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

against

WILLIAM BRYDEN CREARIE, 18 Waterloo Street, Glasgow
Respondent

1. A Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, William Bryden Crearie, 18 Waterloo Street, Glasgow (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There was a Secondary Complainer in this matter, namely Charles Donnelly, 19 Muirfield Steading, Gullane, East Lothian who claimed to have been directly affected by the Respondent's misconduct and was seeking compensation for losses resulting from that misconduct.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Written representations were made by the Respondent.

4. In terms of its Rules the Tribunal appointed a procedural hearing to be heard in respect of the Complaint on 21 August 2015 and notice thereof was duly served on the Respondent.

5. At the hearing on 21 August 2015, the Complainers were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. The Respondent was neither present nor represented. The Fiscal submitted that the written response submitted by the Respondent was not in proper form. The Fiscal had been unable to clarify with the Respondent what parts of the Complaint were disputed. The Respondent had intimated to the Fiscal that he had no intention of attending at the procedural hearing. The Tribunal ordered that the matter be set down for a full hearing on 2 October 2015. The Respondent was allowed 14 days to lodge Answers and the Complainers a further 14 days to adjust.

6. On 22 September 2015 the office of the Tribunal received an email from David Clapham, Solicitor, Glasgow indicating that he had been instructed in the matter by the Respondent and requesting that the date for hearing be postponed. There being no objection by the Complainers, the Chairman agreed to a postponement and the date of the 29 October 2015 was identified as a suitable date for all parties. Notices of hearing were duly served upon both parties.

7. On 1 October 2015 the office of the Tribunal received an email from Mr Clapham's office, attaching Answers for the Respondent.

8. At the hearing on 29 October 2015, the Complainers were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. The Respondent was present and was represented by David Clapham, Solicitor, Glasgow. One Inventory of Productions had previously been lodged for the Complainers and two Inventories of Productions for the Respondent. A Joint Minute between the parties was lodged at the hearing. Evidence was led from one witness for the Complainers. The Respondent commenced giving evidence but due to pressure of time, the hearing required to be adjourned midway through the Complainers' cross examination of the Respondent. The hearing was continued to the 17 November 2015 at 10:30am.

9. In accordance with the Tribunal's Rules, Notices for the hearing of the 17 November 2015 were duly served upon both parties.

10. At the hearing on 17 November 2015, the Complainers were represented by their Fiscal Grant Knight, Solicitor, Edinburgh. The Respondent was present and was represented by David Clapham, Solicitor, Glasgow. The leading of evidence was concluded. The Fiscal moved to amend the Complaint and, after hearing submissions from both parties, the Tribunal granted that motion. Submissions were made on behalf of both parties.

11. The Tribunal found the following facts established:-

11.1 The Respondent is a Solicitor enrolled in the Registers of Scotland. His date of birth is 8th November 1963 and he was enrolled as a solicitor on 10th December 1987. He operates as a Partner of Messrs A & S Ireland, Solicitors, 18 Waterloo Street, Glasgow, G2 6DB and has a place of business there. He is also the said firm's Money Laundering Partner.

11.2 There is a Secondary Complainer in this matter namely Charles Donnelly, 19 Muirfield, Steading, Gullane, East Lothian, EH31 2EQ, (hereinafter "CD") who claims to have been directly affected by the Respondent's misconduct and may seek compensation for losses resulting from that misconduct.

11.3 On or about 7 December 2009 the Respondent was instructed by CD and JM (hereinafter "JM") in respect of their purchase of Property 1. At a meeting between the Respondent, and CD and JM, on 17 December 2009 the Respondent was advised that CD was contributing a sum of £54,000 from his savings, £56,000 by way of mortgage funding and the balance was to be received from JM from the sale of her property at Property 2. The title to the property was to be taken in the parties' joint names and the

security in favour of the Bank of Scotland was similarly to be taken in the parties' joint names. The date of entry for the said property was to be 29 January 2010.

11.4 By letter dated 5 January 2010 the Respondent wrote to JM and CD tendering advice in relation to the said purchase transaction. Said letter also enclosed a draft Minute of Agreement which, *inter alia* narrated the parties contributions towards the purchase price of the property and further narrated the agreement between them in the event of the said property requiring to be sold. By letter dated 15 January 2010 the Respondent wrote to JM & CD in which he, *inter alia*, apologised for the typographical errors in the previous draft Minute of Agreement and provided copy States for Settlement in respect of the sale transaction being undertaken by JM, and the purchase transaction being undertaken by both parties. By letter dated 22 January 2010 the Respondent wrote to CD and JM confirming that the missives had been concluded for the purchase transaction and enclosing a further draft Minute of Agreement for the parties' discussion. By letters dated 29 January and 8 February both 2010, the Respondent wrote to JM & CD and sought their instructions in relation to the draft Minute of Agreement.

11.5 The Respondent subsequently met with CD and JM on 17 January 2011 and following that meeting provided them with a further draft Minute of Agreement to comply with their instructions. Said draft Minute of Agreement was enclosed with a letter to the parties dated 18 January 2011. The Respondent then met with the parties on 11 February 2011 and the principal Minute of Agreement was executed with the Respondent acting as witness to both signatures. By letter dated 14 February 2011, the Respondent wrote to JM and CD and enclosed a copy of the completed Minute of Agreement the original of which was to be

held in the Respondent's firm's safe. The said Agreement was not registered.

11.6 On 25 August 2011 the Respondent received a telephone call from CD in which he advised that he wished to implement the terms of the Minute of Agreement and sell the said property at Property 1 either on the open market or to JM, all in terms of said Minute of Agreement. By letter dated 2 September the Respondent wrote to JM seeking her instructions as to whether she wished to purchase CD's interest in the property or for the property to be sold on the open market. By telephone call dated 9 September JM indicated that she did not wish to purchase CD's interest and that the property would require to be marketed for sale. The parties then agreed to delay the marketing of the property until January 2012.

11.7 On 3 January 2012 CD instructed the Respondent that he wished to market the property immediately. The Respondent took instructions from JM and sent an email to CD on 11 January indicating that JM wished to delay the marketing of the property until certain repair works had been completed. CD responded to that email indicating that whilst he accepted the likelihood of repairs being required, he insisted that the terms of the Minute of Agreement be implemented with the property being marketed for sale. The Respondent then sought instructions from JM. On 31 January CD sent an email to the Respondent seeking an update and enquiring as to why the property had not been placed on the market for sale. The marketing of the property was then further delayed. The Respondent instructed his firm's estate agency on 29 March to market the property. A Terms of Engagement letter was sent to JM on 5 April and an email issued to CD on 11 April in connection with proposed marketing of the property. The Respondent sent an email to CD on 18 April advising that he had met with JM and was instructed to market the property with

immediate effect. By email reply of the same date CD expressed his disappointment that his efforts to market the property had been hampered by a lack of communication from JM and the Respondent.

11.8 On 29 August 2012 an offer was received for the property in the sum of £205,125. The Respondent was instructed by both parties to conclude missives and missives were concluded on 9 October 2012 with a date of entry being 2 November 2012. A redemption figure was requested from the existing lender. The sale transaction settled on 2 November 2012. The Respondent sent an email to CD on 6 November 2012 enclosing a State for Settlement. It detailed the fees and outlays in connection with the sale of the property and also the redemption figure for the existing loan. It brought down net free proceeds of sale of £158,784.43. It then further narrated the division of those proceeds whereby JM received a sum of £110,512.50 and CD received a sum of £48,271.93. The Respondent knew that JM required the sum of £110,000 to complete her purchase of Property 3. The said State for Settlement, prepared by the Respondent, narrated that said division was per the Minute of Agreement between the parties. Said email sought instructions from CD in relation to a further proposed deduction of £150 and requested confirmation from CD as to whether this amount could be deducted failing which the amount provided for would be transferred to the nominated account of CD. On receipt of said email CD contacted the Respondent's firm and indicated that no funds were to be distributed until he had met with the Respondent. By said date the proceeds of sale had been distributed by the Respondent in accordance with his interpretation of the Minute of Agreement. By email dated 22 November, the Respondent wrote to CD and indicated that if there was going to be a dispute regarding the sums due to the

parties, then CD and JM should both seek independent legal advice.

11.9 Following upon the intimation of a complaint by CD to the Scottish Legal Complaints Commission, the Respondent provided information and documentation in response to said complaint. Said documentation included the cashroom records held by the Respondent for the work carried out by him on behalf of CD and JM. Four separate transactions were carried out by the Respondent on behalf of the parties namely the sale of Property 2on behalf of JM, the purchase of Property 1 on behalf of both parties, the sale of the said property on behalf of both parties, and the purchase of flat Property 3 on behalf of JM. The Respondent recorded all of the transactions in relation to these four separate pieces of work on behalf of the parties on a single ledger card and the entries in the ledger card did not differentiate between each of the four transactions. The Respondent and his firm had received advice from the Financial Compliance Department of the Complainers in January 2012 following an inspection of their firm which highlighted the same cashroom issues and, in particular, the importance of maintaining separate ledgers with full narratives.

12. Having given careful consideration to the evidence led, Productions, submissions and the facts established, the Tribunal found the Respondent guilty of Professional Misconduct by acting in a conflict of interest situation and preparing a Minute of Agreement when the parties thereto had competing interests and without tendering any advice as to the meaning and effect of the Minute of Agreement.

13. The Tribunal heard submissions from both parties with regard to mitigation, expenses and publicity. The Secondary Complainer confirmed his intention to lodge a claim for compensation. Thereafter, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 17 November 2015. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against William Bryden Crearie, 18 Waterloo Street, Glasgow; Find the Respondent guilty of professional misconduct in respect of his acting in a conflict of interest situation and preparing a Minute of Agreement when the parties thereto had competing interests without tendering any advice as to the meaning or effect of that Minute of Agreement; Censure the Respondent; Find the Respondent liable in 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 and may but has no need to include the names of anyone other than the Respondent; Allow the Secondary Complainer until 15 December 2015 to lodge a written note of claim at the office for the Tribunal.

