

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

D E C I S I O N

in Complaint

by

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

Complainers

against

**COLIN DOUGLAS
RICHARDSON WHITTLE,
Solicitor, R & R Urquhart LLP,
117-121 High Street, Forres**

Respondent

on behalf of

**Andrea Clare Webster, 38D South
Street, Elgin**

Secondary Complainer

1. A Complaint dated 29 May 2012 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that, Colin Douglas Richard Whittle, Solicitor, R & R Urquhart LLP, 117-121 High Street, Forres (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 Chairman of the Tribunal was not satisfied that the Complaint disclosed a *prima facie* case of professional misconduct and a pre-warrant hearing was fixed for 12 July 2012.

3. At the pre-warrant hearing the Complainers were represented by their Fiscal, Mr Jim Reid, Solicitor, Glasgow. Following submissions from Mr Reid and questions from the Tribunal Mr Reid sought permission from the Tribunal to withdraw the Complaint. The Tribunal agreed to the Complaint being withdrawn.
4. A further Complaint dated 11 October 2013 was lodged with the Scottish Solicitors' Discipline Tribunal by the Complainers requesting that the Respondent be required to answer the allegations contained in the statement of facts which accompanied that Complaint and that the Tribunal should issue such order in the matter as it thinks right.
5. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
6. Having considered the documentation lodged, the Tribunal resolved to set the matter down for a procedural hearing on 28 January 2014 and notice thereof was duly served on all the parties.
7. The procedural hearing took place on 28 January 2014. The Complainers were represented by their Fiscal, Mr Jim Reid, Solicitor, Glasgow. The Respondent was represented by Mr David Burnside, Solicitor, Aberdeen and Mr Gordon Reid QC. Mr Reid QC argued that Complaint should be dismissed in terms of Rule 10 of the Tribunal's rules on the ground that it was without merit. He indicated that he wished the Tribunal to fix a debate on the relevancy, specification and competency of the Complaint. The Tribunal indicated that it would be useful to have written submissions on the issues and directed that these should be lodged with the Tribunal by 4 April 2014. The Tribunal directed that thereafter three weeks be allowed for any amendments to the Complaint and that the Respondent be allowed a further three weeks to respond to the amendments. The Tribunal adjourned the matter to a debate on 21 May 2014.

8. The debate took place on 21 May 2014. The Complainers were represented by their Fiscal Mr Jim Reid, Solicitor, Glasgow. The Respondent was represented by Mr David Burnside, Solicitor, Aberdeen and Mr Gordon Reid QC.

9. The Tribunal heard submissions from both parties on the preliminary pleas and after consideration of the written submissions and the authorities lodged by both parties, upheld the plea to the relevancy of the Complaint and therefore dismissed the Complaint. The Tribunal repelled the plea under Article 6 of the European Convention on Human Rights and held that the delay was not unconscionable or unreasonable. The Tribunal therefore dismissed the Secondary Complainer's claim for compensation. The Tribunal determined that the Complainers should be liable to the Respondent for the expenses of the proceedings but did not sanction the cause as suitable for the employment of senior counsel.

10. The Tribunal produced an Interlocutor in the following terms :-

Edinburgh 21 May 2014. The Tribunal having considered the Complaint dated 11 October 2013 at the instance of the Council of the Law Society of Scotland against Colin Douglas Richard Whittle, Solicitor, R & R Urquhart LLP, 117-121 High Street, Forres; Sustain the Respondent's plea to the relevancy of the Complaint and therefore Dismiss the Complaint; Repel the Respondent's plea in relation to unconscionable and unreasonable delay in terms of Article 6 of the European Convention on Human Rights; Find the Complainers liable in the expenses of the Respondent 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; Refuses the Respondent's motion for sanction of the cause as suitable for the employment of Senior Counsel: and Direct

that publicity will be given to this decision and that this publicity should include the name of the Respondent and may but has no need to include the names of anyone other than the Respondent.

(signed)

Alistair Cockburn

Chairman

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

IN THE NAME OF THE TRIBUNAL

Alistair Cockburn
Chairman

NOTE

For the avoidance of any confusion in this note Mr Gordon Reid QC will be referred to as “Mr Reid” and Mr Jim Reid on behalf of the Complainers will be referred to as “the Fiscal”.

The following documents were lodged –

1. An Inventory of Productions on behalf of the Complainers.
2. An Inventory of Productions on behalf of the Respondent.
3. Submissions on behalf of the Complainers dated 8 May 2014.
4. A Note of Argument on behalf of the Respondent dated May 2014.
5. An Extract from Green’s Solicitors Professional Handbook 2009/2010.
6. M v Law Society of Scotland 2013 SLT 462.
7. Council of the Law Society of Scotland v McPherson 2002 SC 628.
8. Council of the Law Society of Scotland v Hall 2002 SC 620.

SUBMISSIONS FOR THE RESPONDENT

Mr Reid indicated that he did not propose to read through his entire Note of Argument but stated that he wished to adopt that document in full as part of his submissions. He advised the Tribunal that he was happy to answer questions on any parts of the Note of Argument which he did not refer to in his oral submissions.

Mr Reid stated that he would first take the Tribunal through the background to the case. He advised that instructions were given to R & R Urquhart in November 2008 to sell the property owned by Ms Webster and Mr A. He advised that although these parties owned the property they had never lived there. The details of the property are contained in Article 4.1 of the Complaint. Mr Reid referred the Tribunal to Production 1 of the Respondent’s Inventory of Productions which refers to the couple’s separation and advised that this occurred in May 2009.

