy then it was for him to say so. He set that out in his letter of 16 January and Mr M confirmed that that was not the case.

If Mr C had seen a letter of complaint then that letter never arrived on Mr A's desk. Mr A questioned if Mr Strain had produced a copy of the letter.

The civil matter that he had referred to earlier in his evidence was to do with an interdict. The Chairman asked him if he had ever been instructed to act in the divorce. The witness said that he believed that that had started out but had fizzled out. He denied having any correspondence from Drummond Miller. He insisted that he had both files but there was no letter on either from Mr Strain.

He had hardly seen the man. He had maybe bumped into him two or three times a year. As he had not received any letter of complaint he had no reason to dislike the man. Their relationship had never amounted to more than a hello in the street. There had been no complaint, no grudge and no change in his attitude. He was indifferent to the man.

The witness was asked about his recollection of the Committee meeting and he indicated that it was his belief that there were 7 members present – 6 plus the convener. It was pointed out to him that the schedule of the meeting recorded that there were 3 solicitors and 5 non solicitors present. The witness then stated that the information he had given in his evidence was information that he had been given by Mr Ritchie. He could not remember from one month to the next how many people had been sitting on a Committee. All he could remember is about Mr S.

With regard to the pre- meeting discussion, all he had said that he knew that Mr Strain lived in Area 1. This had arisen because the convener had made a passing comment that this was an interesting case.

Even if he had known that Mr Strain had sent him a letter of complaint 14 years previously, on behalf of a client, it would not have changed his position. He might have explored matters further with the convener but Mr Strain would not have been expressing his own personal unhappiness but would have been expressing unhappiness on behalf of a client. That would not immediately flag up a conflict of interest.

Mr Hastie asked the witness if he accepted that if Mr Strain had given pointers on the criminal matter and if the letter of complaint had been sent then viewing the situation objectively, there would be raised suspicion that Mr A might be less than impartial. Mr A denied that. The Chairman intervened in this line of questioning and suggested to Mr Hastie that he was asking the witness to usurp the function of the Tribunal.

The witness insisted that if Mr Strain had sent the letter it had not arrived. A change of relationship was an exaggeration because there had been no relationship to change. Mr A had not sent a letter out. If Mr Strain says he received one then that was a lie. Mr C may have had pointers from Mr Strain but if he had he did not tell Mr A about that or that would have been flagged up in his file note.

SUBMISSIONS FOR THE APPELLANT

Mr Hastie moved the Tribunal to quash the Determination of the Council of the Law Society, together with the Censure and Fine. He did not propose to narrate the whole terms of the complaint. He submitted that it could be summarised as a complaint that Mr Kidd had been designed as the lead (and only) partner in the tender at a time when he was suspended from working and it was clear that he was not going to return.

He submitted that in essence the grounds of appeal were in three categories:

1. That there was an appearance of bias at the Sub Committee meeting and this is incorporated in ground 1 of the Appeal;
2. A question of whether on the evidence the complaint was proved and this was reflected in grounds 2 to 4 of the Appeal; and
3. Even if the evidence proved the complaint, the question was whether the conduct proved amounted to unsatisfactory professional conduct, and this was reflected in grounds 5 and 6 of the Appeal.

Mr Hastie clarified that the Appellant was not insisting in his Appeal in relation to the level of fine imposed.

Mr Hastie indicated that he would first of all address the issue of bias. He accepted that the test for this issue was set out in the case of Porter-v-Magill [2001] UKHL 67

and was referred to within the First Respondent's written submissions. There it was said that the test was:

> *"whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

He submitted that the Tribunal required to consider the evidence and all of the facts. Nothing had been agreed in the Answers for the First Respondents. It was simply a blanket denial. However, the witness Mr A in evidence accepted that some of the issues put forward for the Appellant were in fact correct.

To cut to the chase, Mr Hastie would describe that the crux of the issue was the Appellant's evidence relating to what he would refer to as the Mr M matter, that before it there was a good relationship between the Appellant and the witness Mr A and then after the Mr M matter the Appellant took a different view. The Mr M matter had involved two issues – the meeting where Mr C had disclosed to Mr A that he had been given pointers by the Appellant and the second was the letter of complaint sent by the Appellant to Mr A in relation to Mr M's matrimonial affairs and in particular fees charged.