(signed)

Alistair Cockburn

Chairman

14. 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

At the hearing on 29 October 2015 the Tribunal had before it the Complaint, Answers, one Inventory of Productions for the Complainers and two Inventories of Productions for the Respondent. A Joint Minute between the parties was lodged at the hearing. The Tribunal clarified that the terms of the Joint Minute in relation to paragraphs 2.4, 2.5, 2.6 and 2.7 of the Complaint had the effect that these statements were admitted save as insofar as inconsistent or not coinciding with the Answers for the Respondent. The Fiscal for the Complainers confirmed that as a result of the Joint Minute he would only require to lead evidence from one witness, namely the Secondary Complainer.

The Fiscal's evidence was concluded on 29 October 2015. Mr Clapham confirmed that he would lead evidence only from the Respondent. The Respondent began his evidence on 29 October 2015 but his evidence required to be interrupted part way through cross examination due to pressure of time. The hearing was continued to 17 November 2015.

On 17 November 2015 evidence was concluded.

EVIDENCE FOR THE COMPLAINERS

FIRST WITNESS – CHARLES DONNELLY

Mr Donnelly lives at 19 Muirfield Steading, Gullane. He is a retired building society manager. He is now married and his wife was at the Tribunal with him today. He confirmed that he was here in relation to a Complaint against his former solicitor, Mr Crearie, and that he had made a Complaint to the SLCC following upon Mr Crearie acting for him and his then partner. He confirmed that in December 2009 he was in a relationship with JM. He had approached Mr Crearie to act on his behalf in relation to the purchase of a property at Property1. He had had no previous dealings with Mr Crearie. They had instructed Mr Crearie as he had previously acted for jm

He was asked when he first met Mr Crearie and if it was the 17 December 2009. The witness indicated that that was probably correct and looked at Production 2 for the Complainers and agreed that this typewritten note of meeting on 17 December 2009 appeared to record what Mr Donnelly had then asked Mr Crearie to do. He was asked if anything else was raised at that meeting and indicated that it was his recollection that JM asked for a Minute of Agreement to be drawn up so that she was not involved in any way with the Bank of Scotland loan to him. There had been no real discussion regarding the payment of the mortgage although the witness intimated at the meeting that he would be taking responsibility for the mortgage.

The witness was referred to Production 3 for the Complainers which he agreed was a letter from Mr Crearie dated 5 October. Production 4 was a copy of the Minute of Agreement enclosed with that letter. There is a question mark in the margin which was placed there by this witness querying the wording in the last paragraph. He had not wanted the net free proceeds divided equally but had wanted it to be an equitable share.

The Fiscal asked the witness if he had agreed that £110,000 was first to be paid to JM. The Chairman asked the Fiscal to rephrase that question. The Fiscal asked *"What were your instructions regarding the division of the sale proceeds?"* The Chairman interrupted drawing the Fiscal's attention to the fact there was a signed Minute of Agreement and there was no averment in the Complaint that the Agreement did not reflect the instructions given. The Fiscal clarified that what he was seeking to confirm with the witness was that the Agreement at that point did not reflect what he had wanted.

The witness was asked to look at Production 5 for the Complainers and was asked if that indicated that number 4 was not the first Minute of Agreement. Mr Clapham objected to this question on the basis that it was not an open question. He then appeared to withdraw that objection indicating that he was content to the leave the matter with the Chairman. Mr Knight agreed to reframe his question and asked the witness if the letter at Production 5 suggested that there was to be further discussion. The witness agreed that this was a fair interpretation. The witness was then asked to confirm that Productions 6, 7 and 8 all confirmed that the Minute of Agreement had

not yet been finalised. He was asked to look at Production 9 which had enclosed Production 10. He was unable to say who had placed the crosses in the margin. He agreed that this version of the Minute of Agreement continued to say that the balance would be divided equally. He agreed that this is not what was wanted. He had simply wanted the same share as JM.

He agreed that Production 11 was a letter dated 14 February 2011 enclosing Production 12 the signed final Minute of Agreement. He accepted that the Agreement was finalised and that both he and JM had signed it.

The relationship later came to an end and he decided either that the property should be sold or that JM should buy him out of his share. His attention was drawn to Production 13, a letter dated 2 September 2013 from Mr Crearie to JM and he confirmed that this must have been around the time that he contacted Mr Crearie with regard to the disposal of the property.

He was asked to look at Production 14 and confirmed that this was an email from him to Mr Crearie's secretary.

By this time he wanted the property onto the market. It had been realised that JM did not have the money to buy him out and so sale was the only option.

On looking at Production 15, an email from Mr Crearie to him, he stated that he had agreed to a degree of flexibility but had meant only for a short period. The repair was due to begin so it was not going to take too long. He had thought if anything it would be a month. He accepted that Production 16 was an email from him to Mr Crearie's secretary indicating that he wanted the property marketed without further delay. He was asked why he had sent the email that was produced as Production 17 dated 31 January 2012 and indicated that he was beginning to get "cheesed off" as nothing was happening and he was anxious to get the property on the market so that he could carry on with his plans. No explanation was given to him. He could not recall anything happening from the legal office to tell him or bring him up to date.

He was asked to look at Production 20 which appeared to be what's called a Terms of Engagement letter dated 5 April 2012. He believed he had seen that letter before. He himself did not get a similar letter. He thought he had seen this letter from seeing the Respondent's file after the event.

Production 21 he confirmed was an email to him from Ms A who was the girl in the Byres Road office. This had enclosed a valuation for the price that the property would be put on the market. He confirmed Production 22 was an email from Mr Crearie to him dated 18 April. Production 23 was an email from him to Mr Crearie. He confirmed that this email conveyed his feelings. The email said he was disappointed which he now considered to be light. He had had to chase everything. He had had to phone the estate agency frequently and had been frustrated. He was asked if he had been given any explanation for the delay in the property being placed on the market and responded that he had known that JM had asked for an extension but that that was the only correspondence he had had on the subject. He believed the delay had probably been to suit JM. He did not believe that he had had any response to his email of 18 April (Production 23) if he had it would have been together with his other papers in his file.

He confirmed that Production 24 was an offer to purchase the property at Property 1. He confirmed that he gave instructions to conclude the sale. He believed that he had spoken to JM at the time and had said to her that was likely to be the best offer they would get.

He confirmed that Production 25 was an email to him from Mr Crearie dated 8 October 2012. He had not done any preliminary calculations regarding the sale price. He had not done any calculations that suggested he would not get £54,000 even though he appreciated there was a reduction in the value of the property and the price being paid.

He was asked to look at Production 26, a letter from the Respondent to JM. He was asked when he had found out that she was purchasing another property. He responded that he had only been made aware of this on 6 November when he had received a sort

of statement of account. He had not been aware of the separate transaction until that point. He had not given any instructions for £310 to be refunded to JM.

At this juncture, Mr Clapham objected to the line of questioning by Mr Knight indicating that in his view there was no allegation regarding the figures of £310 or £620 going to the last page of the Complaint.

Mr Knight responded that the averments in the Respondent's Answers suggested that the Respondent dispersed the funds in accordance with the Minute of Agreement. The correspondence being referred to discloses that he did something other than that thereby creating a conflict.

The Chairman asked whether the funding of £620 had been contemplated in the Minute of Agreement. He asked whether the Minute of Agreement specified any payment of disbursement in connection with the sale. Mr Clapham responded that the Agreement when it mentioned fees incurred included estate agency fees etc. Mr Knight argued that a repayment of disbursement was not included. Mr Clapham responded that in a conveyancing transaction a seller has to get a home report and various other reports which involve outlays. Mr Clapham indicated he was content to leave the matter in the hands of the Tribunal. The Chairman indicated that the evidence would be admitted subject to relevancy and competency.

The witness indicated he had not seen the letter which was produced as Production 26 before. He confirmed that the letter was dated 30 October and that his purchase was not due to settle until 2 November.

The witness was referred to Production 27 which he confirmed was a letter to JM dated 5 November. He confirmed he had not seen this letter before. The Fiscal read out the first paragraph of the letter. The witness confirmed that he had not given his agreement to the payment of these additional figures to JM. He explained that the £150 referred to within that letter came from a joint account that was held by them both for maintenance purposes. The account had had £300 in it and the £150 was his share.

The witness was referred to Production 12 – the Minute of Agreement. He confirmed that there was no mention of £150 in Clause 4 and said that there would not be because this was a personal thing. The witness was asked if he could remember about the payment of GSPC costs. He said he could not really remember the detail but did remember that he was asked for 500 and something pounds by Mr Crearie's office. He had had to advise the office that he had paid this figure in April and that it was already in their account. He was asked if it was the position that JM had paid an outlay to the GSPC and the witness had to reimburse her. The witness thought that that was her position but he had been under the understanding that he had already paid his half.

The witness confirmed that Production 26 was a letter dated 5 November i.e. three days after the settlement of the transaction. Production 28 was an email received by the witness from Mr Crearie dated 6 November which had enclosed a cash statement which was Production 29. The witness was asked what his reaction was when he received the email and he responded "shock". He indicated that he immediately phoned the office and asked that no funds be distributed to either he or JM until he had spoken to Mr Crearie. The witness did not get to speak to Mr Crearie or the secretary, Theresa, at the time. He believed he got to speak to someone else and told them that it was urgent that they tell Mr Crearie that no funds were to be paid out until the witness had had a chance to speak to Mr Crearie.

The witness was asked why he had asked for the funds to be held back. He responded that he felt that he had been cheated and thought that there was something going on that he had not been aware of. He had always expected that they would have an equitable share of what was left. It would not matter if the property went down or up. Although in terms of the agreement clearly he accepted he would have been "quids in" if the property had gone up in value. It was never his intention that he should be favoured by the Agreement, it was always intended to be an equitable division of the proceeds. He had phoned Mr Crearie immediately. Someone came to the witness and said that a meeting could take place on 8 November. He had had a meeting with Mr Crearie on that date.

The hearing adjourned for lunch and then recommenced at 2:10pm.

