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

DECISION

in Complaint

by

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

against

JAMES GERAD MOORE, Messrs Moore Macdonald Solicitors, 2 Scott Street, Motherwell
Respondent

1. A Complaint dated 7 March 2014 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") averring that, James Gerad Moore, Moore Macdonald Solicitors, 2 Scott Street, Motherwell (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. In accordance with the Rules of the Tribunal, the Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent which contained three preliminary pleas.

3. Having considered the content of the Answers and preliminary pleas for the Respondent, the Tribunal ordered that the case call for a preliminary hearing on 9 September 2014.

4. At the preliminary hearing on the 9 September 2014, the Complainers were represented by their Fiscal, Jim Reid, Solicitor, Glasgow. The

Respondent was present and was represented by Usman Tariq, Advocate, instructed by Ian Ferguson, Solicitor, Glasgow. Prior to the hearing the Fiscal had lodged a List of Authorities and a List of Productions. The Respondent had lodged a List of Productions in advance of the hearing and lodged a List of Authorities at the hearing. Mr Tariq confirmed to the Tribunal that he was proceeding with only two of the previously intimated preliminary pleas. The Tribunal heard detailed submissions from both parties.

5. After careful consideration of these submissions, the Tribunal refused the Respondent's motions to dismiss or sist the Complaint and ordered that a full hearing be fixed for 4 December 2014 at 10:30am.

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

> Edinburgh 9 September 2014. The Tribunal in respect of the Complaint dated 7 March 2014 at the instance of the Council of the Law Society of Scotland against James Gerad Moore, Moore Macdonald Solicitors, 2 Scott Street, Motherwell; Refuse the Motions for the Respondent to dismiss or sist the Complaint and Order that a hearing of the Complaint be heard on 4 December 2014 at 10:30am.
>
> **(signed)**
> **Malcolm McPherson**
> **Vice Chairman**

7. 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

Malcolm McPherson
Vice Chairman

NOTE

In his Answers to the Complaint the Respondent had included three preliminary pleas which could be summarised as motions to (1) sist the Complaint; (2) dismiss the Complaint on the basis of mora, taciturnity and acquiescence; and (3) dismiss the Complaint on the basis a breach of Article 6(1) of the European Convention of Human Rights ("the Convention") in relation to unreasonable delay. Accordingly, the case was allocated for a preliminary hearing to consider these pleas on the 9 September 2014.

Prior to the case calling on that date, a List of Productions and a List of Authorities were lodged for the Fiscal and a List of Productions was lodged for the Respondent. At the hearing on 9 September 2014, the Respondent lodged a List of Authorities.

At the commencement of the preliminary hearing the Tribunal was advised that the Respondent was only insisting on the preliminary plea to dismiss the Complaint in relation to a breach of Article 6(1) of the Convention and a motion to sist the case. The Respondent withdrew his preliminary plea on the basis of mora, taciturnity and acquiescence. The Tribunal heard detailed submissions from both parties.

SUBMISSIONS FOR THE RESPONDENT

Mr Tariq submitted to the Tribunal that as the preliminary pleas were taken by him that it would be sensible for him to lead with his submissions and for Mr Reid to respond thereafter. He confirmed that following a meeting with the Fiscal where he had had an opportunity to consider the detailed chronology of correspondence prepared by the Fiscal, which was item 1 on the List of Productions for the Complainers, he had taken a view in relation to the Respondent's preliminary plea regarding mora, taciturnity and acquiescence and was no longer insisting on that plea.

There were two remaining pleas to consider. The first was under the heading A in the Answers and was a motion to sist the Complaint pending the outcome of the petition procedure referred to in the Answers. The petition procedure was currently sisted. Those proceedings were taking place in the Inner House of the Court of Session and

should take priority over the current proceedings particularly where the petition proceedings had the same questions of fact and law. The ultimate effect of the appointment of the Judicial Factor would be to bring the Respondent's practice to an end and if a Judicial Factor was appointed then the Complainers could consider whether there was any point in proceeding with the current proceedings. Mr Tariq referred the Tribunal to Rule 44 of the Scottish Solicitors Discipline Tribunal Rules 2008 ("2008 Rules") confirming that the Tribunal had the power to sist a case on the application of any of the parties at any time upon such terms as to expenses or otherwise as to the Tribunal shall appear just. He submitted that where there were proceedings outstanding in the Inner House on the same facts it could not be appropriate to have the cases ongoing at the same time.

