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

F I N D I N G S

in Complaints

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

NICHOLAS WHELAN, 105 High Street, Arbroath

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 Nicholas Whelan, 105 High Street, Arbroath (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct. This Complaint was allocated reference number 1825.

2. There was no Secondary Complainer.

3. The Tribunal caused a copy of the Complaint 1825 as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules, the Tribunal appointed the Complaint 1825 to be heard on 1 November 2018 and notice thereof was duly served on the Respondent.

5. The Tribunal Office received an email from the Respondent dated 31 October 2018 seeking a postponement of the hearing. The reasons given for that motion were for the Respondent to have additional time to prepare his defence and a lack of specification within the Complaint. The Fiscal having confirmed he had no objection to that motion, the Tribunal

in terms of Rules 56 and 44 of the Tribunal Rules 2008 administratively postponed the hearing to 4 February 2019.

6. At the hearing on 4 February 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented himself. On the Respondent's motion, the hearing was adjourned to 16 May 2019. The Respondent was allowed 28 days to adjust his Answers and the Fiscal 14 days thereafter to adjust in response.

7. A further Complaint was lodged with the Scottish Solicitors' Discipline Tribunal by the Complainers averring that the Respondent was a practitioner who may have been guilty of professional misconduct with regard to separate issues. This Complaint was allocated reference number 1852. There was no Secondary Complainer.

8. The Tribunal caused a copy of Complaint 1852 to be served upon the Respondent. No Answers were lodged. In terms of its Rules, the Tribunal appointed the Complaint to be heard on 16 May 2019 and notice thereof was duly served upon the Respondent.

9. The Respondent forwarded amended Answers in relation to Complaint 1825 to the Tribunal Office on 9 May 2019 and Answers in relation to Complaint 1852 on 13 May 2019. Additionally, the Respondent forwarded Inventories of Productions in relation to both Complaints which in terms of the Tribunal Rules 2008 were late. The Fiscal for the Complainers indicated that he was opposed to both sets of Answers and the Inventories of Productions being lodged late.

10. On 16 May 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented himself. The Tribunal had before it both Complaints 1825 and 1852. On the motion of the Respondent and of consent, the Tribunal conjoined both Complaints under Rule 17 of the Tribunal Rules 2008. Having heard submissions from both parties, the Tribunal allowed both sets of Answers to be received late along with three Inventories of Productions. A hearing was fixed for 4 September 2019 with a procedural hearing on 11 July 2019. The Respondent was allowed 21 days to adjust his Answers and to produce a note of argument regarding his preliminary plea. Both parties were allowed 14 days thereafter for mutual adjustment of their pleadings and for the Complainers to produce a note of argument in response. The Tribunal found the

Respondent liable in the expenses of the Complainers and of the Tribunal, including the expenses of the Clerk, in respect of preparation for and attendance at the hearing on 16 May 2019. Both parties confirmed to the Tribunal that a preliminary hearing was not necessary to consider the Respondent's preliminary plea and that it was preferable to hear evidence prior to hearing arguments thereon.

11. The Fiscal contacted the Tribunal Office to indicate that his witnesses were not available for a hearing on 4 September 2019. The Respondent confirming that he had no objection to a motion to adjourn, the Tribunal adjourned the hearing administratively in terms of Rules 53 and 44 of the Tribunal Rules 2008 to 16 October 2019.

12. At the procedural hearing on 11 July 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented himself. The Respondent confirmed that he was insisting in his preliminary plea and both parties confirmed that the hearing previously assigned for 16 October 2019 should hear evidence prior to hearing parties' submissions in relation to the preliminary matter. The Fiscal was ordered to lodge an amended Record within seven days of the procedural hearing and the matter was continued to the hearing already fixed for 16 October 2019.

13. A further Complaint was lodged with the Scottish Solicitors Discipline Tribunal by the Complainers averring that the Respondent was a practitioner who may have been guilty of professional misconduct in relation to further matters. This Complaint was allocated the reference number 1866. There was no Secondary Complainer.

14. The Tribunal caused a copy of the Complaint 1866 to be served upon the Respondent. No Answers were lodged. In terms of its Rules, the Tribunal appointed the Complaint 1866 to be heard as a procedural hearing on 4 October 2019 and notice thereof was duly served upon the Respondent.

15. By email dated 13 September 2019, the Respondent submitted Answers to the Tribunal Office.

16. At the procedural hearing on 4 October 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented himself. On the unopposed motion of the Respondent, the Tribunal allowed his Answers to

be received late. The Fiscal moved the Tribunal to fix a hearing for 16 October 2019. The Respondent having waived the notice period required under the Rules, the Tribunal continued the matter to a hearing on that date. Parties were ordered to lodge Lists of Witnesses and Productions at least seven days prior to the hearing.

17. At the hearing on 16 October 2019, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented himself. On the unopposed motion of the Fiscal, the Tribunal conjoined Complaint 1866 with the previously conjoined Complaints 1825 and 1852. The Fiscal led evidence from two witnesses and concluded his case. The matter was continued to a hearing on 10 December 2019. On that date, the Tribunal heard evidence from the Respondent. Following the conclusion of evidence, the Tribunal heard submissions from both parties in relation to the Respondent's plea to competency and relevancy. Having given careful consideration to the written and oral submissions made by both parties, the Tribunal upheld the Respondent's plea in relation to reference to the Accounts Certificate dated 11 February 2016. As a consequence, the Tribunal deleted reference to that certificate within averment 4.1(c) and deleted the whole of averments 2.11 and 2.13 *Quoad Ultra* the plea was repelled.

18. The Tribunal proceeded to hear submissions from both parties in relation to the evidence before the Tribunal. Having careful regard to the parole evidence led, documentary productions and submissions of both parties, the Tribunal found the following facts established:-

18.1 The Respondent is a solicitor enrolled in the Registers of Scotland. His date of birth is 3 January 1970 and he was enrolled on 16 November 2000. Since 1 February 2005 he has been the principal and sole partner of Whelan & Company, 105 High Street, Arbroath (hereinafter "the firm"). He is also the Designated Cashroom Partner and Manager, the Client Relations Manager, and the Anti-Money Laundering and Compliance Partner.

18.2 The Financial Compliance Department of the Complainers conducted an inspection of the financial records, books, accounts and documentation of the firm on 16 July 2012. This inspection identified breaches of the Law Society of Scotland Practice Rules 2011 (hereafter "2011 Rules"). Said breaches were highlighted in an Executive Summary produced by the said Department. The

breaches of the 2011 Rules highlighted included a potential deficit in breach of Rule B6.3.1, inadequate recording of compliance with money laundering procedures in breach of Rule B6.23, and inadequate record keeping of invested funds in breach of Rule B6.7.1. All of said matters required to be addressed by the Respondent following said inspection. During the period from 15th August 2012 to 22nd March 2013 responses were received from the Respondent, and the Complainer's said department determined that the matters disclosed at said inspection did not merit a report to the Complainers Guarantee Fund Sub-Committee but the Respondent's financial records would be reconsidered at a subsequent inspection.

18.3 The Financial Compliance Department of the Complainers conducted a further inspection of the financial records, books, accounts and documentation of the firm on 13 to 15 May 2013. This inspection identified breaches of the 2011 Rules. Said breaches were highlighted in an Executive Summary produced by the said department. Said breaches were also deemed to be of a serious concern and the said Department determined that their report be considered by the Complainers Guarantee Fund Sub-Committee. The breaches of the 2011 Rules highlighted included a failure to address matters outstanding from the said inspection on 16th July 2012, inadequate recording of compliance with the money laundering procedures in breach of rule B6.23, a failure to obtain client's authority in a conveyancing transaction in breach of rule B6.5.1(c), a failure to issue terms of business letters in breach of rule B4.2, a failure to obtain and retain client account cheques in breach of rule B6.7.6, and a failure to review client balances in breach of rule B6.11.

18.4 The Respondent prepared Accounts Certificates for the firm for the periods ending on 31 January 2014 and 31 July 2014. Said Certificates were delivered to the Complainers by the Respondents in accordance with Rule 6.15.1 of the Law Society of Scotland Practice Rules 2011. Said certificates did not disclose any breaches of the 2011 Rules.

18.5 The Financial Compliance Department of the Complainers conducted a further inspection of the financial records, books, accounts and documentation of the firm on 7 October 2014. This inspection identified again breaches of the 2011 Rules.