The witness went on to clarify that he had telephoned Mr Crearie's office on 6 November when he got the statement. He could not meet with Mr Crearie the next day and so a meeting was arranged for 8 November. At that meeting he had asked for an explanation of what had gone on with the division and sale. He had prepared a list containing 10 or 12 points that he wanted to ask Mr Crearie. He had provided Mr Crearie with a piece of paper outlining his concerns. It was presented to the witness that this was a fait accompli and that nothing could be done about it. He learned about JM's house purchase and was told that the money had been disbursed and that was it.

The witness was asked if he could recall how much he actually got at the end of the day. The witness said it was *"forty something thousand".* He was asked to look at Production 29 and agreed the figure he received must have been £48,271.93. The witness could not remember if the five hundred and odd pounds had been deducted or not. He did remember explaining that he had paid this figure months previously. The witness went on to say that the £150 was not deducted from his share of the funds either.

The Chairman asked for clarification of this issue as it was his understanding that the funds sent to JM had included the £150 being discussed. Mr Knight responded that the letter says that the figure was deducted but as a matter of fact it was not. The Chairman asked Mr Knight to look at Production 27. He asked whether or not JM received a cheque for £652.50. Mr Knight responded that so far as he was aware she did. The Chairman then asked for confirmation that the figure of £150 did not go and the Fiscal responded *"yes".*

Mr Knight asked the witness to look at Production 38. It was explained to the witness that this was the ledger card of the Respondent's firm relating to this transaction. The Fiscal pointed to an entry on the ledger disclosing that a payment of £48,754.43 was made to him. The Fiscal then referred back to Production 29 and suggested to the witness that the figure actually paid to him shown on the ledger card was the figure previously mentioned to him at Production 29 but without the five hundred and odd pounds taken off. The witness was asked if the forty eight thousand and odd pounds was paid to him on 8 November, the day they met. The witness responded it must

have been. The witness' attention was drawn to a figure of £42,909.32 paid to the Halifax and agreed that would have been the repayment of the old loan with HBOS.

Mr Knight drew the witness' attention to a cheque for £652.50 being cancelled in the ledger card and the witness agreed that this was the same figure mentioned in correspondence as being paid out to JM. He was asked if one of the figures paid on 25 April as shown in the ledger card was paid by him and he said one of them was. He had paid it into the Byres Road estate agency office. He had understood that that was his half share of the GSPC costs.

The witness was asked what his reaction was when was told that JM had a separate purchase transaction ongoing. He said that he had had no knowledge of it and that was a bit of a shock. From the outset he had put his trust in Mr Crearie to divide anything equitably whether it be up or down. He had taken his list of points to Mr Crearie and the witness' reaction had been that if nothing could be done then he would have to think about all of this.

A member of the Tribunal asked Mr Knight if he could clarify with the witness what he meant when he said equitably. In response to a question put to him by Mr Knight, the witness replied that he used the term equitably to mean that if there were sale proceeds they would be divided equally between them both either down the way or up the way. He had gone into this putting his trust in their solicitor and it had never occurred to him that this would not happen.

At this juncture the Chairman interrupted the questioning of the witness and drew to Mr Knight's attention that there were no averments in the Complaint that the Minute of Agreement was not what was instructed. Mr Knight indicated that it was his position that there was no averment that the Minute of Agreement did not contain what was instructed.

The witness accepted that the signed Minute of Agreement did not provide for an equal division of sale proceeds. The Fiscal then asked the witness "Is it not the case that Mr Crearie distributed the sale proceeds in accordance with what the Minute of Agreement said?" The witness confirmed that it was his position that the funds were

dispersed in accordance with what the Minute of Agreement said although not what the witness had wanted.

The Chairman asked Mr Knight to confirm if the Complainer was accepting that this was a ranking agreement. He said "no, the Complainer didn't." Mr Clapham indicated that it was his position that this was a ranking agreement. Mr Clapham indicated that there was no suggestion in the Complaint that the agreement bore any other interpretation. The Chairman responded that it was his understanding that the payment was not in accordance with the Agreement. He asked Mr Knight if it was the position that he had misunderstood this. Mr Knight responded that given what was agreed between the parties he could not raise any issue regarding what the parties had wanted. The Chairman stated that this was not the point he was raising. The Chairman indicated that he was asking whether or not the distribution did conform to the signed Agreement or not, although this could be a matter for submissions later.

The Fiscal went on to ask the witness if the position was that the Agreement had been effected by Mr Crearie, what the witness' grievance with Mr Crearie was. At this juncture the Chairman interrupted. It was put to Mr Knight that the Tribunal could not deal with what this witness thought was wrong. The Tribunal was constrained by the averments in the Complaint prepared by the Fiscal.

Mr Knight then asked the witness whether or not the matter was resolved to his satisfaction and the witness confirmed it was not and that after further legal advice he had taken up the issue with the Scottish Legal Complaints Commission.

The witness was asked who drew up the Minute of Agreement. He responded that it was Mr Crearie or someone within his firm who had done so. The witness was asked what information had been given to Mr Crearie to enable him to prepare this Minute of Agreement. The witness responded the information had been the fact that they wanted a 50/50 split or to put it another way an equitable split. At this juncture Mr Clapham objected. The Chairman pointed out that he was late in his objection but again reiterated to Mr Knight that there was no averment in the Complaint that the agreement was not conform to the client's instructions. The Chairman went on to explain to the witness that the Rules of the Tribunal required that the Respondent be

given fair notice of a case against him. In this case the Complaint made no reference to the Minute of Agreement not being conform to instructions and so the Tribunal was constrained to treating the matter as if it conformed to the instructions given.

Mr Knight went on to ask the witness if he felt he had been dealt with equitably when it came to the sale and marketing of the property. The Chairman objected to this line of questioning and reiterated to Mr Knight that this witness' feeling of equity was not relevant. The Tribunal was constrained by the terms of the Complaint.

Mr Knight rephrased his question and asked if the witness believed that the sale of the property was delayed against his instructions. Mr Clapham objected to this question. Drawing the Tribunal's attention to head of Complaint A that there was a failure to correspond adequately with the witness and that it did not allege a delay contrary to instructions.

The Chairman asked the Fiscal if he had an averment in the Complaint regarding delay. The Fiscal responded that there was an averment at paragraph 4.2. Mr Clapham reiterated his objection stating that his client had come to the Tribunal to answer these specific averments of professional misconduct as set out in the last page of the Complaint. The Chairman responded that the question would be allowed subject to relevancy and competency later.

The shorthand writer repeated the question *asked "Do you believe the sale of that property was delayed against your instructions?"* The witness responded *"No, probably no. But I didn't know it was happening at the time."*

The Chairman asked the witness to confirm if he was saying that he had no complaint then in relation to the transaction being delayed. The witness responded *"No – just the disbursement of the monies."* Mr Knight attempted to ask the witness about delay again but was prevented from doing so as the question had been asked and answered.

The witness was then asked to confirm if he was aware that he could claim for compensation if there was a finding of professional misconduct against Mr Crearie.

The witness indicated that he was aware of that and confirmed that it would be his intention to make such a claim.

Mr Clapham then asked for an opportunity to discuss matters with the Fiscal prior to cross examination.

When parties returned, Mr Knight indicated that he could not proceed with paragraph 5.1(b). He clarified that he was not advancing any argument in relation to delay in paragraph 4.2. He confirmed that he was still insisting on paragraph 5.1(a) but not in relation to delay.

CROSS EXAMINATION

Mr Donnelly confirmed that he was a retired building society manager and had retired in 1999. He was asked if he could confirm that the problem here really was that the property fell in value and he responded "yes". The witness was asked to confirm that if the property had sold at a higher value this Minute of Agreement would have benefited him. There was then an exchange between Mr Clapham and the witness where the witness was describing what he had anticipated happening by way of an equal division of any surplus and Mr Clapham reiterating that was not what the Minute of Agreement stated. The Chairman interrupted this line of questioning. The Chairman warned Mr Clapham about opening up a line of evidence regarding whether or not the Minute of Agreement was in accordance with the client's instructions Mr Clapham went on to explain that he was trying to establish that the reason why everyone was here was that the price for the property fell.

The witness was asked if he had contemplated that there was going to be a loss on the sale of property at the time of the Minute of Agreement. The witness responded he had not. He accepted that if there had been a gain in value then he would have been "quids in" but that had never been his intention. He and JM had both put in £110,000 and that was what they expected to get back. He understood now that was not what the Minute of Agreement said.

The witness confirmed that he bought the house in January 2010 and that there was correspondence from Mr Crearie in February 2010 with a draft of the Minute of Agreement. That was the draft that had come out in the name of two males. The witness agreed that the letter 15 January 2010 indicated that the house had been bought but the Minute of Agreement not yet completed as further information was anticipated. The witness agreed that the Minute of Agreement was not signed until 11 February 2011 and that the whole process had taken more than a year. Mr Clapham asked the witness if it was not the case that he had a long long time to think about the Minute of Agreement. The witness asked him to look at it from the witness' point of view. The first Agreement had come out under two names he had never heard of. It had to go back and went back into Mr Crearie's machinery and came out again and, all the time, time was passing and when it came out again it was not what he had asked for.

Mr Clapham asked the witness to look at Production 8 from the Complainers' Production. The Chairman warned Mr Clapham to beware of this line of cross examination because if he produced evidence not backed up by any averment the Tribunal was not constrained in the same way to restrict the cross examination and that if the evidence came out it would be evidence in causa.

The witness accepted that the Minute of Agreement was signed in February 2011 and that Mr Crearie was bound to work to its terms. He went on to say that the Minute of Agreement came back to him on many occasions and that he was not re-reading it all the time. He said he was a layman and not a solicitor. It was put to him that as a retired building society manager he was financially aware and he agreed that was the case.

