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

F I N D I N G S

in Complaint

by

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

Complainers

on behalf of

REX PROPERTY DEVELOPMENTS LIMITED, 5 Woodhead Gardens, Bothwell

Secondary Complainers

against

DAVID ROBERT LINGARD, Director, Leonards Solicitors Limited, 133 Cadzow Street, Hamilton

Respondent

1. A Complaint dated 5th March was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") on behalf of Rex Property Developments Limited, 5 Woodhead Gardens, Bothwell (hereinafter referred to as "the Secondary Complainers") requesting that, David Robert Lingard, Director, Leonards Solicitors Limited, 133 Cadzow Street, Hamilton (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

2. The Tribunal caused a copy of the Complaint as originally lodged to be served upon the Respondent.

3. In terms of its Rules the Tribunal appointed the Complaint to be set down for a procedural hearing on 16 May 2012 and notice thereof was duly served on the Respondent. The Law Society were represented by their fiscal, Paul Marshall, Solicitor, Edinburgh and the Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow. It was clarified that the majority of the facts in the Complaint would be capable of agreement and that a Joint Minute of Admissions in connection with the evidence would be lodged. There would however require to be a limited proof on the issue of ostensible authority. A further procedural hearing was fixed for 6 June 2012. On this date the fiscal for the Complainers indicated that he wished time to make adjustments to the pleadings following the Respondent's Answers. As there were also issues with regard to the health of two of the witnesses for the Complainers, it was agreed that the matter be adjourned to a date to be fixed.

4. Adjustments were made to the Complaint and a Joint Minute of Agreement in respect of the facts was lodged. A hearing was fixed for 5 July 2013. On this date the Complainers were represented by their fiscal Paul Marshall, Solicitor, Edinburgh. The Respondent was present and represented by Ian Ferguson, Solicitor, Glasgow. A Record was lodged together with the Joint Minute of Admissions. Mr Ferguson made further adjustments to his Answers and a slight amendment was made to the Joint Minute. Parties then proceeded to lead evidence from witnesses in connection with ostensible authority.

5. Evidence was led on behalf of the Respondent from the Respondent, from Ms A and from Ms B.

6. The case then called again on 25 September 2013 and evidence was led on behalf of the Complainers from Mr C and from Mr D. The Tribunal

then heard submissions from parties with regard to whether or not to allow affidavit evidence of Mrs E and Mr F. The Tribunal, after consideration, allowed the affidavits to be lodged.

7. The case then called again on 14 November 2013 when written submissions from both parties were considered by the Tribunal Having considered the written submissions and the oral submissions made by both parties, the Tribunal found the following facts established:-

7.1 The Respondent was enrolled as a solicitor on 25 August 1977. On 17 June 1985 he became a partner in the firm of Leonards Solicitors, 133 Cadzow Street, Hamilton, ML3 6JG ("the Partnership"). On 21 February 2008, he was appointed as a director of Leonards Solicitors Limited, a company incorporated under the Companies Acts and having a place of business at 133 Cadzow Street, Hamilton, ML3 6JG ("Leonards"). He is the sole director of Leonards. On 31 October 2008 the Partnership was dissolved.

7.2 The sole directors of the Secondary Complainer are, and have been since incorporation, Mr F and his wife, Mrs F. At the date of incorporation Mrs G was the Secondary Complainer's company secretary and continued in that role until 1 February 1995, when she resigned and her daughter Mrs E was appointed as the company secretary. The Secondary Complainer has been a client of the Respondent for approximately 30 years.

7.3 Mr and Mrs F have a son, Mr C. On or around March 2005, Mr C instructed the Respondent's Partnership in connection with family matters and the agreement of aliment. Ms A was employed by the Partnership as an associate at this time. Ms A was acting on Mr C's behalf under the supervision of the Respondent at this time. Mr C instructed Leonards in connection with the preparation of a Minute of Agreement to settle the existing divorce proceedings being handled by another

Firm on behalf of Mr C in an attempt by Mr C to reduce further legal costs being incurred by him to that other Firm.

The Respondent was instructed by Mr C on behalf of the Secondary Complainer in connection with: the purchase of a warehouse and offices at property 1 in 2002; advice regarding Company 1 (in provisional liquidation); a lease of a ground floor factory premises at property 2 in 2006/2007; and the purchase of property 3. The Respondent was instructed by Mr C on behalf of the Secondary Complainer to pursue Company 2 for outstanding rent. The Respondent was also instructed by Mr C in connection with a court action by Company 3 – this was a court action against Company 4, a company owned and operated by Mr C and not connected to the Secondary Complainer.

7.4 On or around 20 November 2008 the Secondary Complainer instructed the Respondent in connection with the purchase of a property at property 3 ("the property") from Company 5. The Respondent received initial instructions to act on behalf of the Secondary Complainer in relation to this transaction from Mr C. Mr C is not an officer of the Secondary Complainer. The Respondent submitted a first offer for the property on behalf of the Secondary Complainer. On 24 February 2009 Mrs E instructed the Respondent to withdraw the first offer and to make a second offer on revised terms. Mrs E's instructions were contained in an email to the Respondent dated 24 February 2009. The Respondent received instructions to act on behalf of the Secondary Complainer in relation to this transaction from Mr C. The Secondary Complainer has been a client of the Respondent for approximately 30 years. Over most of that period all instructions with a singular or double exception were given to the Respondent by Mr C acting as an agent of the Company and this resulted in him being an agent having

ostensible authority as evidenced by the Respondent being instructed by the said Mr C in connection with the transactions as set out in paragraph 7.3

7.5 Company 5 instructed Biggart Baillie LLP in connection with the sale of the property. Leonards and Biggart Baillie concluded missives for the sale of the property on 27 February 2009. The missives comprised Leonards' offer dated 20 November 2008, Biggart Baillie's qualified acceptance dated 1 December 2008, and Leonards' formal letters dated 9 and 26 February 2009.

7.6 It was a condition of the sale of the property that from the Date of Entry of 27 February 2009 the Secondary Complainer would lease the property to Company 5 for a period of up to two years at a rent of £27,500 per annum. The formal letter from Leonards to Biggart Baillie dated 9 February 2009, at qualification 5, provides:-

"*On the date of entry a sum equivalent to 18 months rent shall be paid by your clients to this firm. One quarter's rent shall be paid by us to our clients and the remainder of the sum shall be lodged in a bank account with the Royal Bank of Scotland in joint names of our firms. Withdrawals from the account to cover ongoing rent shall be made as that falls due and shall be paid to our clients. Interest generated shall belong to your clients*."

7.7 One quarter's rent together with VAT amounted to £7906.25. Leonards opened a joint account with Biggart Baillie in trust for the Secondary Complainer on 27 February 2009 ("the joint account"). On receipt of the equivalent of 18 months' rent from Biggart Baillie, Leonards paid the first quarter's rent immediately to the Secondary Complainer and deposited the

remaining sum of £39,531.25 equivalent to 15 months' rent into the joint account.

7.8 It was agreed that the rent would be paid quarterly in advance. Reference is made to the terms of a draft lease annexed and signed as relative to Leonards' formal letter of 26 February 2009. Clause 4 of said draft lease provides:-

"*the Tenant undertakes to pay to the Landlord: Rent payable without any deduction by equal quarterly payments in advance on Twenty seventh February, Twenty seventh May, Twenty seventh August and Twenty seventh November*."

7.9 In accordance with the missives and the terms of the draft lease, the rent due to be paid to the Secondary Complainer for the period 28 August 2009 to 27 November 2009 was £7,906.25. On 14 August 2009 this sum was withdrawn by Leonards from the joint account. The Respondent was Leonards' designated cashroom partner at this time. This quarter's rent of £7,906.25 was not paid in full by the Respondent to the Secondary Complainer. On 14 August 2009 Ms A telephoned Mr C. Ms A advised that Faculty Services fees in the sum of £3,757.50 incurred in connection with Mr C's aliment instructions remained outstanding, Mr C's aliment case was scheduled to call at Airdrie Sheriff Court the following day, 15 August 2009. Ms A advised that these Faculty Services fees required to be settled prior to the date of the hearing. Mr C asked to be transferred to Leonards' cashier, Ms B. He instructed Ms B to take payment of the outstanding Faculty Services fees from the joint account. The directors and the company secretary of the Secondary Complainer were not made aware by the Respondent that this payment was taken from the joint account at that time. The Respondent did not obtain written consent on behalf of the Secondary Complainer to withdraw this sum from the joint account. In a letter of 14 January 2010 to the Secondary

Complainer's agents, the Respondent confirmed that the sum of £3,757.50 was withheld from the rental payment due to the Secondary Complainer. In said letter the Respondent claimed that Mr C requested that the rent money be used to pay fees due to Faculty Services. The withheld funds were used to pay outstanding solicitor's fees owed by Mr C to Leonards and outstanding Faculty Services fees incurred by Leonards on behalf of Mr C in the matter "SHE 1240(7) Mr C v Ms G". In a letter of 22 January 2010 to the Secondary Complainer's agents, the Respondent enclosed copies of two Faculty Service fee notes dated 2 August 2009 and 22 October 2009 totalling £3,757.50 which were settled using the withheld funds. In said letter the Respondent confirmed that no invoice was issued to the Secondary Complainer in respect of the outstanding Faculty Service fees. These Faculty Services fees were owed personally by Mr C. These fees had no connection with the services provided by the Respondent to the Secondary Complainer. The Respondent was verbally authorised by Mr C to withhold of the said sum of £3757.50 and use it to pay fees due to Faculty Services Limited.

7.10 In accordance with the missives and the terms of the lease, the rent due to be paid to the Secondary Complainer for the period 28 November 2009 to 27 February 2010 was £7,906.25. On 16 November 2009 this sum was withdrawn by Leonards from the joint account. The Respondent was Leonards' designated cashroom partner at this time. The withheld funds were used to reduce the sums due to Leonards in terms of the invoices previously issued to Mr C as an individual. In a letter of 29 January 2010 to the Secondary Complainer's agents, the Respondent enclosed copies inter alia of two invoices dated 21 April 2009 and 7 August 2009 totalling £11,338.20. These invoices were issued to the Secondary Complainer after the conversation between the Respondent and Mr C resulting in his

undertaking that they would be paid by the company. The solicitor's fees contained in the invoices originally issued to Mr C were owed personally by Mr C and had no connection with the services provided by the Respondent to the Secondary Complainer. The Secondary Complainer became liable to pay the aggregate value of those invoices in consequence of the gratuitous promise made on their behalf by Mr C as their agent. The directors and the company secretary of the Secondary Complainer were not made aware by the Respondent that this payment was taken from the joint account at that time. The Respondent did not obtain written consent on behalf of the Secondary Complainer to withdraw this sum from the joint account.

7.11 As a result of the Respondent's acts or omissions, during the rental period 28 August 2009 to 27 February 2010, Leonards withheld the total sum of £10,393.40 from rental income due to the Secondary Complainer in order to pay solicitor's fees due by Mr C to Leonards and Faculty Services fees incurred by Leonards on behalf of Mr C. No fee notes were received by any officer of the Secondary Complainer in respect of the solicitor's fees and Faculty Services fees incurred by Mr C to Leonards. The Respondent has been called upon by agents acting for the Secondary Complainer to repay the sum of £10,393.40 owed to the Secondary Complainer in correspondence dated 1 February 2010, 16 March 2010 and 18 March 2010. The Respondent refused or delayed to do so. After inspection by the Law Society of Scotland the Respondent met with the Guarantee Fund Committee ("GFC"). The Chairman of the GFC confirmed that they could not interfere with the complaint process but recommended that the Respondent should open a special account in wording they suggested and put the sum of £10,393.40 into it awaiting resolution of the contractual dispute and this complaint. The Respondent corresponded with the

> Financial Compliance Department and complied with that request and the sum of £10,393.40 was placed in an Account awaiting resolution of the contractual dispute and this complaint. On 27 June 2012 the Respondent's agents wrote to the Secondary Complainer's agents enclosing a cheque made out to the Secondary Complainer in the sum of £10,399.54 representing the outstanding £10,393.40 together with interest of £6.14.

8. Having very carefully considered the evidence and the written submissions lodged by both parties and oral submissions made by the Fiscal for the Law Society and the Respondent's representative, the Tribunal found the Respondent not guilty of professional misconduct but considered that the Respondent's conduct may amount to unsatisfactory professional conduct and the Tribunal accordingly remit the Complaint to the Council of the Law Society in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

9. Having heard parties on publicity and expenses, the Tribunal pronounced an interlocutor in the following terms:-

> Edinburgh 14 November 2013. The Tribunal having considered the Complaint dated 5 March 2012 as adjusted on 29 August 2012 at the instance of the Council of the Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh on behalf Rex Property Developments Limited, 5 Woodhead Gardens, Bothwell against David Robert Lingard, Director, Leonards Solicitors Limited, 133 Cadzow Street, Hamilton; Find the Respondent not guilty of Professional Misconduct; Remit the Complaint in terms of Section 53ZA to the Council of the Law Society of Scotland; Find the Respondent liable in 50% of the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last

published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent.