The second preliminary plea he explained was a motion to dismiss the Complaint in full or in part in relation to a breach of Article 6 of the Convention. Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "In a determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The question arose as to the starting point for reasonable time. He submitted that the clock started not when the Complaint was submitted to the Tribunal but when the Complainers felt they had a sufficient case in fact and law to proceed. This Complaint follows on from the petition raised by the Complainers in 2008. The petition was an application for the appointment of a Judicial Factor. He submitted that the Complainers must have concluded their investigations before lodging the petition as one would surely not apply for a Judicial Factor to be appointed if investigations were ongoing. He argued that the clock therefore began to tick from October 2008 which led to the conclusion that the Complainers had breached the Respondent's Article 6 right. He indicated that he would seek to distinguish the case of Hall (The Council of the Law Society of Scotland-v-Hall [2002] SLT 989). In that case there had been no application for the appointment of a Judicial Factor. In the current case the Law Society had jumped straight to court for the appointment of a Judicial Factor.

It was submitted that the appropriate starting point was for him to explain some of the factual background to the case. He indicated that he would refer to the detailed chronology prepared by the Fiscal, with which he took no contention.

He explained that the chronology indicated that the Law Society carried out an inspection of the Respondent's firm over the period of the 22 September 2008 to 25 September 2008. The content of that inspection had led the Law Society to conclude that there was sufficient information for them to apply for the appointment of a Judicial Factor. This, he submitted, was the most serious form of sanction to be taken by the Law Society as if successful it would wrest the firm from the control of the Respondent. Mr Tariq submitted that the Law Society must have concluded their investigations by 7 October 2008 for them to have averred the facts in the petition. He went on to suggest that if the investigations had not been complete by the time of the raising of the petition then that would have been an abuse of process. He was not suggesting that to be the case here. Rather, he was arguing that the Law Society had said that they had concluded their investigations and had sufficient information to allow them to lodge the petition. In other words, the Society must have reached an adverse view of the Respondent's conduct sufficient to justify an application for the appointment of a Judicial Factor.

The petition was lodged on 7 October 2008. The name of Messrs Moore Macdonald is a trading name for a sole practitioner. On the same date, and without any notice to the Respondent, the court granted the appointment of an Interim Judicial Factor. Production 4 for the Complainers was a copy of that Interlocutor. The Respondent lodged Answers to the petition and these are replicated as number 3 on the Complainers Inventory of Productions. Mr Tariq referred the Tribunal to paragraph 4 of the Answers where it was alleged that some of the content of the petition was misleading.

He agreed that the test for the appointment of a Judicial Factor was in terms of Section 41 of the Solicitors (Scotland) Act 1980. He argued that an appointment of a Judicial Factor here had been unlawful in terms of Article 6(1) of the Convention.

At a hearing on 22 October 2008 both parties had made submissions to the Inner House. As a result, the appointment of the Interim Judicial Factor was recalled with immediate effect. The Respondent had been present at this hearing and had advised Mr Tariq that the Inner House was aghast that such an august body as the Law Society would mislead the court. The Inner House had concluded that the appointment of the Interim Judicial Factor had been unjustified and recalled it. That Interlocutor was Production 5 on the Complainers List.

Not only did the court recall the appointment, it went onto censure the Law Society by making an adverse award of expenses in the enhanced rate of expenses where it is concluded that the conduct of a party is either unreasonable or incompetent. That Interlocutor forms Production number 6 for the Complainers.

Mr Tariq referred the Tribunal to the case McKie-v-The Scottish Ministers [2006] SC 528 which had set out the basis on which an award of enhanced expenses could be made. This clearly reflected that for this scale of expenses to have been awarded the court was imposing an penalty where a party had acted unreasonably or incompetently.

On 14 January 2009 the petition was sisted to allow the Complainers to conduct further investigations. This Interlocutor is Production 7 on the Complainers List. The petition remains to be sisted, five and a half years after this initial skirmish. He submitted that if the Complainers had decided to pursue disciplinary proceedings rather than to appoint a Judicial Factor then they should have intimated this in relation to the court proceedings.