The witness accepted that on the 8 October 2012 he knew that there was a bargain for the sale of the house. The witness said he had to keep chasing the estate agency part to find out what was happening. The witness accepted that he knew the price that was being achieved for the property was £205,125.00. The email of 8 October 2012 also told him that the date of entry was 2 November 2012. The witness accepted that he had not said anything between the 8 October and the date of entry on 2 November 2012 regarding distribution of the sale proceeds. The witness explained that he had

assumed that the proceeds would be distributed fairly between them. Mr Clapham asked the witness to confirm that as a solicitor Mr Crearie would be bound by the Minute of Agreement. The witness indicated that he expected that the solicitor would have said that there was going to be a problem with it. The witness accepted that he had not said anything to Mr Crearie between 8 October and 2 November but explained that he did not know that there was going to be a problem.

The witness was asked if he could confirm that there was correspondence between him and Mr Crearie regarding the house going on the market. The witness said the correspondence was Mr Crearie telling him that JM wanted an extension to the three month delay given in the Minute of Agreement. The witness agreed that he had agreed to some delay as if repairs were required it was in both of their interests for it to be done.

The Chairman interrupted Mr Clapham and indicated that the witness had already explained that he had no complaint with any delay in the marketing only the disbursement of funds.

The witness confirmed that Production 1 on the Second Inventory of Productions for the Respondent was the note that he had prepared and given to Mr Crearie. The next item was an email from him to the Law Society dated 29 December 2013.

Mr Clapham then went on to ask the witness with regard to the payment of fees and outlays as set out in the Minute Agreement. He brought that line of questioning to an end indicating that he was content to leave it to submissions.

Mr Knight confirmed that he had no re-examination for the witness. Mr Knight indicated that that closed the case for the Complainers. Mr Clapham asked the Tribunal if it would entertain a no case to answer submission. The Chairman indicated that that was not appropriate as the proceedings were civil and not criminal.

EVIDENCE FOR THE RESPONDENT

The Respondent confirmed his full name was William Bryden Crearie. He has been a

solicitor since 1987 and is currently a partner of the firm of A & S Ireland based at 18 Waterloo Street, Glasgow. He undertakes mostly property and private client work. He has not been before the Tribunal before.

He confirmed that he had acted for both Mr Donnelly and JM. He confirmed that it was general practice where two parties contributed unequally to a purchase to complete some sort of record in event of them going their separate ways and if you do not do that it ends up with a Complaint going to the SLCC and you get a fine. So as a consequence of that in this case he recommended the completion of a Minute of Agreement for the joint purchase. After, he thought, five letters they signed the Agreement. As previously indicated it was about a year to get the Agreement signed.

In response to a question from the Chairman, the witness confirmed that the mortgage of £56,000 was a joint mortgage as the property was being held in joint names. There was a long delay in the framing of the Minute of Agreement. The purchase began at the beginning of 2010 and the Minute of Agreement was not signed until February 2011. It could not be said that this was the type of situation where anyone was having a gun held against their head to sign. Mr Crearie had had the Minute of Agreement available to him at the time of sale. It was his understanding that he was to divide the sale proceeds in accordance with clause 4 of the Minute of Agreement. The witness was asked to look at Production 1 on the First List of Productions for the Respondent. The witness explained that the first draft of the Minute of Agreement was not acceptable as the parties did not want an equal division of the net free proceeds of sale. This Minute of Agreement incorporated what the parties wanted. His understanding of the Minute of Agreement was that the mortgage was paid first, then any estate agency and legal fees including the usual conveyancing outlays, then the matters as described in clause c. Thereafter £110,000 was to be paid to JM and Charles was then paid £54,000 and then anything remaining to be paid to Charles. The Chairman asked the witness to confirm if that was simply his interpretation. The witness explained that was why the Agreement was worded the way it was and that the matters had to be paid in that order or the Agreement would have been worded differently. The fact that JM had a separate house purchase settling on the same day was not relevant to the distribution of the funds. He would not have favoured one client over the other.

The first indication of Mr Donnelly having a problem was after the email of 6 November when he phoned to come in and talk about it on Thursday 8 November. That was when Mr Donnelly handed him the note previously described and they had a discussion regarding the distribution of the sale proceeds. In response to a question from the Tribunal, the witness clarified that he believed that Mr Donnelly telephoned the office on the Tuesday and that he thought Mr Donnelly had spoken to his secretary but in any event Mr Donnelly had come into the office on 8 November. By the time Mr Donnelly had come into the office the funds had already been distributed with the sale and purchase being completed on 2 November. Even if the witness had wanted to he could not have frozen the money. The witness had no advance notice that there was an issue with regard to the distribution of the sale proceeds. He had had authority to pay £110,000 to JM because there was a signed Minute of Agreement telling him to do so. He was not sure what issue was being raised by Mr Knight with regard to the other sums payable to JM. He thought it was something to do with JM having paid the home report and the GSPC marketing fee of £1005 initially. Then it was subsequently that half of it was to be repaid but this witness had got quite confused by what Mr Knight was saying. The Minute of Agreement required that the mortgage was paid first, then the outlays. Then JM was to get this fixed sum. The person whose share of the proceeds would be affected by the outlays would be Charles. JM had placed the witness in funds earlier on in the transaction in relation to the GSPC fees. So she was entitled to get something back.

With regard to the suggestion of the failure to correspond, the witness said that there was no difference in the correspondence between him and Mr Donnelly and JM. There was no evidence to suggest that the witness had treated Mr Donnelly any differently.

Once a property is being marketed it is dealt with by the firm's estate agency branch which is based in the Byres Road office. Any enquiries regarding marketing of the property would not be addressed to this witness, it would be addressed to his estate agency. The partner in charge of the estate agency is the **C**lient Relations Partner – Mr B.

Mr Clapham asked the witness to consider the specific allegations of professional misconduct beginning with the allegation that he had failed to correspond adequately with the Secondary Complainer. The witness denied this and suggested that there was no evidence that he had corresponded inadequately with Mr Donnelly or differently with the other party. The witness also indicated that Mr Donnelly did not appear to be taking any issue with that.

The witness was then asked to address the question of whether or not he had acted in a conflict of interest situation in the preparation of a Minute of Agreement. The witness responded that there was no question of him giving instructions or financial advice. There was no question of him favouring anyone in the preparation of the Minute of Agreement. He was recording what they had instructed him to put into the Minute of Agreement on an execution only basis. A Minute of Agreement is used by many solicitors in such situations and the witness was not aware of it being a conflict of interest to act for both parties.

He had distributed funds as there was a Joint Minute executed instructing him to do so.

The witness conceded that he should have had two ledger cards rather than just one. There had been four transactions: a sale by JM, then the joint purchase, then the joint sale, and then a purchase by JM alone. The joint purchase and joint sale should have been on a separate ledger card to the other two. To be fair, when he had sent the ledger cards originally to the Law Society he had marked up on each of the entries on the ledger cards what they related to as he was trying to help.

A & S Ireland has a substantial conveyancing practice. The witness was not the cashroom partner and had never inputted any entries into ledger cards himself. The witness confirmed that the firm had been inspected in July 2015 and that no issues were raised, specifically anything to do with client ledgers.

In response to a question from a member of the Tribunal regarding two entries on the ledger card, one for £505.50 and the other for £502.50, the witness confirmed that £502.50 was paid by Mr Donnelly.

CROSS EXAMINATION

The witness confirmed that he had accepted instructions to act on behalf of both JM and Charles Donnelly in connection with the purchase and sale of the property. He had also accepted instructions from JM to purchase property 3. He had accepted instructions on a joint basis to frame a Minute of Agreement. He accepted he drafted the Minute of Agreement. Mr Knight asked the witness to clarify why he had never said in the correspondence to the Law Society that he accepted drafting the Minute of Agreement. The witness explained that he drafted it by incorporating information into the document that he had been provided. By draft he meant filling in the blanks with information he was given. He was not creating anything. He would like Mr Knight to show him anything by way of a telephone note, email etc pointing to him giving any advice or what that advice was. The narrative for the Minute of Agreement he had obtained from the clients. The legal terminology was from a style that they use in the office. He filled in the blanks.

At no point did he act in a conflict of interest situation at any stage in proceedings. When he distributed the monies he did so exactly per the Minute of Agreement. The Fiscal asked the witness if in hindsight he thought there could have been something else in the Minute of Agreement that would have prevented all of this. The witness said that he needed a clue. The Chairman asked the witness if he was aware that if the value went up, Mr Donnelly would get more. If the value went down, he would get less and the witness agreed. He said to the Tribunal that he was not looking at this until the sale went through.

The Chairman asked the witness to confirm that as a solicitor he was preparing and issuing a document for signature without considering what the effect of that document might be. The witness said that all he was doing was putting the information into the document, information given by the clients. He was not giving them any kind of financial advice. The Chairman asked the witness to consider that it might be thought that he had an obligation to advise the clients of what might happen as a result of the Minute of Agreement. The witness said the issue of property prices increasing or decreasing was not a legal matter. The Chairman asked the witness again *"Was it not*

an obligation in a situation like this when a legal document is being sent to a client for signature and there was to be a disparity in distribution of the proceeds to advise the client of the consequences of the Minute of Agreement?" The witness responded that it was obvious from clause 4 that that was what it said. "*It is not exactly difficult to follow*". The witness said that it was his position that the agreement reflected what he was asked to put in it. He was asked how the joint instructions were given to him. He said "*It must have been at a meeting but there was correspondence enclosing draft minutes of agreement*". The Fiscal drew the witness' attention to Production 2, the file note of his initial meeting with JM and Mr Donnelly. He accepted the detailed information therein. He was asked where the information was regarding what was to happen on a subsequent sale. He explained that this meeting was pre-purchase and he was trying to find out how they were funding the purchase. He was not envisaging a sale at the time that they were buying. The witness was asked when the subject of the Minute of Agreement arose. The witness explained that it was in his letter of 5 January 2010. The Fiscal pointed out that that letter enclosed a completed Minute of Agreement and asked where the information had come from to go in the draft. The witness said that he assumed that he must have got it from both of the clients at the initial meeting. He could not explain why it was not in his file note. The Fiscal pointed out to the witness there was nothing in his note to indicate what was to happen in the event of a sale. The witness answered that it was in the Minute of Agreement. The Fiscal explained that he was trying to ascertain where that information for the Minute of Agreement came from. The witness suggested that it was all in the file note, that was the only place that he could have got it from. It was all on the file note: *"she was providing £110,000 from her own resources, £54,000 was coming from Mr Donnelly's funds and then the mortgage for the rest".*

The Fiscal again asked where in the note he got the instructions for what was to happen in the event of a sale as set out within the Minute of Agreement. The witness said he had sent Mr Donnelly five drafts and Mr Donnelly had not denied that these were his instructions.