The Appellant had given evidence that he was approached by Mr C and that he gave Mr C pointers to use. The Appellant had then been told by Mr C that at the meeting with Mr A mention had been made of the Appellant's involvement. The Appellant's understanding of that comes from Mr C. With regard to the second matter, Mr C had asked the Appellant for advice with regard to Mr M's matrimonial matter and the fees charged. The Appellant had undertaken to write to Mr A and did so and received a response. Evidence was led that the Appellant had asked Biggart Baillie to search for the correspondence but as no separate file had been opened this had been difficult and the Appellant received no response from Biggart Baillie.

The Appellant's point was that relations had been good prior to the M's affair in as much as the Appellant and Mr A would engage when they met although they were not friends. After the M affairs, the Appellant was given the cold-shoulder by the witness.

The Sub Committee meeting took place some 11 or 12 years after these issues referred to. By then the Appellant had moved abroad. The complaint had been dealt

with by Biggart Baillie on the Appellant's behalf. The reporter's position on the matter had been given to the Appellant. Then when the Appellant received the intimation of the result of the Sub Committee meeting the Appellant could not reconcile the two, given his previous experience with such matters. Consequently, the Appellant had requested confirmation of the makeup of the Sub Committee.

Mr Hastie's position was that:

1. The Appellant's perception of relations changed; and
2. Mr A carried a grudge.

The other issue that had caused the Appellant some concern was that he had received a response containing a statement from Mr A that said Mr A only knew the Appellant as a solicitor who lived in Area 1. That statement did not accord with the Appellant's position.

Mr Hastie submitted that Mr C gave evidence:

1. That was consistent with what the Appellant had described with regard to pointers;
2. That he was 80-90% sure he had seen a letter of complaint from Mr Strain to Mr A; and
3. That he had either seen a response from Mr A or had had one read out to him.

Mr A's position appeared to be that:

1. No mention was ever made to him of the involvement of the Appellant and he had no idea that the Appellant had any connection with Mr M;
2. That the evidence with regard to the letter and response is absolute nonsense and that if Mr C claimed to have seen a response he was a liar. If any letter had been sent to Mr A by the Appellant, Mr A had not seen it; and
3. Mr A had not remembered very much at all about the Committee meeting. He accepted that he had had his memory refreshed by another. He gave various figures of the makeup of the Sub Committee which did not accord with the actual schedule noting the Determination. He could not remember which way he voted but was sure he did not vote for no action. He had been reminded

about the conversation with the chairman of the Sub Committee regarding his knowledge of the Appellant by the chairman himself.

Mr Hastie submitted that Mr C's evidence was consistent with that given by the Appellant and with the evidence of Mr A's file note in that that note had described a difficult and acrimonious meeting. He submitted that it was difficult to see why the witness C would come to the Tribunal and lie. The evidence suggested that he was no longer involved with Mr M's sister. There was nothing to suggest an ongoing relationship with the Appellant and there was no suggestion from the witness Mr A that there had been any falling out between Mr C and him. It appeared Mr C had nothing to gain but a lot to lose. Mr Hastie conceded that it could be said that the Appellant had something to gain by coming to the Tribunal and lying. He submitted to the Tribunal however that it was difficult to see how the Appellant could have known about the Mr M's matters, unless there had been some contact with him and Mr C about these issues at the time.

In evidence the Appellant had not recollected very much. He conceded that he had had his memory jogged including by the chairman of the Sub Committee. There was a stark contrast in the evidence between Mr A and the evidence of the Appellant and Mr C with regard to the letter of complaint. Mr Hastie invited the Tribunal, insofar as the evidence was inconsistent, to prefer the evidence of the Appellant and Mr C.

The test of the fair minded observer set out in the Magill case was also referred to in the case of British Car Auctions Limited-v-Mr A P Adams, Employment Appeal Tribunal 23 April 2013.

In that case the court came to decide that by not disclosing a relevant matter that raised a real risk that the individual was consciously hiding something.

In this case, Mr A had only raised with the chairman that he knew the Appellant as a solicitor in the town in which he lived. If the Tribunal accepts the evidence on behalf of the Appellant, then the connection between the two was more than that conceded by Mr A and so the disclosure was a restricted one. That restriction suggested to an impartial observer that there was more to hide. In the Car Auctions case the question was raised. In this case the question was not raised. There was no record of the discussion between Mr A and the chairman at all. It is not known what discussions

took place at the time of the Sub Committee meeting or what Mr A might have raised with the chairman. If the Appellant's evidence is accepted that if all Mr A disclosed to the chairman of the Sub Committee was that he was a solicitor who lived locally whereas there was more to it than that this raised a real risk of bias.