A Rule 19(2) inspection of the Respondent's business had commenced following upon the petition.

Mr Tariq argued that the background he had described was particularly relevant in this case as the petition contained many of the same issues as the current Complaint. In relation to this he referred the Tribunal to Production 2 of the Complainers Inventory of Productions, which was a copy of the petition referred to. The first substantive averment of the petition is paragraph 8. This lists a number of transactions

where there had been possible money laundering. In October 2008 the Law Society as officers to the court were making these averments. He submitted that the detail given in particular at paragraph 8a could only be given if the Law Society had completed its investigations and reached a view that the conduct of the Respondent required some sort of sanction. Four names mentioned in the October 2008 petition, Mr A, Mr B, Mr C and Mr D reappear in paragraph 4 and 4.4 of the Complaint. The averments from the petition are replicated in the current Complaint. He further referred the Tribunal to paragraph 4.5 of the Complaint where reference was made to Mr C, as another example of an averment from the petition being repeated in the Complaint.

Mr Tariq submitted that he had demonstrated to the Tribunal a considerable overlap between the factual averments in the petition and the factual averments in the Complaint. He conceded that the Complaint did contain matters that went beyond the contents of the petition but suggested that this was unsurprising given the five years taken to investigate matters.

He summarised his submissions stating:-

1) There was an overall significant overlap in the content of the petition and Complaint. These matters were not unrelated or disconnected. They touched upon many of the same transactions.

2) In his submission it was clear that the Complainers must have completed their investigations regarding this Complaint by the time of submitting the petition in October 2008. Before they could have lodged the petition they must have been able to reach a view sufficient to raise the petition.

The Rule 19(2) inspection commenced only a matter of weeks after the skirmishes before the court. He referred to the detailed chronology and indicated that the inspection had taken place some six days following the recall of the Interim Judicial Factor.

The background outlined above, Mr Tariq explained was relevant to both the motion to sist and the motion to dismiss the Complaint in terms of Article 6. He indicated

that he wanted to deal first with the Human Rights point as it was lengthier and more complex.

He submitted that Article 6 applied to proceedings before the Tribunal and meant that the Respondent should have had a hearing within a reasonable time which had not happened here. Mr Tariq understood that the Complainers would argue as a result of the case of Hall the clock only commenced when the Complaint was passed to the Tribunal: that the clock would commence on 7 March 2014, some five and a half years after someone has sufficient information to raise court proceedings. This he suggested defied the spirit and terms of the Convention. If a debt prescribes after five years in terms of the Prescription and Limitation Act 1973 then by comparison five and a half years was a significant passage of time. This he suggested made a mockery of the Convention.

Mr Tariq went on to explain that in the course of his submissions he would refer to some authorities that at first blush would appear to support the position taken by the Law Society. He, however, would seek to distinguish these cases as they all arose from fundamentally or consequentially different grounds. Those cases all involved a long investigative period. That did not arise in this case, where the petition had been lodged in October 2008.

He referred the Tribunal to the case of Brown-v-United Kingdom 28 EHRR CD233 1998 at page 236, paragraph 2, the court states that the relevant time for determining the length of proceedings runs from the date of the relevant court procedure determining the dispute and not from the conduct in question. In the current case, Mr Tariq indicated that he was not trying to suggest that the period of time ran from the date of the conduct but ran from the date of the relevant court procedure which was in his submission the date of the petition.

Thereafter he referred the Tribunal to the case of Zimmerman and Steiner-v-Switzerland 6 EHRR 17 at paragraph 24 where the court indicated that in assessing the reasonableness of the length of proceedings each case required to be assessed according to the particular circumstances having regard to the complexity of the factual or legal issues, the conduct of the applicants and what was at stake.

The petition was brought by the Complainers in 2008 to bring the Respondent's practice to an end. Now the Complainers were attempting to strip him of his practising certificate.

The test of reasonable time had to be construed narrowly. He did not understand the Complainers to be saying that the issues here were complex. If they were then they would not have been in a position to present the petition for a Judicial Factor within two weeks of the inspection taking place.