(signed)
Alistair Cockburn
Chairman

10. 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 Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

The case, after procedural hearings, called for a substantive hearing on 5 July 2013.

Mr Marshall referred to the Joint Minute of Agreement which had been lodged and submitted that on the basis of what had been agreed, the Tribunal would be able to make a finding of professional misconduct in respect of the fact that the Respondent took money from Rex Property Developments Limited to pay money due by Mr C personally without any written consent from the company and in breach of the Accounts Rules. The Respondent also took money to pay his firm's fees without rendering a fee note to Rex Property Developments Limited. This put him in a conflict of interest situation because he put his personal interests in obtaining the firm's fees above the interests of the client being Rex Property Developments Limited. Mr Marshall explained that the Respondent admitted the facts but submitted that they did not amount to professional misconduct because he was entitled to take the money as he had ostensible authority from the company at the material time. In the circumstances parties agreed that the best way of dealing with the matter was firstly to hear evidence on whether or not ostensible authority existed in these circumstances.

The Chairman pointed out that it might be necessary to find out whether or not the Respondent thought he had ostensible authority as well as whether he did in fact have ostensible authority. The Chairman also clarified with Mr Marshall that the Law Society were only reserving the right to lead evidence with regard to ostensible authority and nothing else. Mr Marshall agreed that he would restrict himself to leading rebuttal evidence in connection with ostensible authority.

Mr Marshall clarified that he would wish the Tribunal to take account of the facts in the Record and in the Joint Minute of Agreement. Mr Ferguson submitted that the Record was misleading because he had not adjusted his Answers in response to the Complainers' adjusted Complaint. The Chairman enquired of Mr Marshall as to what was in the Record that was not in the Joint Minute. Mr Marshall was unable to provide this clarification. The Chairman accordingly gave Mr Ferguson an adjournment in order for him to consider what amendments required to be made to the

Record and which averments in the adjusted Complaint were not admitted by the Respondent.

After the adjournment, it became clear that the admission by the Respondent in paragraph 9.2 of the Joint Minute of Admissions that no fee notes were rendered to the Secondary Complainers in respect of the solicitor's fees and Faculty Services' fees incurred by Mr C to Leonards was not in fact correct.

Mr Ferguson advised that Mr C was in attendance and that he may be able to give evidence with regard to fee notes being sent to him at his address. The Chairman allowed Mr Marshall an adjournment to consider whether or not he felt his position was prejudiced by the suggested amendment. After the adjournment Mr Marshall stated that Mr C would be able to give evidence with regard to whether or not he received invoices but not in connection with whether anyone else in the Secondary Complainer's office did.

After discussion, it was agreed that Article 9.2 of the Joint Minute be amended to read "no fee notes were received by any officer of the Secondary Complainer in respect of the solicitor's fees and Faculty Services' fees incurred by Mr C to Leonards".

Mr Ferguson then proceeded to lead his evidence.

EVIDENCE ON BEHALF OF THE RESPONDENT

EVIDENCE FROM THE RESPONDENT

Mr Lingard stated that he had acted for the company since 1980 when Mr C. was 18. At the outset he received instructed from Mr F but as he got older he started to receive instructions from the son. He had not had significant contact with other members of the family although he occasionally received instructions from Mrs E. Mr Lingard however clarified that over the last 20 years his instructions had mainly come from Mr C. He clarified that Mr F was now in his 80's. Mr Lingard explained that the family ran a family business which originally dealt with renting out slot machines and he acted in the recovery of debts and also for personal matters in connection with

buying houses etc for members of the family. He detailed seven matters where he had acted for the company. In these matters he was instructed on behalf of the company by Mr C. Mr C also had his own company called Company 6. Mr Lingard also explained that he last seen Mr F nine years ago and had not seen Mrs E since 1995.

Mr Lingard stated that he understood that Mr C was the mouthpiece of the company. He indicated that he knew he was not a Director because every now and then he would have to get members of the family to sign documentation. Mr Lingard stated that he was in no doubt that Mr C regularly consulted the company for instructions. Letters to the company were sent to Mr C at the premises in property 1. He explained that the company acquired factory premises in property 1 and had two or three units in a row. The registered office of the company was at Mr F's house.

In connection with the third unit acquired at property 1, there were negotiations through DM Hall and there was an issue with the sellers being a training company which had financial problems. They needed the premises to trade so the company bought the premises but allowed the sellers to be tenants. Because there was doubt about whether or not the sellers would be good for the rent, Mr C stated there should be a 12 month lease. Then Mrs E phoned and stated that the family wanted an 18 month lease and matters had to be redone. It was the condition of the contract that two years rent be paid in advance by way of deduction from the price and lodged in a joint account and when the rent became due, money was withdrawn from the account and paid to Rex Property Developments Limited.

Mr C separated from his wife and had Mclay, Murray & Spence acting for him. He came to see Mr Lingard with his wife and told him that they had reached an agreement and asked him to do changes to the Minute of Agreement and finalise the divorce to keep expenses to a minimum. Mr Lingard explained that he said he could not act for both of them and so referred Mr C's wife to another solicitor. Mr Lingard finalised the divorce and did a Minute of Agreement. There was then an aliment dispute and a dispute in connection with the interpretation of documents which led to litigation between Mr C and his wife.

Mr Lingard explained that he passed Mr C to his associate to deal with the matrimonial matters. Mr C wanted to instruct Counsel. Mr C then did not pay Counsel's fee notes and did not pay Leonards' fees. He did try and make some payments by credit card but the payments were rejected. The fees were still outstanding. Mr Lingard's associate had concerns with regard to the non-payment and Mr C stated that his father would be prepared to help him meet the fees and outlays due to Faculty Services using the rent money. He told Ms A, the associate, the same thing. On one occasion there was a hearing the next day and Counsel's fees were still outstanding and the fees required to be paid before the court case went ahead. Mr C asked to be put through the cashier and instructed payment of Counsel's fees from the rent money. The cashier came to see Mr Lingard who stated that it was in order to do this. Mr Lingard explained that in order to uplift the rent money, there had to be a joint letter from Leonards and Biggart Baillie signed so that the bank would release the money to Leonards. This would normally be transferred to Rex Property Developments' account but this time the money for the two Faculty Services' fee notes was deducted from it first. Mr Lingard stated that he did not feel it necessary to speak to Mr F about this because he had no reason to doubt that the father had said what Mr C said he had said.

Mr Lingard explained that he had had a number of chats over the years with Mr F about Mr C who lived beyond his means and his father had had to help him out on a number of occasions in the past. Mr Lingard stated that he appreciated that he should have obtained written permission from Rex Property Developments before making the transfer but that he had acted on the verbal instructions of Mr C who was the only one who was instructing him on behalf of the company.

Mr Lingard explained that Ms A was doing work and rendering interim fees but Mr C was not making payment. Ms A was concerned about this and statements were prepared by the cashier showing how much Mr C owed. He kept saying he did not understand how the figures were arrived at. Mr Lingard stated that he told him that the situation could not go on and Mr C stated that he had spoken to his father and that the accounts should be re-rendered to the property company and he would ensure the company made payment immediately. Mr C asked him to change the narrative to the fee note to more general legal advice and he agreed to do this. Mr Lingard stated that

he realised he probably should not have done this because the fee notes were for work for Mr C as an individual.

Mr Lingard explained that Mr C did not cause the company to make payment even though he had said he would and he looked at the Accounts Rules and thought that the money could be taken from the next rent instalment. Mr Lingard explained that his position was that he had authority from Mr C on behalf of the property company to render the accounts and therefore under the Accounts Rules he was permitted to take payment of the fees from the property account in the name of the company. Mr Lingard stated that there was a misunderstanding between him and the cashier and he thought that Mr C knew that the fees were being taken but he did not in fact know. £7900 was taken to account of the outstanding fees which covered some of Leonards' fees, Counsel's fees and court dues. When Mr C came back from his holiday he went to discuss outstanding fees with him and neither of them mentioned the fact that the fees had been taken from the rent account. After Mr C left the Respondent spoke to the cashier and realised that Mr C had not been told and so he sent him an email apologising for having not spoken about it. He also phoned Mr C. He clarified that the firm would have taken the money even if Mr C had not authorised it. In the phone call, Mr C accepted it and did not object. He then sent an email saying that he wanted the money put back. Mr Lingard clarified that the email he sent was dated 27 November which was a Friday. He thinks he spoke to Mr C on the Monday and then Mr C's email was sent on Tuesday, being the 1 December. Mr Lingard stated that he did not respond to the email but there were no further discussions with Mr C about it. Mr C met with the cashroom and gave them a statement which he had prepared on which he had included the credits from Rex Property rent accounts.

It was a lot later that Mr D wrote instructed by Rex Property Developments Limited and wanted all the money returned. Mr Lingard stated that he did not feel obliged to return the money although he recently realised that his argument in connection with the Accounts Rules was flawed. Mr Lingard confirmed that the rent money had now been replaced but that Mr C owed them more than £6000. At the request of the Law Society the money had been put into a special account in trust for Rex Property Developments and the Respondent.

In cross examination, Mr Lingard clarified that he felt he was entitled to take the outlays due to Faculty Services Limited out of the rent money because he had ostensible authority from Mr C to do this. In connection with the money taken for fees, he thought the Accounts Rules entitled him to do this and Mr C authorised it retrospectively. Mr Lingard accepted that in the file note at Complainers' Production 5, no mention was made of money being taken from the company. Mr Lingard stated that this was because at this time Counsel had not even been instructed. It was much later that the instructions to take the money came. He gave Mr D the file note because it was the only thing he had in writing and it showed the general tone of the situation. Mr Lingard stated that it was only recently that Mr C accepted that he did instruct the cashier to dMs Bit the rental account as set out in the Joint Minute. Mr Lingard clarified that he accepted that Mr C had no knowledge of the second payment until after it had been taken. However he did retrospectively have ostensible authority to allow the second payment to be taken. Mr Lingard clarified that he approved the money to be taken to fees because Mr C owed the firm a lot of money and he relied on his interpretation of the Accounts Rules. He was irritated by the amount owed by Mr C. Mr C told him to render invoices to the company but the invoices had already been rendered to Mr C.

The discussion took place just before the dates that were on the invoices. It was done quickly because the firm needed the money. Mr Lingard stated that he did not have the files to provide letters showing that the invoices were rendered but confirmed that they were rendered and sent to the address on the invoice on the date that they were prepared. They were resent quickly because otherwise the firm would not have been paid. Mr Lingard referred to invoices at Production 7 being the invoices dated 21 April 2009, 7 August 2009 and 21 October 2009. He clarified that Company 4 was Mr C's own business but this company had no money and Mr C knew this. Mr Lingard stated that he did not have an attendance note with regard to his meeting and phonecalls with Mr C. The email that was sent by Mr C however did not reflect their conversation and therefore he ignored it. Mr Lingard clarified that he did not give the money back because he considered that Rex Property Developments Limited were bound by Mr C. acting under ostensible authority and due to his Accounts Rules argument. Mr Lingard stated that Mr C. provided instructions on behalf of the company. Mr C.'s father stated that he would assist his son and the father was

Director and Shareholder of the company. Mr Lingard stated that it was not much of a stretch to consider that therefore this was approved. Mr Lingard stated that Mr C. was communicating instructions from the company and the money was withdrawn from the rent account which fell within property matters. Mr Lingard stated that the ostensible authority of Mr C did extend to the taking of this money although he accepted that he should have sought written permission from the company before taking the funds.

In response to a question from the Chairman, Mr Lingard clarified that the previous invoices were sent out for the same amounts as those issued to Mr C. He stated that he was not sure if all three invoices were then sent to the company at the same time but he thinks that they were done at the same time but the dates were the original dates of the invoices. He stated he thought that they would have been sent out proximate to the emails but he could not be sure of the exact date. The invoices were prepared to go to the company between September and November 2009 and it was probably after 21 October.

EVIDENCE FROM MS A

Ms A confirmed that she is an assistant with Leonards Solicitors and that Mr C was a long standing client. Ms A stated that she undertook two matrimonial matters on behalf of Mr C. One to vary aliment and the other where Counsel was employed in connection with suspension of a charge and rectifying the Minute of Agreement. Mr C wanted to instruct Counsel but she told him that it would be expensive and he indicated that his father would help out and that family company money could be utilised. Ms A stated that she asked him for payment of fees and to account of outlays because the firm is responsible for all Counsel's fees. She discussed matters with Mr C regularly but fee notes were not paid. She would chase matters up and send a copy of the fee note plus vouching. He said that there would be no trouble paying and that the money was available from Rex Property Developments Limited and that Mr Lingard knew about it. Ms A stated that she spoke to Mr Lingard as she was concerned about the unpaid fees and outlays and wanted to check that money was actually available. Mr C had tried to pay by credit card a number of times but this had been unsuccessful.