Mr Hastie referred the Tribunal to the case of Tote Bookmakers Limited-v-Dundee Licensing Board [2006] SLT (Sheriff Court) 129. He said that he was referring to this case for completeness sake. The case appeared on the face of it against the Appellant where the Sherriff had decided that where the decision was taken by a Committee and only one person on the Committee had apparent bias, this was not enough to taint the whole Committee's decision. Mr Hastie however stated that it was crucial to view the case in detail. In that case no attack was taken on the actual decision/reasoning of the decision by the Sub Committee. Here the Appellant was directly attacking the reasoning behind the Sub Committee's decision and therefore the Tote Bookmakers case could be distinguished.

The Chairman asked Mr Hastie if it could not be suggested that this case involved a long time for an individual to hold a grudge.

Mr Hastie conceded upon the face of it 12 years could be considered a long time. He suggested however that it was not just the grudge itself that was the issue but all of the circumstances making up the package. The problem may have occurred 12 years before but if you accepted that there had been an issue then why did Mr A only make reference to his connection to the Appellant as a local solicitor? An impartial observer might question that.

The Chairman asked Mr Hastie if it was necessary for the Tribunal to hold that the witness Mr A was lying when he said that he had no recollection of these matters. Mr Hastie conceded that he was not sure he could say that Mr A was a liar. The Chairman asked Mr Hastie if it was the case that the Tribunal had to accept that Mr A deliberately did not disclose something and that if Mr A had had no recollection of an issue and the Tribunal accepted that, it would not be possible to say there was a risk of bias.

Mr Hastie submitted that Mr A's original position had been simply to deny all of the circumstances outlined by the Appellant in his Appeal. In relation to some of these

matters he had in evidence accepted that he might well have had some involvement with the Appellant. For instance, he had accepted that he might have received an offer for a house being sold by his client Mr Q and he accepted that their children went to the same school and that he might have met them there. The Appellant's position had been fuelled by the witness' blanket denial. Additionally, Mr A's recollection of the Sub Committee meeting appeared to be provided by the chairman of the Sub Committee.

The Chairman suggested to Mr Hastie that there were two possible scenarios. The first was that the witness had a recollection of events that led him to bear a grudge and he suppressed that. The second was that the witness had no recollection of these matters. He asked Mr Hastie what would be the result if the Tribunal took the view that Mr A had no recollection of these matters.

Mr Hastie submitted that this was irrelevant. The question was the position of an impartial observer and the question of apparent bias. If the Tribunal accepted that a complaint had been made by the Appellant then to an impartial observer there would be a risk of apparent bias. The Appellant could not say that there was actual bias. The question was whether or not an impartial observer standing back could say there was a risk that there might have been bias.

Mr Hastie submitted that the actual state of knowledge of Mr A was irrelevant. The Tribunal required to look at what happened 12 years ago to consider if there was a perception of a risk of bias.

The Chairman asked Mr Hastie to clarify from page 5 of the Record whether all of the items listed were being relied upon in connection with the question of bias or whether it was just the M's criminal and matrimonial matters.

Mr Hastie explained that the other things mentioned suggested that if they had happened then it was not simply the case that Mr A only knew the Appellant as a solicitor in the town. That raised the question of why Mr A was hiding these other matters.

He invited the Tribunal to look at all of the circumstances and to draw the appropriate inferences from them.

Moving onto the second sub heading of the Appeal and the question of whether or not the complaint was proved on the evidence, Mr Hastie indicated that this required to be split into two elements.

The first element related to the actual wording of the complaint made. In his submission the complaint made was that the Complainer had been described as "the lead (and only) partner" in the tender. He referred to pages 3 and 4 of the Sub Committee's decision. The complaint had originally been made against the firm generally. As a result of the Appeal the complaint was recast against individuals. The Sub Committee make reference to the SLCC case and what the Inner House had concluded at paragraph 25 of their decision.

Mr Hastie emphasised that in this case the Sub Committee, and Tribunal, were dealing with a complaint framed by a solicitor and not a lay person. The words "and only" required to be read in conjunction with "lead". The words "and only" appeared in brackets, so they must be taken to be a qualification of the primary position. The Chairman asked Mr Hastie whether the use of the word "lead" had any technical meaning. He asked if it could be said that if there was only one partner listed then he could be described as the lead.