The Zimmerman case also indicates that it is only the delay on the part of the State, which in this case should read as the Law Society, that should be taken into account. He referred to the Fiscal's detailed chronology and in particular referred to the entry of 12 May 2010 where it was said that between the 12 May 2010 and 4 May 2011 a list of issues in the process was being drafted. He submitted that on any view a year where there was nothing substantial happening was unreasonable. The irony, he said, was that on 25 May 2011 the Law Society wrote to the Respondent giving him 21 days to respond to something that they had spent a year preparing. Following discussions, the Law Society had ultimately agreed to give the Respondent until the 31 July 2011 to respond.

The second period of delay began on 1 August 2011 when the Law Society wrote to the Respondent indicating that a reporter was to be appointed but that there could be a delay in that procedure of approximately six weeks. In fact the reporter was appointed on 9 August 2011. A new reporter was appointed on 11 January 2012. On 29 March 2012 the Law Society had indicated a hope that a report would be completed by 13 April. On 11 May 2012 they wrote again apologising for the delay. On 10 July 2012 they indicated that only part of the report had been completed. On 6 August 2012 they wrote confirming a draft report had been completed. Only on 21 August 2012 was the report itself forwarded to the Respondent. The process had taken over a year from the first reporter being appointed to the report being issued. Mr Tariq indicated that on the basis of the chronology he had identified two periods of approximately one year where the case had stagnated and that this had been irrespective of any conduct on the

part of the Respondent. He referred again to the case of Zimmerman and pointed out that the delays were the conduct of the Complainers.

He invited the Tribunal to accept that the delays were unreasonable and led to a breach of Article 6(1).

The Respondent referred the Tribunal to the case of Porter-v-McGill[2002] 2WLR37, a House of Lords Decision, the import of which was that the Respondent did not need to demonstrate prejudice and that the right to a hearing within a reasonable time was a separate and independent right to a fair trial. The only question was whether or not the time taken to determine the rights or obligations of the Respondent was unreasonable. He submitted that the process of determining the Respondent's rights or obligations was begun on the presentation of the petition to the Court of Session that sought to wind up the Respondent's practice.

He drew the Tribunal's attention to paragraph 110 of the case of Porter, this emphasised that the question of reasonableness had to be assessed according to the circumstances of each case taking into account questions of complexity, the pursuer's conduct and the matters at stake.

Mr Tariq emphasised that his submission was that what distinguished this case from the other cases mentioned was that here there had been proceedings initiated in October 2008. He suggested that the question for the Tribunal was whether it was faced with two entirely distinct and separate cases or whether there was a sufficient similarity that meant that the commencement for the reasonable period of time began with the raising of the petition. He suggested that these were not two entirely distinct and separate cases but essentially the same, involving the same parties, with an overlap of the same issues and both relating to the Respondent's civil rights.

He referred the Tribunal to the case Ewing-v-United Kingdom [1998] 10 ECHRR 141. The ratio of this case was that where there were two sets of proceedings merged into one then the earlier set of proceedings starts the clock. Although the case of Ewing involved criminal matters he submitted that there was no distinction in Article 6(1) between criminal and civil cases. He argued that the content of the petition raised

in 2008 was merged into the present Complaint. On that basis the relevant time started running from the lodging of the petition in October 2008.

Mr Tariq went on to refer to the case of The Law Society of Scotland-v-Ms A, Solicitor – 28 February 2001. He indicated that this case was authority for the proposition that Article 6 applies to this Tribunal's proceedings. He referred to the content of the case and indicated that the key phrases used within that case reflected what was an example of the typical type of case where there was a substantial investigatory process. In the case of Ms A it was only on the 30 June that it was possible for the Council of the Law Society to take a decision on the conduct of the solicitor. In the current case, at least as far as the facts that overlap between the two cases, the Law Society was able to take a decision in October 2008. The Society could well have taken a decision to prosecute the cases it had investigated for the petition at that time. It chose not to but chose to carry on an investigation lasting five and a half years which resulted in a Complaint which included the issues in the petition.

Mr Tariq submitted that the period of October 2008 to March 2014 could not in any way be described as a period of fact finding. The Law Society had clearly determined that they were going to censure the Respondent when they lodged the petition in October 2008.