The Chairman asked the witness who told him to give precedence to the £110,000. The witness answered that both of them did. The Chairman asked the witness if at that stage it had occurred to the witness that the person being paid out second might

not get what was expected. The witness answered he had not considered it. The Chairman asked the witness if there was any indication in any of the papers as to the source of the information for the order of payment. The Chairman asked, who first decided on this. The witness said that they jointly instructed him. The Chairman asked the witness to clarify if he meant that they had jointly specifically instructed him regarding the order of payment and the witness said he had been instructed to do that verbally by both of them at a meeting.

The Chairman asked the witness what discussion he had had with this clients regarding the order of payment and the effect that might have. The witness responded *"she is contributing her £110,000 he was contributing his £56,000 and the joint mortgage".* It was the witness' understanding that JM didn't want any obligations in relation to the joint mortgage. The Chairman asked the witness if it was his position that he had unequivocal instructions that the £110,000 was to be paid first. The witness said that that was correct. The Chairman asked if that was not unusual. The witness responded that the Chairman was looking at this with the benefit of hindsight and the fall in property prices. In response to a question from a member of the Tribunal the witness accepted that this was an unusual arrangement but that he had not come up with any of it. The Tribunal member asked the witness, given that the situation was unusual**,** whether or not he thought it was appropriate to act for both or whether separate advice should have been obtained. The witness stated that there had been an offer of separate advice and that was reflected in clause 5 of the agreement and they had had a year to consider matters. Mr Donnelly had indicated that he had another lawyer and that if Mr Donnelly had had any concerns he could have contacted that solicitor. The witness conceded that he was aware that it was the Law Society's general guidance that separate representation should be considered and the witness said that he had considered that. Although the instructions were unusual the witness did not think that they were that difficult to follow in any technical sense. The Chairman asked the witness to clarify for the Tribunal that it was his evidence that each client had made it clear to him by communication that JM was to be paid in full before any sum of money was to be paid to Mr Donnelly. The witness said that was his position.

The witness confirmed that it was his evidence that he was given instructions in accordance with Clause 1 of the first draft. The Fiscal pointed out the question mark beside Clauses 1 of the draft, which was Production 4 for the Complainers. The witness said he had no idea who had put the question mark in the margin.

Mr Knight pointed out that in the first draft the position was that £110,000 was paid to JM then £54,000 to Mr Donnelly and then the balance equally between them. He asked the witness to look at Production 5. The Fiscal pointed out reference to the words *"further discussion"* in that letter and asked the witness why, if the Minute of Agreement was framed exactly as the client's had wanted, there was any need for further discussion. The witness responded that this was a draft. They were going to discuss it further. The witness accepted that Production 6 referred to a further draft and indicated that the clients must have asked for a change. On looking at Production 9, the Fiscal pointed out that this enclosed a further draft which was said to comply with further instructions. The Fiscal asked the witness what the further instructions were. The witness said he was unclear as to what draft was enclosed. The witness indicated that the various drafts had been destroyed. He had been trying to make sure that it was not complicated and only have the final signed Minute of Agreement on the file.

The Fiscal referred the witness to Production 10 and in particular changes therein. He drew the witnesses attention to paragraph 1 where there was an addition that the mortgage was to be a 10 year interest only mortgage. He could not remember when he got the instructions to do that but was clear that it would not be there unless he was instructed to put it in. The Fiscal then drew the witness' attention to Production 12, the completed Minute of Agreement and indicated that there were again changes. The Fiscal asked the witness to confirm that in the original draft, the balance of the net free proceeds was to be divided equally between the two clients whereas in the final Minute of Agreement the balance was all to go to Mr Donnelly. The witness agreed that that was the case. The Chairman asked the witness to clarify whether that was indeed the case given the words *"to the extent that he has repaid the mortgage"*. The witness said that it was his understanding that Mr Donnelly was to get the whole balance. The Chairman asked the witness to explain what those words meant and what their significance was. The Chairman emphasised that it was the witness' firm's

language and asked the witness if he had considered that. The witness said Clause 3 in the Minute reflected what was due on the mortgage then. He thought this was him making it clear that the mortgage was to be repaid in the first place. The Chairman asked the witness if he was saying that the instructions were that Mr Donnelly was only to be paid that sum of money that he had already repaid to the building society. The witness said that was not the case. The witness said Charles was to get the whole balance. The Chairman asked the witness again if he did not think there was a difference between simply saying pay the whole balance to Mr Donnelly versus saying pay the balance to the extent that he had repaid the mortgage. The witness hesitated. The Chairman rephrased the question for the witness and asked him if it was his position that the Minute of Agreement meant that even if the couple had been together for 20 years and disposed of the property then the whole balance was expected to go to Mr Donnelly. The witness said yes that that was his understanding. The Chairman asked the witness if it was his position that he maintained that as a solicitor that this was a reasonable interpretation of that Clause framed with unambiguous instructions from his clients. The witness said that that was his understanding. The Chairman asked him if it was not the case that he could only have put that wording in if he had unambiguous instructions from the two clients. It was his understanding that it was communicated to him that Charles was to get all of whatever balance there was. The Chairman asked the witness if originally the balance was to be shared and then that changed, did those clients say that Charles was to get the whole balance. The witness responded that it was JM's position that she just wanted to get the £110,000 back, that was the main point of her instructions. The Chairman asked the witness if he had thought it necessary to explain that possible dual interpretation. The witness responded no.

The Fiscal asked the witness if he had unequivocal instructions to frame the first Minute of Agreement which said the balance was to be divided equally and then framed the final Minute of Agreement where the balance was to be divided in a different manner, why this change in instructions was not recorded. The witness said he could not really remember but thought that the change in instructions might have been written on rough drafts and these drafts were subsequently chucked in the bin. The Fiscal asked the witness, would it not have been better to have actually recorded the change in instructions. The witness indicated they were recorded in the actual

agreement. The witness said that he did not know exactly what Mr Donnelly meant when he referred in his evidence to equally or equitably. It had not crossed the witness' mind that if the property value had increased Mr Donnelly would have profited as a result of this Minute of Agreement. He had been following joint instructions. JM was only interested in her £110,000. It had not occurred to him, acting for two clients, that he needed to advise them of what would happen on a subsequent sale. He did not see that as a piece of advice that a solicitor should give, to speculate on property prices. That was not a solicitor's remit. He was not asked to give advice regarding the content of the Minute of Agreement. If they had asked for advice that might have been a separate matter but he was not asked to give advice. The Chairman asked the witness whether he considered it appropriate as a solicitor to prepare a document for signature without giving any advice as to the consequences of that document. The witness said he had not given any advice. The Chairman asked the same question several times, as to whether or not the witness considered it appropriate to draw up a document for signature without giving advice as to the possible adverse consequences for either party. The witness repeated that he had not given advice. The witness's eventual position was that he had not given advice and therefore he had thought it appropriate not to do so.

The Fiscal drew the witness' attention to Production 15, the email regarding the delaying of the marketing of the property and asked whether or not that was straying into a potential conflict. At that stage he did not think there had been an issue as Mr Donnelly was happy to be flexible and he understood that there might be a month or so delay in connection with repairs. He had not had any real issue with the delay in subsequent marketing in later dealings. He had not considered it an issue at that point. Both had ultimately wanted to get the property on the market and get the best price they could.

Continuation of Evidence – 17/11/15

The witness was referred to Production 18 for the Complainers which was a file note of a telephone conversation between the Respondent and JM. The witness did not think that this was the beginning of a conflict. In his view it was just a discussion on

what to do. The parties were still talking to each other. No alarm bells had been rung for him.

The Respondent was referred to Complainers' Production 20, a letter to JM from the Respondent's firm dated 5 April 2012. He agreed that this letter referred to outlays of £1,005. He was asked if each of the sellers had paid one half share and responded that he thought that they had but he was not sure if these had been paid at the start. He stated that these details would be on the ledger card. He was unable to say if a similar letter had been sent to the Secondary Complainer as these issues were being dealt with by the estate agency department of his firm. His firm did not have the Secondary Complainer's address. There was an email to the Secondary Complainer with the letter.

The Respondent had not thought to mention to the parties that there was a conflict. The parties were jointly marketing the property and so the Respondent could not see any reason to do that. He accepted that the parties were a separated couple but took the view that there was a Minute of Agreement in place dealing with the issues.

The witness was referred to Production 23 for the Complainers which he accepted was an email addressed to Teresa Copeland who he confirmed was his secretary. This email appeared to be a response to an email from the Respondent to the Secondary Complainer of the same date.

The Respondent was asked why it was said in his Answers that he had no knowledge of the email at Production 23. The witness responded that he had simply been asking for a copy to be sent to him and if the email was there it was there.

The Respondent was referred to Production 26 for the Complainers which he confirmed was a letter to JM from him dated 30 October, enclosing a cash statement. He agreed that this letter was dictated three days before the date for settlement. He had not written to the Secondary Complainer in the same terms. The letter to JM of 30 October was written because he needed money from her regarding her purchase and was not anything to do with the Secondary Complainer. He was unable to recall

exactly how much money was required from JM but stated that this could be determined from the ledger card.