Ms A stated that on one occasion Counsel had said that they would not appear until paid and the case was calling the next day. She spoke to Mr C and he said he would make payment through the property company and asked to be transferred to the cash department to authorise payment of Counsel's fees. She stated that her understanding was that the money would be coming from the property company. She explained that she verified that this was the arrangement and that Mr C said that his father would assist him and that the funds were in Rex Property Developments Limited's account and that they could be used.

In cross examination, Ms A stated that the rental income was held for Rex Property Developments Limited and Mr C instructed the firm on behalf of the company and told her that the firm was holding funds on behalf of the company. He asked that personal invoices for the work be rendered to the company and he stated that payment would be made immediately. She stated that she told Mr C that the fees required to be paid before the hearing the following day and that he may accordingly have felt under pressure to pay. He had however been given numerous reminders prior to this.

EVIDENCE FROM MS B

Ms B confirmed that she had been a cashier with Leonards but retired in November 2010. She had met Mr C but not the other family members. She indicated that there were outstanding fees that she chased up. Mr C was not a good payer and invoices and fee notes would be sent out and then he had to be chased up between six and ten times. She advised that she was instructed to transfer money from Rex Property Developments Limited's account to the matrimonial business. Mr Lingard gave her the instructions to transfer the money and she prepared a statement showing the transfer over to Mr C. She advised that she was on the phone to Mr C and he said that she had to transfer money from the property account and he authorised her to pay the Faculty Services account. Mr C kept coming in to the offices with statements. She advised that she prepared a statement of fees. Production 19.2 was what she prepared and sent out with copies of the fee notes and Counsel's accounts. Mr C never queried that these were shown on the statement. Mr C came into the office and had his own

statement but she did not understand it. He said that there was no problem with regard to the outstanding fees because his father's money was available in the firm.

In cross examination, she stated that Production 19.1 would have been prepared and sent out on the 27 November 2009. She stated that the only authority she had came from Mr Lingard. She did not know if she transferred matters to Faculty Services. She said that she did not know if she spoke to Mr C before transferring the money.

Mr Ferguson stated that this concluded his witnesses but he wished to lodge a Statement from Mr H whose evidence had been agreed. The Chairman enquired as to what authority he had to ask the Tribunal to receive this and how it was competent and admissible in evidence. Mr Ferguson then withdrew the Statement and stated he would call his witness on the next occasion. Alternatively the witness' evidence would be agreed and incorporated within the Joint Minute of Admissions.

The case was then adjourned part-heard due to lack of time to 25 September 2013 at 11:30am.

The case called again on 25 September 2013. Mr Ferguson stated that it had not been possible to agree the evidence of Mr H and Mr H had been unable to attend. Mr Ferguson confirmed that he had no further oral evidence to lead at this stage. He would address the Tribunal with regard to his position on Mr H's statement at a later stage.

EVIDENCE ON BEHALF OF THE COMPLAINERS

Mr Marshall called his first witness, Mr C.

EVIDENCE FROM MR C

Mr C confirmed that he was a company director and that Rex Property Developments Limited was a family company. Mr C stated that his mother and father were directors of the company and his sister, Mrs E was the company secretary. His father founded the company and ran the company. Decisions were made by all four family members.

His mother did not take an active management role. His sister was an independent financial advisor and was able to sign cheques. Mr C confirmed that the registered office of the company was his father's home address. Mr C explained that he organised maintenance works for the company's properties and liaised with tenants and with the lady who did the book keeping work and with estate agents with regard to advertising properties etc. His role was to manage the properties. The Respondent had acted as solicitor for the firm for 36 years and had been involved in setting up Rex Property Developments Limited in the 1970's.

Mr C stated that he had contact with the Respondent on behalf of the company and the Respondent did the leases. The company had a bank account and his sister and his father were both signatories but he was not. Mr C stated that he was aware that the Respondent issued fee notes to the company and these were settled by cheque.

In connection with property 3, this was purchased by the company and leased back to the sellers. 18 months' rent was held in a joint account between Biggart Baillie and Leonards Solicitors and was drawn down by him when invoices were provided on a quarterly basis. There were sufficient funds in the account to cover two years' rent but there was an option to terminate earlier. Mr C confirmed that each quarter he issued an invoice and gave it to Ms B, the cashier at the Respondent's firm and then the money was taken from the solicitor's account to pay the rent.

Mr C stated that he had personal court actions going on in connection with his divorce and he discussed these matters with the Respondent. Ms A, the associate within the firm was assisting him. He had a discussion with the Respondent in Spring 2009 about whether or not he required a QC to represent him. Mr C confirmed that his father thought that it would be best for him to have a QC and indicated to him that he would assist if required in paying for the QC. It was suggested to the Respondent that the QC should be appointed and Mr C confirmed that he told the Respondent that his father had indicated that he was prepared to assist if it was required.

Mr Marshall referred Mr C to Production 5 in the Complainers' Productions being the attendance note in October 2008 and he confirmed that this was a correct record and

that it was October 2008 rather than Spring 2009. Mr C confirmed that there were no other discussions with the Respondent about this matter.

In August 2009 the Respondent deducted £3,737 before the rent monies were passed to the company and this was to pay Faculty Service fees due by Mr C. Mr C was referred to Production 19 being the email from the Respondent dated 27 November 2009 with attached statement. Mr C stated that he did not receive any statement from the Respondent until this time. This showed that on 14 August the rent due to Rex Property Developments Limited was £7,906 from which the Faculty fees were deducted and only £4,148.75 was paid to the company. Mr C explained that Ms A had told him the day before there was a hearing in court where counsel was to appear that he had to pay the Faculty Services fees or the QC would not appear for him. He explained he could not pay this money so quickly and accordingly he phoned Ms B and asked her to transfer the money that was due to the QC over from the Rex Property Developments Limited's rent money and in effect he borrowed money from the company and he indicated that he was going to square it back over the next three months. He confirmed that he did not talk to his father or sister to obtain authority prior to doing this. Mr C however confirmed that he only told the Respondent's firm to do this on one occasion. He explained that it became difficult because he was paying £500 or £1,000 each month and he was not really sure what he owed to the Respondent's firm. He got a phone call from Ms A indicating that he owed £12,000 in November 2009. He phoned Ms B and said he could not understand and asked for a statement. She became rather heated and said he would have to see the Respondent. She told him that he owed £4,000. He accordingly asked for an appointment with the Respondent who he saw on 24 November 2009. He asked at this time why the QC had been paid in full because there had been mistakes made by the QC and he felt the bill should be abated and the Respondent agreed. After the meeting with the Respondent Mr C indicated that he was happy because the Respondent had told him that he owed £4,000 and the next day he gave him £3,000 which meant he thought he only still owed £1,000 which would be covered by the credit note from the QC. Mr C confirmed that he did not ask the Respondent to render invoices to the property company. On 18 November, £7,906 was deducted from Rex Property Developments Limited's account and taken to account for fees. Mr C stated that he did not advise the Respondent to do this and did not receive an invoice. He sent an email to the

Respondent asking for the return of the money which was Production 20. The money was not repaid. Mr C advised that he had a director's loan account with Company 4 from which he could have paid £7,906. This was a fruit machine business of which he was the sole director.

In Cross-examination Mr C agreed that he was the messenger between the company and Leonards in connection with company matters. He also confirmed that he would instruct DM Hall and Knight Frank, who dealt with him and his father. He explained that he had dealt with the cashier at the Respondent's firm, Miss B, over a period of 10 years and they were on good terms. He indicated that he thought his sister had had at least one meeting with the Respondent and had also been involved in a phone call with him in respect of property 3. Mr C indicated that he told his mother, father and sister about his authorising the payment to Faculty Services from the company account after 27 November 2009. They were not pleased and stated that this should not have been done. He however told them that he had paid £5000 back. He advised that he was making payments to cover the costs. He paid Miss B and asked her to replace the money. Mr C indicated that he had an ongoing dispute with the Respondent's firm with regard to how much fees were owed. He advised that he had never received bills with a proper breakdown, he only got interim fee notes with an amount on them. They did not have a VAT number. Mr C stated that his father was semi-retired but that the Respondent knew that it was a family business. Mr C confirmed that he paid two lots of £1500 to the Respondent's firm on 25 November and he thought he had paid everything that was due. The difficulty with paying Faculty Services fees at the time was because there was only 24 hours' notice. He indicated that he had not received a fee note for the QC's account before this. Mr C stated that he did not ask the Respondent to re-address the invoices to Rex Property Development Ltd. He also confirmed that he had not received the principals of the fee notes attached at Production 7.

EVIDENCE FROM MR D

Mr D confirmed that he was a consultant solicitor with Pinsent Masons. He had first acted for Rex Properties Developments Ltd in October 1992. He had been instructed by Mr F. There had not been a huge amount of work involved with the company after

that. He did not have much contact with Mr C. He had a meeting on 1st October 2009 with Mr F, Mrs E and Mr C and it was explained about the money being taken out of the company bank account and used to pay personal items for Mr C. In connection with property 3, this was purchased from Company 5 and it was agreed that the rental would be put into a joint account in the names of both parties and administered by the solicitors to ensure that the rental income was paid and each quarter's rent was taken and paid to Rex Property Developments Ltd. Mr D explained that at the start the complaint was unfocused and he investigated the position. The company's position was that they had not authorised it and they wanted their money back. He contacted the Respondent by phone on 11 January 2010 and indicated that he wished to resolve issues. The Respondent's response was that Mr C had said that his father had agreed to fund the costs of his divorce and the Respondent stated that the company could not pick and choose what fees they paid and that Mr C was a high risk client. Mr D stated that he could understand the Respondent's situation. He clarified at this time that the company concerned was Rex Property Developments Ltd rather than Mr C's company. The Respondent also said that Mr F had said that he would pay for the divorce fees. Mr D confirmed that he sent a letter to the Respondent asking for his response and for evidence in respect of his claims. Production 4 was his response dated 14 January 2010. Mr D then had a meeting with Mr F and Mrs E and Mr F did say that he had general discussions with his son in 2008 when the action for Rectification was starting and Mr F had been supportive of the idea of instructing Counsel and had indicated that he would help his son with the costs of Counsel. However the son never came back to his father with any specific requests for assistance. Mr F was adamant that he would never have indicated that he would use company funds but he would have given his son a personal cheque. Mr D indicated that he asked the Respondent for vouching with regard to the Counsel fees and he received invoices from him.

Production 5 is the Respondent's letter of 22 January 2010 which attached the file note of October 2008, which Mr D thought was inconclusive. Mr D clarified that he was not aware of the additional amount being taken in connection with Counsel fees until he received this.

Production 7 is a letter from the Respondent enclosing various invoices and it was then possible to work out the sums due. Mr H stated that he thought that Mr F and Mrs E saw these at a meeting but they indicated that they did not recognise the invoices. Mr F stated that Mr C did not have the authority to use the money from the company. Mr D confirmed that he wrote the letter at Production 8 on 1st February 2010 which set out the company's position that there was no authority given by the company for the transfers made and asking that the funds be immediately returned. The funds however were not returned until 27 June 2012. Mr D confirmed that the company incurred fees in respect of his work which amounted to £7750 as set out at Production 11 and confirmed that the company were seeking compensation in respect of the losses incurred.

Mr Ferguson confirmed that there was no cross-examination of Mr D.

Mr Ferguson also confirmed that he did not seek to lead evidence by way of a statement from Mr H.

Mr Marshall confirmed that he did not wish to lead any further witnesses but lodged a written motion asking the Tribunal to allow him to lodge affidavit evidence from Mrs E and Mr F, who were both unfit to attend to give evidence at the Tribunal. Mr Marshall lodged written submissions submitting that Rule 14 of the 2008 Procedural Rules of the Tribunal apply because the Secondary Complainer was not present or represented at the hearing. Mr Marshall submitted in the alternative that if Rule 14 did not apply then the Civil Evidence (Scotland) Act 1988 applied and provides that affidavit evidence shall be admitted in Tribunal proceedings. He referred to Walker & Walker on the Law of Evidence 2nd Edition paragraph 15, which indicates that there is no discretion to refuse affidavit evidence but where the court does not have the opportunity to subject the evidence to scrutiny then the court should take this into account in assessing the weight of the evidence. Mr Marshall submitted that the Civil Evidence (Scotland) Act applied to this Tribunal.