He submitted that the Tribunal were on new territory in connection with this case and referred it to the case of M-v-The Law Society 2013 SLT 462. That case confirms that Article 6(1) applies to Tribunal proceedings. At paragraph 27 the court took the view that Article 6 was engaged during the investigative process of the Complaint because the reporter feeds into what eventually happens before the Tribunal. In this case, leaving aside the involvement of the reporter and other preliminary investigative proceedings, he would argue that what happened in the Court of Session with regard to the Respondent would have effect on what happened before the Tribunal and so Article 6 was engaged at that point. The court in the case of M at paragraph 4 suggested that the case of Hall was wrongly decided although the court indicated that it was bound by the case of Hall. The Respondent's argument was a stronger one than that put forward in M given that this case was not a typical case but included the application for a Judicial Factor.

The fundamental basis of his submissions was that Hall was not binding upon the Tribunal in this case and that the Tribunal had to look at the circumstances of each case as referred to in Zimmerman.

Mr Tariq went on to refer to the case of R-v-Governors of X School [2012] 1 AC 167. He referred to the ratio of the case at paragraph 1 which held that where two sets of proceedings have been merged for Article 6 to be engaged in relation to the earlier proceedings did not require that the earlier proceedings would be truly dispositive of the civil right which was the subject of determination in the later proceedings but that the court should ask how close the link was between the two sets of proceedings, whether the object was the same, and whether there was any policy reason for holding that Article 6 should not apply in the initial proceedings. The court in that case at paragraph 69 concluded that where the outcome of the earlier case would have a substantial influence or effect on the determination of the civil right or obligation then Article 6 was engaged in relation to the earlier case unless there was a policy reason for it not to apply. Mr Tariq submitted that he would draw two points from this authority. The first was that each case should be decided on a pragmatic context sensitive basis. Delay in terms of Article 6 should not be a rigid rule. The rule as stated in the case of Hall is too rigid. The Tribunal's hands are not tied by Hall in this case because of the application for a Judicial Factor. The second point he would make is that where there are two sets of proceedings merged together then Article 6 is engaged in the first set of proceedings where the first proceedings would have a substantive effect on the second. Article 6 applies throughout the proceedings even though determination of the first set of proceedings would not directly determine the civil right but would have a bearing on the determination of the civil right.

The Tribunal should not artificially divide sets of proceedings and with reference to the case of Ewing, the appropriate starting point would be with the application for the appointment of the Judicial factor.

To summarise his argument he indicated that the time in connection with Article 6 began to run when court proceedings were initiated on the basis of the Respondent's conduct. These proceedings were initiated on 7 October 2008 with the application of

appointment of an Interim Judicial Factor. Investigation must have concluded by that time in order to allow the petition to be raised. That was the date when the process to determine the solicitor's civil right to practise as a solicitor in Scotland had commenced. The five and a half years delay since that time was clearly unreasonable. The Tribunal required to have in mind the complexity of the case, the conduct of the parties and what was at stake for the Respondent in considering whether the period was reasonable. The cause of the delay was attributable to the State (The Law Society). There was no complexity in this case. There had been two lengthy delays at the hands of the Law Society and Article 6 had consequently been breached.

Although prejudice was not necessary in relation to a breach of Article 6, as confirmed in the case of Porter-v-McGill, it was relevant. The question of prejudice was live and pressing in this case. There were two areas where prejudice arose. The first was where the Respondent's computer system had been affected by a virus that had resulted in all of the data becoming unusable. This had hampered the Respondent in the preparation of his Answers as the contents of the Complaint involved historic issues which were not fresh in the Respondent's memory. Mr Tariq referred to the Production lodged on behalf of the Respondent confirming that an expert had been instructed by the Respondent to deal with the virus but that there had been a loss of documents. The delay of five and a half years had clearly prejudiced the Respondent as if the Law Society had proceeded timeously then the Respondent would still have had his documents.

The second area of prejudice related to potential witnesses. The financial advisors referred to within the Complaint were no longer in business and the Respondent was unable to trace the individuals. The individuals concerned appeared to no longer be practising as independent financial advisors.

His primary submission to the Tribunal was that as a result of the breach of Article 6 the whole Complaint fell to be dismissed as a result of unreasonable delay. Although the Complaint contains matters that are not in the petition, he submitted that the case of Ewing supports the contention that the clock started ticking on the earlier date.