Said breaches were highlighted in an Executive Summary produced by said department. The breaches of the 2011 Rules highlighted included *inter alia* :-

(a) a failure to review client balances in breach of Rule B6.11. In accordance with this Rule, all practices had been given a period of two years up until 31st October 2013 to disburse old client credit balances. In particular seventeen client balances were identified and two of those with the client references GRE004-4 and YOU009-1, had been raised at the said previous inspection on 13th-15th May 2013;

(b) a failure to issue terms of business letters in breach of Rule B4.2;

(c) a failure to adequately record compliance with money laundering procedures in breach of Rule B6.23. In particular the Respondent did not have an anti-money laundering procedures manual. These issues had been raised at the said previous inspection on 13th-15th May 2013; and

(d) a failure to correctly maintain the records of the firm in order that the true financial position of the firm is shown, in breach of Rule B6.7.4. In particular, a period of eight months had elapsed from the firm's year end but no adjustments had been posted to the firm records and a trial balance had not been finalised. Further, a loan in the firm's name was noted but not reflected in the firm's records. These issues had been raised at the said previous inspection on 13th-15th May 2013.

18.6 The Respondent produced an Accounts Certificate for the period to 31 January 2015 and submitted to the Complainers to comply with the said Rule 6.15.1. The Respondent disclosed two qualifications in said certificate. Firstly that an anti-money laundering handbook would be prepared and secondly that around nine historic client balances were being investigated to be disbursed and resolved.

18.7 The Financial Compliance Department of the Complainers conducted a further inspection of the financial records, books, accounts and documentation of the firm on 2 February 2015. This inspection was a follow-up to the said inspection dated 7 October 2014. This inspection again identified breaches of the 2011 Rules. Said

breaches were discussed in an ongoing exchange between the inspection team and the Respondent and recorded in the executive summary document commenced following the inspection of 7 October 2014. The breaches of the 2011 Rules highlighted included *inter alia*:-

(a) a failure to review client balances in breach of Rule B6.11. Of those balances identified at the said inspection on 7th October 2014, four balances remained unresolved. Further, two of said balances with the client references GRE004-4 and YOU009-1, had been identified at previous inspections as hereinbefore condescended upon. The said department reminded the Respondent that as these historic balances remained held in breach of the said Rule, those required to be noted in the Respondent's next Accounts Certificate to be submitted to the Complainers;

(b) a failure to issue terms of business letters in breach of Rule B4.2;

(c) a failure to adequately record compliance with money laundering procedures in breach of Rule B6.23. In particular the Respondent, as at 2nd February 2015 had not prepared and provided an anti-money laundering procedures manual. This issue had been raised at the said previous inspections on 13th-15th May 2013 and 7th October 2014;

(d) a failure to correctly maintain the records of the firm in order that the true financial position of the firm is shown in breach of Rule B6.7.4. In particular, the accountant's adjustments, and the recording of a loan in the firm's name, remained outstanding. These issues had been raised at the said previous inspections on 13th-15th May 2013 and 7th October 2014. The said department reminded the Respondent that as there was a failure to show the true position of the firm, this breach of the Rule required to be disclosed in the Respondent's next Accounts Certificate to be submitted to the Complainers in July 2015. The Respondent advised on 26th May 2015 that he would instruct his accountant to make the appropriate entries to reflect the said loan through the firm's accounts.

18.8 The Respondent produced an Accounts Certificate dated 13 August 2015 for the period to 31 July 2015 and submitted said Certificate to the Complainers in accordance with the said Rule 6.15.1. The said Certificate however failed to disclose any breaches of the 2011 Rules. In particular it failed to disclose the breaches of Rules B6.11 and B6.7.4 hereinbefore condescended upon.

18.9 By email dated 28 August 2015, the Complainers advised the Respondent that the said Accounts Certificate, failed to disclose said breaches and requested a response by the Respondent by 7 September 2015. No response was received. A reminder was issued by the Complainers on 12 October 2015 calling for a response by the Respondent by 16 October 2015. No response was received. A further reminder was issued by the Complainers to the Respondent on 26 October calling for a response by 30 October. No response was received. A further reminder was issued by the Complainers to the Respondent on 20 November calling for a response by 27 November. Said letter included a reminder that breaches of the 2011 Rules require to be disclosed in the firm's Accounts Certificates to be submitted to the Complainers. A short response was received from the Respondent on 26 November but that response failed to address the full issues outstanding. A further reminder was issued by the Complainers to the Respondent on 27 November seeking a response by 4 December. No response was received. A further reminder was issued by the Complainers to the Respondent on 11 December calling for a response by 14 December. No response was received. As a result of the Respondent's failure to respond to the Complainer's correspondence and a failure to address the matters raised by the said Department, the Complainers wrote to the Respondent on 21 December advising that the matter would now be referred to the Complainers Client Protection Sub-Committee.

18.10 The Complainers Client Protection Sub-Committee met on 4 February 2016 to consider the matters raised during the course of the said inspections by the Complainers Financial Compliance Department in August 2014 and February 2015. Further they considered the terms of the Accounts Certificates submitted by the Respondent for the period ended 31 July 2015 which, *inter alia* did not disclose any breaches of the Complainers Practice Rules 2011. The said Committee also considered the terms of the correspondence which had been

issued to the Respondent following upon the latter inspection in February 2015 and the submission of the Accounts Certificate in August 2015. The said Sub-Committee opined that the Respondent had not responded fully and adequately to the concerns raised by the Complainers Financial Compliance Department and that his failure to do so may constitute a further breach of the Complainers Practice Rules 2011, namely Rule B6.18.7. The said Sub-Committee accordingly resolve to invite the Respondent to attend for interview and that on 17 March 2016.

18.11 The said Sub-Committee met on 17 March 2016. The Respondent failed to attend said interview. They observed the terms of the Accounts Certificates submitted by the Respondent which failed to disclose breaches of the Complainers Practice Rules 2011. It further observed that the Respondent had failed to substantively and adequately address the concerns raised by the Complainers Financial Compliance Department. In light of those observations, the said Sub-Committee resolved to make a formal referral to the Scottish Legal Complaints Commission and further that the said firm be re-inspected in September 2016.

18.12 The Respondent represented a client ("FGS") at an Exceptional Hardship Hearing in Forfar Justice of the Peace Court on 16 September 2015. Following upon said hearing, the Respondent was instructed to lodge an Appeal against the sentence imposed against the said FGS. On 2 October 2015 the Respondent wrote to Faculty Services Limited Criminal Appeals Service (hereafter "FSL") to instruct them as Edinburgh Agents and to instruct Counsel in respect of the Note of Appeal lodged on behalf of the said FGS. The Respondent advised that the matter was to be privately funded.

18.13 On 8 October 2015 FSL wrote to the Respondent accepting his instructions and enclosing an interlocutor advising that Leave to Appeal had been refused at the First Sift and requesting confirmation that instructions were to be given to prepare an Opinion in support of an Appeal to the Second Sift. Said letter enclosed a Letter of Engagement and Terms of Business. On 15 October the Respondent wrote to FSL instructing an Appeal be marked to the Second Sift and for Counsel to prepare the necessary documentation. By email dated 19 October 2015, FSL acknowledged receipt of those instructions and advised that Counsel's fee for the preparation of the Opinion would be £300 plus VAT. By email dated 20 October

2015, FSL provided the Respondent with a copy of Counsel's Opinion and confirmation that it had been timeously lodged. On 3 November 2015 FSL issued a fee note to the Respondent in respect of the said Opinion in the total sum of £360 including VAT.

18.14 On 4 November 2015 FSL wrote to the Respondent enclosing a copy of a letter from Judiciary Office confirming that the Appeal had passed the Second Sift and that a Hearing had been set down for Wednesday 2 December 2015. Said letter confirmed that Counsel had been instructed to conduct the said Appeal. By email dated 12 November 2015, FSL advised the Respondent that Counsel's fee for preparing a written submission and attending at the Appeal Hearing would be £600 including VAT. On 3 December 2015 FSL wrote to the Respondent advising that the Appeal had been unsuccessful. On 9 December 2015 FSL issued a fee note to the Respondent in respect of Counsel's fee for the preparation of the written submission and attendance at the Appeal Hearing in the total sum of £600 plus VAT. Said fee note was settled by the Respondent on 16 December 2015.

18.15 FSL issued a first reminder to the Respondent regarding the said Counsel's fee totalling £360 on 12 December 2015. Further reminders were issued to the Respondent by FSL in February, March, April, May, June, August, September, October, and November, all 2016. Despite said reminders, the Respondent failed to settle the outstanding fee due to Counsel. Further reminders were issued to the Respondent by FSL in relation to said Counsel's fee in January, February and March all 2017. The Respondent failed to settle Counsel's fee. FSL then lodged a complaint with the Scottish Legal Complaints Commission who in turn referred matters to the Regulation Department of the Complainers.

18.16 By letter dated 12 October 2017, the Respondent wrote to the Complainers acknowledging that he had failed to settle Counsel's fee but maintained that he did not instruct Counsel to prepare an Opinion.

18.17 By email dated 18 July 2018 to the Complainers, the Respondent acknowledged that he should have settled Counsel's fee note. The Respondent settled Counsel's fee note on 8 August 2018.