Mr Reid advised that in June 2009 a question arose regarding whether one of the Respondent’s partners could act for Mr A as his matrimonial solicitor. That partner,

Ms B, was unaware of the conveyancing instructions given to the Respondent. Mr Reid stated that Production 60 of the said Inventory, an affidavit from Ms B, explains the background to this. Ms B wrote to Ms Webster asking if she objected to Ms B acting on behalf of Mr A. Ms Webster did object and therefore R & R Urquhart never acted for either of the parties in the division of their matrimonial property, the firm only acted as conveyancing solicitors. Mr Reid submitted that this was a matter which the Law Society's Professional Conduct Committee got wrong. The Committee seemed to think that R & R Urquhart had acted for Mr A for a short period of 2 months. Mr Reid submitted that that did not occur.

Mr Reid stated that in August 2009 Knight Frank were instructed as selling agents and other estate agents were also instructed. Mr Reid referred the Tribunal to Production 3 of the said Inventory which is a letter from the Respondent to Knight Frank advising them of his client's separation.

Mr Reid advised that in September 2009 Ms Webster was referred by R & R Urquhart to matrimonial solicitors. She asked for a recommendation and the Respondent consulted with his colleague Ms B who produced the note dated 3 September 2009, which is contained within Production 5 of the said Inventory. Details of the solicitors recommended by Ms B were passed on by the Respondent to Ms Webster in an email of 11 September 2009, which is contained at Production 7 of the said Inventory.

Mr Reid advised that the next stage was the issue of the draft Minute of Agreement. Mr Reid stated that this was a style passed to the Respondent with the note of 3 September 2009 referred to above. He indicated that the draft agreement is contained in Production 47 of the said Inventory. He advised that Ms B's affidavit also refers to this draft at paragraph 7 of that document. Mr Reid indicated that Production 47 also contains certain revisals proposed by Ms Webster at a later date and Mr Reid advised the Tribunal that he would refer to those revisals at a later stage in his submission.

Mr Reid referred the Tribunal to Production 19 of the said Inventory, an email dated 8 December 2009 from Ms Webster to the Respondent in which she suggested amendments to that draft agreement. Mr Reid stated that apart from these

amendments the document at Production 47 was by and large the draft which was sent by the Respondent to the parties.

Mr Reid drew the Tribunal's attention to the preamble of the agreement which states that –

“R & R Urquhart LLP, Solicitors, 121 High Street, Forres, Moray, have represented both of the Parties until now but it is a requirement that each of the Parties seeks separate advice in respect of matrimonial separation and division, and are doing so”.

The draft also advised at paragraph 5 that –

“R & R Urquhart were appointed to act in the sale of the property”

Mr Reid stated that this part of the agreement concurs with what was stated in the email sent at the end of August 2009 which he had referred to earlier.

Mr Reid referred the Tribunal to paragraph 1.5 of the draft agreement which states -

“Thereafter the net free proceeds of sale shall be divided equally between the parties”.

Mr Reid stated that at this stage all that had been communicated to R & R Urquhart is that the property was in joint names, that the title was held equally between both parties and was to be sold. Mr Reid submitted that the paragraph in the draft agreement regarding the free proceeds is a matter of style and reflects the norm as far as conveyancing solicitors are concerned.

Mr Reid also drew the Tribunal's attention to paragraph 4 of the agreement which states –

“The parties acknowledge that in reaching the terms of the agreement they have had the opportunity and benefit of separate legal advice.”

Mr Reid stated that right at the outset the indications were that R & R Urquhart were appointed to act in the sale of the property and they requested the parties to take separate advice regarding matrimonial issues and emphasised that. Mr Reid submitted that everything in this case is coloured by the terms of that Minute of Agreement. He stated that Ms Webster expressly agreed that Urquharts should act in the sale, even though she must have known at that stage that she wanted more than a 50 percent share of the free proceeds of the sale of the property. Mr Reid stated that Ms Webster never withdrew her consent to the instruction that the firm was to act for her in the conveyancing.

Mr Reid referred the Tribunal to Production 27 of the said Inventory, an email dated 16 December 2009 from Ms Webster to the Respondent. Mr Reid stated that in that email Ms Webster confirms that she wants the sale to go ahead. Mr Reid further stated that throughout the transaction the documentation disclosed that neither Urquharts nor the Respondent gave either party matrimonial advice. The Respondent made it clear in the draft agreement that separate advice was needed and referred Ms Webster to other solicitors.

Mr Reid submitted that it is clear from the documents lodged as productions that Ms Webster did what the draft agreement suggested and consulted matrimonial solicitors. Mr Reid stated that Ms Webster subsequently advised the Respondent that she had engaged a third party solicitor to represent her in the separation and divorce. He stated that this was all entirely consistent with the brief draft minute of agreement which was issued by the Respondent to Ms Webster and Mr A on 17 & 18 September 2009. Mr Reid stated that that draft agreement was there partly to explain to both Ms Webster and Mr A exactly what was happening regarding the conveyancing transaction and partly to confirm that R & R Urquhart were the conveyancing solicitors and were not involved in any way in the matrimonial dispute.

Mr Reid explained that that was the general background i.e. that Ms Webster knew that she needed a matrimonial solicitor, she knew that it could not be R & R Urquhart

and then she arranges a meeting with another solicitor. Mr Reid stated that one of the curiosities in this case is that the solicitor representing Ms Webster never identified himself or herself and never communicated with R & R Urquhart.

In response to a question from the Chairman as to which document confirmed that another solicitor had been consulted, Mr Reid referred to Production 17 of the said Inventory which contains an email dated 18 November 2009 in which Ms Webster states –

“I have now engaged a solicitor to represent me in my separation and divorce.”

Mr Reid then referred to paragraph 4 of his Note of Argument where the Tribunal is requested –

- “1) “to act consistently by holding that the Complaint discloses no prima facie case and to dismiss the Complaint; alternatively,
- 2) to hold that the Complaint is irrelevant and to dismiss it; alternatively,
- 3) to hold that there has been such unreasonable and unjustifiable delay in the making and processing of the Complaint, and it falls to be dismissed.”