Mr Hastie submitted that the Tribunal require to refer to the tender itself. The tender itself makes reference to a lead person. This has the clear connotation that this is the person to go to first. The Complainer was not designed as such within the tender. Nor was he designed as a lead partner. Ms B was designed as the lead person to whom the client required to go in the first instance. The Sub Committee specifically find in their decision that the Complainer was not described as the lead partner in the tender. In all of the other teams the lead person was a partner. In this case the team was different. The Tribunal had to consider the terms actually used within the tender and how the tender used the word "lead".

Mr Hastie submitted that there was an error in law. If the complaint was that the Complainer was designed as lead partner, and the Sub Committee decided that he was not so described then the complaint could not be sustained. He referred to the schedule of the Sub Committee at page 7 where the Sub Committee said it was

satisfied as a matter of fact that the tender did not described the Complainer as lead partner of the core team.

The second issue of the sub heading of the Appeal relates to whether or not there was a misrepresentation. This was the third ground of appeal. The second part of Complainers' complaint was that he had been suspended and that the tender had misrepresented the position. He indicated that there were two sides to this. The first was that the Tribunal had to consider the Appellant's knowledge at the time that the tender was signed off. In Mr Kidd's appeal against the SLCC decision the Inner House suggested that the essential question was whether there was no realistic prospect of Mr Kidd returning to work. At the time the tender was signed off by the Appellant what was his position and what was the Appellant's state of knowledge? The Sub Committee had evidence before it to the effect that Mr I had discussed with the Complainer in March and April that he would become a consultant. Mr I accepted that he preferred the position that the Complainer not return at all. Mr I was the senior partner and Mr D was the managing partner. Mr Strain's knowledge of the situation was relayed to him by these two people. In advance of the tender the Appellant and Ms H had attended the meeting in March. When the tender was being signed off Mr I had reported to the Appellant that there were discussions of a consultancy agreement whereby the Complainer might have returned. Mr Hastie referred to Production 20 for the Appellant, a letter from Mr I dated 14 November. The Appellant's evidence was that he was told that at the very least the consultancy was being discussed. Therefore the Appellant was not able to say that there were no realistic prospects of Mr Kidd returning to the firm. This was a complaint against the individual and not the firm so the individual state of knowledge was important.

Mr Hastie submitted that the Tribunal also had to consider the question of whether, if the tender was a misrepresentation, whether the client was actually misled. The Appellant and the colleague had had a meeting with the client to discuss the Complainer's situation. The reporter to the Sub Committee approached Ms J, an employee of the client, to ask her recollection of the situation. She had responded that she did not think that she had left that meeting with the clear understanding that Mr Kidd was not returning to work. This would be consistent with the Appellant's position that he had stated that it was not clear when or if the Complainer was coming back. The Sub Committee appeared to have proceeded on the basis that this individual made an assumption that the Complainer would return. That was not an assumption

she could have made on the basis of the meeting. The Appellant's colleague also attended the meeting who gave a statement which was Production 80. There was no basis on which it could be said that when the tender was submitted the client was misled.

Mr Hastie submitted that there was no evidence that it was clear to the firm that the Complainer would not be available to undertake work. The Complainer had been off sick and then there were discussions of the possibility of a consultancy. If the Complainer had wanted to return he could have done so and that was reflected in the partnership agreement.

On the information the Appellant had at the time of the tender it was not a conclusion that he could have made, that the Complainer would not return to the firm.

The Chairman asked Mr Hastie what inferences the Tribunal could draw from the notice that had been served by the firm that required an 80% support from the partners. Mr Hastie responded that this was simply the first stage of a procedure which was engaged simply to encourage negotiation. By April the firm had not gone on with the procedure and Mr I was having discussions with the Complainer regarding the possibility of returning as a consultant.

The Chairman asked if it was significant that the Complainer would return as a consultant rather than as a partner. Mr Hastie responded that that was not the Sub Committee's finding. The Sub Committee finding was that he would not be able to undertake any work. In Mr Hastie's submission it was the Appellant's state of knowledge that was relevant. The finding of the Sub Committee was not supported by the evidence and they had evidence before them which they had not taken account of regarding the question of consultancy.

The question of whether or not there had been a misrepresentation rested on the state of knowledge of the Appellant at the time of the tender.