18.18 The Financial Compliance Department of the Complainers conducted an inspection of the financial records, books, accounts and documentation of the firm on 4-6 October 2016. This inspection identified breaches of the Law Society of Scotland Practice Rules 2011 (hereafter "2011 Rules"). Said breaches were highlighted in an Executive Summary produced by the said Department. The breaches of the 2011 Rules highlighted included *inter alia*:-

(i) A failure to disburse historic client balances in breach of Rule B6.11 and in particular:-

(a) Charity Ledger, CHARI01-01, £326.37 held since August 2014 not yet paid out to charity;

(b) COC002-7, Mr S.C., purchase of property in Arbroath, £155 held since the transaction settled in 2011.

(c) LAIDA01-02, Mr A.L., assault, £40 retained since March 2014;

(d) ST0-1, Ms L.S., sale of [property], £82.72 disbursed to client on 10 November 2014 and not presented: re-credited to ledger May 2016 and retained.

(ii) A failure to show the true financial position of the firm in breach of Rule 6.7.3 and in particular:-

(a) The drawings ledger was incorrectly stated at £392,676.19 as at 31 August 2016 which exceeds the capital account of £249,280.00 as at 31 August 2016;

(b) The capital account within the trial balance does not accurately reflect the capital account stated in the latest set of Annual Accounts prepared to 31 October 2015;

(c) The secured loan for the office property is not reflected within the trial balance, however it is reflected within the Annual Accounts as at 31 October 2015 as £23,305;

(d) Accruals were highlighted at the previous inspection in the sum of £3,541.95. It has not yet been evidenced what the outcome of investigations with LawWare or how it was being dealt with; and

(e) A Motor Vehicle currently showing as an asset for the firm in the sum of £44,419 and depreciation of £27,320.50 was indicated in discussion with the solicitor to not be accurate.

(iii) Inadequate recording of compliance with Money Laundering procedures in breach of Rule B6.23 and in particular;-

(a) Identification documentation was missing or insufficient in the following files:-

(i) WEIR01-01 Mr B.W. and Mrs G.W., discharge of security.

(ii) DUNBE01-01, Mrs E.D., Executry of the late Mr B.J.D.

(iii) YOU009-1, Mr D.Y., Executry of the late Mr P.Y.

(iv) HAGGA01-01, Mr G.H. and Mrs V.H., discharge of security.

(v) NEW004-24, N.L.C.P. the sum of £15,000 was received from Mr B.M.. The necessary identification was not seen to be held by Mr B.M.

(b) Information re source of funds in respect of MARSM02-01, Mr and Mrs M. The sum of £19,976 was transferred to the client bank however the full client name was not narrated in the bank statement; and

The documentation relating to paragraph 28.28(iii)(a)(iii) was received by the Complainers on 12 January 2017. The documentation for paragraph 18.18(iii)(a)(v) was received by the Complainers on 15 November 2016.

(iv) A failure as Cashroom Manager to ensure the said firm's compliance with the Accounts Rules in breach of Rule B6.13. In that the Respondent as Cashroom Manager had failed to ensure that the practice's compliance with the Accounts Rules and therefore failed in his responsibilities.

The said Department concluded that their findings were of a serious concern and that their report be considered by the Complainers Client Protection Sub-Committee.

18.19 The Complainers Client Protection Sub-Committee met on 2 February 2017 to consider the matters raised during the course of the said inspection. The said Committee opined that the Respondent had not responded fully and adequately to the concerns raised by the Complainers Financial Compliance Department and that his failure to do so may constitute a further breach of the 2011 Rules, namely Rule B6.18.7. The said Sub-Committee accordingly resolve to invite the Respondent to attend for interview and that on 16 February 2017.

18.20 The Complainers Guarantee Fund Panel met on 16 February 2017 and the Respondent attended, and the resolved to re-inspect the firm in November 2017. The said Complainers said Client Protection Sub-Committee met on 2 March 2017 to consider matters further and resolved to make a formal referral to the Scottish Legal Complaints Commission and in addition order a re-inspection of the firm in November 2017.

18.21 On 22 November 2017 the Complainers intimated the said Complaint to the Respondent and required his response within twenty one days. The Respondent failed to respond. On 19 December 2017 the Complainers issued notices to the Respondent in terms of Section 15.2(ii) of the Solicitors (Scotland) Act 1980 and Section 48(1)(a) of the Legal Professional and Legal Aid (Scotland) Act 2007. Whilst the Respondent acknowledged said notices, he failed to adequately respond. On 30 January 2018, a further notice was issued by the Complainers to the Respondent in terms of Section 15.2(ii) of the said Act. The Respondent acknowledged receipt of said notice but again failed to adequately respond. On 4 September 2018 the Complainers intimated a further Complaint to the Respondent. In respect of his failure to respond to the said correspondence issued to him and requested a response to that and the previously intimated issues within twenty one days. The Respondent again failed to adequately or timeously respond. The Respondent subsequently provided a response to the original issues intimated by a letter dated 9 October 2018.

19. Having considered the foregoing circumstances, the Tribunal having been invited to consider the averments of misconduct in each of the three original Complaints separately, the Tribunal made the following findings:-

(i) In respect of Complaint 1825, the Tribunal found the Respondent guilty of professional misconduct in that:-

(a) he submitted an Accounts Certificate for the practice unit's accounting period ending 31 July 2015 which failed to disclose breaches of the Law Society of Scotland Practice Rules 2011, which had been identified at previous financial compliance inspections of the practice unit on 7 October 2014 and 2 February 2015, despite having agreed to make those disclosures together with an explanation of the remedial action taken in respect of them, thereby serving to mislead the Complainers as to the practice unit's compliance with the Practice Rules during the relevant period; and

(b) In the period after submission by him of the aforementioned Accounts Certificate, he failed to respond, or at least delayed unduly in responding, to the reasonable enquiries of the Complainers in respect of matters arising from that Accounts Certificate and prior financial compliance inspections of the practice unit, in particular in breach of his duty in terms of Rule B6.18.7 of the Practice Rules to provide reasonable cooperation to persons authorised by the Complainers in the conduct of the said inspections.

(ii) In regard to Complaint 1852, the Tribunal found the Respondent not guilty of professional misconduct; and

(iii) In respect of Complaint 1866, the Tribunal found the Respondent guilty of professional misconduct, *in cumulo*, in that:-

(a) he failed, or at least delayed unduly, in disbursing client monies held by him and the said firm, after there was no longer any reason to retain them, as hereinbefore condescended upon, and that in breach of Rule 6.11 of the Law Society of Scotland Practice Rules 2011;

(b) he failed to keep at all times properly written up such account records as were necessary to show the true financial position of the said firm, as hereinbefore condescended upon, and that in breach of Rule 6.7.3 of the Law Society of Scotland Practice Rules 2011;

(c) he failed to comply with the Anti-Money Laundering procedures by (i) failing to keep on file client identification, and (ii) failing to retain on file sources of funds documentation all as hereinbefore condescended upon, and that in breach of Rule B6.2.23 of the Law Society of Scotland Practice Rules 2011.

(d) In his capacity as Cashroom Manager he failed to ensure that the said firm complied with the Law Society of Scotland Practice Rules 2011 as hereinbefore condescended upon, and that in breach of Rule B6.13;

(e) He failed or delayed in responding to correspondence and Statutory Notices issued by the Complainers.

20. Having heard further submissions from both parties, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 10 December 2019. The Tribunal having considered the conjoined Complaints at the instance of the Council of the Law Society of Scotland against Nicholas Whelan, 105 High Street, Arbroath; Uphold the Respondent's plea to the competency and relevancy only in relation to an Accounts Certificate dated 11 February 2016, *quoad ultra* repels the said plea; Finds the Respondent guilty of professional misconduct in respect that (a) he submitted an Accounts Certificate for the practice unit's accounting period ending 31 July 2015 which failed to disclose breaches of the Law Society of Scotland Practice Rules 2011 which had been identified at financial compliance inspections on 7 October 2014 and 2 February 2015, despite having agreed to make those disclosures together with an explanation of the remedial action taken in respect of them, thereby serving to mislead the Complainers as to the practice unit's compliance with the Practice Rules during the relevant period and he failed to respond, or at least delayed unduly in responding, to the reasonable enquiries of the Complainers in respect of matters arising

from that Accounts Certificate and prior financial compliance inspections of the practice unit, in particular in breach of his duty under Rule B6.18.7 of the Law Society of Scotland Practice Rules 2011 and (b) *in cumulo,* in respect of his breaches of Rules B6.11, B6.7.3, B6.2.23, B6.13 and his failure or delay in responding to correspondence and statutory notices issued by the Complainers; Censure the Respondent; Fine him in the sum of £2,000 to be forfeit to Her Majesty; Find the Respondent liable in the expenses, insofar as not already dealt with, 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 restricted to 75%; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Catherine Hart

Acting Vice Chair

21. 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 9 MARCH 2020.

IN THE NAME OF THE TRIBUNAL

[redacted]

Catherine Hart

Acting Vice Chair

NOTE

Two hearings had been set down for 16 October 2019. The first related to Complaints 1825 and 1852 which had previously been conjoined. The second hearing was in relation to Complaint 1866.