The witness was referred to Production 38 for the Complainers. This was the ledger card for these clients. He confirmed that two credits (£505.50 and £502.50) dated 25 April 2012 looked like the clients paying their share of the home report and marketing costs. A credit of £10,659 dated 31 October 2012 appeared to him to be the deposit from JM for her purchase. A credit of £205,125 dated 2 November 2012 he confirmed was the proceeds of sale. The debit of £120,000 on the same date was JM's purchase. A payment of £714 was JM paying her fee. A debit of £240 on 12 November 2012 was the payment of JM's disposition dues. He confirmed that JM was paying a purchase price of £120,000 funded, £110,000 from the sale and £10,659 paid direct from her. He accepted that the figures did not add up properly in that he had been put in credit to the figure of £120,659 but her purchase was £120,000, her fees £714 and other outlays of £240. That appeared to leave a debit of £295. At this juncture Mr Clapham objected to the line of questioning submitting that there was no averment in the Complaint relating to a payment of £295. Mr Knight responded that in the Respondent's Answers he stated that he had dispersed the funds in accordance with his interpretation of the Minute of Agreement. The Fiscal was seeking to draw from the witness that the figures did not stack up even in his interpretation of the Minute of Agreement.

The Chairman indicated that the Fiscal was taking no issue with whether or not the Minute of Agreement reflected the parties' instructions. The Chairman asked the Fiscal for clarification of where this line of questioning was going. Was the Fiscal asking whether or not the payment fell within the witness' understanding of the Minute of Agreement or did not fall within that understanding. The Fiscal explained that he was intending to ask if the Respondent thought he was entitled under the Minute of Agreement to pay £295 out of the funds or not.

The Fiscal asked the witness what in the Minute of Agreement the witness relied upon to cover this extra £295. The Respondent answered that he was not aware of any error in his cash statements but he would have to look at these again. The witness was asked if it was possible that the £295 came from the Secondary Complainer's share of

the sale proceeds. The witness said he was not sure but would need to calculate the figures again. This was not something where he deliberately misled the parties.

The Respondent was referred to Production 26 for the Complainers. He was asked where the instructions for him remitting an extra £310 to JM came from. The witness stated he had been supplied this information in a telephone call or meeting with JM. He presumed the money was to do with the costs of the home report but could not recall exactly. The witness insisted that he had distributed the sale of proceeds according to the Minute of Agreement. He was asked where in the Minute of Agreement there was authority for this payment. He responded that it was within the normal role of a solicitor to calculate the correct figures in a sales transaction. He did not accept that the payment was not covered by the Minute of Agreement. The witness was directed to the Minute of Agreement itself and stated that this payment would have been covered by clauses 4(b) and 4(c). The witness was asked where in these clauses there was authority for this payment to JM and responded *"What more do you want?".* The payment he insisted was covered by clauses 4(b) and (c).

The Chairman asked the Respondent if he could clarify what the £310 represented. The witness indicated that he believed that to be the cost of an updated home report. Home reports have to be no more than three months old and often required to be updated.

The Fiscal referred him again to the firm's ledger card and suggested that there was no further debit on the card in relation to this. The witness explained that he could not recall the exact circumstances but sometimes the payment is made direct to the surveyor rather than the GSPC. This was something that the estate agency would sort out.

He would be able to tell the Tribunal why the payment was made if he thought it was important and had time to look at the file again. He would not pay out figures *"willy nilly*."

The Chairman drew the witness' attention to the ledger card and asked where on the ledger card the payment of £620 could be seen. The witness responded that he was not

sure whether the payment was made through the ledger or whether it was paid separately. There was no other ledger card but the parties could have paid the surveyor directly. This still would be something that he would help sort out.

The witness was referred to Production 27 for the Complainers, a letter from him to JM dated 5 November 2012. This letter stated that a cheque for £652.50 was enclosed. The witness was asked to clarify why JM was receiving the additional cheque for £652.50. The Respondent stated that the payment was not actually made as the cheque was cancelled on the ledger card. The cancellation may have been carried out subsequent to negotiation with the Secondary Complainer. The witness could not remember whether that letter was something that the Secondary Complainer had had an opportunity to speak to him about. His authority for making this payment came from clauses 4(b) and (c). This is the amount being deducted from the sale proceeds in the normal way.

The witness was asked why he was apportioning the outlay to one client and not the other. He responded that he was trying to help sort out the financial details. He stated that a solicitor has authority to distribute sale proceeds correctly. He conceded that these figures were not correct.

The witness was asked to clarify what the figure of £150 referred to in the ledger of 5 November 2012 related to. He said it was the same situation and seemed to be outlays incurred to do with the sale and consequently covered by the Minute of Agreement. The witness accepted that the cancellation of a cheque for £652.50 did not take place on the ledger till 15 November 2012, a delay of some 10 days. He could not recall the exact circumstances behind that. He assumed that it was as a result of the discussion of whether or not the outlays had been properly shared or not. He had not seen JM after the sale transaction. He had only spoken to her on the phone. The cancellation may have been the result of a phone call. The cheque may or may not have been returned. It may just have been stopped. The Respondent would have asked her to return the cheque for audit purposes but he could not recall the exact circumstances here.

The Chairman asked the witness why he had phoned JM. The witness responded that he assumed that he had telephoned her because the Secondary Complainer was not satisfied that costs had been allocated correctly.

The Chairman asked the witness on what basis he was able to do something about the cheque for £652.50 and whether the witness accepted that he had made a mistake in this payment. The witness responded that this was a small amount of money in relation to the sums involved. It may have been done on the basis that there was an agreement that there needed to be an adjustment. That agreement would have been between JM and the Secondary Complainer. The Secondary Complainer must have communicated it to him. He could not recall the Secondary Complainer complaining about this particular point. This was a small amount of money that needed to be correctly adjusted. He could not recall why he had adjusted but both clients must have acknowledged that something was not correct.

The witness was asked to clarify what the additional £150 represented. The witness stated he could not remember exactly but it might have been a factor charge.

The Fiscal pointed out to the witness that the correspondence referred to £150 being a figure deducted by the Secondary Complainer. The Secondary Complainer had given evidence that this was his one half share of money held in a joint account. The Secondary Complainer had not been challenged in evidence. The Fiscal asked the witness if he was willing to agree that he had had no authority to make the payment of £150 as it did not relate to the conveyancing matter. The witness responded that he did not remember but explained that it was him trying to help agree a final figure between the parties. He did not accept that this created a conflict of interest for him.

There was no particular reason for the Secondary Complainer getting his accounting a day later than JM. It would just have been the order in which the items were typed.

The witness was referred to Production 28 for the Complainers, an email from him to the Secondary Complainer dated 6 November enclosing the cash statement. The witness accepted that that email referred to the £150 as not being referred to in the Minute of Agreement and conceded that the £150 was not part of the Minute of

Agreement. The Respondent was unable to say whether or not the letter to JM dated 5 November had been sent out to her that day or the next day. He stated that the bottom line was that he had stopped the cheque. He stated that if the ledger states that the cheque for £652.50 was posted on 6 November then that would be correct. He did not accept that writing to Mr Donnelly in the terms of Production 28 was him getting himself involved in a conflict of interest. He said he was just trying to tidy up financial matters and help both clients. The cheque must have been stopped as a result of further discussion.

He accepted that the cash statement attached to Production 28 was prepared by him. He was asked about an entry on the cash statement for posts and incidents and could not explain whether that had been posted in the ledger or not. His attention was directed to the second page of the cash statement. He did not know if he had prepared that or not. He did not recognise that. Whilst he accepted that it came from his file he suggested that the document could have been provided to him by the Secondary Complainer at the meeting they had on 8 November. His attention was drawn to a correction of the figure of £512.50 to £502.50 which was mirrored in the body of the email. The witness accepted that he had made the amendment on the email but could not remember drafting the second page of the cash statement. If that page was on his file and had not been prepared by the Secondary Complainer then it must have been prepared by him.

The witness conceded that the figure in the email was wrong on the basis that the Secondary Complainer had already paid his share.

The witness did not accept that he had been acting in a conflict of interest situation. He had distributed funds and prepared the Minute of Agreement in accordance to what the clients had wanted. At the meeting on 8 November the Secondary Complainer had only taken issue with half of the estate agency fees being refunded to him. The Secondary Complainer accepted that the Minute of Agreement had correctly been applied.

The witness was referred to Production 31 an email from him to the Secondary Complainer. He confirmed that the email was factually correct and that he had spoken

to JM on the telephone and she had agreed to the refund. She had subsequently changed her position. The refund was not required due to the Minute of Agreement. The Secondary Complainer was asking the Respondent separately if she would agree to that payment.

The Chairman asked the witness why any payment was required by JM if the cheque had been cancelled. The witness responded that he was asking for money from her from the money that had already been distributed.

In response to a question from one of the members of the Tribunal, the witness accepted that the effect of the Minute of Agreement was that the residue of the sale proceeds bore the whole fees. He accepted that was why JM was approached for a contribution towards them. She had initially agreed to that and then changed her mind.

The witness accepted that £652.50 should never have been sent out to JM in the first place.

The witness' attention was drawn to the second paragraph of the email at Production 31 where reference was made to the parties seeking independent legal advice. The witness accepted that the penny was dropping by that stage regarding a conflict of interest. It remained his position that up until that point he had not acted in any way in a conflict situation.

The witness was referred to Production 32 for the Complainers, a letter from his firm to the Secondary Complainer. In the third paragraph of page 2 of that letter reference is made to the Respondent *"creating a legally binding agreement".* The witness was asked if there was any significance to the use of the word *"create"* rather than the word *"frame".* The witness responded that that question required to be addressed to Mr Crow.

The witness was asked whether or not there was any significance to there being no mention of the framing of the Minute of Agreement in paragraph 3 of Production 33

for the Complainers. The witness said that there was nothing meant by that and confirmed his position remained as expressed in the last paragraph of that letter.

The witness stated that he had been caught between a rock and a hard place. If he had not recommended a Minute of Agreement then that could have resulted in a complaint to the SLCC. He had been giving best advice to his clients with regard to getting a Minute of Agreement. He had not been advising them about financial matters. He could follow what the parties were trying to achieve. When asked by the Chairman if the Minute of Agreement did not measure up to what the Secondary Complainer wanted, the witness responded that he had no argument with the Secondary Complainer's testimony.

He agreed that it had been his advice that the parties needed to complete a Minute of Agreement. He had not given any advice regarding the content or consequences of the Minute of Agreement. His implementation had been what was recorded in the agreement itself.