The Chairman asked Mr Hastie what the consequence would be if the Tribunal accepted that there was no chance of the Complainer returning as a partner but that he might return as a consultant. Mr Hastie responded that the Tribunal required to look at what the person was at the time of the tender. The tender required to be submitted in

the terms that existed at the time. The issue was whether or not there was no realistic prospect of him returning to work. The essential question was the Appellant's state of knowledge at the time.

The third and final part of the Appeal was whether or not the findings of the Sub Committee amounted to unsatisfactory professional conduct. This was reflected in grounds 5 and 6 of the Appeal. Mr Hastie submitted that the findings in fact made by the Sub Committee did not satisfy the test. It was accepted that the Complainer was not described as lead partner. It was accepted that the Appellant and his colleague had gone to meet the client in advance. It was accepted that the client had no clear recollection. It was accepted that the partners did not want the Complainer to return to work. It was accepted that there might be further problems if the firm excluded the Complainer. It was accepted that there was no deliberate or reckless attempt to mislead the client.

If the Tribunal take these conclusions together with the Appellant's evidence of discussions with Mr D then there was an attempt to keep the client informed of as much as they could at the meeting. Then at the time of the tender the senior partner had made the Appellant aware of discussions regarding consultancy. It was difficult to say that what the Appellant did as an individual could not be expected of a reasonably competent solicitor. What he did was as much as he could. The Sub Committee concluded that there was no deliberate or reckless misrepresentation.

The Chairman asked Mr Hastie if that did not reflect the Sharp Test rather than the test for unsatisfactory professional conduct. Mr Hastie responded that the conduct was not inadvertent. The Appellant was not involved in the discussions with the Complainer. He had discussed the matter with the senior partner and the managing partner and had presented the positon as competently as he could.

SUBMISSIONS FOR THE RESPONDENT

Mr Knight confirmed to the Tribunal that he had nothing to add to his written submissions which were as follows:-

"A Complaint was remitted to the Respondents by the Scottish Legal Complaints Commission. The Complainer was a David Kidd. Following the Respondents initial

investigations, a report was produced by a Complaints Investigator (no. 1 in the Appellant's bundle). It recommended that no action be taken and comments were then invited from the parties. There were a significant volume of those and a supplementary report was produced by the Complaints Investigator on 4 September 2013 (no. 5 in the Appellant's bundle) and the recommendation remained that no action be taken.

The matter was then placed before the Professional Conduct Sub-Committee (PCC) on 10 October 2013 (no. 7 in the Appellant's bundle) and the PCC continued determination of the Complaint as it sought additional information from the alleged affected client, in this case the Scottish Children's Reporter's Administration (SCRA).

Further documentation was received including an email from the SCRA dated 18 July 2013 (page 75 in no. 4 of the Appellant's bundle).

The Complaint then came back before the PCC at a meeting on 14 November 2013, which meeting we are concerned about in this Appeal. They determined that the test for unsatisfactory professional conduct was met and their Determination was confirmed in a Schedule which runs to some ten full pages (no. 1 in the Appellant's bundle).

The Schedule details their deliberations and findings and it is not, *prima facie*, a short cursory document. In particular, it summarises their findings in relation to the Appellant's conduct at pages 6 to 9. It details all of the information the PCC had available and details all the documents that it considered. All the documents available in hard copy format have now been lodged by the Appellant in this Appeal. They run to some 380 pages.

It is submitted therefore that it cannot be suggested that the PCC did not consider all the relevant material that it had to arrive at its conclusion.

It appears to be suggested by the Appellant that the decision was inherently wrong. The question that has to be asked is what is inherently wrong with that decision and the answer to that question is nothing.

Section 42ZA(9) of the Solicitors (Scotland) Act 1980 narrates that where "a solicitor in respect of whom a determination upholding a conduct complaint has been made…may appeal to the Tribunal against the determination…"

The test for unsatisfactory professional conduct is narrated within Section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 namely "….professional conduct which is not of the standard which could reasonable (sic) be expected of a competent and reputable solicitor….but which does not amount to professional misconduct and which does not comprise merely inadequate professional services…."

The powers of the Tribunal on appeal in a matter such as the present are set out in Section 53ZB of the Solicitors (Scotland) Act 1980. The Respondents would invite the Tribunal to confirm the determination being appealed against in terms of Section 53ZB(1)(a).

In respect of the Grounds of Appeal, the first ground in that the determination is tainted on the ground of apparent bias. It is submitted that that ground is without foundation either in fact or in law.