In response to a question from the Chairman Mr Reid confirmed that the third plea is an Article 6 rather than a *Mora* plea. Mr Reid stated that this plea is referred to in detail in his Note of Argument. Mr Reid submitted that there was a delay from June 2011 until October 2013 when a Complaint was submitted to the Tribunal for a second time.

Mr Reid referred the Tribunal to the part of his Note of Argument dealing with unreasonable delay. He advised that this was dealt with in paragraphs 60 to 75. He referred to the case of Council of the Law Society-v-Hall 2002 SC 620 at paragraph 14 at 623B. He submitted that the Hall case dealt specifically with a different period and that it did not cover the period from the date of intimation of the Complaint to the solicitor by the Professional Conduct Committee to the date that the Complaint was referred to the Tribunal.

Mr Reid advised that in the Hall case that period was a very short period of three months. He advised that the Hall case was concerned with a much earlier period during which the Law Society was dealing with an inadequate professional service matter. Mr Reid stated that the Inner House said that the start date for consideration of a period of delay was the date that the Complaint was referred to the Tribunal. He stated that he would come back to that later in his submission.

Mr Reid referred the Tribunal to his Note of Argument and stated that paragraphs 7 to 34 contain his submissions regarding whether the Complaint discloses a prima facie case. Within these paragraphs Mr Reid stated that he has set out in detail the history of the matter based on the documents involved.

Mr Reid advised that he wished to make a general point which is contained at paragraph 24 of his Note of Argument which states –

“The Tribunal should consider how many times must a solicitor (acting in the sale of property owned by separated spouses) make it clear that he is acting as conveyancing solicitor, not as matrimonial solicitor, and that if his conveyancing clients or one of them wishes advice about the division of matrimonial property other than in accordance with the title, the client should not seek such advice from the conveyancing solicitor but seek such advice from a matrimonial solicitor.”

Mr Reid stated that in the following paragraphs 25 to 28 of his Note of Argument he asks the question should it be once, twice, three times or four times and in each paragraph he gives a reference to documents in the bundle where he has identified that the Respondent did make this matter clear.

Mr Reid stated that there are quotes from these documents in paragraph 8.7 of the Answers. In particular Mr Reid referred to Production 25, an email dated 15 December 2009 from the Respondent to Ms Webster stating –

“I totally understand that you do not wish to sign anything with which you are unhappy nor do we wish you to do so. I cannot over emphasise that if you are

in any doubt you should seek advice from the solicitor advising you on matrimonial matters”.

Mr Reid submitted that this is the Respondent speaking as Ms Webster’s conveyancing solicitor.

In response to a question from the Chairman Mr Reid indicated that the title provisions were the same as those in the agreement.

Mr Reid referred the Tribunal to the last document referred to in paragraph 8.7 of the Answers. Mr Reid stated that in response to a strongly worded email from Ms Webster the Respondent stated -

“I would emphasise, as I have done on a number of occasions, that if you are in any doubt as to any matter you should seek independent advice from your matrimonial solicitor.”

Mr Reid stated that this part of his submission is simply to highlight the number of occasions throughout the transaction when it was pointed out expressly by the Respondent that if Ms Webster was in doubt regarding the issue of the matrimonial division rather than the conveyancing, she should seek advice from her matrimonial solicitors whom she had been advised to consult in September 2009 and whom by November 2009 she had engaged.

Mr Reid stated that he wished the Tribunal to note the following points:-

1. The Respondent was only engaged as a conveyancing solicitor and those instructions were never withdrawn.
2. The Respondent made it clear that a division of the free proceeds on other than a 50/50 basis was not something he could become involved in.
3. It was clear that Ms Webster obtained separate advice on matrimonial matters and the fact that she did this makes it clear that she accepted that the Respondent could not and would not advise her on the division of her matrimonial property.

4. It was for the matrimonial solicitor to protect Ms Webster's position regarding the distribution of her property if she instructed him to do so and if he thought that it was appropriate to do so.
5. All the Respondent could do was to distribute the proceeds in accordance with the Title and the agreement.
6. The parties could have agreed to do something different. They could have agreed to split the proceeds 70/30 or have them placed on joint deposit receipt, but they did not agree to do either. Similarly R & R Urquhart could have been interdicted or the funds could have been arrested, but neither of these things happened.

Mr Reid submitted that there was no conflict for the Respondent in acting as the conveyancing solicitor for Ms Webster and Mr A. Mr Reid submitted that the Respondent could discharge his duties to both parties because their instructions were the same regarding the sale. Mr Reid further submitted that the Respondent had to distribute the free proceeds on a 50/50 basis until he was told something different with the agreement of both parties or prevented by an order of the court. Mr Reid stated that it is relatively common that the wife contends that distributing free proceeds would put them out of her reach or prejudice her claim to a proper division of matrimonial property. He stated that the courts and solicitors are used to the procedure whereby the proceeds of matrimonial property can be frozen, but submitted that this can only be done by agreement or a court order and in this case neither of these things happened.

Mr Reid referred the Tribunal to paragraph 32 of his Note of Argument where he states that the Complaint is selective in its reference to documentation and does not contain the complete picture. He stated that he also makes this point in various places in the Answers. He asked the Tribunal to give particular consideration to that point.