Mr Knight lodged two Joint Minutes and explained that one related to the conjoined matter and the other related to the third Complaint, 1866. He confirmed that this would shorten the evidence necessary but that there were still a number of issues outstanding between the two parties.

Mr Knight made a motion in terms of rule 17 for the third Complaint (1866) to be conjoined with the others. He confirmed that the purpose of this motion was to allow all of the evidence to be heard in one go. He confirmed that he would not be inviting the Tribunal to use the evidence in relation to one Complaint to support a finding of professional misconduct on an *in cumulo* basis in relation to another Complaint. He would be inviting the Tribunal to consider the three Complaints individually on their own merits albeit they were all conjoined. The Respondent confirmed he had no objection to this motion and this was granted.

Mr Knight confirmed that he would not be leading evidence in relation to averment 2.13 in the Record as this contained averments now within the third Complaint.

The Respondent lodged a principal Affidavit and asked the Tribunal to allow this to be received. Mr Knight confirmed he had no objection to that. Additionally, the Respondent had lodged a List of Productions with the Tribunal office late. This List was erroneously numbered four. The Respondent moved to amend that to List of Productions Five and asked the Tribunal to allow this to be received late. Mr Knight confirmed he had no objection to that motion. The Tribunal allowed the Affidavit and the late List of Productions to be received.

Mr Knight led evidence from two witnesses and closed his case. The hearing was continued to 10 December 2019 when the Respondent gave evidence, concluding the hearing of evidence.

EVIDENCE FOR THE COMPLAINERS

WITNESS ONE: JENNIFER BROWN

This witness confirmed that she was formerly employed by the Financial Compliance Department of the Law Society. Now she works for a firm of solicitors in Aberdeen. Her qualifications include SOLAS, the Association of Accounting Technicians and a qualification as an executry paralegal.

She confirmed that she was involved in some of the inspections carried out at the firm of Whelan and Company but she could not remember the dates.

She identified Production 3 and confirmed that her name was on the final page of this report confirming that she was involved in the inspection that took place between 13 and 15 May 2012. She confirmed that at that stage she was still in training with the department and that Natalie Cooke was therefore the lead inspector. She explained that the key findings listed in the report are the matters discovered during the inspection and that need a response from the solicitor. The matters discovered are given a category or weighting. At that time, there were three categories – 1 to 3 – with 1 being the least important and 3 being the most significant. There are now four categories. The primary purpose of the document set out as Production 3 is to be passed to the solicitor for him to respond on in relation to the individual issues. In some circumstances, there is correspondence back and forward between the solicitor and the inspection team. An inspection normally lasts one to three days. As the breaches are discovered, they are highlighted. If the solicitor is present at the inspection then a response can be obtained at the time. There can be a complete answer to a suggested breach.

She confirmed that she was involved in reviewing this firm's Accounts Certificates. She identified Production 4 on Inventory 1 for the Complainers as a letter with an Accounts Certificate attached. That certificate did not identify the person in the Law Society who had checked it. The procedure is that Accounts Certificates are submitted to an administrator who looks over them. If the certificate discloses a breach then the certificate is referred on to an inspector. If there is nothing in the certificate then it would not be passed to an inspector. At inspections, the inspector doing the inspection will look at previously lodged Accounts Certificates. She imagined that the second row of ticks on the copy Accounts Certificate would have been placed there by the administrator who received the Accounts Certificate.

The witness was referred to Production 6 on Inventory 1 which was an inspection report summary and recommendation relating to an inspection on 7 October 2014. She confirmed that this report was in a different format to the earlier one referred to. This would not have been the only report. Production 6 incorporated the various responses. The formats of the inspection reports changed at one point to do with the inputting of all of the information on to the computer system.

She confirmed that the report on pages 1, 2 and 3 refers to a breach of rule B6.11 in relation to historic client balances. Five of these noted at the bottom of 6/1 were raised at a previous inspection. She could not remember if this was a follow-up inspection to one that took place in February 2013. She noted her response on page 2 dated 2 February 2015. This suggested that the Respondent must have sent something in prior to the 2 February. She noted that part of her response dated 2 February 2015 was to remind the Respondent that he required to note the historic balances on his next Accounts Certificate. It was her practice to put this reminder in such reports as in her experience some solicitors did not realise that these breaches noted during an inspection required to be included in the Accounts Certificate that covered the time period during which the breaches occurred.

She noted her colleague's response dated 29/5/15 on Production 6/3 and noted the reminder there that the matters would be monitored under the Accounts Certificate process.

The second issue raised within that report was one of a breach of rule B4.2 in relation to failing to issue terms of business letters. She noted her response dated 02/02/15 at Production 6/5.

The third issue raised was noted at Production 6/6. This was a breach of rule B6.23 in relation to record keeping for anti-money laundering regulation purposes. This type of breach crops up a lot during inspections as many solicitors do not understand their duties under anti-money laundering regulations.

She explained that an anti-money laundering manual is something that should contain the policies and procedures for the firm confirming what the firm will do to ensure compliance with the AML regulations. The manual can either be held in a hard-copy or electronic form. If the firm holds it electronically sometimes the inspector will ask for it to be printed. You would normally find within the manual details of how the firm is going to comply with the ID regulations and how they will be satisfied with regard to the source of funds/wealth. The manual also requires to contain information about the training of staff. It should indicate where the inspectors will find the necessary information. It should document the risk attached to each case. The inspectors would require to see the policies and procedures noted within the manual mirrored on the content of client files e.g. the presence of risk assessment forms. Rule B6.23 has an absolute requirement that there be such a manual.

The fourth issue noted is at Production 6/8 and was a breach of B6.23 in relation to risk assessments required by the AML regulations. There are six files listed that have no evidence of a risk assessment having been carried out. Three files disclosed a risk assessment being carried out substantially after work

began. Her response given on page 9 of Production 6 dated 2/2/15 discloses that the issue of risk assessments was addressed.

The fifth issue is noted at page 10 of Production 6 and relates to a breach of rule B6.23 and the requirements of client identification for AML regulations. She confirmed that this issue was given a weight of 2 and thought that this might be because there were only a handful of files that had problems with ID and it could be that the rest of the files checked had no issues. Remedial steps were taken.

The sixth issue is noted at page 12 of Production 6 and is a breach of rule B6.23 regarding the requirements of confirming the destination of funds.

At this juncture, the Respondent objected to this line of questioning and the witness was removed from the hearing room. The Respondent clarified that it was his submission that there were no averments within the Complaint relating to this line of examination. Mr Knight responded that in averment 2.5 of the record, the report is referred to as having been incorporated *brevatatis causa*. The follow-up inspection of 2 February 2015 is contained in averment 2.7 which also refers to the executive summary as incorporated herein *brevatatis causa*. Both averments 2.5 and 2.7 contain breaches of rule B6.23.

The Respondent stated that the averments did not specifically set out these issues in the Complaint. He said that this was not fair notice of the allegation of professional misconduct.

Mr Knight submitted that the averments of professional misconduct in the Complaint are that Accounts Certificates were produced after inspections that had identified accounts rules breaches (including breaches of rule B6.23) which did not include these breaches within them. To give context to this averment of misconduct, the Tribunal required to know what the rule breaches were. The Fiscal was not putting to the Tribunal that the accounts rules breaches themselves were misconduct. It is his position that the failure to disclose these breaches on the certificates is what amounts to misconduct.

The Respondent insisted that the averments within the Complaint did not detail these specific accounts rules breaches. He drew the Tribunal's attention to averment 2.5 and emphasised that therein the Fiscal had highlighted individual accounts rules breaches and he had understood that these were what the Complainers were relying upon. There was no averment of breach of rule B6.23 specifically averred.

Mr Knight drew the Tribunal's attention to the Joint Minute signed by the Respondent agreeing the executive summary of the Law Society inspection.

The Respondent explained that he was concerned that he had not included this objection in his preliminary notice and therefore felt he required to raise it within the hearing. He was happy for the Tribunal to hear the evidence under reservation and to make submissions about the matter thereafter.

The Chair confirmed that the Tribunal would continue to hear this line of evidence under reservation.

Mr Knight continued with his examination-in-chief. He referred the witness to Production 6/14 and the witness confirmed that this was the seventh issue raised, a breach of rule B6.7.4 relating to the firm's trial balance. She confirmed that the purpose of this rule was so that one could see the assets and liabilities of a firm at a glance of the trial balance and see the true financial position of the firm. She confirmed that the trial balance would include things such as salaries, payment of tax and VAT etc. You would always expect adjustments to the trial balance at the year end. The firm's accountants would normally provide the cashier with a note of adjustments to post to the books and records of the firm to ensure that the firm's books and records were a mirror to the firm's accounts. It usually takes a few months for these adjustments. Here the inspection was eight months after the year end. They had noticed that there was a loan in the firm's accounts that was not in the trial balance. The witness noted that at page 15 of Production 6, there was reference to the loan being a personal loan and not a firm loan. She noted the solicitor's response dated 26/5/2015 that the loan would be put through the business accounts. Her colleague in her response dated 29/5/2015 referred the Respondent to including this issue in the firm's Accounts Certificate. The witness said she could not remember whether the issue of the loan was ever rectified. The witness confirmed that the following pages of Production 6 noted other issues.