The Chairman enquired as to what the up to date position was in connection with the medical conditions of both witnesses. The Chairman indicated that the Tribunal

considered this to be important in it considering its exercise of discretion in the matter.

Mr Ferguson indicated that, to allow the affidavits to be lodged would be prejudicial to the Respondent as there would be no chance to cross-examine the witnesses on their evidence. Mr Ferguson however confirmed that he was aware of the content of both affidavits prior to his client giving evidence. The Tribunal allowed a short adjournment for Mr Marshall to check on the up to date position with regard to the health of both witnesses. Mr Marshall, after an adjournment, advised that the health of both witnesses was such that they would be unable to attend the Tribunal to give evidence. Mr Ferguson indicated that he did not challenge that this was the case.

DECISION WITH REGARD TO WHETHER TO ALLOW AFFIDAVIT EVIDENCE OF MRS E AND MR F TO BE LODGED

The Tribunal has an enabling power in paragraph 4 of Schedule 4 to the Solicitors (Scotland) Act 1980, which enables it to control its own procedure. Rule 14 of the Tribunal Rules cannot apply in this case because it only applies where the Respondent fails to appear or be represented at the hearing and the Tribunal decides to proceed and determine the Complaint in the absence of the Respondent. That clearly is not the case here. The Tribunal however considered that this Rule was empowering rather than restrictive. Rule 55 would not help in this case given the health of the witnesses. The Tribunal accepted that the Civil Evidence (Scotland) Act applied to these proceedings and accordingly considered that it would be appropriate in these particular circumstances, given the health of the witnesses, to allow both affidavits to be received. It is only the unusual circumstances relating to the witnesses health in this case that has led the Tribunal to take this decision and this should not be seen as an indication that the Tribunal will readily allow affidavit evidence.

The affidavit for Mr F confirmed that he did previously advise Mr C that he would be able to assist him to meet Counsel's fees in connection with his court action on the basis that he would personally provide his son with funds so that he could use them to pay Counsel fees. Mr F confirmed that he did not say to his son or anyone else that company funds could be used to pay his son's legal fees. He confirmed that he was

not approached directly by the Respondent to request that company monies could be used to pay fees owed by Mr C.

The affidavit for Mrs E confirmed that she was the Company Secretary of the family business and the sole directors were her parents Mr F and Mrs F. Mrs E confirmed that she and her father were authorised to sign cheques on behalf of the company but her brother was not. Ms E confirmed that she contacted the Respondent in connection with the purchase of property 2 and confirmed that the offer was to be withdrawn and a new offer made. Ms E indicated that the Respondent understood that the directors of the company were the ones who took the decisions. Ms E submitted that company matters and her brother's matters were entirely separate. Her Affidavit refers to her going to see the Respondent at his offices in 2002 where it was made clear that nothing should be done without the approval of herself and her parents. Her Affidavit also goes through the 7 transactions where the Respondent was instructed by Mr C and points out the Respondent would be aware that formal missives and documents would require to be checked and authorised at family meetings and the decisions would be communicated by her brother. Ms E states that she would have expected the Respondent to check with one of the officers of the company before using company money to pay for her brother's personal matters. She confirmed that none of the company officers advised the Respondent that he could take companies monies to pay her brother's legal fees and none of the company officers advised her brother that he could tell the Respondent to do this. The Respondent also did not tell the company officers that the funds had been taken.

The case was then adjourned to 14 November 2013. When the case called on 14 November 2013 parties referred to the written submissions which had been lodged with the Tribunal. These are as follows:-

Submissions on behalf of the Law Society

This submission is made up of the following parts:-

1. Finding of professional misconduct sought from the Tribunal

2. Facts proved to support finding sought

3. Consideration of Respondent's defence/mitigation – including submissions on ostensible authority

4. Why the conduct proved amounts to professional misconduct

5. Conclusion

PART 1: SUMMARY OF FINDING OF PROFESSIONAL MISCONDUCT SOUGHT FROM THE TRIBUNAL

The Law Society submits that the Respondent is guilty of the following acts or omissions which, singularly or in cumulo, constitute professional misconduct:-

In relation to the first deduction from Company monies of £3,757.50 to meet faculty services fees owed by Mr C personally – (a) by taking Company monies without the written authority of the Company and (b) without rendering a fee note to the Company, when both steps were required by Rule 6(1) of the Accounts Rules (which also left a shortfall of monies owed to the Company and is a breach of Rule 4 of the Accounts Rules);

In relation to the second deduction of Company monies of £7,906.25 to meet solicitor's fees owed by Mr C personally – (a) by taking Company monies without the written authority of the Company and (b) without rendering a fee note to the Company, when both steps were required by Rule 6(1) of the Accounts Rules (which also left a shortfall of monies owed to the Company and is a breach of Rule 4 of the Accounts Rules);

In relation to both the first and second deduction, failing to act in the best interests of his client the Company, contrary to paragraph 3 of the Schedule to the 2008 Standards of Conduct Practice Rules in taking the Company monies in settlement of the son's fees without the Company's permission. (And separately the refusal to return the monies was a breach of Rule 4 of the Accounts Rules).

PART 2: FACTS PROVED TO SUPPORT FINDING OF PROFESSIONAL MISCONDUCT

1. First deduction from Company monies to meet faculty services fees owed by Mr C

(a) The Respondent admits that on 14 August 2009 the Company monies were taken without the written consent of the Company and this was a breach of Rule 6 (1) of the Accounts Rules. Separately, there is no evidence the Respondent obtained written authority or even spoke to a Company director or officer about the proposal to take Company monies beforehand. The evidence of Mr H is that the Company officers knew nothing about the monies having been taken until after the event. That is also confirmed in the affidavit evidence of both Mr F the Company Director (para 5) and Mrs E the Company Secretary (paras 2, 25, 54). Accordingly I would submit that you can find 1 (a), that the Respondent took these Company monies without the written authority of the Company, proved.

(b) The Respondent admits that no invoice was issued in respect of the faculty services fees which were taken from the Company monies (see Joint Minute of Agreement at para 7.1 and 7.4, and the Respondent's letter of 22 January 2010 to Mr H). There is no evidence of invoices being issued in respect of the faculty services fees owed. That is also confirmed in the affidavit evidence of Mrs E (paras 2 and 29). Accordingly I would submit that you can find 1(b), that no fee note was rendered to the Company before the faculty service fees were taken, proved.

2. Second deduction of Company monies to meet solicitor's fees owed by Mr C

(a) The Respondent admits that on 16 November 2009 the Company monies were taken without the written consent of the Company and this was a breach of Rule 6 (1) of the Accounts Rules. Separately, there is no evidence that David Lingard obtained written authority or even spoke to a Company director or officer about the proposal to take company monies beforehand. The evidence of Mr H is that the Company officers knew nothing about the monies having been taken until after the event. That is also confirmed in the affidavit evidence of both Mr F the Company Director (para 5) and Mrs E the Company Secretary (paras 2, 25, 54). The Respondent does **not** claim that Mr C gave him permission to take the second deduction before the Respondent approved the money being taken. The furthest the Respondent is willing

to go is to claim that Mr C instructed him to re-issue fees to the Company which were payable by Mr C.

But even if Mr C instructed him to re-issue fees, after re-issuing the fees the Respondent proceeded to take Company monies he was holding, to pay these fees, without the permission of the Company, and without the permission of Mr C. He admitted in evidence that Mr C knew nothing about the second deduction until after it had happened. That was also Mr C's position. The Respondent is not claiming that Mr C, having ostensible authority, approved the taking of funds **before** they were taken. Therefore he had no authority to take the second deduction written or verbal.

Accordingly I would submit that you can find 2 (a), that the Respondent took these Company monies without the written authority of the Company, proved.

(b) The Respondent claims that he rendered fee notes for the second deduction. However he agrees that no fees were received by any officer of the Company. He claims that these fees notes were issued to Mr C. Mr C states that he did not receive any fee notes addressed to the Company. The first time we see fee notes addressed to the Company is two months after the second deduction, in the Respondent's letter to Mr H on 29 January 2010 (Production 7 in the Law Society's papers). Mr H's evidence is that the Company officers told him they had not seen these invoices before that time. That is also confirmed in the affidavit evidence of Mrs E (paras 2 and 29). The Respondent has failed to produce any evidence to suggest the fee notes were sent. Accordingly I would submit that you can find 2 (b), that no fee note was rendered to the Company before the solicitor's fees were taken, proved.

Therefore even if you consider that there is evidence which suggests that the invoices were rendered to Mr C, two key points remain. First, Mr C was not an officer of the Company and that the Company officers were in the dark about this. Second, the Respondent accepts that he did not obtain the written or verbal authority of the Company **or** Mr C for that second deduction **before** it was made.

3. Failing to act in the best interests of the Company

Against the factual background of the two deductions, I would separately submit it is proved that when the Respondent took Company monies to pay fees owed by Mr C he

placed his own interests above those of his client the Company, and failed to act in the best interests of the Company. In his evidence about the second deduction the Respondent explained that:-

(a) "Mr C *asked me to change the reference in fees payable by Charles to "general legal advice". To hide the fact it was for him. I agreed to do it*."

(b) "*Charles didn't arrange for payment to be made. I looked at the Accounts Rules.* ***I formulated an argument that enabled us to take the money we urgently needed*** *from the next instalment of rent due from the account*."

(c) "*No one told Mr C we were doing this.* ***We would have taken the money even if he didn't authorise it.*** *I put forward my argument about ostensible authority and the accounts rules. I now recognise this was flawed*."

(d) When cross examined, the Respondent accepted that he didn't really care whether Mr C authorised the taking of monies or not. For him the issue was that Mr C owed a great deal of fees and outlays.

(e) The Respondent accepts he made no inquiry of Company directors or the Company secretary before taking the Company's monies.

In my submission 3(a) to (e) demonstrate that in taking the Company's money to meet fees owed personally by Mr C, the Respondent was placing his own and his firm's interests before those of his client, Rex Property Developments Limited. This is consistent with the Respondent's prolonged refusal to return the money to the Company when their solicitor Mr H contacted him to explain the Company did not authorise or approve of its money being taken. The Respondent considered that his firm was entitled to those funds and he was reluctant to return them. I would submit that the refusal to return the monies and the deploying of arguments to keep the money also demonstrates that the Respondent placed his own and his firm's interests before those of his client the Company – the Company was properly due those funds.

PART 3: THE RESPONDENT'S DEFENCES/MITIGATION

Against the factual background I consider that the Respondent has tried to make out two lines of defence or mitigation:-

1. The Respondent claims that Mr C advised him that the "Company" would provide assistance with fees owed by Mr C.

2. The Respondent claims that Mr C had "ostensible authority" to act on behalf of the Company. And that he was entitled to rely on that ostensible authority.

I will submit why each of these claims should be dismissed.

Claim that Mr C would be given financial assistance "by the Company"

The Respondent has admitted that he had no contact with any Company directors or Company secretary over the taking of Company monies.

However he relies on the fact that Mr C advised that he would receive financial assistance from "the Company". That was his position in evidence, and we can see that this is his position in his letter to the Company's solicitor of 22 January 2010 (Production 5). In that letter he states that:-

"*There is no correspondence from the Company confirming that Mr C would be given financial assistance. That information came from Mr C himself and we had no reason to doubt it. Mr C gave me this information and I enclose a copy of a file note to that effect*."

The file note relied on by the Respondent is attached to the letter and is dated 5 October 2008. That file note states that Mr C "*wanted an Advocate to conduct the case and that his father was prepared to fund this*".

I make three submissions in relation to the file note:-

1. The October 2008 discussion cannot be relied on as giving the Respondent permission to take the second deduction which was solicitors' fees – the note only refers to the costs of funding an advocate.

2. The file note refers to Mr C's **father** funding the Advocate – it makes no reference to the Company, Rex Property Developments Limited, funding the Advocate. It makes no reference to the Company at all.

3. The file note is dated 5 October 2008. The faculty services fees were taken from the joint account on 14 August 2009. At the time of the discussion recorded by the file note there were no rental funds on joint account – there was no joint account in existence. In those circumstances the October 2008 discussion cannot be relied on as giving the Respondent permission in August 2009 to withhold funds payable to the Company and take these funds to meet the son's faculty services fees.

In my submission the Tribunal should find that during the October 2008 discussion Mr C simply advised the Respondent that his father was willing to help with the costs of an advocate. This was the evidence of Mr C. This was also the evidence of Mr F provided in his affidavit (para 4).

As a result in my submission it would be wholly inappropriate to rely on the October 2008 discussion as authority to take Company funds in August 2009 or in November 2009.

Respondent's claim of ostensible authority

The Respondent also claims that there is no professional misconduct based on a defence of ostensible authority: namely that Mr C had ostensible authority to bind the Company which the Respondent relied on.