Mr Reid advised that he wished to address the Tribunal regarding the issue of compensation for the Secondary Complainer as set out in the Fiscal's written submissions. He stated that the Fiscal relies on Ms Webster's request for the division of financial property other than on a 50/50 basis as creating a conflict of interest. Mr Reid referred the Tribunal to paragraph 7 of the Fiscal's written submissions. Mr

Reid submitted that paragraph 7 contains the nub of the Complaint as far as the Fiscal is concerned. Mr Reid advised that what is contained in paragraphs 6 and 7 is the Fiscal's response to an issue raised in the Answers. Mr Reid referred the Tribunal to the second sentence of paragraph 6 which states –

“He contends he was therefore obliged to distribute the net proceeds equally ‘unless he was informed to the contrary by virtue of agreement Ms Webster and Mr A bearing the position under the Title, or unless he was prevented from doing so by any Court Order.’ ”

Mr Reid advised that the Fiscal argues that this contention was erroneous. Paragraph 7 states –

“The Respondent's contention is erroneous. He was acting for both parties in respect of the conveyancing of the property. One of the parties, Ms Webster, sought a division of the free sale proceeds on other than a 50/50 basis. As an immediate consequence of Ms Webster seeking a division other than on a 50/50 basis, there was a conflict of interest, irrespective of whether or not Ms Webster or Mr A had the benefit of separate advice as to their rights.”

The Chairman asked whether that would be the case that even if the conflict was a temporary one.

In response Mr Reid suggested that there was either a temporary conflict or no conflict at all, in view of the terms of the Minute of Agreement. He submitted that when Ms Webster got herself a matrimonial solicitor the matter was resolved. Mr Reid stated that the agreement reflects the position under the Title. He submitted that when the parties asked the Respondent to sell the property that they had a right as owners to one half each of the free proceeds. He stated that this became more complex when they separated, but the Respondent had to proceed on the basis of the title provisions unless there was an agreement or a court order stating something different. Mr Reid submitted that the fact that one party asserts that she should be entitled to more than a 50 percent share of the proceeds does not present a difficulty for the conveyancing solicitor.

Mr Reid asked the question whether if there had been a position where both parties wrote to the Respondent seeking 70 percent of the proceeds, that would have meant that there was a conflict of interest so that the Respondent would have had to withdraw from acting. Mr Reid submitted that that is not the case and that the Respondent has a duty to sell the property unless his instructions are withdrawn and he has a duty to disburse the free proceeds equally unless an agreement is reached to the contrary or he is prevented by a court order.

Mr Reid submitted that what the Respondent did was follow the guidance. Mr Reid stated that either of the parties could have instructed a matrimonial solicitor to withdraw their instructions to the Respondent to sell the property but that never happened. Mr Reid submitted that the fact that Ms Webster wanted 70 percent of the free proceeds did not mean that the Respondent had to withdraw as the Respondent had made it clear to Ms Webster that she needed to go elsewhere for matrimonial property advice. Mr Reid stated that the Respondent knew that Ms Webster had her own matrimonial solicitor and he did not place himself in a situation where Ms Webster's loyalties were mixed.

Mr Reid submitted that the Respondent issued the draft Minute of Agreement in terms of what was provided for in the title to the property, which accorded with his instructions at that time. Later Ms Webster advised him that she wanted more than a 50 percent share of the proceeds. The Respondent asked her to revise the Minute of Agreement. The Respondent did not revise the Minute of Agreement himself. Mr Reid submitted that the revisions were done by Ms Webster and all that the Respondent did was to produce the draft document. Mr Reid stated that the revision of the draft was a matter for the parties and that the initial instructions were in line with the title position.

Mr Reid stated that it was clear from the document dated 1 November 2010 sent to the Law Society Complaints Investigator, which is contained within Production 37 of the said Inventory, that Ms Webster had received and had followed advice from her matrimonial solicitor. Mr Reid submitted that this was in line with what Ms Webster had told the Respondent in November 2009.

Mr Reid then referred the Tribunal to paragraph 49 of his Note of Argument where he considers the guidance. He advised that the guidance would appear to be in two separate documents i.e. the 2006 guidance and the 2009 guidance. Mr Reid advised that the guidance is contained in the Extract from Green's Solicitors Professional Handbook 2009/2010 which he had lodged. He referred to page 14 of that extract which states –

“If the parties have reached written agreement dealing with the free proceeds, and that means an agreement signed by the parties themselves, the solicitor acting for one of the parties in the matrimonial affairs may act in the sale but must account to both parties in accordance with the signed agreement. He cannot accept unilateral instructions from one of them to alter that. That would be a conflict situation requiring him to immediately withdraw from acting”.

Mr Reid submitted that the Respondent has essentially followed the guidance. Mr Reid then referred to further on in the guidance at the same page referred to above where it states –

“Unless or until a written agreement dealing with the free proceeds is intimated to you at the time or before the sale settles you are required to account to the parties in accordance with the Title. You cannot under any circumstances accept unilateral instructions to do otherwise. If both parties wish some other division, that needs to be confirmed by both in writing. It is not something which the firm acting in the sale can give any advice about.”

Mr Reid stated that the situation alluded to in the guidance was more or less the position which the Respondent had found himself in in this case. Mr Reid submitted that the Respondent could not accept a unilateral instruction to give Ms Webster 70 percent of the free proceeds or alternatively to put the funds on joint deposit receipt pending the divorce. Mr Reid advised that the guidance is summarised in the Answers and in his Note of Argument. Mr Reid stated that the 2006 guidance is the guidance founded on in the Complaint and is in similar language to the 2009 guidance

but the wording is not identical. He stated that he was not making any point regarding the differences between the two guidelines and submitted that the substance is the same. Mr Reid stated that the 2006 guidelines contemplate that the conveyancing solicitor continues to act in certain circumstances and stated that this makes good practical sense because otherwise there would have to be two further sets of conveyancing solicitors instructed and this would involve further expense for the parties. He submitted that the other sets of solicitors would find themselves in the same situation. He stated that it was clear from the documents that Ms Webster wanted more than 50 percent of the free proceeds, at one stage she wanted 100 percent and he submitted that it is reasonable to infer that from the productions she has received separate matrimonial advice. Mr Reid stated that it is not known what that advice was, it could have been good advice and she ignored it or it could have been bad advice.