She was asked if she could remember what action the Law Society decided to take as a result of this report. She believed that the decision was taken to give the solicitor time. However, as there had been breaches in past inspections it was decided that there would be a follow-up inspection rather than leave the matter to be dealt with by way of correspondence. She could not remember if a decision had been taken to refer the matter on to one of the Sub Committees.

She confirmed that Production 7 on Inventory 1 contained an Accounts Certificate for the Respondent for the accounting period ending 31 January 2015. The inspection the witness had been discussing had taken place in October 2014 i.e. it fell within the six-month period prior to the Accounts Certificate. Box 1.4 should have been ticked 'no'. The issue of the firm's trial balance was a breach of rule B6.7.4. The solicitor refers to a note in relation to paragraph 1.9 – historic client balances – and these are referred to

in a note attached to the certificate. Paragraph 7.4 has not been ticked and refers to a note attached and that note refers to the AML regulations manual.

Production 8 is an Accounts Certificate for the period ending 31/7/15. Boxes 1.4, 1.9 and 2.3 are ticked so that no breaches are disclosed. She would have expected some breaches to be disclosed there. The executive summary page 6/2 pointed out to the Respondent that he required to disclose historic balances on his Accounts Certificate.

Production 9 is an email from Mandy Gibb dated 28 August 2015 explaining to the Respondent that he should have included client balances and the issue of his loan in the Accounts Certificate. Production 10 is an email chasing Production 9. Production 11 is a further email chasing the earlier two.

She had no specific recollection in this case, but she would have expected the matter to be referred to the Client Protection Sub Committee. She identified Production 15 as the report of the Sub Committee in this matter and thought that she would have been present at that meeting as she had done the inspection. The conclusion of that meeting was to invite the Respondent to an interview.

Production 16 was an Accounts Certificate for the period to 31 January 2016. No disclosure of any alleged or established rule breaches were made therein.

She could not recall the outcome of the interview that took place as a result of the Sub Committee meeting.

Mr Knight indicated he was moving on to a different part of the evidence and referred the witness to Production 17 in the same Inventory. The witness confirmed that this was a report of an outcome of inspection that had taken place on 4th and 6th October 2016. She believed that she was the inspector at the firm. Natalie Cooke was the report coordinator pulling all of the information together. Page 1 lists seven bullet points, some of which were new and some the same as previous inspections. Page 2 highlights four previous issues raised in the previous inspection. The conclusion of the report was that the matter should be reported to the Client Protection Sub Committee. This conclusion was only reached after discussion with her colleague. This recommendation can change after the process of correspondence has gone through, if a solicitor provides all of the answers that the team were looking for. 17/7 confirms that everything was addressed, and the case was withdrawn from the Sub Committee meeting. In the various schedules of that report it disclosed that there was significant delay in the solicitor

providing responses to matters raised. Some rule breaches had been raised continuously. It should be noted that Rule 6.4.3 had become Rule 6.7.3 by the time of this inspection report, see Production 17/25.

The Respondent was interviewed as a result of the inspection in October 2016. The outcome of that interview was seen at Production 4/6 of Inventory 1 for 1866. His firm was to be re-inspected in November 2017.

She did not attend the inspection in November 2017. She ceased employment with the Law Society in 2019.

CROSS EXAMINATION

The witness confirmed that inspection reports disclosed what appears to the inspectors to be breaches of the Accounts Rules. Sometimes the solicitor involved can provide responses which answer the matters raised.

She had some recollection that the Respondent had said that the loan referred to was a personal loan and not a firm loan. However, the loan was in the firm's annual accounts and she took the view that if it was in the firm's accounts it should be in the trial balance. She was asked why that was the case and responded that she was not a qualified accountant. She did not recall the Respondent producing any documentation in relation to the loan. If the Respondent had said that he was going to discuss the matter with his accountant, she would have expected the team to ask for information from the accountant to explain why the loan had been set up in that way. She could not recall asking for documentation in relation to the loan.

The primary purpose of the trial balance is to ensure that clients funds are protected. It needs to be up to date to ensure that there are no outstanding loans and the inspectors can see if the firm is financially stable. In this case, she confirmed that there was no suggestion that there was a risk to client funds.

The witness was referred to Production 6 on inventory 1 for Complaint 1825. The Respondent asked her if he had provided her with an explanation for each of the historic client balances. The witness pointed to page 6/3 and the response from the team dated 29 May 2015. An exchange between the Respondent and witness followed regarding the historic credit balance for KT Properties Limited. The Respondent insisted that he had had authority to hold on to these funds. The witness could not remember the Respondent giving her that information at the time of the follow-up visit to the inspection. The witness

insisted that even if that authority had existed, the sum remained client funds and a credit balance held on the client ledger. Mr Knight objected to this line of cross-examination on the basis that the Respondent had nothing in his answers to allow him to cross-examine on this line. The Respondent was asked to reframe his question. He asked the witness if, given that the issue between him and the client took time to resolve, he should have transferred the funds into his firm account, and she responded that he could not do that without written authority. The balance had been held since 2013. The solicitor's response was 26 May 2015. She had no recollection of asking for a completion certificate. If the Respondent had been able to provide evidence that this was an ongoing transaction, then that would have answered the issue. She expected him to disclose any credit balances held beyond the time allowed within his Accounts Certificate.

The Respondent referred the witness to the wording of Rule 6.11 and asked if he only required to report credit balances if the transaction was concluded. The witness responded that the transaction was deemed to be concluded when the sale price had settled. This balance was held two years down the line, and they would have expected him to disclose this on his Accounts Certificate and explain why. She did not recall any explanations being given for any of the historic balances at the time of the inspection.

The Respondent referred the witness to Production 17/8 and his response of 15 November 2016. He said that he was asking for clarification of the matters raised. The witness responded that there was always a summing up meeting after the inspection report. It would have been very unusual not to have had a summing up. She could recall coming out to his office with Natalie Cooke and discussing a report with him.

The witness agreed that often anti-money laundering documents are held elsewhere in an office. It was her experience that the team always asked for sight of any folder that might be held. She accepted that a number of solicitors had had difficulties with the introduction of the Anti-Money Laundering Regulations. She did not accept that it was over 50% of solicitors. She agreed that it was not uncommon to find ID documentation missing from a file.

She agreed that the Committee noted that at interview, in Production 4/5 for Complaint 1866, the Respondent was frank and open.

She agreed that there were issues around anti money laundering manuals for firms at the time and she was aware that the Law Society had updated its website to give more guidance to solicitors although she could not give a date for that. He asked the witness if she was aware that his terms of business letters

were not on the file because the firm had moved to cloud based storage. She said she could not remember that, but she did recall him sending terms of business letters to the Law Society after the inspection.

RE-EXAMINATION

The witness confirmed that the trial balance required to reflect the position in the firm's accounts.

If a solicitor holds funds from a transaction because he thinks it is not completed, then she would expect it to be reported so that the Law Society could assess it as an ongoing transaction. She accepted that there might be a difference in interpretation between the Law Society and the solicitor.

WITNESS TWO: NATALIE COOKE

The witness confirmed that she is employed as financial compliance manager within the Financial Compliance Department of the Law Society of Scotland. The witness confirmed that she was a part of the inspection of the firm on 16 July 2012 and identified the report from that inspection, which was Production 2 for Inventory 1, Complaint 1825. The matters raised in that inspection were dealt with by way of correspondence with the Respondent.

She assumed that she attended the firm as part of the audit team of the inspection 13 – 15 May 2013 which was reported in Production 3. That report disclosed an issue regarding breach of the Anti-Money Laundering Regulations and regulations to do with terms of business letters amongst others. She could not remember if the matter had proceeded to the Guarantee Fund Sub Committee following the inspection.

The inspection team did not have any role in reviewing Accounts Certificates unless rule breaches were disclosed. Sometimes they would ask the department dealing with the Accounts Certificates to forward them if issues had been raised during the inspection. She could not honestly say if that had been done here. The Respondent's Accounts Certificate for the period end January 2014 was a clean certificate reporting no breaches. The Accounts Certificate for the following period, to 31 July 2014, similarly disclosed no breaches.

She confirmed that Production 6 was an inspection report for the inspection from 7 October 2014. By this time, there were three grades of seriousness of breach – scaled from 1 to 3.