The Respondent authorised or approved of two deductions from funds properly due to the Company. I will submit that ostensible authority does not apply to either deduction. To do that I will need to consider the relevant evidence and the law on ostensible authority. However, as a preliminary point I would submit we can immediately recognise that ostensible authority could **not** apply to the second deduction, on the Respondent's own evidence, because the Respondent admits that Mr C himself knew nothing about the second deduction until **after** it had happened.

However in my submission, on a proper understanding of ostensible authority, it could not apply to either of the deductions for following reasons:-

- For ostensible authority to apply there must be a **representation by the principal to the third party** – in this case a representation by the Company to the Respondent.

- That **representation must extend to the transaction in question** – in this case that Mr C had authority to take Company monies to settle his own debts.

- There has been no evidence of a **specific representation** by the Company to the Respondent in connection with Mr C's authority to take Company monies to settle his own debts.

- **The representation by the principal may be passive**– the Company failing to speak up when they know of Mr C's conduct and that the Respondent has relied on the position.

- However for a representation to be passive the **principal must know** about the situation – in this case there is no evidence to suggest that the Company knew about any arrangement to take Company monies to pay fees owed by Mr C. The evidence before the Tribunal from Mr H, Mr C and the Company officers is that they had no knowledge,

For these reasons I submit that ostensible authority does not apply to the deduction made from the Company's monies.

The relevant evidence for ostensible authority

- Mr C acted as a property manager within the business and this involved arranging leases and instructing offers for properties.

- David Lingard's dealings with Mr C all related to property matters on behalf of the Company.

- There is no evidence that on any previous occasion Mr C provided advice to David Lingard to take property monies to meet fees personally owed by Mr C.

- There is no evidence that on any previous occasion the Company directors or officers advised David Lingard that Company monies could be used for Mr C's

fees. There was no evidence of representation by the Company to that effect at all.

- The evidence that we do have is that Mr C on one occasion, the first deduction, advised Leonards to take payment of faculty fees that he owed from monies held on behalf of the Company.

- There is no evidence that Mr C stated to David Lingard that the second deduction which was the full quarter's rent could be taken to meet solicitor's fees he owed.

- There is no evidence that the Company directors or officers were aware that the first or the second deductions had been taken. According to their solicitor, Mr H, the Company knew nothing about either deduction in advance. That is also the position stated by Mr F (para 5) and Mrs E (para 2, 25 and 54) in their affidavit evidence.

- There is no evidence that the Company directors or officers made representations to David Lingard that Mr C was authorised to instruct that Company monies be taken to pay personal fees.

The law of ostensible authority

Reid and Blackie on Personal Bar provides guidance on the law on ostensible authority – also known as apparent authority – at Chapter 13 (number 6 in the Council's list of authorities). The authors explain that there are two requirements for ostensible authority:-

1. The principal must act in a manner which implies that another is acting as his agent and which is therefore inconsistent with a later denial of agency; and

2. If the principal was to assert his right to repudiate his agent's acts there would be unfairness to the third party who has engaged with the agent.

The authors provide a useful introduction to ostensible authority at **paras 13-01, 13-03 and 13-04**. After these initial comments the authors deal with the first requirement above –inconsistent conduct by the principal – at para 13-05. My submission is that

the first requirement is not satisfied in this case and that as a result there is no ostensible authority in connection with the taking of the Company's monies.

The ostensible authority must extend to the transaction in question

I place particular significance on the guidance at para 13.05 that:-

"The critical question is whether the principal's conduct during a course of dealing could reasonably be interpreted as creating the impression that the authority of the agent ***extended to the transaction in question."***

In my submission while the Respondent has referred to examples where he received instructions from Mr C on behalf of the Company, and this was permitted by the Company, he has failed to point to any conduct by the Company which created the impression that Mr C's authority **extended to the transaction in question**, namely the taking of Company funds to meet personal debts owed by Mr C.

In my submission permitting Mr C to instruct the Respondent in property matters should not be held as establishing ostensible authority for the taking of Company funds to meet personal debts owed by Mr C.

In support of that submission I would refer to the case of *Dornier GmbH v Cannon* (number 8 in the Council's list of authorities). This First Division case concerned an assertion by the Defender that ostensible authority existed.

In the case of *Dornier* (page 314), Lord Hope cited with approval the classic dicta of Diplock LJ in the English decision of *Freeman & Lockyer v Buckhurt Park Properties (Mangal) Limited* as part of his summary of ostensible authority. Lord Hope stated:-

"*As Diplock LJ pointed out in Freeman & Lockyer v Buckhurt at page 503, apparent or ostensible authority is a legal relationship between the principal and the other party to the contract which is created* ***by a representation that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of the "apparent" authority****. By making this representation, he said, "the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other*

persons of the kind which an agent so acting ***in the conduct of his principal's business has usually 'actual authority' to enter into.***"

"*At page 505 he pointed out that the commonest form of* ***representation by a principal*** *creating an apparent authority of an agent is by conduct, namely permitting the agent to act in the management or conduct of the principal's business. By doing this he represents to all persons dealing with the agent that the agent has authority to enter on behalf of the principal into* ***contracts of a kind "which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business****"*."

It is not disputed that Mr C dealt with property matters on behalf of the Company. However in my submission taking Company monies to pay fees owed by Mr C is not "a contract of the kind within the scope of the ostensible authority" he had, which was dealing with property matters.

If it is the case that ostensible authority has been established by permitting Mr C to act in the conduct of the principal's business, then the ostensible authority is limited to the conduct of the principal's business. As Lord Hope says, it is a representation that the agent is permitted to enter contracts of a kind which the agent usually enters into in the ordinary course of such business. In my submission the taking of Company monies to pay personal fees cannot be viewed as a contract which an agent would usually enter into in the ordinary course of his principal's business.

Therefore in my submission the Respondent must point to some other representation by the Company beyond Mr C instructing him in property matters to justify the claim that Mr C's ostensible authority extended beyond property matters to arranging for his own personal fees to be paid out of the Company monies. If the Respondent cannot lead evidence of some further representation by the Company then ostensible authority is not established for the taking of Company funds for Mr C's fees. There is no evidence of any further representation.

In my submission *Dornier*, supports a conclusion that in the current matter there has been no representation by the Company to the Respondent that Mr C's authority extended to taking Company monies for his own benefit i.e. to settle fees he owes.

Lord Hope adds a further observation– he states:-

"*But in our opinion, **the more extraordinary the transaction the less likely it is that the agent has authority to enter into it**, so questions of fact and degree may arise as to the proper limits of the apparent or ostensible authority*."

In my submission the guidance fits very well to the current circumstances. I would submit that an agent instructing a third party to take monies held for the principal and use these monies to pay debts of the agent is an extraordinary transaction.

The authors in Reid and Blackie make this point at para 13-05:-

*"The more **unusual** a transaction, the less likely it is that the agent can be regarded as having authority to undertake it".*

I would submit that this is a useful guidance when considering the current matter. I would submit that it is most unusual for an agent (Mr C) to suggest that a third party (David Lingard) can take monies held for the principal (the Company) and use those to pay debts of the agent. This sits very well with the rationale for Rule 6 of the Accounts Rules which provides if you are taking a client's money to meet a payment on behalf of another party you must obtain the client's written consent to do so. As has been averred, the Respondent ought to have obtained the Company's written authority in these circumstances.

Conduct establishing ostensible authority must be on the part of the Company

The Respondent appears to place significance on the actions of Mr C. However, at para 13-06, Reid and Blackie make clear that the conduct establishing ostensible authority must be conduct by the Company – not the agent.

*"The conduct which forms the basis of personal bar **must** be that of the putative principal, either in person, or, where the principal is a juristic person, on the part of a person with actual authority to make representations of this kind."*

Applying that rationale to this case, the Company is a juristic person – a legal person – and so the conduct which engages the ostensible authority must be that of a person with *actual* authority to make representations of this kind. The persons with actual

authority to make representations on behalf of the Company are the officers of the Company.

It is a matter of agreement between the parties that no officer of the Company made any specific representation to the Respondent in connection with the taking of Company monies to meet the fees of Mr C. In those circumstances for ostensible authority to arise the Respondent must be able to point to some other representation made on behalf of the Company which gave him the impression that he could take these funds. I have submitted that there is no evidence of any such representation.

Passive representation – requires knowledge on the part of the Company

In my submission this is an important point. The authors of Reid and Blackie discuss ways in which the principal may allow a third part to be misled as to the agent's authority at para 13.05:-

"Indeed the conduct may be largely passive: the principal fails to speak when it ***knows*** *that a third party is under a misapprehension as to the existence, or the extent, of the alleged agent's authority."*

For passive conduct to amount to representation there must be knowledge by the Company of a misapprehension by the Respondent as to the extent of Mr C's authority. In my submission there is no evidence before the Tribunal to suggest that the Company had any knowledge that the Respondent was under a misapprehension as to the extent of Mr C's authority. There is no evidence to support a finding that the Company had any knowledge that Mr C suggested to the Respondent that Company monies could be taken to pay his personal fees. The evidence from Mr H, the Company and Mr C is that the Company had no knowledge of this.

At para 13-07, the authors continue to stress the importance of knowledge on the part of the principal:-

"But while representations or other conduct by the purported agent alone…are insufficient of themselves to bind the principal, the principal's omission to correct a misapprehension of a third party ***when the principal knows that the agent is claiming unwarranted authority*** *may bar the principal subsequently from denying*

such authority. The conduct is then that of the principal, not the agent. However, ***bar requires knowledge****. The principal cannot be barred unless, at the time of the conduct upon which the bar is based, it knew – or is deemed to have known – that the third party was being misled in this particular way."*

Thus a principal's failure to correct a misapprehension by the third party as to the extent of the agent's authority can be held against them. However the principal's failure can only be relied on if the principal had knowledge of the misapprehension around agency in the first instance.

As I have submitted, there is no evidence to support a finding that the Company had knowledge, or can be deemed to have knowledge, that Mr C's was claiming authority to pay his fees out of Company monies. The evidence from Mr C, Mr H, and the Company's officers is that the Company had no knowledge of this.

Summary – ostensible authority not established on the evidence

The doctrine of ostensible authority means that the principal is bound by a contract which his agent enters on his behalf with a third party. In my submission ostensible authority does **not** apply to the Company money taken by the Respondent for the following reasons:-

- For ostensible authority to apply there must be a **representation by the principal to the third party** – in this case a representation by the Company to the Respondent.

- That representation must extend to the transaction in question – in this case that Mr C had authority to take Company monies to settle his own debts.

- There has been no evidence of a **specific representation** by the Company to the Respondent in connection with Mr C's authority to take Company monies to settle his own debts. The evidence from Company officers is that they made no such representation.

- **The representation by the principal may be passive**– the Company failing to speak up when they know of Mr C's conduct and the Respondent has relied on the position.

- However for a representation to be passive the **principal must know** about the situation – there is no evidence to suggest that the Company knew about any arrangement to take Company monies to pay fees owed by Mr C. The evidence before the Tribunal from Mr H, Mr C and the Company officers is that they had no knowledge. **In my submission that is sufficient to support a finding that ostensible authority did not apply in connection with the taking of Company monies**.

- In addition, in connection with the second deduction – it is agreed that Mr C had no knowledge of the second deduction until after it was made. That evidence provides further support for the submission that ostensible authority cannot apply to that deduction.

For these reasons I submit that the evidence demonstrates that the Company has not made a specific or passive representation in connection with the taking of Company monies to meet Mr C's personal fees. As a result ostensible authority does not apply to the deductions made.

PART 4: THE CONDUCT ESTABLISHED AMOUNTS TO PROFESSIONAL MISCONDUCT

Against the factual background established, and having addressed the defences produced by the Respondent, I will make my submission on why this conduct amounts to professional misconduct. I would ask the Tribunal to find the Respondent guilty of professional misconduct in accordance with Lord President Emslie's dicta in *Sharp v Council of the Law Society* 1984 SC 129.

"*There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made*."

Taking funds without written authority and without rendering fees

In my submission taking Company funds without written permission, and taking Company funds in settlement of another person's fees without rendering a fee to the Company, separately and together amount to professional misconduct.

In support of my submission I would refer first of all to the guidance in Law Practice and Conduct for Solicitors by Alan Paterson and Bruce Ritchie (9 of the Law Society's Authorities). At page 213 paragraph 9.03.01 under the heading of Rule 6 – Drawing from Client Account, the authors provide:-

"*What is absolutely forbidden by Rule 6 is to use one client's monies to finance another client's business without* ***specific authorisation*** *from the "lending" client. Even if it is possible to obtain it is not recommended. Clearly, issues of a conflict of interest are bound to arise in such circumstances*."