Mr Reid referred the Tribunal to paragraph 49 of his Note of Argument. He stated that he initially thought that one of the guidelines superseded the other. However he advised that they both appeared in the 2009/2010 Professional Handbook and both still appear in the current edition. Mr Reid stated that the Respondent is accused of professional misconduct, i.e. serious and reprehensible conduct in that he carried on acting in the conveyancing matter when he should have withdrawn. Mr Reid submitted that the Respondent's conduct cannot possibly meet the Sharp test as the guidelines were followed.

Mr Reid accepted that the Respondent could have withdrawn. However, he did not withdraw and Mr Reid submitted that the Respondent was entitled to continue with the transaction as the next solicitor would have faced the same problems. Mr Reid referred the Tribunal to paragraphs 52 and 53 of his Note of Argument where he deals with that issue in more depth.

Mr Reid then turned to deal briefly with what he referred to as subsidiary grounds advanced in the Complaint. Mr Reid advised that these subsidiary grounds are that it is alleged in the Complaint that in respect of the agreement the Respondent was acting in the preparation and execution of that deed. Mr Reid referred the Tribunal to Answers 5.5 and 6.1. Mr Reid stated that there was no doubt that the Respondent

prepared the initial draft and submitted that this was partly for his own protection to record the advice he gave regarding requiring separate matrimonial advice. Mr Reid stated that the Complaint does not aver that the Respondent advised on the terms of the agreement or gave advice which conflicted with the interests of Ms Webster on the one hand or Mr A on the other. Mr Reid stated that in fact it is very clear from the Respondent's email of 16 December 2009, which is found at Production 19 of the Fiscal's Inventory, that this did not occur. In paragraph 1 of that email the Respondent states –

“Further to our exchange of emails yesterday afternoon I managed to speak to John. He has agreed to sign the revised agreement in the terms amended by you.”

Mr Reid then referred the Tribunal to Production 19 of the Respondent's Inventory of Productions, which is an email from Ms Webster dated 8 December 2009 in which she sets out the amendments she proposes. Mr Reid stated that these have the flavour of having been drafted by a solicitor and advised that it is clear from the documents lodged that Ms Webster says that she had engaged a solicitor.

Mr Reid stated that the Respondent did not advise the parties regarding the draft agreement or revise it; he had to remain neutral as he repeatedly stated in the correspondence. In relation to the execution of the Minute of Agreement, Mr Reid submitted that the Respondent was a witness to Ms Webster's signature, nothing more.

Mr Reid referred to the Tribunal to Answer 8.7 which refers to a whole series of emails in the correspondence from the Respondent to Ms Webster stating that if she was in any doubt about the Minute of Agreement she should seek advice from her matrimonial solicitor. Mr Reid stated that it is clear that Ms Webster never viewed the Respondent as her matrimonial solicitor and submitted that there is nothing about the issuing of the draft, which was essentially a style, in mid-September 2009, which amounted to serious and reprehensible conduct by the Respondent.

The Chairman asked the Fiscal to clarify if his position was that the misconduct extended to the preparation of the Agreement.

In response the Fiscal responded that he contended that there was professional misconduct by the Respondent in continuing with the document. The Fiscal stated that his contention was that there was a continuing situation and it was a continuing conflict.

In response to a question from the Chairman as to the crux of the misconduct, the Fiscal responded that in his view the crux of the misconduct was continuing to act as a conveyancing solicitor when a conflict of interest situation had arisen.

In response Mr Reid stated that in his submission this proposition has not been relevantly identified in the Complaint.

Mr Reid advised that the second part of the Complainer's case related to compensation and that this is dealt with in the Answers and the Note of Argument. Mr Reid stated that he wished to make one point regarding the Secondary Complainer's claim for compensation. He referred the Tribunal to Article 7.2 of the amended Complaint which reads as follows-

“She avers that she has suffered loss in that, despite instructing the Respondent on several occasions prior to settlement to hold on to the house sale proceeds pending agreement on their ultimate distribution either through mediation or by Court Order, the Respondent nevertheless distributed the house sale proceeds 50/50 into her bank account and that of her husband shortly after the sale, contrary to her instructions.”

Mr Reid submitted that the complaint in this case is that the instructions were contravened and loss flowed from that. Mr Reid stated it was plain from the above averment that those instructions were unilateral instructions in a conveyancing transaction where the Respondent was acting for two parties. Mr Reid submitted that Ms Webster was not entitled to give such instructions and the Respondent was not entitled to accept them. Mr Reid stated that this is clear from the 2009 guidance. Mr

Reid submitted that therefore the Secondary Complainer's claim for compensation is based on a false proposition.

Mr Reid then turned to his submissions regarding delay. He submitted that the original material produced by the Fiscal does not deal with the Article 6 point which he had raised on behalf of the Respondent in the Note of Argument. Mr Reid referred the Tribunal to paragraphs 60 to 75 of his Note of Argument. Mr Reid stated that he now understood that leave to withdraw the original Complaint was granted by the Tribunal and so the proceedings in relation to the original Complaint came to an end in June 2012. Mr Reid submitted that the delay in this matter is therefore a delay between May 2011, which was the stage at which the Professional Conduct Committee decided to refer the Respondent for prosecution, until the fresh Complaint was sent to the Tribunal in October 2013. Mr Reid submitted that this was the relevant period and that it constituted an unconscionable period of delay as the Respondent was entitled to have his rights determined within a reasonable time.