The witness was referred to Production 34 for the Complainers, a letter from him to the Law Society. He was asked how he could say that he had not been giving any advice when the Minute of Agreement had been changed on at least three occasions. The witness responded that it was their input not his. The agreement had taken over a year to finalise. The Secondary Complainer had already intimated to him that he was financially aware. The parties appeared perfectly friendly and there was nothing contentious.

The wording of clause 4(f) of the completed Minute of Agreement was the wording of the two clients which the Respondent had copied into the final version.

On being asked to explain the change between the earlier draft and the later draft in its consequences on the residue of the proceeds of sale, the witness explained that all JM had wanted was the £110,000 she had contributed.

The Chairman asked the witness why it had been necessary in clause 4(f) to insert the words *"to the extent that he has repaid the mortgage".* The witness stated that was

what had been said by the clients and that was why it was recorded. He interpreted that as meaning that the Secondary Complainer was to receive the whole residue. The wording of clause 4(f) was the wording exactly given by the clients and simply regurgitated by him.

The Respondent had only given conveyancing advice not any advice to do with the content of the Minute of Agreement as explained by him in his letter which was Production 36. He had given the parties a style to work on, to tailor to their own needs. He recorded what the clients had instructed him to put in the Minute of Agreement. There had been several drafts. The file had been cleaned out of the rough drafts. He could not say if Production 4 for the Complainers was the first draft of the agreement as it was not dated.

The witness was referred to Production 4 for the Complainers and was asked if he was familiar with his firm's style of agreement. He agreed that clauses 4(a) to (c) are standard clauses. He agreed that clauses (d) and (e) were independent circumstances. He was asked by the Chairman if when the Minute of Agreement was sent to the clients this part had been blank. He responded that this was what the client was instructing him on. The Chairman asked the witness, that if a style had been sent to the clients for them to complete, what would have been in clause 4 when it went out on the first occasion. The Respondent answered that clauses (a) to (c) were normal. After that the remainder was subject to input from the client. It probably would contain no typing other than the standard agreement of paragraphs (a) to (c) and the rest would depend on the circumstances.

The Fiscal asked the witness why he had not previously mentioned that he had sent out a style to the clients and asked them to tailor it to their own needs. He said he had done so and could not count the number of drafts that had been sent out. He was asked again to indicate where he had said previously that he had sent out a style and he responded that the clients had already said that the Minute was in accordance with their agreement. He had sent out a draft agreement on a number of occasions. No advice or instructions were given to them by him. He agreed that his firm's style was a document with a number of gaps to fill in. He said the skeleton was there and that he gave that to the clients and asked them to tailor it to their needs. He said that this had

the same effect as describing the process as drafting. He accepted that there were no gaps in Production 4 and explained that this was because the information had already been given. He thought a style might have gone out before that document had been issued. A number of drafts had been sent to the clients. He denied preferring JM's position over the Secondary Complainer's. He denied that he had drafted the Minute of Agreement to make sure that she got back her £110,000. He denied that he had kept her more informed about the transaction. He accepted that he had sent a cash statement to her a couple of days before the Secondary Complainer but that was because he needed money from her in relation to her purchase. He did not accept that he had exceeded his authority in terms of the Minute of Agreement other than tinkering with small matters. Whilst the £150 previously discussed was not covered by the Minute of Agreement at the end of the day that was something that had been resolved as the cheque had been cancelled. Tinkering is the normal role of the solicitor trying to complete a conveyancing transaction.

The witness was asked to explain why it appeared that JM had received her share of the proceeds of sale on the 2 November, whilst the Secondary Complainer did not receive his until 8 November. The witness explained that this was because of settling a sale and purchase on the same date. The purchase for JM was settled by a solicitor's cheque. It was normal practice when a sale and purchase were settling on the same day to send the cheque on the same day. He had never had the situation where a solicitor's client account cheque had bounced.

RE-EXAMINATION

The witness explained that the sale proceeds were paid to his firm by a solicitor's cheque. The purchase was made by cheque. It was not necessary to wait for the normal period of a cheque clearing. The payment to the Secondary Complainer was made by CHAPS and so had to wait for cleared funds being in the client account.

JM was to receive a fixed sum from the sale proceeds. The person to meet the outlays was the Secondary Complainer. Each client had contributed to the costs at the outset.

She was entitled to £502.50 back. The figure of £652.50 referred to was probably arrived at by adding the cost of the initial home report plus the updated home report. The figure of £150 was a separate matter. He would require to crunch some numbers before he could answer the questions raised regarding the figure of £295.

The Chairman asked the witness for further clarification of the figure of £150. He pointed out to the witness that the Secondary Complainer had given unchallenged evidence that this was his one half share of a joint account kept for maintenance purposes. If that was correct it could not be covered by the Minute of Agreement. The Respondent responded that he wondered if the figure had been a factoring charge. The witness indicated that he got the information about the £150 from JM. He was asked on what basis he had decided it was appropriate to refund that figure and he responded that it was because she had asked him and he had checked with the Secondary Complainer. The Chairman asked why it had not been put to the Secondary Complainer that the Respondent had spoken to him about this. The Respondent said there was an email asking if this was appropriate. He could not be sure if the letter of 5 November and the email of 6 November went out at the same time or not. He was trying to help.

MOTION TO AMEND

At the close of evidence Mr Knight lodged copies of the Complaint with amendments marked thereon. He made a motion to amend the Complaint in these terms.

Mr Clapham took exception to only those amendments relating to Paragraph 4.1 of the Complaint It was his position that the Respondent had come to answer the terms of the Complaint as served upon him. He submitted that the Tribunal should be reluctant to amend once evidence had been given.

The Chairman observed that the disputed amendments related to evidence led without objection and asked if consequently the evidence was now evidence *in causa*.

Mr Clapham responded that parties were entitled to assume that they would be making submissions on averments of fact and duty they were working from. He could not refer to any authority in support of his submission.

The Tribunal considered that the amendments proposed by the Fiscal reflected evidence that had been led without objection and admitted without reservation and therefore granted the motion to amend.

SUBMISSIONS FOR THE COMPLAINERS

Mr Knight submitted that paragraph 6 of the 2008 Practice Rules and Rule B1.7.1 of the 2011 Practice Rules state that solicitors must not act for two clients where there is a conflict. A solicitor should exercise caution if there is a risk of conflict. Here the Respondent prepared a Minute of Agreement where, according to him, he tendered no advice to the clients regarding the contents or consequences of the Minute. The Respondent's evidence today was that he had sent out a skeletal draft which had then allowed him to prepare an actual draft which then came to a final Minute of Agreement. It was incredible that this argument could be advanced to the Tribunal. The whole reason that this came into being was that the narrative was the clients and not the solicitor. We know from the Secondary Complainer that it was not what he wanted and that the way funds were distributed was not what he wanted. The Fiscal conceded that it had been correctly pointed out to him that this however was not part of the present Complaint.

The Respondent failed to consider the impact of future developments that might have caused a conflict. It had not crossed his mind until now that there may have been a conflict.

The Respondent claims that he had unequivocal instructions to frame and re-frame the Minute of Agreement. In the first day of evidence the Respondent was asked a number of questions by the Tribunal as to why he had never considered or tendered advice. The Respondent's actions had been described as cavalier. This appeared to be an accurate description of the Respondent's approach.

There was no evidence other than the Respondent's own incredible evidence that he had been given instructions for a ranking agreement. This had not been put to the Secondary Complainer when he gave evidence. Yet the Respondent maintained that this was a clear agreement.

The agreement does not narrate that it is a ranking agreement. The difficulty with its terms are that you could give the agreement to three different lawyers and get three different answers. However, it was the Fiscal's submission that, in its ordinary reading, there was no ranking to the payments listed.

The Fiscal stated that the Tribunal had heard further incredible evidence from the Respondent that he had received instructions from JM that all she wanted, following the sale of the property, was £110,000, regardless of what happened. If the property had sold for more then the Secondary Complainer would have been *"quids in"* – even though the Secondary Complainer said that that was not what he wanted to happen.

The Respondent's ineffectual and poor drafting of the Minute of Agreement had created a potential conflict.

The Chairman interrupted the Fiscal to ask what took this element of the conduct from negligence to misconduct. The Fiscal indicated that he would return to that.

The Fiscal stated that the Respondent must have known that there was going to be a shortfall given his interpretation of the Minute of Agreement. The Respondent had kept JM informed – he had written to her twice but had not written to the Secondary Complainer. The Respondent had written to JM explaining the sums due to her.

The Respondent had exceeded the authority given by the Minute of Agreement in making the payments of £652.50 and £150 to JM. The Respondent gave evidence that he had operated according to the Minute of Agreement but he had not and had thus created and acted in a conflict of interest.

The Respondent had acted in favour of JM. The Respondent had known that she required £110,000 for her purchase and had not told the Secondary Complainer about

that. Instead, the Respondent claimed that he had had instructions to pay the £110,000 first.

The ledger card produced itself suggests that the Respondent preferred JM to the Secondary Complainer when it shows that JMreceived her share of the funds 6 days before the Secondary Complainer. The Fiscal submitted that the Respondent had provided no adequate answer for that.

The Fiscal stated that the payment of £295 from the funds due to the Secondary Complainer also pointed to the Respondent preferring one client over the other.

Here the Tribunal had a Respondent who had a Minute of Agreement he believed he had to implement. The Respondent did not apply his duties equally to both clients. Perhaps the result had been unintentional but it had resulted in a preference to the female client for whom he had acted for a number of years in comparison with the Secondary Complainer who had only just instructed him because of JM.

The Fiscal submitted that it was simply not credible that the solicitor had not acted in a conflict of interest. The Respondent had clearly drafted these documents. It was not credible to suggest that the wording of clause 4(f) was wording given to him by the Secondary Complainer. The Respondent must have been tendering some advice given that the contents of the Minute of Agreement changed on at least three occasions. The Respondent had acted from the preparation of the original first draft, which was Production No 4 right through to the conclusion of the conveyancing transaction in the face of both an actual and potential conflict.

The Fiscal invited the Tribunal to find the Respondent guilty of professional misconduct in terms of paragraph 5.1(c)(i) as supported by paragraph 4.1 of the Complaint and the evidence heard over two days.