Mr Tariq conceded that this might not be an attractive decision for the Tribunal and suggested that he had a subsidiary submission which was that the Tribunal could dismiss the Complaint in relation to those matters that were also included within the petition. On any view, he suggested that the Law Society could have brought proceedings in relation to the conduct outlined in the petition five and a half years ago and they did not require to wait for the later charges to be added. If the Tribunal was not prepared to dismiss the whole Complaint he invited the Tribunal to dismiss the parts of the Complaint relating to what the Law Society knew in October 2008.

Mr Tariq then moved on to address his motion to sist. He suggested that there was a clear overlap between the two cases. Although the Court of Session proceedings were sisted, they were still live. He suggested it was appropriate for the Law Society to choose which case they wished to proceed, with either the petition or the Complaint. He suggested that by proceeding with, both the Law Society were having their cake and eating it too. It was not appropriate to have concurrent proceedings. This case should be sisted because a) the application for the Judicial Factor came first and b) the Inner House should take precedence over the Tribunal. If a Judicial Factor was appointed then that could be an end to this matter.

He referred the Tribunal to Rule 44 and submitted that where there was a petition outstanding it was appropriate for a Complaint to be sisted pending the outcome of the petition procedure.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal for the Complainers indicated that he would begin by addressing the significance of the petition from 2008 and the raising of today's Complaint.

He submitted that these two processes had completely different functions. The petition sought to appoint a Judicial Factor. The Complaint relates to the question of professional misconduct. Whilst the two processes might have matters which overlapped, and some matters in common, they were two entirely different processes with two entirely different end results.

It had been suggested on behalf of the Respondent that if a Judicial Factor was to be appointed there would be no need for this Complaint. Mr Reid submitted that irrespective of whether a Judicial Factor was appointed that would in no way rule out the prosecution for professional misconduct.

To emphasise the difference between the two procedures, the Tribunal should have in mind the different standard of proof for a Complaint of professional misconduct versus the standard of proof for the petition.

Mr Reid submitted that the real question was what the purposes of the two procedures were. Whilst there may be an overlap regarding information or averments, each of the procedures had an entirely distinct and separate purpose. Each process would have two entirely different results.

Mr Reid suggested that there was no relevance to the petition having been sisted for five and a bit years. He emphasised that it was open to either party to the petition proceedings to seek to recall the sist.

To summarise his position he indicated that firstly there was no reason for this matter to be sisted to await the outcome of the petition and secondly that the Tribunal was dealing with an entirely different procedure and process to the petition.

Mr Reid indicated that he would refer to three of the cases relied upon by the Respondent.

Firstly, he referred to the case of Brown. That case had concluded that the relevant time period was from the proceedings being issued in November 1995 against the applicant for professional misconduct. In this case the relevant proceedings were not petition proceedings but the Complaint before the Tribunal.

Secondly, he referred to the case of Zimmerman. At paragraph 24 the court in that case refers to the reasonableness of the length of proceedings. For the purposes of this question Mr Reid submitted that the proceedings were the Complaint.

Thirdly, Mr Reid addressed the case of Ewing. In that case there had been the merging of two proceedings into one. Mr Reid submitted that this could not be said about the current Complaint. He submitted that this was not a merging or amalgamation of two different proceedings but was simply a question of an overlap. There was no question of the bringing together of an appointment of a Judicial Factor with a Complaint for professional misconduct. Their purposes were entirely distinct.

Mr Reid indicated that his basic submission was that the Tribunal was bound by the case of Hall.

The Fiscal explained that there was a slight complication with the case of Hall in that matters started as an investigation into inadequate professional services. This was referred to at paragraph 22 of the Decision. Paragraph 29 of the case of Hall made it perfectly clear that the appropriate date was the date when the Complaint was made to the Tribunal itself.

Whilst it was true to say that there was some disagreement with Hall expressed in the case of M, nonetheless, Hall is an Inner House Decision that has not been overturned.

The Fiscal stated that he felt he should address a matter that was raised in the case of The Council of the Law Society of Scotland-v-Colin Whittle, 21 May 2014. There is reference in that decision at page 29 to the appropriate starting point for the consideration of delay to be the decision of the Law Society to refer the matter to a Fiscal for prosecution. Mr Reid submitted that this was inconsistent with the case of Hall but he had felt obliged to draw it to the Tribunal's attention.