Mr Reid advised that the case of Council of the Law Society of Scotland v Hall 2002 SC 620 is referred to in paragraph 68 of his Note of Argument. Mr Reid stated that as previously stated the Hall case deals with a different period. In the Hall case the period between the decision made by the Council to prosecute in February 2000 and the date the Complaint was made to the Tribunal in May 2000 was only 3 months. He then referred the Tribunal to paragraph 69 of his Note of Argument. Mr Reid stated that the real issue in Hall was whether the reasonable time should be calculated from the date, when at an earlier stage (in 1997), a finding of inadequate professional service had been made. Mr Reid submitted that was the Tribunal's erroneous approach which the court rejected by drawing a distinction between the jurisdiction of the Tribunal and the jurisdiction of the Council. He stated that the court in the Hall case held that the correct starting point was the date the Complaint was made to the Tribunal in May 2000.

Mr Reid then referred the Tribunal to paragraph 68 at page 13 of his Note of Argument where it is stated –

“However, the Court endorsed a submission by the Council that if it were asserted that the Council should have made a complaint of professional misconduct to the tribunal earlier than it did, and that on this account it should not be allowed to proceed with such a complaint, it is open to a respondent to take a plea that there would be a breach of his right to a fair trial in accordance with article 6.1 of the Convention.”

Mr Reid then referred the Tribunal to paragraph 22 of the Hall decision where it was stated –

“If there were a complaint as to the time taken by the Council before it presented a complaint to the Tribunal, it was open to the solicitor to take a plea of *Mora* or a plea that there was a breach of his right to a fair trial in accordance with art 6.1”.

Mr Reid then referred the Tribunal to paragraph 28 of the Hall decision where that argument on behalf of the Council was referred to in the Decision of the Inner House as follows –

“If it is asserted that the Council should have made a complaint of professional misconduct earlier than it did, and that on this account it should not be allowed to proceed with such a complaint, the respondent is not without remedy, as was pointed out by counsel for the Council.”

Mr Reid stated that he wished to rely on that latter passage although it was not part of the *ratio* of the decision, as the Hall case referred to a different period. However, he submitted that the concession was fully endorsed by the Inner House in their decision.

Mr Reid stated that in this present case the Complaint was not referred to the Tribunal until 13 October 2013 and he submitted there was no acceptable justification for that delay. Mr Reid acknowledged that there were a lot of documents in the case but stated that they were all thoroughly investigated by 2011. He submitted there was no other excuse for the delay; he stated that there was no flood, death or lost files in this case. He stated that the reasons for the delay were not acceptable. He submitted that

to wait two and a half years for the matter to be referred to the Tribunal despite a number of reminders by the Respondent's agent, was not acceptable.

Mr Reid stated that the Tribunal has to decide firstly whether he is right regarding the starting and end points for the delay and secondly if it is reasonable for the Complainers not to produce a valid Complaint for two and a half years. He argued that as the original Complaint was withdrawn it therefore could not be considered. Mr Reid submitted that in making this decision the Tribunal will need to consider the facts of the case.

Mr Reid submitted that the Respondent was not responsible for any of the delay. He stated that it used to be a rule of thumb that if a solicitor had failed to deal with correspondence for a year he was likely to be found guilty of professional misconduct on the grounds of undue delay. Mr Reid stated that he was only using that as an example and not saying that the Fiscal was guilty of any misdemeanour. He advised that he was merely pointing to the passage of time and saying that in this case it was too long. He submitted that all he had to point to is that the delay is not reasonable.

Mr Reid stated that the Respondent is entitled to the determination of his civil rights within a reasonable time and in his submission, having to wait over two years before a valid Complaint was made to the Tribunal was not reasonable. However, Mr Reid stressed that, as stated in his Note of Argument, this is a supplementary argument and that the Respondent does not want the Complaint dismissed under a technicality.

Mr Reid stated that he did not find it necessary to refer to the case of Council of the Law Society of Scotland v McPherson 2002 SC 628 except to say that that case and the Hall case are authority for the proposition that the Tribunal and the Law Society are both public authorities under the Human Rights Act.

Mr Reid asked the Tribunal to consider his oral submissions along with the whole terms of his Note of Argument and the Answers in making its decision on this matter.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal submitted that as far as a *prima facie* case and relevancy is concerned, it is the Complainer's position that the Complaint discloses a *prima facie* case of professional misconduct and it is relevant. The Fiscal stated that Mr Reid QC has set out the Respondent's position and the competing arguments.

The Fiscal stated that his own position is straightforward and is laid out in paragraphs 5, 6 and 7 of his written submissions. The Fiscal advised that he did not dispute that on a number of occasions the Respondent advised Ms Webster that she should seek advice from matrimonial solicitors, but submitted that that was not the end of the matter.

The Fiscal stated that the Respondent produced the draft agreement. He had two clients. One client, Ms Webster, disputed that the proceeds of the transaction should be split 50/50. The Fiscal submitted that it was the Complainers' position that when that happens a conflict arises. He stated that ultimately an agreement was signed in December 2009, however he submitted that that fact does not make any difference to what happened along the way. The Fiscal stated that if there was a conflict i.e. the issue of the split of the free proceeds, that that does not become resolved simply because an agreement has been signed. He submitted that the conflict does not disappear. The Fiscal stated that the same applies to any conflict and if a conflict arises in the course of any transaction a solicitor has a duty to withdraw from acting. He stated that in a conflict of interest case if the solicitor does not withdraw and the conflict is later resolved that does not mean that he should not have withdrawn from acting.

In response to a question from the Chairman as to when the missives were concluded and the Minute of Agreement signed, both the Fiscal and Mr Reid stated that their understanding was that both occurred at the same time.

The Chairman made the point that one event would have had to have come first and asked whether the agreement was signed after missives were concluded.