In these circumstances the Respondent took monies belonging to one client, Rex Property Developments Limited, to finance the work being carried out for another client, Mr C, without the **specific authorisation** of the lending client Rex Property Developments Limited.

I have already submitted why ostensible authority does not apply. But even if the Respondent believed that Mr C was authorised by the Company as he claimed, given that he was going to take the property money to meet fees owed by Mr C he should have sought authority from the Company officers. He didn't do that. Instead the Respondent admits that he formulated arguments in connection with ostensible authority and Rule 6 to justify retaining the money.

The Company's solicitor Mr H contacted the Respondent on his client's instructions to make clear that the taking of the Company monies had not been authorised by the Company. He sought the immediate return of those funds. The Respondent refused. He deployed the arguments which he had formulated to retain the money. The Company finally recovered the money taken by the Respondent albeit after two and a half years and having incurred legal costs to do so.

In support of the submission that a breach of the Accounts Rules in these ways can result in a finding of professional misconduct I would also refer to Procedure and Decisions of the Scottish Solicitor's Discipline Tribunal by Smith and Barton (Law Society's Authorities at 10). At page 168 the authors deal with the Accounting Rules and compliance with the Accounting Rules. Under a heading of "Compliance with the Accounts Rules" the authors provide that:-

"*Breaches of the Accounts Rules may result in a finding of professional misconduct even where no dishonesty is involved but the Tribunal will always take into account not only the breach or breaches concerned but also the surrounding facts and circumstances….*

The following breaches have been found to constitute a professional misconduct:-

Withdrawing monies from a client account in circumstances other than those set out in the Accounts Rules for the withdrawal of such money."

and also at page 175 at paragraph 19.07 under a heading of "Debiting fees to Client's Accounts", Smith and Barton state:-

"*The Tribunal has taken the view that it is a breach of the Rule which permits "money properly required for or to account of payment of a Solicitor's professional account against a client which has been debited to the ledger account of the client and the Solicitor's books". If the funds are taken from the account to meet the Solicitor's fees without a fee note being prepared* ***and without the permission of the client*** *and in such a case found professional misconduct established (case 826/92)."*

I would submit that the case 826/92 which is the decision of *Thomson* (at 11 of the Law Society's papers) is of assistance to the Tribunal in this matter. In my submission the same circumstances arise as here, whereby a Solicitor takes funds held on account to meet client fees without a fee note being prepared and without the permission of the client. In that case the Tribunal found this failure alone amounted to professional misconduct.

I also rely upon the Tribunal decisions in *Forrester* and *Duncan* which are at 12 and 13 of the Law Society's papers and which concern failures to render fee notes and

failures to obtain written authority from a client before taking monies held on account to meet fees.

In the case of *Forrester* the Respondent closed his client bank account and transferred these funds to his firm account in settlement of fees without rendering fee notes. The Tribunal considered this failure alone amounted to professional misconduct. (page 11 of decision).

In *Duncan* the Respondent was instructed in the winding up of an estate. He deducted three fees from the estate but failed to obtain written authority from the executor before doing so. One of the fees referred to the estate and to "a criminal complaint". It transpired that part of that fee related to criminal defence work carried out by the Respondent for the executor's son and had nothing to do with the executry. The Tribunal considered the failure to render a fee note to the son and the failure to obtain the written authority of the executor, amounted to professional misconduct. (paragraphs 6 and 7 of the decision)

Failing to act in the best interests of the Company

I would submit that the actions of the Respondent in taking one client's funds (the Company) to meet fees he was owed by another client (Mr C) without the permission of the Company from whom he took the funds is a breach of his duty to act in the best interests of his client, Rex Property Developments Limited. As a Solicitor for the Company he had a responsibility to safeguard his client's funds and not put his or his firm's interests before those of his clients as required by the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008 paragraph 3 of the Schedule.

I submit that in this matter the Respondent has allowed his and his firm's interest in recovering fees to trump the interest of his clients who are entitled to be confident that their funds will be safely held by him on account and transferred to them. I submit that can be clearly witnessed from the Respondent's own evidence as set out at Part 2, heading 3, (above). In my submission he aggravated this breach through his ongoing refusal to return the funds after he had been contacted by Mr H in January 2010 until these were finally returned in June 2012.

PART 5: CONCLUSION

In conclusion I would ask the Tribunal to find the Respondent guilty of professional misconduct, singularly or in cumulo, for the following acts or omissions:-

1 In relation to the first deduction from Company monies of £3,757.50 to meet faculty services fees owed by Mr C personally – (a) by taking Company monies without the written authority of the Company and (b) without rendering a fee note to the Company, when both steps were required by Rule 6(1) of the Accounts Rules (which also left a shortfall of monies owed to the Company and is a breach of Rule 4 of the Accounts Rules);

In relation to the second deduction of Company monies of £7,906.25 to meet solicitor's fees owed by Mr C personally – (a) by taking Company monies without the written authority of the Company and (b) without rendering a fee note to the Company, when both steps were required by Rule 6(1) of the Accounts Rules (which also left a shortfall of monies owed to the Company and is a breach of Rule 4 of the Accounts Rules);

In relation to both the first and second deduction, failing to act in the best interests of his client the Company, contrary to paragraph 3 of the Schedule to the 2008 Standards of Conduct Practice Rules in taking these the Company monies in settlement of the son's fees without the Company's permission. (And separately the refusal to return the monies was a breach of Rule 4 of the Accounts Rules).

In making that finding I would also ask the Tribunal to direct the Respondent to pay compensation to the Secondary Complainer for the loss resulting from the misconduct in accordance with section 53(2)(bb) of the Solicitors (Scotland) Act 1980 albeit limited to the sum of £5,000.

Expenses

In making that finding I would ask the Tribunal to order the Respondent to meet the expenses incurred by the Law Society in this matter.

7 October 2013

Representations for David R Lingard

The Law of Agency

Crucial and central to this case is the Law of Agency. Allow me to remind this Tribunal of the relevant basic and essential law relating to this branch of the Law of Scotland. I quote from The Law of Scotland by Gloag and Henderson 13th Edition at Chapter 18. The Law of Agency is also referred to and summarised in Stair Memorial Encyclopaedia Volume 1.

Definition of "Agency"

"The fiduciary relationship which exists between two persons,

- one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and
- the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.

The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party"

How is it established.

"It is established by contract and so there can be many variations in the precise relationships of the parties, however a case of agency in the full legal sense is one in which the Agent has power, referred to as his authority, to change the legal rights and obligations of the principal towards third parties.

He may do this by subjecting his principal to binding obligations or by gaining rights for him by contract and by acquiring or disposing of property for his principal.

The Agent's authority may be actual, either

1) express, that is set out in the contract, or
2) implied, by appointment to a position or in a capacity which normally carries such authority.

If the principal represents to third parties that a person is his agent or allows him to act as if he were an agent, the principal may be bound by his actings; in that case the agent is said to have apparent or ostensible authority."

Constitution of the Contract

"The authority of an agent or mandatory may arise from an express contract.
It may be entered orally under Section 1 of the Requirements of Writing (Scotland) Act 1995 or it may be inferred from the prior conduct of the parties see Ben Cleugh Estates Limited –v- Scottish Enterprise (2006) CS0H35 at page 143 (Lord Reed).

Principal and Agent inter se (between each other)

"According to Bell "An agent is bound to show the most entire good faith and make the fullest disclosure of all facts and circumstances concerning the principal's business" Bells Principals S222.

The circumstances of agency relationships may vary widely and in every case the particular facts and circumstances must be examined to determine the scope of the agent's contractual and fiduciary duties and the requirements of good faith arising from them as well as the degree of trust and confidence reposed by the principal in the agent.

The most common examples of the requirements of good faith arise in connection with

- the agent's duty to account,
- the rule against secret profits and also
- the obligation not to place himself in a position where his interests conflict with those of his principal"

Authority

"First the agent may be acting with the express authority of his principal, either for a single transaction or for a series of transactions. In that case the question whether the principal was bound depends on the facts and circumstances of the authority" .....
"Thirdly the principal may have represented to third parties, by words or conduct, that the Agent has authority to act; in that case, the principal will be bound by the actings of the agent within his apparent or ostensible authority."

Ostensible Authority

"A principal may also incur liability under a contract if the agent's act in entering the contract was within his ostensible, but not within his actual authority.

Liability on the ground of ostensible authority cannot arise unless there are circumstances where it can be established that the principal held the agent out as possessing authority or made a representation as to his authority. See First Energy (UK) Limited - v - Hungarian International Bank (1993) 2 Lloyds Report Rep.194.

If A represents, manifests himself, behaves or allows B to behave such that the reasonable inference is that A has authorised B to act for him, and hence that B has any necessary actual authority, A may incur liability to anyone dealing with B, though in a question between A and B there may be no contract or a contract of a different kind. It is insufficient that the representation is made only by the agent. The basis of liability is personal bar.

The usual cases of ostensible authority arise
(1) where authority has been conferred, but has been withdrawn or
(2) where limited authority has been given and has been exceeded.

Where a party has authorised another act as his agent and has withdrawn his authority, that party is bound to give notice of the fact of withdrawal. If he fails to do so he will

be liable on contracts which the agent may make with parties who deal with him in the belief that the authority is still in force."

Applying the Law of Agency to this Complaint.

The present complaint details 2 acts in relation to the one matter, being the leaseback part of a purchase and leaseback transaction, where Accounts Rules were breached. I would make these observations:-

- My client was dealing with Mr C who had previously over many years held himself out as acting for the Secondary Complainer ("the Company") in relation to the property matters of a property development company.
- He did not receive instructions for property matters and court cases from the Directors or the Secretary, only Mr C (except on one occasion where instructions required to be changed in one respect by circumstances but in doing so the essential transaction was affirmed).
- There was no protest by the Company during all those years at any time that the matters instructed were not within the authority of Mr C and the Directors or Secretary signed formal documents and paid fees for the transactions and in so doing affirmed his authority.
- My client was dealing with a professional firm of surveyors, D M Hall, Chartered Surveyors, Hamilton that he knew to be acting for the company also on the instructions of Mr C.
- The Company is a family company with all officeholders and shareholders being family. Mr C is the son of the 2 Directors of the Company, the brother of the Secretary and a shareholder of the Company holding 1,500 shares of a total of 9,000 shares.
- Mr C was acting like an employee charged with authority to instruct property matters but seems to have been unpaid, except that he had a material stake in the company by holding 1500 shares.
- During all the years the Company never sought or intimated to limit the authority of Mr C in his dealings with my client.
- I conclude Mr C was an agent of the company and no limit was placed on that authority by the company.
- He had prior confirmation of Mr C to the payment of the first amount of fees of £3737.50
- He thought he had prior approval of Mr C for the second payment and when it was apparent Mr C had not done this he obtained that consent in retrospect.
- Mr C held out that he had the authority of his father for payment from the rent money received.
  My client believed him. It was Mr C who suggested payment out of rental monies not my client.
- Holding out something as being the case when it is not and allowing a third party to act and change his position on the strength of that to their detriment is fraud. My client changed his position and paid the Counsel's fees but has had to repay to the company the £3737.50.

General

1) Not every breach of a rule is Professional Misconduct (PM). That was the position even before the Legal Profession and Legal Aid (Scotland) Act 2007 (the 2007 Act).
2) The 2007 Act also introduced a new lower level or category of misconduct called unsatisfactory professional conduct (UPC).
3) Definition of UPC in the 2007 Act
   "Unsatisfactory professional conduct means, as respect to a practitioner who is a conveyancing practitioner, professional conduct which is not of the standard which could reasonably be expected of a competent and reputable conveyancing practitioner but which does not amount to professional misconduct and which does not comprise merely inadequate professional services;".

4) Definition of Professional Misconduct from the Sharp case
   "There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained off is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made".

At page 317 of that case PM is described as "a grave charge" and on page 318 the court uses the phrase "the grave charge of professional misconduct". PM therefore has to be a very serious departure from standards of behaviour expected of a solicitor.

The Sharp case also makes clear on page 316 that a breach of accounts rules may amount to professional misconduct. It follows that some breaches of accounts rules may not amount to professional misconduct.

5) RMs Balancing

There is now a need for the SSDT to consider in every case whether the conduct complained of is PM, UPC or neither. I also think that it likely that some conduct that was previously labelled as PM when there was no other alternative, might now be considered as UPC.

Reasons for concluding why the conduct is not PM

The Complaint details 2 acts in relation to the one matter (being the leaseback part of a purchase and leaseback transaction) where Accounts Rules were breached. I suggest that there are some very good reasons for treating the breaches as not PM.

The Facts

(a) Mr C owed and still owes fees to Leonards. The actual amount is in dispute and is still to be determined by court action but whatever the actual amount is, it is many thousands of pounds.