Mr Reid referred the Tribunal to the chronology that was Production 1 on his List of Productions. This demonstrated that there was continuing correspondence over the time that the two inspections were taking place. He submitted that the Tribunal was entitled to take the view that questions arose as a result of the inspections that required to be answered prior to proceeding. In this regard, the Tribunal should bear in mind the difference in standard of proof for today's Complaint compared to the petition. The standard of proof for a Complaint of professional misconduct is "beyond reasonable doubt".

He then went onto address the question of prejudice. Mr Reid stated that he could not comment on the loss of computer files and that it was not clear what relevance that had. It was not clear, he suggested, what had been lost. If there was a loss of correspondence then the Complainers can provide the Respondent with copies of the correspondence between them. There were three boxes of original files available and these covered what was averred in the Complaint.

With regard to tracing the independent financial advisors, he indicated that within five minutes of going onto the internet he was able to identify a Mr E who appeared to be the same advisor as mentioned in this case. He could not agree that the personnel from the Company 1 had disappeared.

Even if he was wrong about the time the question of delay commenced, it was his submission that there was no undue delay. He submitted that it was clear that this was not a straightforward matter. The matters before the Tribunal were serious. There was a different standard of proof between the two court processes.

The Respondent had referred to a year being taken to draft issues and consult with the Guarantee Fund. Perhaps that period ought to have been shorter, he could not say. It was his submission however that this was not an unreasonable period having regard to the standard of proof for this case.

He invited the Tribunal to repel the preliminary plea to dismiss the Complaint and to refuse to sist the case.

SUBMISSIONS IN RESPONSE FOR THE RESPONDENT

Mr Tariq emphasised that he sought to distinguish the case of Hall. In the current Complaint the Law Society had formed a view in respect of the conduct of the Respondent as early as October 2008. They must have been able to form a view that the conduct of the solicitor formed a sufficient basis to raise the petition. The petition is a conduct related process. In Hall the court had indicated that it was the making of the Complaint to the Tribunal that first put in issue a dispute as to professional

misconduct, the result of which could have affect the Respondent's civil right to practise as a solicitor. If a petition for the appointment of a Judicial Factor is lodged in a case where the solicitor is a sole practitioner then surely that is an interference with his right to practise as a solicitor. A third party would be appointed to come in and administer the firm. The current case accordingly was entirely distinguishable to the case of Hall.

In response to a question from the Tribunal, Mr Tariq conceded that the test set out in Section 41 of the Solicitors (Scotland) Act 1980 was a different test to that for professional misconduct. He argued however that the factual averments in both cases showed that it was the same conduct being assessed. He emphasised that the end result was the same if a Judicial Factor was appointed i.e. the end of the practice.

The Tribunal asked for clarification of the effect of the appointment of the Judicial Factor. In response Mr Reid indicated that the appointment of a Judicial Factor resulted in the suspension of the solicitor's practising certificate in terms of Section 18 of the Solicitors (Scotland) Act 1980.

In response to a question from the Tribunal, Mr Reid emphasised that it was his position that the averments in the petition were that the conduct might give rise to a claim on the Guarantee Fund thus showing that the purpose of the petition was protection of client funds.

Mr Tariq submitted that whilst an Interim Judicial Factor would take control of the business with regard to protecting clients, nonetheless the solicitor would be side-lined and would have no involvement in the day to day running of the business.

Mr Tariq emphasised that it was accepted that the Law Society was a public authority and therefore governed by Article 6. The question before the Tribunal was whether or not the Law Society had breached Article 6 and whether or not the Tribunal could then dismiss the Complaint in whole or in part.

The Fiscal was asked to clarify the effect of the suspension of a solicitor's practising certificate. In response he confirmed that the suspension would last until the end of

the Judicial Factory unless the solicitor applied for the suspension to be lifted. He submitted that there was provision for the solicitor to apply at any time to have the suspension lifted. He did not accept that the consequences of the petition would be the same as the consequences of the Complaint before the Tribunal.