On behalf of the Respondent Mr Reid advised that he understood that missives were concluded on 17 December 2009 by a letter from Gillespie Macandrew which held

the bargain as concluded. He stated that earlier the same day, Ms Webster signed the Minute of Agreement and Disposition and settlement took place on 18 December.

The Fiscal referred the Tribunal to Production 27 of the Respondent's Inventory of Productions, an email dated 16 December 2009 from Ms Webster to the Respondent giving her approval to conclude the bargain.

The Chairman asked at what point the Respondent lost control of the situation and could no longer stop the bargain from being concluded. He asked whether there was a qualified acceptance issued. The Chairman stated that up until the agreement was signed the Respondent did not have instructions to conclude the bargain and so Ms Webster's position was never prejudiced by the Respondent entering into a contract on her behalf. The Chairman stated that the position changes once missives are concluded.

In response the Fiscal stated that it would appear as if the agreement was signed prior to missives being concluded and stated that this was clear from Production 27 of the said Inventory.

Mr Reid stated that Ms Webster signed the agreement on the evening of 16 December and Mr A on 17 December.

The Fiscal stated that it is not exactly known what occurred regarding the missives and the Minute of Agreement.

The Chairman stated that the Tribunal needed to ask if there was a conflict and if so were the Respondent's actions serious and reprehensible and stated that the information regarding the missives would be a factor in determining that.

In response to a question from the Tribunal, the Fiscal stated that he was not able to comment on whether Mr A was agreeable to the unequal split and could only confirm that ultimately there was an agreement to split the proceeds on a 50/50 basis.

In response to a question from the Chairman as to whether the Fiscal accepted that the Respondent was acting only as a conveyancing solicitor, the Fiscal responded that he accepted that the Respondent was not the matrimonial solicitor for either party and that his firm did not act either. In response to a question from the Chairman, the Fiscal agreed that his case could be distilled down to what is contained in paragraph 7 of his written submissions.

In relation to the delay argument, the Fiscal stated that his submissions are contained within paragraphs 9 to 19 of his written submissions and are based on the decision in the Hall case. The Fiscal stated that in this present case the Professional Conduct Committee's decision to refer the matter for prosecution was taken on 26 May 2011. He stated that Mr Reid QC had referred the Tribunal to paragraph 22 of the Hall decision but pointed out that paragraph 22 was not part of the decision in the Hall case but was summarising the argument for the Council.

The Fiscal referred the Tribunal to paragraphs 26 and 28 of the Hall case. The Fiscal stated that paragraph 26 read as follows -

“The foregoing considerations clearly indicate that (a) the jurisdiction of the Tribunal is distinct from that of the Council; and that (b) the contestation which is the subject of proceedings before the Tribunal is distinct from any dispute which lies within the power of the Council to deal with”.

He referred the Tribunal to paragraph 28 of the Hall case which states –

“In the present case, as we have already narrated, the submission for the respondent was that a dispute existed when the client complained to the Law Society, or at any rate when the Council made their finding of inadequate professional services. However it is clear, because of the distinct nature of the proceedings before the Tribunal and the dispute with which it was concerned, that the first of these propositions cannot be correct. As regards the latter proposition, the same applies. In addition we do not accept that a dispute about professional misconduct should be held to exist at a time when, it is said, the Council ought to have identified the grounds for a complaint of such

misconduct. At that time the Council had formed no view that there was evidence of professional misconduct, let alone communicated such a view to the respondent or to the Tribunal. The Council did not commit itself to a complaint of professional misconduct against the respondent until after it had received advice from the reporter, had given an opportunity to the respondent to comment, and had received the recommendation of the appropriate committee. If it is asserted that the Council should have made a complaint of professional misconduct earlier than it did, and that on this account it should not be allowed to proceed with such a complaint, the respondent is not without remedy, as was pointed out by counsel for the Council.”

The Fiscal stated that the starting point for the consideration of delay is the point where the decision regarding misconduct is intimated, not to the Tribunal but to the solicitor.

The Fiscal stated that he thought that the decision in Hall was referring to the Law Society starting consideration of misconduct at an earlier stage than it did. The Fiscal submitted that this argument was about sanctioning of the Law Society’s position and that paragraph 29 of the Hall decision supports that. The Fiscal stated that his contention is that on the basis of the Hall case the date the starting point from which any delay should be calculated is when the relevant Complaint is referred to the Tribunal.

The Fiscal stated that there may be an Article 6 point or a *Mora* argument if there is a delay by the Law Society but submitted that is not what is to be taken from the Hall case.

The Fiscal stated that he did not intend to refer to the McPherson case.

In response, Mr Reid stated that the *ratio* of the Hall case said that the starting point is when the Complaint is lodged with the Tribunal but it did not deal with the period that he had invited the Tribunal to consider that is when a decision is taken to prosecute, i.e. refer to a Fiscal. Mr Reid submitted that the inference which the Fiscal has put on

paragraph 29 is unsound. Mr Reid stated that at the end of paragraph 29 the court is referring back to the concession made by the Law Society as stated in paragraph 28

“If it is asserted that the Council should have made a Complaint of professional misconduct earlier than it did, and that on this account it should not be allowed to proceed with such a Complaint, the respondent is not without remedy, as was pointed out by counsel for the Council.”

Mr Reid stated that that takes us back to the passage at paragraph 28 of the Hall decision referred to above which says, in terms, if there was a complaint regarding the time taken by the Law Society before referring the matter to the Fiscal, it could lead to a delay argument.

Mr Reid submitted it is the time when the Law Society decides to commit itself to prosecuting which is the starting point. He stated that the Tribunal should look at the date of lodging the Complaint and then look at the period before that. Mr Reid stated that that was not what that concession in paragraph 28 of the Hall case is about. He accepted that it is not part of the *ratio* of the case but submitted that it is a clear concession that there could be an Article 6 point. However, that point was not taken because that period was only a short period of 3 months in the Hall case. He submitted that in the McPherson case the period was longer but that case was complex.