The test is set out in *Porter –v- Magill 2001 UKHL 67*. That test is:- "…whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.".

It is clear therefore that all the facts have to be considered and that the possibility has to be a real possibility. There is an increased emphasis on the issue of possibility.

That same test was approved in *Gillies –v- Secretary of State 2006 SLT 77* which was a matter concerning a Disability Tribunal.

It was also approved in *Robson –v- The Council of the Law Society of Scotland 2006 SLT 244* when questions were raised about the impartiality of this Tribunal.

It necessarily follows that to apply the test in this matter the facts need to be considered and the evidence tested.

It is submitted that in respect of the Appellant, he was neither credible nor reliable in giving evidence to this Tribunal. That is to be contrasted with Mr A's evidence who was open, direct and both credible and reliable. The Tribunal is accordingly asked to prefer the evidence of Mr A where any conflict arises between that evidence and the evidence led on behalf of the Appellant.

The Appellant has produced four differing versions of his position in this process. Only somewhat latterly in the process when he was finally pressed to state the full reasons for his allegations of bias did he produce the version involving the complaint about Mr A's client, Mr M. Only then did he point to that matter being the catalyst to the breakdown in their purported relationship.

Under cross-examination by the Tribunal and on behalf of the Respondents, the Appellant told the Tribunal that the complaint which he wrote on the instructions of Mr C about the actings of Mr A on behalf of Mr M, and the response which he received to that letter of complaint, was the matter which gave rise to Mr A acting in a biased manner towards the Appellant. The Appellant's belief was that Mr A had held that against him for a period of approximately twelve years until his complaint came before the Committee in November 2013 and that Mr A influenced the outcome of that Committee Meeting.

In response to a direct question in cross-examination the Appellant responded that Mr A's umbrage at the Appellant's complaint was the reason that he influenced the Committee's decision.

He was asked if there were any other circumstances which occurred that led him to believe that there was bias and he responded that the sole circumstance was the complaint.

Mr A denied that there had been any complaint. There had been no letter received by him and no response issued by him either. He described the suggestion that he had acted in a biased manner towards the Appellant as nonsense and preposterous.

In support of his allegation, the Appellant called Mr C. He was it is submitted of little assistance. He described himself as a "mouth-piece" which in this instance was an accurate description of his evidence. He indicated that to the best of his recollection

he was almost certain he saw a letter of complaint but he could put it no higher than that.

Perhaps more significantly, the Appellant did not seek to call as a witness on his behalf the client upon whose behalf this complaint was allegedly made. Mr M is apparently still residing and working in Area 1 and would be readily traceable and available. No explanation was given as to why he was not in attendance to give direct evidence on this issue. No copies of the purported letters were produced either. Taking in isolation these two matters, it is submitted that the Appellant's account is not credible, but the other matters referred to provide further support that the Appellant's account is not credible.

The Appellant has produced a number of versions of events for the Tribunal. Up until the allegation regarding Mr M was added this ground of appeal was advanced on weak and bald averments that he had reason to believe Mr A did not care for him. That was a poor attempt to support these allegations and only when he was finally pressed did he eventually come up with the latest and final story regarding Mr M. It is curious and indeed incredible, that if the Mr M's matter was the catalyst to the breakdown of any relationship, that that was not the first issue which was raised when this ground of appeal was originally lodged. It is as if the Appellant realised he did not have enough material to support his argument, added slightly more each time he was asked to, and then eventually added something which was perhaps more serious and substantive and which might support the ground which he still seeks to advance.

It is submitted therefore that the Appellant has failed to produce any facts whatsoever which support his contentions here and the Tribunal is therefore invited to reject in their entirety the factual matters led in evidence by the Appellant. There is accordingly nothing of any substance that would allow the Tribunal to conclude that there was a real possibility of bias in this matter.

The remaining grounds of appeal placed before the Tribunal in this matter are essentially contentions that the Respondents erred in law.

The determination is produced and it sets out in detail the reasons for that determination and the view that the Committee took regarding the wording of the complaint.

The Committee considered all of the facts and circumstances and all of the material available.

In addition, the Committee was entitled to take cognisance of the terms of the Judgment in the case of *Kidd –v- Scottish Legal Complaints Commission 2011 CSIH 75* and in particular at paragraph 14 of that Judgment. The comments in that paragraph are certainly persuasive and there is no error in law on the part of the Committee in taking into account, along with all other material and facts available, the terms of that Judgment.