With regard to historic client balances, the team will ask to look at a random selection of client balances. If they cannot see anything on the ledger to suggest that the matter is ongoing these credit balances will be noted as a breach. Normally there would a meeting with the solicitor at the end of the inspection. The team might ask about one or two of the historic credit balances but not necessarily all of them. She was not involved in the follow up inspection in February 2015. She noted from the report that the Respondent was advised by her team that this matter would be supervised in an ongoing basis under the Accounts Certificate procedure. She would have expected to see the breaches under Rule 6.11 (historic credit balances) and Rule B4.2 (terms of business letter) disclosed in the relevant Accounts Certificate. With regard to the breach of Rule B6.23 – Anti-Money Laundering Regulations– it is important to note that there is a pre-inspection questionnaire sent to the solicitor. This requires the solicitor to forward a list of books and records that the Law Society want to see. That would include anti money laundering manuals and documentation.

The October 2014 inspection raised issues to do with the firm trial balance. Although the issues were categorised as a medium rule breach – level 2, this still amounts to a breach of the Rules. One of the issues was that adjustments had not been carried out to the trial balance following the preparation of the firm's accounts for the year end. The firm is given a reasonable period of time to carry out these adjustments considered to be 8 or 9 months after the year end. Anything over that period is considered to be too long. The other issue noted was a loan within the firm's annual accounts which was not reflected in the trial balance. It is expected that if a firm has a loan in its annual accounts, it should be reflected in its books and records. The trial balance is a summary of the income, expenditure, assets and liabilities of the firm. On the face of it here, the loan was a firm loan, but it was not reflected in the books and records as such. This can often be a way of hiding a high level of debt. It is important that the Law Society can ascertain the true financial position of the firm to ensure that client's money is not at risk. In this case, there did not appear to be an issue of finances being at risk. The firm always looked in a healthy financial position and the problems appeared to be down to poor record keeping.

Given the response of 26 May 2015, she would have expected to see the loan and the breach of the rule disclosed in the July Accounts Certificate.

She confirmed that the Respondent's Accounts Certificate for the period end 31/1/15 included reference to the breach of historic credit balance rules and the Anti-Money Laundering Regulations. It did not disclose the issues to do with the trial balance. She understood that some solicitors were confused about whether issues with the firm's accounts had to be disclosed in the Accounts Certificate. The regulations apply to all books and records of the firm, not just client accounts. The Accounts Certificate for the

period end 31/7/15 did not disclose any breaches. This was raised in correspondence and she spoke to emails listed as Productions 9 to 14. She confirmed that following a Sub Committee meeting, the Respondent was invited to an interview on 17 March 2016.

The witness was asked how serious she considered a solicitor missing items out of the Accounts Certificate and responded that it was considered to be quite serious given that the matters had been raised with the solicitor following an inspection.

The Respondent's Accounts Certificate for the period end 31/1/16 was a clean certificate. She would have expected there to be disclosures in that certificate particularly if the matters were still outstanding.

The firm was inspected again in October 2016 as ordered by the Sub Committee. The witness was the report coordinator but did not attend the inspection. The report was emailed to the Respondent on 24 October 2016. This inspection identified more problems than the one previously. She accepted that if all of the issues within the inspection were addressed then the matter could be withdrawn. The difficulty was that there were other issues now arising including the Respondent's duty to rectify the original problems. Some of the issues raised were dealt with but some proceeded to the Client Protection Sub Committee. The Sub Committee ordered a Section 40 interview which took place on 16 February 2017. Following interview, there was a recommendation that the firm be re-inspected in November 2017.

The witness was aware that the firm was inspected in November 2017. She was not sure if she attended that inspection or simply had sight of the report.

CROSS EXAMINATION

The witness explained that the problem the Respondent faced with the loan being discussed was that it was included in the annual accounts for the firm. That being the case, the Law Society expected to see it reflected in the other books and records including the trial balance.

The Respondent asked the witness about the inspection in 2013. She confirmed that she had not seen anything to doubt that some of the anti-money laundering documentation was not on client files at the time but held elsewhere. She explained to the Respondent that there was a distinction between the identification documentation required by Anti-Money Laundering Regulations and investigation into the source of wealth of clients. Copy bank statements on the file disclosed the location of the funds, they do not disclose the source of the wealth.

With regard to the issue of possible deficits on the firm account, the witness explained that the bank statement was not enough to show whether or not the firm might have had a deficit on any given day.

With regard to the issue of terms of business letters, the witness would have expected the Respondent to disclose that the terms of business letters were held electronically prior to the inspection in which case the inspectors would have asked to see them stored online.

The witness was asked whether or not the Respondent only required to disclose what he considered to be breaches of the Rules to the Law Society on the Accounts Certificate. He said that in relation to historic credit balances, the Respondent had explanations showing that the transactions were ongoing and so did not fall foul of that rule. The witness explained that as these matters had been raised at inspections, and the information not provided to the team to satisfactorily answer their issues, she expected the credit balances to be disclosed on the Accounts Certificate with the appropriate explanation. He should have disclosed that balance but explained why it was not a breach.

With regard to the disputed loan, the witness stated that the Respondent did not say whether it was or was not a firm loan. In fact, what he had said was that he would speak to his accountants.

The witness confirmed that tick box 1.4 on the Accounts Certificate sometimes caused confusion and some people misinterpreted that as relating to only the client side of the business records and not the firm side.

With regard to the rule breach 6.13, the witness accepted that the Respondent had asked for clarification, but she considered that her colleague's response of 18 November 2016 was quite clear.

At this juncture it was noted that averment 2.2(i)(b) contained the wrong figure and Mr Knight confirmed he would later amend that to £155.

The witness accepted that there can be a delay in obtaining information from accountants to make the appropriate alterations to trial balances.

She did not remember any discussion about motor vehicles.

The Respondent questioned whether he needed to obtain identification documentation where he was dealing with the discharge of a standard security where the mortgage had already been redeemed before he was instructed by the client. The witness responded that it depended what his money laundering manual required. She was unable to say off the top of her head whether it breached Rule 6.23.

She confirmed that it did not matter what the size of the credit balance was, the rules required these balances to be dealt with timeously. The Law Society had written to firms giving them time to deal with historic credit balances and had expected them to be sorted out by 2013.

She accepted that there was no evidence of misuse of client funds or any question of the firm being in financial difficulty.

The Tribunal asked if the Respondent had reported these matters in the Accounts Certificates whether the complaint would have proceeded. The witness explained that there were other issues of non-communication.

The Tribunal asked the witness if the Respondent was in fact being asked to disclose something that the Law Society were already aware of. The witness responded that any breaches of Accounts Rules required to be disclosed on Accounts Certificates.

The Tribunal asked questions of the witness with regard to summing up interviews. The witness explained that it was the usual case that a solicitor would be spoken to at the end of the inspection, unless he was not available. If he was not available at the time, then the report would be issued and a meeting with the cashroom manager would take place later. In other words, in her view it was highly likely that there were summing up meetings following the inspections in this case. She confirmed that if a solicitor during a summing up meeting gave specific information then the inspectors would include that in the report. If a solicitor indicated to the team that they thought the team had made a mistake, then they would be told to put it in a response and that would be included. She was not aware of any of that type of communication in this case.

EVIDENCE FOR THE RESPONDENT

The Respondent referred the Tribunal to his Production 5/47 and following pages, which was the letter from SLCC to him dated 1 March 2017 intimating a summary of complaint. He thereafter referred the Tribunal to Complainers' Production 9/1, an email to him from Mandy Gibb at the Law Society which

made reference only to historic credit balances and the issue of the loan that had not been included in the firm's trial balance. As a result of these documents, he understood the issue he faced was the submission of an Accounts Certificate which did not make reference to the historic credit balances and the trial balance. Otherwise his position was as contained in his responses noted in the executive summary.

With regard to Complaint 1852 and the non-payment of Counsel's fee, he genuinely believed that he had not instructed Counsel's Opinion.

He had represented a client in respect of an exceptional hardship hearing which was found not to be established. An appeal was marked. He had instructed Counsel to conduct the appeal. The appeal did not pass the first sift. He had received an email from Faculty Appeal Services offering Counsel's Opinion and asking if the appeal was to proceed. He had replied instructing that they lodge an appeal against the refusal, but he did not ask for Counsel's Opinion. Counsel's Opinion was an unnecessary additional piece of work.

He referred the Tribunal to the affidavit lodged which he described to the Tribunal as the affidavit of an advocate well experienced in criminal defence work. This, he said, confirmed that such an opinion would not be expected to be automatically produced as a matter of course.

The Respondent accepted that if he had instructed Counsel's Opinion then he was responsible for the fee. That was not the case here. The fact that he had ultimately paid the fee should not be seen as an acceptance that it was due. This was simply an effort on his part to resolve the matter. He had not recovered the sum from his client.

He wanted to explain the situation with regard to the issues raised in relation to the firm's trial balance, an issue in both Complaints 1825 and 1866. The loan referred to was taken out when he started business. He had started in business as a sole practitioner. He purchased the office with a loan taken out in his sole name as it is impossible to take a loan in the firm's name, it not being a legal entity. The bank would not allow the firm to sign the standard security and so he had to sign it in his name.