(b) Leonards were holding money on behalf of a limited company owned by Mr C and the sister, father and mother of Mr C.

(c) Mr C is a shareholder in the company but is not a director. Decisions about the company business were made amongst the family and communicated to Mr Lingard by Mr C. The family were content to have that system in place. Mr Lingard has not seen Mr F, Mrs F or Mrs E for many years and, with the exception of a few telephone calls and an exchange of emails in relation to part of one transaction with Mrs E, all instructions in relation to the limited company were communicated to Mr Lingard by Mr C. My client does dispute a meeting in 2002 with Mrs E and Mr C. He last met her in 1995.

(d) Against the background of fees and outlays being due by Mr C for his personal work he gave verbal instructions to Ms B, Leonards' Cashier to make a withdrawal of funds from the deposit account to pay fees and outlays due in relation to his personal business. That course was not suggested by my client. Mr C suggested it. Leonards should have had that authority in writing but did not. That is admitted as a breach of the accounts rules.

(e) My client authorised Leonards' Cashier to make a second withdrawal from the company money. He did not have Mr C's authority at the time to make the transfer but he believed that the accounts rules permitted him to make that transfer and his reasoning is set out in a letter dated 14th January 2010 to Mr H which is production 4 on the list of documents. At paragraph 2 on page 2 he makes reference to Rule 6(i)(b) of the Accounts Rules and he had that belief because he had been asked by Mr C to address invoices to the limited company for work carried out for Mr C personally. For that reason he believed that the limited company was the client for the purposes of Rule 6.

My client now accepts that his interpretation of the accounts rules may be wrong but his belief was genuine at the time. The flaw in his argument is that Rule 6 (i) begins "so long as money belonging to one client is not withdrawn without his written authority for the purpose of meeting a payment to or on behalf of another client". The mechanics of the second withdrawal were that the money was taken out of the limited company account and transferred to Mr C's account. When invoices were made out to the limited company for Mr C's personal work at his suggestion or re-addressed to the limited company Mr C's personal account reference was shown on them.

Had the mechanics of this second withdrawal been carried out differently there would be a stronger argument that Rule 6 had been complied with. If a client account ledger card had been created in the name of the limited company for the work carried out for Mr C personally and had the rental deposit money been transferred into that account with the money not going into Mr C's ledger card, then the first

part of Rule 6 (i) would not have been breached. As that was not done this meant money was being transferred from one client to another without written authority. That would have left an argument about whether in these circumstances the limited company truly was the client. I make that point because in my submission it has an effect on the degree of culpability on the part of my client.

(f) When the company complained and wanted the money returned my client made it clear that he would do that only when Mr C paid the outstanding fees. Subsequently a court action against Mr C was raised and that has been sisted.

(g) When the Law Society became involved my client was asked to attend a meeting of a Sub-Committee of the Guarantee Fund who told him that he should put the money into a joint account pending resolution of the complaint. My client complied with that request. When the matter was referred to the Discipline Tribunal my client requested legal advice and received legal advice to repay the money. He accepted that advice and he did so.

The Evidence of Mr C

The credibility and reliability of his evidence is in serious doubt.

- It is not true that he was only asked to pay the advocate's fee notes by Ms A on the telephone the day before the court hearing, nor that he didn't get proper fee notes or statements, nor that he didn't ask for the fee notes to be readdressed to the company not that he never received the readdressed fee notes.
- He was contradicted on all these points by evidence of my client, Ms A and Ms B.
- My client has been consistent in his position throughout, his evidence to the tribunal being entirely consistent with the detailed explanations given in his correspondence with Mr H and Ms A and Ms B and it all fits together.
- It is simply not credible that my client and his firm would do all these things in the way Mr C has described. Why else would they readdress the feenotes? Why would they not send him feenotes as soon as possible? The firm wanted to be paid.
- By contrast Mr C puts forward his version to try to justify his failure to pay Leonard's fees.
- Mr C told Leonards he had authority from his father that they could use the money for
  Counsel's fees and that was Mr C's suggestion to my client not my client to him.
- Mr C induced the firm to change its position by paying these Counsel's fees on the basis he had authority of the company to do so. When money had to be returned by my client to the Company it left the firm out of pocket to that amount. I suggest that this is a case of fraudulent misrepresentation whereby Mr C misrepresented his authority and it has now led to a position where my client effectively has paid the Counsel's fees for Mr C and so there is financial loss to my client as a direct result of that misrepresentation.
- One might have expected an apology from Mr C for all the bother and fuss his misrepresentation has caused. In my opinion there was nothing apologetic or contrite about his evidence or in his manner giving it.

The Evidence of the Secondary Complainer

Affidavit evidence is subject to the same rules of competency and relevancy as direct oral evidence. The weight to be placed on such evidence is a matter for the court (or Tribunal) taking into account the difficulties in assessing the credibility and reliability of the maker of the statement and the fact that the evidence cannot be the subject of cross examination. (McVinnie –v McVinnie 1995 SLT(Sh Ct) 81)

1) Mrs E Affidavit

My client disputes there was a meeting in 2002 with Mrs E and Mr C. He last met her in 1995. My client was not cross examined about his evidence of not having met Mrs E since 1995. In absence of that cross examination by the fiscal the evidence of Mrs E on this disputed point has been discredited. (Keenan -v- Scottish Wholesale Co-operative Society 1943 S.C. 108 per LJC Cooper at 109)

2) Mr F Affidavit

- There is evidence of some agreement by Mr F to Mr C to pay fees if necessary.
- Although Mr F says there is no definite agreement of Mr F to pay my client's firm's fees out of the company funds he said he would at least cover Counsel's fees if necessary. It was necessary and he did not honour that promise. If Mr F did not mean it when he said it then he lied. Mr C said he had his father's authority to take the amount from the company rental monies at the time and Mr F says he did not so either Mr F or Mr C lied about that.
- Mr F was aware of this from the correspondence with Pinsent Masons and he and his company could have honoured his commitment to his son knowing of his son's misrepresentation to my client but Mr F did not. Instead Mr F reneged on the promise to his son and allowed the Respondent's firm to be out of pocket.
- Mr F admits saying he would provide financial help for his son. The family seeks to draw a distinction between his doing that personally and using company money. However Mr C held out that his father had said he would assist and he suggested that as part of that Leonards could use the company money. It was not unreasonable for my client to accept Mr C's word.

Conclusion

The position is that there was a breach of the Accounts Rules on two occasions. In relation to the first breach there is verbal authority but not written authority. My submission is that Mr Lingard was entitled to rely on the instructions given by Mr C. I make that submission on the basis that Mr C had ostensible authority to give the instruction and my client believed he had that authority. However that is not the question for the Tribunal. The question is whether in accepting Mr C's instructions and not having written instructions was my client behaving in a manner which can be described as serious and reprehensible. The Sharp case makes it clear that that is a grave charge and that the Tribunal is entitled to look at all the circumstances. "Reprehensible" is a stronger word than "serious". I would submit that you are entitled to look at the fact that Mr C owed significant sums of money, the two clients

were connected and that my client genuinely believed that he had authority to make this withdrawal.

In relation to the second withdrawal my client had a genuine belief that the Accounts Rules permitted him to take the fees in terms of the Accounts Rules.

Lord President Emslie observed in the Sharp case that any failure in conduct has to be judged by the gravity of the failure and consideration of the whole circumstances in which the failure occurred including the part played by the individual solicitor in question.

The book by Paterson & Ritchie "Law, Practice and Conduct for Solicitors" comments at page 12 that at least in Scotland misconduct would seem to require mens rea or substitutes such as recklessness or negligence. I would submit that mens rea is demonstrably absent and so are its substitutes.

Overall, this is a dispute about fees. We are not dealing here with a solicitor who has embezzled money, taken money that he was not entitled to etc. Some of the money which was taken was used to pay fees due to Counsel. These circumstances have all been triggered by the fact that Mr C was unable or unwilling to pay fees and outlays.

In my submission what my client did here, although it was a breach of the rules, should not be described as serious and reprehensible and in my submission the Tribunal is entitled to find that there has been no PM by him.

1. There were good reasons for my client to act as he did. My client was dealing with someone who had previously held himself out as acting for the company over many years in relation to property matters of a property company.

2. We are dealing with one matter only being the leaseback part of the purchase and leases of property 3.

3. The Sharp case ultimately confirms that whether there is conduct amounting to PM depends upon the circumstances, i.e. the whole circumstances, of the case.

I submit to you that that in this case the conduct does not amount to Professional Misconduct.

Date 4 October 2013
The parties then made further oral submissions to the Tribunal

Further Submissions on Behalf of the Complainers

Mr Marshall referred to his written submissions. He pointed out that the definition of ostensible authority as set out in the Respondent's submissions was incomplete. He stated that for conduct to be passive there must be evidence to show that the principal was aware that the agent had overstepped his authority. There was no evidence of this

in this case. Mr Marshall also pointed out that the Respondent's submissions made no reference to the leading case on ostensible authority in Scotland. He asked the Tribunal to prefer the Law Society's submissions in this respect. Mr Marshall stated that the Law Society agreed that it was a family company involved and that there had been agreement over a number of years that the Respondent received instructions from Mr C in connection with property matters. It was not however accepted that there was no limit on Mr C's authority. Mr Marshall pointed out that the second deduction was made with no prior knowledge of Mr C. Mr Marshall stated that in respect of the facts set out in the Respondent's submissions it was irrelevant whether or not Mr C owed fees to the Respondent. The Respondent stated in his evidence that he would have taken the money to fees whether or not Mr C had given authority for the money to be taken because the fees were owed. Mr Marshall stated that this showed that the Respondent had still not recognised the purpose of the Accounts Rules. Mr Marshall stated that the Accounts Rules were there to protect the interests of clients and the profession. He stated that in this case it was clear that funds belonging to one client had been taken to settle fees of another client without written authority. Mr Marshall submitted that the fee notes were not properly due by the Limited company as they related to work done for Mr C personally and were not properly due. Mr Marshall further submitted that the Respondent's submissions in relation to the Accounts Rules were not relevant when considering whether the conduct amounted to professional misconduct. Mr Marshall referred to the Respondent's delay in paying back the money. The Chairman indicated that this was not relevant to whether or not the act amounted to professional misconduct as these actings post dated the conduct but that it might be relevant to penalty. Mr Marshall submitted that this conduct showed that the Respondent was not thinking about the best interests of his client. Mr Marshall further submitted that the Respondent's rationale for not returning the money was relevant to his rationale for taking the money in the first place. Mr Marshall submitted that clients' funds should not be held to ransom. He stated that there was no evidence to show that Mr F stated that he would meet his son's fees out of company money. His evidence was to the affect that he said he would meet his son's fees from his own money. There was no evidence to suggest that Mr F had been asked by the Respondent to provide any funds.

Mr Marshall referred the Tribunal to the case of *McMahon-v-The Council of the Law Society SC February 2002*. This case makes it clear that the Accounts Rules reinforce the duty of honesty in the handling of clients' money and that the client account is sacrosanct. It was held in this case that there could be no situation in which the client account can justifiably be in deficit. In the present case the Respondent took money he was not entitled to take. Mr Marshall also referred to the case of the *Law Society of Scotland-v-Docherty 1968 SC* where the court states that the observance of the rule regarding the proper keeping of client accounts is of cardinal importance if public confidence in solicitors is to be preserved. The Chairman pointed out that the case of Sharp made it clear that the Tribunal was required to look at the whole circumstances in which the conduct occurred and that not every breach of Rule 6 would necessarily amount to professional misconduct.

Further Submissions for the Respondent

Mr Ferguson stated that in this case Mr C had requested that the fee notes in respect of his personal fees be re-done in favour of the company. In respect of the Faculty Services fees there was no invoice as this was an outlay. Mr Ferguson stated that it was not denied that there was no written authority but there was verbal authority. The Chairman enquired as to how this assisted because it was a breach of the Accounts Rules if there was no written authority, although it may be relevant to mitigation. Mr Ferguson clarified that his client admitted a breach of Rule 6 but because he received verbal authority this meant that the conduct would not necessarily amount to professional misconduct. Mr Ferguson stated that it was confirmed by the evidence of the Respondent, Ms B and Ms A that the Respondent received authority from the agent that he thought was representing the company. Mr Ferguson stated that the Respondent's evidence was that Mr C instructed him to re-issue the fee notes to the company. The evidence of the Respondent, Ms B and Ms A is to the effect that the Respondent thought that he had authority to take the fees before they were taken. Authority was subsequently given and the fee notes were rendered at Mr C's request. Mr Ferguson asked the Tribunal to find that Mr C's evidence was unreliable and to prefer the evidence of the Respondent, Ms B and Ms A.