Mr Reid stated that the delay period was two and a half years but accepted that he could not produce authority that two and a half years was too long. He advised that he did not think that such a period had been examined in discipline cases. Mr Reid stated that there is a whole raft of Strasburg cases regarding delay and it is a matter for the Tribunal to look to see if there is any good reason why it took so long to prosecute in this case. Mr Reid submitted that the Tribunal need to look at the whole circumstances of the case, including what is at stake. Mr Reid stated that the Fiscal was wrong in what he says about the two paragraphs from the Hall case. Mr Reid stated that it is quite clear that there is a remedy if the Law Society acts in a way incompatible with Article 6. Mr Reid submitted that such a delay did not arise in the Hall or McPherson cases but does arise in this case.

Mr Reid confirmed that the period of delay should be calculated from the date of the Law Society's decision to refer the matter to the Fiscal for prosecution, to the date that the Complaint was intimated to the Tribunal. Mr Reid submitted that two and a half years is too long and stated that there was no possible justification for such a delay. Mr Reid stated that there has been no reason identified. In this case the transaction took place in 2009 and the complaint was made in 2010. He argued that there was a period of two and a half years when no progress was made.

The Fiscal stated that paragraph 22 in the Hall decision is a résumé of the Council's position and not part of the decision of the court. He stated that in his view paragraph 28 relates to a different matter and not the period which is at stake in this case.

In response to a question from a member of the Tribunal, the Fiscal stated that the Respondent should have withdrawn from the case when he realised that there was a conflict. In response to a follow up question from a member of the Tribunal as whether or not that is contrary to the 2006 and 2009 guidance which appeared to allow him to continue, the Fiscal responded in the affirmative.

The Fiscal agreed with a view of a member of the Tribunal that it was not uncommon for conflicts to arise in these circumstances. In response to a further question from the Tribunal the Fiscal advised that the consequences for the parties, if he had withdrawn at that stage, would have meant that they would have had to have obtained separate representation. The Fiscal confirmed that his position was that in a conveyancing situation where the solicitor is acting for separated spouses, where one wants a larger share of the proceeds than the title specifies, that a solicitor must cease to act.

Mr Reid QC referred the Tribunal to paragraphs 52 and 53 of his Note of Argument which contained his submissions regarding this matter.

DECISION

The Tribunal had regard to the oral and written submissions and to the productions and authorities which had been lodged. The Tribunal was of the view that when acting for two clients a conflict of interest situation occurs when a solicitor either withholds giving advice which he would give if he were acting on behalf of an individual client or gives advice to one client to the prejudice of the other client. The Tribunal did not consider that this occurred in this case. The Tribunal noted the guidance referred to and considered that this had been followed. The view of the Tribunal was that even if it were persuaded that a conflict existed when a claim for a 70% share of the proceeds was intimated, until such time as the client making the claim has been prejudiced, which here would have been the conclusion of missives, it did not consider that continuing to act for both parties in these circumstances would pass the Sharp test as being conduct which was serious and reprehensible. To suggest that a solicitor must withdraw from acting for both parties in a matrimonial sale when one claims a disproportionate share, would mean that as a consequence they could not act even if they were separately represented in their matrimonial affairs because the conflict would still exist.

The Tribunal noted that advice was given to Ms Webster on multiple occasions to take independent advice from a matrimonial solicitor and that she had acknowledged that she had taken that advice. The Tribunal also noted that the draft agreement was altered and signed after Ms Webster had intimated that she had received such advice. In these circumstances the Tribunal found it impossible to declare the conduct serious and reprehensible, even if it had been of the view that there had indeed been a conflict of interest in the matter in which the Respondent was instructed. The view of the Tribunal therefore was that the Complaint was irrelevant and should be dismissed.

In relation to the preliminary plea regarding delay, the Tribunal considered that the starting point for consideration of delay was the time between the decision of the Law Society to refer the matter to a Fiscal for prosecution and that the end point was the time at which the Complaint was sent to the Clerk of the Tribunal. In this case the parties were in agreement regarding the period of delay and it was a matter for the Tribunal to determine whether the delay was unconscionable and unreasonable. In determining this matter the Tribunal took the following matters into account. Firstly, any delay regarding matters which potentially affect one's ability to work in their

chosen profession is bound to cause angst. Secondly, the Respondent did not assert that there was any prejudice to him from any delay on the part of the Fiscal or the Law Society. Thirdly, the Respondent was able to continue to practice and, through his agent, was aware of what was happening in the case from regular correspondence with the Fiscal. In view of all of these matters, the Tribunal did not consider that the delay in this case is sufficient to pass the test of unconscionable or unreasonable.

There being no finding of professional misconduct, the issue of compensation does not arise.

Mr Reid QC made a motion for the expenses of the case to be awarded against the Law Society and asked that the cause be sanctioned as suitable for the employment of senior counsel. Mr Reid stated that any cases alleging professional misconduct are serious for the solicitors involved and stated that this was an unusual case.

The Fiscal opposed the motion for expenses insofar as seeking sanction for senior counsel.

The Tribunal refused the motion that the cause be sanctioned as suitable for the employment of senior counsel. The Tribunal was of the view that this was not a particularly complex case and it could have been dealt with by a solicitor.

Mr Reid QC stated that his preference would be for there not to be publicity in this case. The Chairman referred Mr Reid to the terms of the Solicitors (Scotland) Act 1980 in relation to publicity and asked for further submissions in relation to legislative provisions.

Mr Reid stated that he wished to make no further submissions on publicity.

The Tribunal therefore made the usual order with regard to publicity.

Alistair Cockburn
Chairman