At the compliance inspections, the Law Society was advising that the loan should be entered into the firm's accounts as a debt. His accountant said that would be overstating the firm's debtors. If he put the loan in as a firm debt, he might not have qualified for relief on interest. He had queried the Law Society's advice with the inspectors and did not get a satisfactory explanation. At first, he took the advice of his

accountant and chose not to put the loan through the trial balance. Following further discussions with his accountants, it was decided to put the loan through the firm accounts as instructed by the Law Society.

In answer to a question from the Tribunal, the witness confirmed that the loan was included in the annual accounts for the firm. He said he had not wilfully defied the Law Society but had followed the advice given by his accountant.

The issue in relation to accruals was finally addressed and he referred to his Answer paragraph 2.2(ii)(d) in relation to Complaint 1866.

With regard to averment 2.2(ii)(e) of Complaint 1866, he could recall a conversation with the inspector about a car lease which was for the previous financial year. He accepted he had made a mistake, but this was not an attempt to mislead and the matter was clarified later.

He did not intend to say anything further unless the Tribunal required further information. His position was set out in his Answers.

CROSS-EXAMINATION

He confirmed that he had agreed in the Joint Minute that the executive summary of the inspection from 2014 was true and accurate, including all of his responses that were noted therein.

He explained that his position had changed with regard to the loan and including it within the firm's trial balance because the advice from his accountant had changed. He accepted that the loan was included in the firm's accounts submitted to the Inland Revenue but not in the trial balance. He insisted that this followed his accountants' advice and that he was claiming tax relief on the interest. He was asked if his accountant had working knowledge of the Accounts Rules and responded that he hoped so. The discussion he had was that this was not a firm loan, that it was not appropriate to put it in as a debt for the practice when legally it was in his name. This would be distorting the firm's accounts. He disagreed with the Law Society inspectors that this was a breach of the Accounts Rules. She did not have anything to produce to confirm his accountants' advice and believed that his explanation would be sufficient as he was not trying to mislead anyone.

He confirmed that he understood the importance of Accounts Certificates in satisfying the Law Society of the liquidity of his business and any issues with regard to client funds. He accepted that it was his duty to ensure that these certificates were accurate.

He was asked if he accepted he had retained client balances for too long and accepted that but said that he had given explanations. He accepted that in principle a client balance held beyond a certain point could be a breach.

With regard to the issue of Counsel's outstanding fee note, he was insistent that he had instructed an appeal against the sift but not Counsel's Opinion. He had advised Faculty Services that he was not going to pay the fee note. He accepted that there was a list of reminders issued by Faculty Services that he had agreed in the Joint Minute. He said that these were computer generated reminders and he could not stop Faculty Services from issuing them.

The Fiscal referred the Respondent to Complainers Production 10, the Respondent's email to the Law Society and he confirmed that email stated he accepted that he should have settled Counsel's account. He drew the Fiscal's attention to the content of the email stating that he did not think he had instructed this Opinion. He believed that he had paid the fee by cheque issued prior to the date of that email. He accepted that if he had in fact instructed this Opinion then it would not have been acceptable for him not to pay the fee for 33 months. It was his position that he did not think he had instructed Counsel to prepare the Opinion in the first place. He had not emailed Faculty Services challenging the fee note but he had had telephone calls with them saying that he was not going to pay the fee note and he referred to an email from the advocate's clerk which the Respondent had lodged as a Production.

In answer to a question from the Tribunal, the Respondent stated there were a number of responses at various points in communication with the Law Society in relation to the issue of the loan. The Law Society told him to include the loan in the trial balance, but his accountant told him not to. He had eventually said he was going to include it but then his accountant had back tracked. He believed that the issue before the Tribunal was that he had not included it in his Accounts Certificate not that he had failed to respond to the Law Society about it.

In answer to a further question from the Tribunal, the Respondent confirmed that generally after an inspection he would have "a quick chat" with the inspector in relation to some of the issues raised. He accepted that there would have been discussions about the loan. This was a long running "thorn in his side" and not something that he was just ignoring.

In answer to a question from the Fiscal, he confirmed that the accountant did not give the advice in writing and so he did not have a letter confirming the advice given. He insisted he was not trying to mislead anyone and that he was given the advice not to include the loan in the trial balance by his accountant.

At the conclusion of the evidence, the Fiscal moved to amend averment 2.2(i)(b) to state a figure of £155 rather £3,155. The Respondent confirmed he had no objection to that amendment and in fact now agreed with the averment.

PRELIMINARY PLEA TO THE COMPETENCY AND RELEVANCY

The Tribunal invited submissions from both parties with regard to the preliminary issue.

SUBMISSIONS FOR THE RESPONDENT

The Respondent had lodged a written note of argument which was as follows:-

1. The respondent avers that the following statements of facts, averments of duties and averments of Professional Misconduct contained within the Form 1 lodged by the Complainers are not relevant, and it would not be competent for the tribunal to consider these, as these aver purported facts in relation to various purported rule breaches that were not contained within the original complaints that were agreed between the Law Society of Scotland and the Scottish Legal Complaints Commission, and subsequently agreed as a conduct complaints:

    a) All of statement of fact 2.2.
    b) All of statement of fact 2.3.
    c) All of statement of fact 2.4.
    d) In respect of statement of fact 2.5 paragraph b; c and d.
    e) In respect of statement of fact 2.7 paragraph b; c and d.
    f) In respect of statement of fact 2.10.
    g) In respect of statement of fact 2.11.
    h) In respect of statement of fact 2.13.
    i) In respect of the 2019 complaint, statement of fact 3.2

2. In respect of the averment of duties as follows:

a) At averment 3.2 at line four, the words "*and 11th February 2016,*" and line five "*and 31st January 2016*" .

b) At averment 3.3 in the fourth line "*Said breaches dated back to on or around July 2012*".

c) At averment 3.4 the whole paragraph.

d) At averment 4.1(c) on the second line "*and dated 11 February 2016 for the six month period to 31st of January 2016."*

e) In respect of the 2019 complaint, averments of 4.1 (c)

3. The respondent maintains that it would be incompetent / irrelevant for the tribunal to consider the above averments on the following basis:

a) The present complaint is a conduct complaint as defined in terms of Section 2 of the Legal Profession and Legal Aid (Scotland) Act 2007. The Scottish Legal Complaints Commission now acts as a gateway for all complaints regarding either the service provided by legal practitioner or the conduct of a legal practitioner.

b) In relation to the two complaints that were lodged by the Council of the Law Society of Scotland to the Scottish Legal Complaints Commission, the terms of both agreed complaints were produced by the Scottish Legal Complaints Commission and intimated to the Complainers and the Respondent..

A copy of the said complaints are produced at 4/48 – 4/50 and their terms are held repeated *brevitatis causa.*

c) When the complaints were lodged with the Scottish Legal Complaints Commission, the commission requires to consider the complaints in accordance with the statutory provisions contained within the Legal Aid (Scotland) Act 2007.

d) Upon receipt of the complaints, the Commission requires to have regards to the provisions of Section 2 of the aforementioned Act. Thereafter the Commission must consider the complaints in accordance with Section 2(3) and thereafter Sections 3 and 4 of the Act and any provisions in rules made under Section 32 (1) as to the eligibility for making complaints.

e) The aforementioned highlighted averments and breaches and purported breaches of Rules aforementioned were not contained within the original complaints submitted, and thereafter agreed between, the Law Society of Scotland to the Scottish Legal Complaints Commission.

> The Complainers do not have lawful authority for materially altering the Complaints that they had agreed with the Scottish Legal Complaints Commission. Accordingly, as the aforementioned statutory provisions were not applied by The Scottish Legal Complaints Commission to the terms of the present complaint as averred by the Commission of the Law Society of Scotland, it would not be competent for the tribunal to consider these averments referred to and accordingly they are irrelevant.

The Respondent had lodged a copy of the Legal Profession and Legal Aid (Scotland) Act 2007 together with statutory notes. He referred the Tribunal to paragraph 5 of the preamble to the statute which he stated clearly indicated that the Scottish Legal Complaints Commission was to act as the gateway for all complaints. The statute introduced a statutory process for complaints which included rules for the eligibility of any complaint. The current Complaint before the Tribunal did not bear any comparison to the complaint that was referred to the Law Society by the SLCC. In his submission, the only averments of breaches of the Accounts Rules that should be before the Tribunal were those relating to four historic credit balances and the issues to do with the trial balance. The other breaches of the Accounts Rules had been added into the process following the referral by the SLCC. This prevented the Respondent from relying on the SLCC as a statutory gateway and deprived him of the protections given within the 2007 Act, for instance, that of time bar. The Respondent referred the Tribunal to paragraph 16.06 of Law, Practice and Conduct for Solicitors by Paterson & Ritchie and submitted that the Law Society were not subject to the same rules of eligibility as the SLCC. If the Tribunal allowed the averments in the Complaint to proceed, then this was the Law Society usurping the role of the SLCC as gatekeeper.