Mr Ferguson submitted that companies often had agents who gave instructions on their behalf. He also submitted that it did often happen in companies that they paid for legal advice provided to officers in connection with personal matters. In this case Mr C requested that the invoices be changed to "general legal advice". The Respondent at the time thought that there was a legal basis for what he did. The Respondent's position was that consent was given later and the fee notes had been issued to the company. He thought the verbal authority of the person instructing him was sufficient. Mr Ferguson submitted that there was no limitation on Mr C's authority. It was expected that the authority be given in writing but if the respondent had had written authority from Mr C this would have been sufficient. Because there was no authority in writing the Respondent had been given legal advice to repay the funds deducted.

Mr Ferguson submitted that the company had chosen Mr C as their agent and he told the Respondent to take the deduction. Mr C told both the Respondent and Ms B that Mr F had given authority for the deduction. Mr C was a beneficial owner of the company. Mr Ferguson pointed out that the distinction of where the money comes from was sometimes blurred when it was a family company and that it was not important whether it came from Mr F or the company. The Chairman pointed out that when a solicitor says that the money belongs to X he must apply the rules to that client. Mr Ferguson submitted that the Respondent was told to fund Faculty Services fees by taking payment from the rent money and was therefore induced by the agent to incur expenses that he now could not get back, which was prejudicial to the Respondent. The Chairman pointed out that this often happened in practice. Mr Ferguson however submitted that the Respondent may not have stayed in the case if the fees had not been paid. The Chairman pointed out that there may have been consequences if he had withdrawn in relation to prejudice to the client. The Chairman further pointed out that once Counsel is instructed the solicitor is responsible for paying the fees.

Mr Ferguson stated that Mr C was involved in giving instructions as to where the rental monies were to go. He was in control as agent. If the company directors did not know about this it was because Mr C did not tell them. He had held out that Mr F had authorised this. Mr Ferguson referred to Reid & Blackie and stated that Mr C did

act in a manner that implies that he was acting as agent. The Chairman pointed out that there must be a breach of the Rules because it was not in writing and therefore if the Rule is breached, what relevance did ostensible authority have to whether an Accounts Rule was breached. Mr Ferguson submitted that it was relevant in connection with whether or not the conduct was serious enough to amount to professional misconduct. The Chairman stated that what may be important was not whether or not the actings amounted to ostensible authority legally but whether or not the Respondent thought and it was reasonable for him to think that Mr C has ostensible authority. Mr Ferguson pointed out that the transactions were purchase and lease back and Mr C told the Respondent he had authority in connection with the rental monies. This was a trusted representative and family member of the company. Mr Ferguson pointed out that companies often have agents or employees act on their behalf, for example a property manager would give instructions in connection with all rental monies. In this case Mr C had misrepresented his authority to the Respondent. Mr C had been chosen by the company to represent them.

The Chairman stated that with either one or two exceptions, the only person who gave instructions for the company was Mr C and he was the only conduit. Mr Ferguson confirmed that this was his position. Mr Ferguson stated that the direction as to where the money should go was within Mr C's authority but he abused this authority. The exact act may not have been known about by the company but the generality of matters was entrusted to the agent. Mr Ferguson referred to Reid & Blackie at paragraph 3.19 which stated that the principal could be barred on the basis that the agent was acting within the scope of his authority express, implied or apparent therefore it could be taken that the company did have knowledge. Mr Ferguson pointed out that the Thomson case referred to by the Complainers was a case of gross neglect and the case of Duncan involved over charging. They were different from this case. Mr Ferguson stated that solicitors required to balance the interests of clients against the interests of their firm and that the Respondent was a business man. The Respondent admitted that the deductions were made but had provided evidence that fees were rendered to the company at the address on the fee notes. The Chairman enquired as to what the exact evidence of the Respondent was in connection with the conversation with Mr C in relation to the change in the fee notes. He brought up the hypothesis that if an individual client stated that his brother owed the firm money and

to send the bill for his brother's fees to him and he would pay it, did this amount to a gratuitous promise, in which case it would fall under Section 6(1)(b) of the Accounts Rules? The Chairman enquired as to whether or not the fact that Mr C had instructed that the fee notes be changed and sent to the company and said that they would be paid amounted to a gratuitous promise. Mr Marshall stated that his position was that ostensible authority could not apply because these were extraordinary or unusual transactions and therefore it was less likely that the agent had authority to carry them out. If Mr C told the Respondent to re-issue the fee notes to the company, were the previous ones cancelled or just changed? Mr Marshall referred to the dicta of Lord Hope and submitted that extraordinary transactions would fall outwith the scope of ostensible authority. Mr Ferguson submitted that this was not a transaction, it was one thing among many in the duties of a manager dealing with rental income and it was not extraordinary as it was a family company and companies did sometimes pick up the expenses of employees. The Chairman pointed out that in the Sharp case, those acquitted had no knowledge of the breach of the Accounts Rules but in this case the Respondent was the actor. Mr Ferguson however emphasised that the Respondent had no reason to doubt what Mr C told him. The Chairman pointed out that it would not have been sufficient for Mr C to give permission in writing for the money to be taken as in terms of the Accounts Rules this would need to come from the company. Mr Marshall submitted that as the Respondent had retained the funds he could not make the funds available to the client and therefore there was a continuing breach. Mr Ferguson submitted that this was not a continuing breach.

DECISION

The Tribunal found this an extremely difficult case. It had to balance on the face of it what looked like two breaches of the Accounts Rules and actions not in the best interests of a client set against the view that the Tribunal formed of the Respondent as a truthful and honest solicitor of many years standing. The Tribunal found that the Respondent gave his evidence in a straight forward and plausible manner. The Respondent had been consistent in his account between the letters written by him, forming part of the productions, the written submissions lodged on his behalf and his oral evidence. The Tribunal found him to be reliable. The Respondent's evidence was also backed up by the evidence from his cashier and his associate. A lot of the facts

in the case were not in dispute. However where there were differing accounts given by the Respondent and Mr C, the Tribunal preferred the evidence of the Respondent. The Tribunal also found Ms B and Ms A to be credible witnesses. The Tribunal took account of the Affidavit evidence from Mr F and Mrs E but this evidence was not subject to cross examination and accordingly has less weight. The Tribunal considered the Respondent's evidence in connection with the re-rendering of the fee notes to the company at the request of Mr C to be significant and wished to be sure of the exact wording of the Respondent's evidence. The Tribunal accordingly had the shorthand writer's notes in respect of this part of the evidence extended over the lunchtime period so that they were available to it when it was making its decision. The Respondent's evidence in this respect was that Mr C told him that he had spoken to his father again and that if the Respondent re-rendered the accounts to the property company, he would ensure that they were paid right away. The Tribunal found the Respondent's evidence with regard to this credible and plausible. The Respondent was candid in his evidence to the effect that he probably should not have done this due to the tax implications as the fees were really due by Mr C as an individual. It was also corroborated by Ms A. Mr C's evidence that he did not ask the Respondent to re-address the invoices to the company was not accepted by the Tribunal. Copies of the invoices re-addressed to the company were provided as productions and although the Tribunal could not be sure on exactly which date these invoices were re-rendered, the Tribunal is satisfied that they were so re-rendered.

It is clear that the invoices readdressed to Rex Property Development Company Limited kept their original dates and were sent to property 2. The Tribunal note the evidence of Mr F and Mrs E that they did not receive fee notes, however these fee notes would have been sent to the company address at property 2 and it may well be that Mr C is the only one who saw them. Mr C does not accept that this is the case but the Tribunal considered in the whole circumstances of the case it is likely that this is what happened. Mr C having used this ostensible authority to indicate that payment of the Respondent's fees would be made right away, that constituted a debt created by a gratuitous promise. The Tribunal was satisfied that the invoices were re-issued to the company and that although the Respondent did not have any direct authority, even from an agent at that time, there could be no breach of Rule 6 because at the time the

funds were taken from the company account there was a debt due to the Respondent's firm constituted by the promise and therefore the acting falls under Rule 6.1(b).

From its own knowledge and experience, the Tribunal is aware that it is not unknown for companies, particularly small family companies such as the Secondary Complainer's, to say that the bill for an employee's domestic conveyancing should be sent to them for payment. The Tribunal accordingly did not consider that this was an extraordinary or unusual circumstance in the context of a private family company and the Tribunal accordingly find that as the invoices were re-rendered to the company and Mr C indicated that if this was done they would be paid right away, a gratuitous promise was made in terms of Rule 6(1)(b). A solicitor does not require authority from a client to debit a client account in respect of a debt owed to the solicitor by that client.

Mr C as an agent of the company made a promise that the company would pay the solicitor's fees which meant that the company was indebted to the solicitor and the solicitor had a right to take the money. The Tribunal had no doubt that Mr C was binding the company to pay a sum of money, the invoices were re-rendered, no funding was received and any condition attached to the undertaking had been fulfilled therefore the nature of the payment was to pay a debt and therefore on a technical basis there was no need for written authority.

In this case, the Tribunal having reached the view that there was a long history of Mr C almost exclusively communicating instructions from the company to the Respondent, the Tribunal was satisfied that both the Faculty Services account and the value of the services rendered to Mr C were matters within Mr C's ostensible authority. The payment of outlays to Faculty Services is not a fee and client's authority is not required to take money to reimburse the fees. However this was money taken from one client to pay another without written authority which is a technical breach of Rule 6. The Tribunal however are aware that in practice where solicitors are acting for a family company these things do blur as to who has authority to do what and which company or individual funds actually belong to. Solicitor members of the Tribunal are aware of how personal relationships develop over many years and that with small family corporate entities who is authorised to do what can

become blurred due to the trust built up over the years. In this case there was a long course of dealings where the family company was happy for Mr C to be the sole conduit of instructions with the Respondent over many years with one or perhaps two exceptions. The Tribunal consider that the trend of behaviour in this case established ostensible authority. The Tribunal consider that the company were passive over the years in allowing Mr C to act as their sole agent in instructing the Respondent.

The Tribunal find that the Respondent was diverted from consideration of the precise terms of Rule 6 by what is a common occurrence in respect of the actings of a small family corporate entity over many years where, with a few exceptions, there had been only one person who communicated with the solicitor on any matter, who was a shareholder but not an officer of the company. Given that was how the relationship operated over many years, the Tribunal was satisfied that the company constituted Mr C as their agent with ostensible authority in respect of all matters dealt with by the solicitor on behalf of the company. However the Respondent's actings in respect of the Faculty Services fee note still were in contravention of Rule 6(1) because no written authority in respect of the transfer of funds for the Faculty Services invoice was given by the company to the Respondent.

In connection with the technical breach of the Accounts Rules in respect of the Faculty Services fee the Tribunal considered the whole circumstances surrounding this and the fact that Mr C, who the Respondent trusted as agent for the company, gave him oral authority to do this. The Respondent genuinely believed that Mr C had authority from the company to authorise this. The Tribunal accordingly did not consider that in the circumstances of this case the Respondent's conduct was so serious and reprehensible as to amount to professional misconduct.

As the Tribunal have found that the Respondent was acting on his client's instructions (by Mr C as their agent) the Tribunal could not find that the Respondent was not acting in his client's interest as he was representing his client's interests by implementing his client's instructions.

In connection with Rule 4, the Tribunal find that the money was due because there was ostensible authority for the deductions therefore there was no wrongful retention of monies.

It however seems to the Tribunal that this is a circumstance where the conduct may fall within the definition of unsatisfactory professional conduct and accordingly in terms of Section 53ZA the Tribunal consider it appropriate to remit the Complaint for consideration of the Council of the Law Society of Scotland.

Even if the Tribunal is wrong in connection with whether ostensible authority existed in law and in connection with whether a gratuitous promise was made the Tribunal is still of the view that in the whole circumstances of this case the Respondent's actions were not serious and reprehensible enough to amount to professional misconduct given his sincere belief that Mr C was acting on the authority of the company. Trust between Mr C and the Respondent was built up over a period of 30 years. It perhaps became misplaced but it induced in the Respondent the belief that authority was being given and therefore his conduct could not be serious and reprehensible.

The Tribunal then asked for submissions on publicity and expenses.

The Fiscal referred to Baxendale Walker. The Respondent asked for expenses to be awarded on the basis of success in favour of the Respondent.

The Tribunal considered that it was the Respondent's own conduct that brought him before the Tribunal. The Respondent breached the Accounts Rules and he could not escape this fact. Although he has been found not guilty of professional misconduct, his conduct may amount to unsatisfactory professional conduct. The Tribunal cannot say that there is no merit in the prosecution and accordingly the Tribunal found the Respondent liable in 50% of the expenses of the Law Society and the Tribunal. The Tribunal made the usual order with regard to publicity.

Alistair Cockburn

Chairman