DECISION

The principal motion for the Respondent was that the Tribunal should dismiss this Complaint, either in whole or in part, as a consequence of a breach of the Respondent's Article 6 right to a hearing within a reasonable time. In making this motion Mr Tariq accepted that the Tribunal was bound by the decision of the Inner House in the case of The Council of the Law Society of Scotland-v-Hall [2002] SLT 989 unless the current case could be sufficiently distinguished from the circumstances involved in the Hall decision. Accordingly, the Tribunal took this as its appropriate starting point for its deliberations.

Mr Tariq submitted that the fact that the Law Society had raised a Petition for the Appointment of a Judicial Factor for the firm of the Respondent where no such application had been made in Hall was sufficient to distinguish the two cases. It was argued that the similarities between the two processes were such that the determination of the Respondent's civil right to practise as a solicitor had begun with the lodging of the Petition in October 2008. He drew support for this submission from the case of R-v-Governors of X School [2012] 1AC 167. He suggested that the parties in the two processes were the same, the facts (at least in part) were the same, and the issues were the same namely the solicitor's conduct and his right to practise as a solicitor. He referred to the Petition as a sanction or censure of the solicitor. It was submitted that an application of the reasoning in the decision of R-v-The Governors of X School to the history of this Complaint meant that the clock for Article 6 started ticking with the lodging of the Petition.

The Tribunal did not agree with the Respondent's assessment of the two processes. Whilst it was accepted that there was an overlap of factual averments in the two, it took the view that these were in fact separate and completely different procedures. An application for the appointment of a Judicial Factor seeks to put in place measures to

protect the interests of clients and the Solicitors Guarantee Fund. The test to be met is set out in Section 41 of the Solicitors (Scotland) Act 1980 and for the purposes of this case were that the solicitor concerned had not complied with the Accounts Rules and that there was a reasonable ground for apprehending that there may be a claim on the Guarantee Fund. Whilst Section 18 of the Solicitors (Scotland) Act 1980 means that the appointment of a Judicial Factor results in the suspension of the solicitor's practising certificate that is not the Petition's aim. Additionally, Section 19(6) of the 1980 Act provides for the solicitor applying for the removal of the suspension at any time. The Petition is not, in the Tribunal's view, either a censure or sanction directed at the solicitor.

A Complaint of professional misconduct is completely different. It is aimed at the Respondent and its central issue is the standard of his conduct. The test for establishing misconduct is a high one as set out in the case of Sharp and requires proof beyond reasonable doubt. The high standard to be met for a Complaint to succeed is reflected in the detailed procedure that an allegation of misconduct requires to go through even before a Fiscal is appointed. In the case of R-v-The Governors of X School, the court had said it should ask how close the link was between the two sets of proceedings and whether their object was the same. The objects of the Petition and the Complaint are completely different with one seeking to provide protection for clients' funds or the Guarantee Fund, whilst the other seeks to impose a direct sanction upon the solicitor himself. Nor would the outcome of one of the processes affect the outcome of the other, given that the questions they seek to answer are not the same.

The Respondent had referred in his submission to the case of Ewing-v-United Kingdom [1987] 10 ECHRR 141. If anything that case served to highlight the differences between the two procedures here. The Ewing case refers to an amalgamation or merging of procedures. The stark differences between the issues and aims of the Petition compared to the Complaint meant that it was impossible to conclude that the Complaint here somehow could amount to a merging of issues.

Taking all of the above into account the Tribunal was unable to distinguish the Hall case and the inevitable conclusion was that the motion be refused.

The second motion for the Respondent was that this Complaint should be sisted to allow the Petition procedure to be resolved first. This motion was founded on many of the same arguments put forward in support of the motion to dismiss.

The Tribunal took the view that the two processes were entirely separate matters. The conclusion of the Petition procedure would not in itself affect the outcome of the procedure before the Tribunal. The Petition was sisted. The Tribunal has no authority to compel the Law Society to progress the Court of Session matter. Accordingly, the Tribunal refused the motion to sist.

Having been advised of the Tribunal's decision, the Fiscal made a motion for an award of expenses incurred as a result of the preliminary hearing. This was opposed by Mr Tariq who asked that the question of expenses be reserved until the written decision of the Tribunal had been issued. The Tribunal concluded that the appropriate order was to reserve the question of expenses until the conclusion of the substantive hearing relating to the Complaint.

Malcolm McPherson
Vice Chairman