With regard to the averment of misconduct relating to failure to communicate effectively, the correspondence and evidence bore out that the Respondent favoured the position of JM over the Secondary Complainer. The Respondent did not tell the Secondary Complainer that JM required £110,000 for her purchase. A solicitor is

obliged to give any relevant information to his client and this was clearly relevant information to the Secondary Complainer. If the solicitor had provided this information then the Secondary Complainer may well have done his own arithmetic and identified the problem.

The Respondent maintained he received instructions from both parties to rank £110,000 over the other payments. This was not put to the Secondary Complainer in cross examination. No part of the Minute of Agreement bears out a ranking agreement.

The Fiscal invited the Tribunal to find the Respondent guilty of professional misconduct in relation to paragraph 5 (1)(a) of the Complaint.

In relation to the Accounts Rules breaches referred to in paragraph 5(1)(d) of the Complaint, the Fiscal submitted these breaches would not normally of themselves attract a finding of misconduct. However, he submitted that taken in cumulo with poor record keeping and the distribution of funds, the breaches of the Accounts Rules clearly contributed to the other elements of misconduct. He submitted that even now it was not entirely clear whose money had actually paid for what. The Respondent's firm had previously been given warnings regarding this by the Law Society and had done nothing.

This was the Respondent's first appearance before the tribunal.

The Fiscal invited the Tribunal to find the Respondent guilty of professional misconduct. Should the Tribunal not be with him, he invited the Tribunal to consider remitting the matters back to the Law Society for consideration of a finding of unsatisfactory professional conduct.

The Fiscal was asked to clarify if he was still insisting in paragraph 5.1(c)(ii). He submitted that he was insisting in this averment of misconduct as the Respondent had distributed funds according to his interpretation of matters which he created.

SUBMISSIONS FOR THE RESPONDENT

Mr Clapham submitted that the onus of proof rests upon the Complainers with the high standard of "beyond reasonable doubt".

He did not intend to rehearse the evidence. He invited the Tribunal to accept Mr Crearie's evidence and to hold him as credible and reliable.

If the Tribunal accept that the Respondent did what he was instructed to do then he had an interpretation of the Minute of Agreement. These proceedings were not an action of reduction or negligence. In order to reach a finding of professional misconduct the Complainers had to overcome the Sharp test. The conduct required to be disgraceful or reprehensible. Even if it could be said that the Respondent had made a mistake, that would not be sufficient.

He submitted that there was no preference with regard to the time of payment of the money. In any purchase and sale it was perfectly normal to get money in by a solicitor's cheque and then use a solicitor's cheque for the purchase. Clients then require to wait for funds to clear for free proceeds to be forwarded by Chaps.

He invited the Tribunal to look at these events through the lens of the Respondent. The Respondent knew that JM was due to receive £110,000 from another transaction. He had to write to her with regard to the purchase.

He invited the Tribunal to find the elements of misconduct not established.

While it was conceded that there ought to have been two ledger cards here where there was only one, this did not meet the test for professional misconduct. The question for the Tribunal was not whether work that was done could have been done better.

He invited the Tribunal to hold that the Complaint of professional misconduct had not been made out.

DECISION

The onus of proof throughout these proceedings rests with the Complainers. The standard of proof that requires to be met is that of beyond reasonable doubt. The test for professional misconduct is described in the Sharp case as conduct departing from the standards to be expected of competent and reputable solicitors which would be regarded by competent and reputable solicitors as serious and reprehensible.

The Tribunal had before it a Joint Minute of Agreement agreeing the facts in the Complaint insofar as not inconsistent with the Respondent's Answers, together with the evidence from the Secondary Complainer and the Respondent.

A number of objections had been taken during the leading of evidence. The Tribunal had allowed the evidence subject to relevancy and competency. No submissions were made by the parties regarding these issues in their closing arguments. The Tribunal therefore considered this evidence to be admissible.

The Tribunal did not accept that the evidence was sufficient to support a finding in relation to paragraph 5.1(a), namely a failure to correspond with the Secondary Complainer with regard to the sale of property 1. Even the Secondary Complainer, when giving evidence, had indicated that he took no issue with the level of correspondence in relation to the transaction. In any event, this appeared to be an area in the main dealt with by the estate agency department of the Respondent's firm.

The Tribunal also concluded that it could not uphold an averment of professional misconduct in relation to paragraph 5.1(c)(ii) relating to the distribution of the sale proceeds. Even in his submissions the Fiscal had conceded that the Minute of Agreement was open to a number of different interpretations. If the Respondent had taken a wrong interpretation then it could perhaps be argued that he was negligent. This would not be sufficient for a finding of professional misconduct.

With regard to paragraph 5.1(d) the Tribunal concluded that in the absence of evidence of this being serial conduct and that this would have been as a result of the

actual actions of the Respondent, it could not support a finding of professional misconduct.

The averment of professional misconduct in relation to paragraph 5.1(c)(i) was in a different category.

Normally the Tribunal in such cases is privy to the dialogue and written instructions between the solicitor and client enabling it to reach an understanding of what precisely had been told to the solicitor. The Tribunal did not have that in this case. However the Tribunal did have the evidence from the Secondary Complainer of the kind of information given and the evidence of Mr Crearie regarding his understanding as to what that meant. There is no doubt that there will be argument regarding the correct interpretation of the Minute of Agreement as to whether it is a ranking agreement or not in which case some other method of division of sale proceeds would be required.

In assessing the evidence before it, the Tribunal found the Secondary Complainer to be both reliable and credible. The same could not be said for the Respondent who was less than candid in his responses, often evading the question put and resorting to a loss of recollection.
It was not part of the present Complaint that the content of the Minute of Agreement was not what was instructed.

However, even accepting the Respondent's position that all he did was put in the Agreement what had been told to him, what he was told ought to have identified to him that there was a potential conflict. That duty of identifying a conflict rests with the solicitor instructed. He cannot simply leave the question of conflict for the client to answer. The Respondent could have removed himself from the situation by sending the clients elsewhere for this piece of work. He could have explained to the clients what he understood the agreement to mean and by doing so resolved that there was no conflict or by doing so have identified to the clients that there was such a conflict this giving them the opportunity to seek advice elsewhere. By doing nothing the Respondent denied them of this opportunity. Simply allowing the clients to be

masters of the drafting without tendering any advice whatsoever resulted in the Respondent maintaining an active role in a conflict of interest situation.

The Tribunal could not accept that any solicitor would draw up such a document with such lack of concern as to whether the client truly understood what this agreement meant in terms of the distribution of the proceeds of sale in due course. The Tribunal members were reinforced in their decision by their individual view that the Minute of Agreement was not a ranking agreement and that the potential for the Secondary Complainer to alone profit if the value of the property increased was not the proper interpretation of clause 4(f). The active role in this conflict of interest situation without any advice being tendered represented a departure from the standard of conduct expected of a competent and reputable solicitor that could only be considered serious and reprehensible. A solicitor cannot absolve himself of his duty by the insertion of a clause such as Clause 5 which records there having been the opportunity to take independent legal advice. Where the solicitor is to any extent involved in the creation of a document which is to be signed by his client he needs to take adequate steps to ensure that there is informed consent to its terms and that requires communication of advice as to what the solicitor understands the terms to mean. The Respondent repeatedly in his evidence was at pains to assert that he gave no advice whatsoever. Therefore, the Tribunal unanimously in this regard, found the Respondent guilty of professional misconduct.

MITIGATION

Mr Clapham submitted that any finding of professional misconduct was obviously a serious matter. The Respondent was a partner in the firm of A & S Ireland and had been enrolled as a solicitor in December 1987. He had been in practice for almost 30 years. It was accepted that this was his first appearance before the Tribunal.

Mr Clapham asked the Tribunal to hold that the matter did not reflect any bad faith on the part of the Respondent. He respected the view that the Sharp test had been met on this occasion. He submitted that this was a sin of omission and not one of commission. The Respondent had been short-sighted. Consequently, he hoped that the Tribunal could restrict penalty to one of Censure.

With regard to the question of expenses, Mr Clapham hoped that not all of the expenses would be awarded against the Respondent given the restricted nature of the finding of misconduct.

The Fiscal indicated that he was moving for an award of expenses. He submitted that a vast amount of the hearing time was related to hearing evidence regarding the preparation of the Minute of Agreement. He also asked the Tribunal to take into account that, before Mr Clapham had been instructed the Respondent had failed to appear at a procedural hearing which had caused unnecessary expense.

Mr Clapham invited the Tribunal to exercise its discretion in the matter and, taking into account that the finding was not in respect of all of the matters, to consider only an award of a percentage of the expenses.

PENALTY

The Tribunal accepted that the Respondent's actions in this instance had not been executed in any bad faith. Whilst the Tribunal accepted that the Respondent's actions could be described as short-sighted, the indications of there being a potential conflict of interest had been significant and the process of preparing the Minute of Agreement had taken a year. The Respondent's demeanour when giving evidence disclosed no insight nor regret for these actions.

However, balancing these issues with the previous good conduct of the Respondent over nearly 30 years, the Tribunal held that a Censure would be the appropriate disposal in this case.

There appeared to be no basis on which to modify any award of expenses, the bulk of the evidence relating to the formation of the Minute of Agreement and the distribution of the sale proceeds under it, and so the usual award of expenses was made.

The agent for the Respondent indicated that he had no submissions in relation to publicity and so the usual order with regard to publicity was made.

COMPENSATION

At the hearing on 4 November 2015, the Secondary Complainer had indicated an intent to lodge a claim for compensation. After the finding of professional misconduct on the 17 November 2015, the Secondary Complainer confirmed that he intended to lodge a written claim for compensation. He submitted to the Tribunal that he would be in a position to do that in early course. Accordingly, the Tribunal allowed the Secondary Complainer until 15 December 2015 to lodge a written claim for compensation with the office of the Tribunal. The Tribunal has noted that the Secondary Complainer is to be admitted to hospital in January 2016 and thereafter may not be fit for a period of three months thereafter.

Alistair Cockburn
Chairman