As averred in Answer 1 to the Appeal at page 13 of the Appeal print at paragraphs A-C, the decision was reached after a full consideration of all relevant facts and material and was one which a reasonable Committee was entitled to reach in the whole circumstances.

The Tribunal is invited to adopt a similar approach to that which the Tribunal took in the case of *Matheson –v- Council of the Law Society of Scotland* which is a determination of this Tribunal dated 3 April 2014. In that matter the Respondents were said to have given insufficient weight to certain facts, failed to address what was a reasonable approach and therefore come to an incorrect conclusion. In that matter the Respondents had carried out a full investigation and issued a determination. The Tribunal held at page 27 of its judgment that there were no defects in the detailed reasons given by the Committee.

It is submitted that that is also the position in this matter.

The Appellant also challenges the level of the fine and sanction imposed upon him. The Respondents would simply address that by indicating that it was not unreasonable nor excessive in the circumstances. In any event the Appellant fails to aver any basis upon which the sanction imposed was either unreasonable or excessive.

Finally, in relation to the issue of expenses, the Respondents would suggest that the issue of expenses will only be capable of being advanced as and when the Tribunals decision on the substantive matters is known. If the appeal is refused in its entirety, the Respondents would seek an award of expenses. If the Tribunal determines to

uphold any part of the grounds of appeal there may be submissions to be made on that partial success."

The Chairman asked Mr Knight what his position was in relation to the question what was a lead (and only) partner. Mr Knight suggested that a lead partner would be one who led the team on a piece of work. He would be the team leader but not necessarily the person delivering the service. He submitted that the client had instructed Biggart Baillie for a considerable period of time. The Complainer had been the partner in that field. He remained in the tender. The question was whether there was a misrepresentation in this document and whether the Appellant knowingly signed up to that misrepresentation.

The Chairman asked the Fiscal if the Tribunal was bound by the precise words used by the Complainer.

Mr Hastie suggested that there was no leeway as this complaint had been drafted by a lawyer and required to be looked at restrictively.

Mr Knight submitted to the Tribunal that the Sub Committee could not add to the complaint but they could "tweak" the complaint, water it down and uphold the core allegation. He submitted that the essence of the complaint here was if the intent was an actual misleading of the client in whether the intention was to tell the client that the Complainer was going to still be a partner when he was not. They all knew that he was not going to be a partner but that the consultancy was perhaps a half way house and none of that was communicated to the client. The focus of the complaint is the misrepresentation and the terminology of it only is only semantics and not a knock out blow to the complaint.

Mr Hastie responded that there was no evidence that "they all knew that he was not going to be a partner." At page 4 of the Sub Committee schedule they say that they cannot amend the complaint and are bound to investigate. This matter originated as a complaint before the SLCC which was refused. Clarification was given in the Appeal to the Inner House at paragraph 41. Clarification comes when the complaint is remitted to the Law Society. The matter was distilled before it went to the Law Society. That was what the Law Society required to investigate and report upon. Mr Knight then indicated to the Tribunal that he had found reference to the case of

Bolton-v-The Law Society suggesting that the primary purpose of proceedings was to protect the interests of the profession and the public and that semantics should not be something that the Law Society or the Tribunal should get involved in. He conceded he could not find the details for this case.

He submitted that the Committee were entitled to look at the wording of the complaint and ask whether the status of the Complainer allowed them to uphold the complaint. They concluded that the Complainer would never be a partner in the firm providing the services outlined in the tender where he was the only partner listed.

DECISION

The Appellant in his submissions to the Tribunal had split the Appeal into three elements. This first element was the question of whether there had been apparent bias on the part of a member of the Sub-Committee. The second was split into two sub elements, the first being that the Complaint was that the Complainer had been described as the "lead (and only) partner" when in fact he had not been and the second being that the Complaint was that there had been a misrepresentation when in fact there had not been. The third element of the Appeal was that even if the Complaint itself was proved, what was proved did not amount to unsatisfactory professional conduct.

With regard to the second element of the Appeal, the Tribunal accepted the explanation for the basis of the tender given in evidence by the Appellant, and supported by reference to documentary productions. On that basis the Tribunal was able to make Findings in Fact 19.1 to 19.4 above.

The crux of the Complaint taken by the Sub-Committee, and by the Fiscal in his submissions to the Tribunal, was whether or not the content of the tender amounted to a misrepresentation to the client. In their decision the Sub-Committee accepted that the tender had in no way described the Complainer as the "lead" partner. He was however factually the only partner listed in the core team. The Sub-Committee referred to the Inner House Decision of Kidd-v-Scottish Legal Complaints Commission [2011] [CSIH75] at paragraph 14 and placed the emphasis on the question of whether or not the tender represented the applicant to the client as a

partner available to provide legal services where in reality there was no prospect of his ever becoming so available.

Factually, the Complainer remained a partner of the firm, although he was suspended from entitlement to share in the firm's profits. The evidence before the Sub-Committee and amplified before the Tribunal, was that negotiations between partners of the firm continued with the Complainer which included the possibility of a consultancy.

The clients themselves had not suggested that they were misled by the content of the tender.

The Complaint was directed specifically towards the Appellant and the question therefore was whether the Appellant had misrepresented the circumstances within the tender. The Tribunal accepted the Appellant's evidence that at the time the tender was completed he had been advised that negotiations were ongoing with the Complainer that included the possibility of a consultancy. If that was the position, could it then be said that, in relation to the state of knowledge of the Appellant at the time, in reality there was no prospect of the Complainer ever becoming available to provide legal services?

In their Decision the Sub-Committee indicate that the Complainer had been suspended from working at the firm. The evidence before the Tribunal, and in part before the Sub-Committee, was that the Complainer had been suspended from entitlement to share in the firm's profits. The Sub-Committee appear to have had little or no regard to the possibility of the Complainer becoming a consultant.

The Complaint considered by the Sub-Committee appeared to be whether or not the tender had contained a misrepresentation. The Sub-Committee in their deliberations accepted that there was no deliberate or reckless misrepresentation on the part of the Appellant. The Tribunal accepted that the relevant issue was the state of knowledge of the Appellant at the time of submitting the tender. The Tribunal accepted the Appellant's evidence that he had been advised that negotiations were taking place that included the possibility of a consultancy. That being the case the Tribunal were unable to say that the Appellant in including the Complainer in the core team list had

done so where he was aware that there was no prospect of the Complainer ever becoming available to provide the core services.

The Tribunal concluded that the Appellant's conduct as described in his evidence supported that the content of the tender reflected the Appellant's state of knowledge at the time. That being the case, the Tribunal concluded unanimously that unsatisfactory professional conduct was not made out.

On that basis, the Tribunal unanimously decided to Quash the Determination and Direction of the Council of the Law Society of Scotland.

With regard to the issue of bias, the Tribunal, in its deliberations, had been unable to reach any decision, either unanimously or by majority. In the circumstances, given that the Tribunal accepted the argument that no misrepresentation had in fact been made, it was not considered necessary to have further regard to that ground of Appeal.

Nor did the Tribunal consider it necessary to consider the question of moderating the language of the actual Complaint made, given that the Tribunal did not accept that the Complaint was made out, even in the terms referred to by the Sub-Committee.

The parties were invited to address the Tribunal with regard to the question of expenses. Mr Hastie moved for an award of expenses insofar as not already awarded in the proceedings. Mr Knight invited the Tribunal to restrict any additional award of expenses to today's hearing and other hearings not including the 5th of March. He submitted that the only evidence that required to be led was in relation to the question of bias which had not been made out.

Mr Hastie argued that expenses should follow success and that the evidence led included evidence relating to grounds other than the question of bias.

Having regard to the submissions made, the Tribunal considered it appropriate to award the expenses of the case to the Appellant, subject to any award of expenses previously made, and modified by 20%.

Mr Hastie then asked the Tribunal to certify the case as appropriate for Junior Counsel. He indicated that the case was one that was difficult, complex and sensitive.

Matters had been made more difficult by the fact that the Appellant was not in the country and consultations became more difficult. He submitted that the law on the matter was not settled and therefore it was appropriate to certify the case as suitable for Junior Counsel. Mr Knight opposed this motion arguing that there was nothing unduly novel or complex about the case. He asked the Tribunal to have regard to the fact that the instructing agent was in fact a Solicitor Advocate.

The Tribunal considered the submissions. It concluded that there was nothing complex, difficult or novel in relation to the matters raised. It was therefore not appropriate to certify the case as suitable for Junior Counsel to be instructed.

The usual order regarding publicity was made, to include the earlier decision of 19 August 2014.

Alistair Cockburn

Chairman