If these additional issues had been identified by the Law Society during the investigation process, they should have been referred to the SLCC. The Respondent would then have had an opportunity to address the various heads of complaint.

This amounts to a fundamental nullity which can be raised at any time in proceedings.

The Tribunal asked the Respondent if he accepted that some of the averments he had objected to set the scene for the averments of misconduct. He responded that he did not understand the need to set out the background and he took the view that the Complainers were stating that he breached rules and so was guilty of professional misconduct.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal had lodged a written note of argument which was as follows:--

This Note is prepared in response to the Note of Preliminary Issues intimated by the Respondent. The Respondent was also provided with a period to adjust his Answers up to 7 June. No adjustments have been intimated.

The procedural history to this Complaint is that it was presented on 28 June 2018 and Answers were lodged by the Respondent on 23 July 2018. A First Inventory of Productions was lodged on behalf of the Complainers on 10 October 2018. A First Inventory of Productions was lodged by the Respondent on 30 October and a Second Inventory on 31 October. Based on the Answers at that time the Respondent indicated that he would agree a substantive Joint Minute of Admissions on 31 October and such a Joint Minute was drafted in advance of a hearing assigned for 1 November. That hearing was adjourned on the Respondent's motion as he had not received the productions for the Complainers due to IT issues within his office. A fresh hearing was assigned for 4 February 2019.

On the morning of that hearing the Respondent advised that he was unclear as to what the details were of the alleged Accounts Rule breaches which were narrated within the Complaint and therefore he was not in a position to proceed with that hearing nor in a position to consider executing the draft Joint Minute of Admissions. The Respondent accordingly moved a motion to adjourn the hearing to adjust his Answers.

The motion to adjourn was not opposed by the Complainers but they reserved their position in relation to expenses. The Respondent's Answers were due by 4 March 2019 with the Complainers being allowed to adjust in response by 18 March and a further hearing assigned for 16 May 2019.

The Fiscal for the Complainers, during the course of discussions prior to the adjournment of the hearing on 4 February, was requested by the Respondent to provide further details of the alleged Accounts Rule breaches which were narrated within the Complaint. In order to assist the Respondent and provide further clarification, therefore, the Complaint was adjusted on behalf of the Complainers on 20 February 2019. Those adjustments are shown in bold in the print of the Working Record now lodged with the Tribunal and dated 17 May 2019.

The primary position of the Complainers is that those adjustments simply provide further clarification of the averments which had previously been on Record and of which the Respondent had received full and proper notice. No fresh or new averments have been incorporated within those Adjustments and they simply expand upon the existing averments on Record.

In particular, the adjustments in Statements of Fact 2.2, 2.3, 2.5, 2.7 and 2.13 are matters extracted from the Executive Summaries for the relative dates in question, which are incorporated into the pleadings and included within the First Inventory of Productions for the Complainers.

By the Tribunal's interlocutor of 17 May, the Respondent was allowed to lodge late an adjusted set of Answers and additional productions. A Second Complaint against the Respondent was conjoined with the present Complaint. The Note of Argument and the Respondent's Preliminary Issues, are all directed against the original First Complaint and not the Second and Conjoined Complaint.

A number of the adjusted Answers now placed before the Tribunal on behalf of the Respondent directly contradict the previous Answers lodged on behalf of the Respondent. In the Note of Preliminary Issues, the Respondent at page two of that Note highlights Statements of Fact with which he now takes issue. Paragraphs (a), (b), (c), (d), (e), (h) were all admitted without qualification by the Respondent in the original Answers lodged on his behalf.

Similarly, the Respondent now challenges certain averments of duty on the second page of his Note and in particular those at Statements 3.2, 3.3 and 3.4 all of which were admitted by the Respondent in his previous Answers.

The Complainers are therefore concerned that the position being advanced by the Respondent now is disingenuous. He sought an adjournment of the hearing on 4 February to seek clarification of the Accounts Rule breaches which were averred within the Complaint. He requested the Complainers to provide clarification of those. Clarification has been provided and adjustment into the Complaint and the Respondent now seeks to take issue with those adjustments.

The averments of professional misconduct against the Respondent in respect of which the Respondent's Note which has been presented are contained within Statements of Fact 4.1 (a), (b) and

(c). Those averments of alleged professional misconduct arise from two inspections of the Respondent's firm which took place on 7 October 2014 and 2 February 2015. The Executive Summary for these inspections was intimated to the Respondent by the Complainer's Financial Compliance Department at the time and has been the subject of the formal complaint process through the Complainer's Regulation Department and ultimately forms the basis of the present Complaint before the Tribunal.

In short, all of the alleged Accounts Rule breaches found by the Complainer's Financial Compliance Department at said inspections are disclosed within those documents and have been known to the Respondent since the date of each inspection. Indeed, the Respondent has responded to certain of the issues raised in the Executive Summary to the Complainer's Financial Compliance Department although not to the satisfaction of the Complainers hence the averment that he has breached Rule 6.18.7 of the 2011 Rules by failing to provide reasonable co-operation, which Rule breach the Respondent admits in Answers 2.10.

The Statements of Fact contained within the Complaint referring to previous inspections of the Respondent's firm are averments of fact. Those averments of fact are not primarily averred in support of the averments of the breach of duties and the averments of professional misconduct but as the previous inspections, and subsequent inspection, are referred to in the inspections dated October 2014 and February 2015, those background and supporting facts are relevant to the averments of those specific inspections upon which the averments of professional misconduct are then founded.

As correctly narrated by the Respondent in his Note, the Scottish Legal Complaints Commission is the gateway for all complaints regarding either the service provided by a solicitor or a conduct of that solicitor. Section 2 of the Legal Profession and Legal Aid (Scotland) Act 2007 narrates that when the Commission receives a complaint the Commission must determine whether the complaint constitutes a conduct complaint or a services complaint and then take preliminary steps to determine whether or not it is frivolous, vexatious or totally without merit or otherwise. In terms of Section of 6 of the said Act, where the Commission determines that the complaint is a conduct complaint and is neither frivolous, vexatious or totally without merit, it remits the complaint to the relevant professional organisation to deal with and investigate.

In the present matter the relevant professional organisation is the Complainers, and their Regulation Department.

As narrated within Statement of 2.12, the Complainer's Sub-Committee having considered the information received from the Complainer's Financial Compliance Department, resolved to make a formal referral to the Commission. A Complaint arising out of the issues highlighted by the Complainer's Financial Compliance Department was remitted to the Commission. A Summary of that complaint, as narrated by a Respondent, is contained within production 4/47 for the Respondent.

The further complaint remitted to the Commission in relation the Respondent and contained in production 4/48 and 49 in the Fourth Inventory of Productions for the Respondent does not form any part of the present Complaint before the Tribunal. A separate Complaint against the Respondent is being presented to the Tribunal in respect of that referral.

In terms of Section 6 of the said 2007 Act, the complaint was remitted to the Complainers for investigation. In carrying out said investigation, the Complainers are accordingly permitted to consider all relevant information, facts and circumstances as disclosed within all documentation, information, precognitions and other pertinent information provided to the Complainers as part of that investigation. Indeed, in terms of Section 47 of the said Act the Complainers must investigate a conduct complaint.

A conduct complaint is defined in Section 2(1) of the said 2007 Act as "...a complaint by or on behalf of any persons mentioned in sub-section (2) – (a) suggesting – (i) professional misconduct or unsatisfactory professional conduct by a practitioner..." No further definition is provided as to what material, information or documentation may be considered in respect of any conduct complaint.

In terms of Section 6(2)(a) of the said 2007 Act, the conduct complaint is remitted to the Complainers, "...to deal with (and give to the organisation any material which accompanies the conduct complaint)."

The Complainers are accordingly entitled to consider all material, facts, circumstances and documentation in the course of providing an investigation report which might then ultimately result in a Complaint being presented to this Tribunal.

Section 51(1) of the Solicitors (Scotland) Act 1980 narrates that "A complaint may be made to the Tribunal by the Council; and, for the purposes of investigating and prosecuting complaints, the Council may appoint a solicitor to act as fiscal."

There are accordingly no restrictions upon which matters or issues the Complainers can determine to remit to a Fiscal instructed by them to frame a Complaint to this Tribunal following said investigation.

There are also no restrictions upon which matters or issues the Fiscal instructed by the Complainers can incorporate within a Complaint to this Tribunal. The said matters or issues however should be based upon the material, information or documentation submitted to the Commission in respect of the conduct complaint. No restrictions are narrated within the said Act nor indeed any other secondary legislation governing these matters.

In summary, the three averments of professional misconduct, arising out of the conduct complaint remitted to the Commission, remitted back to the Complainer's Regulation Department, and then remitted to the Complainer's Fiscal to present a Complaint before this Tribunal, are all matters encompassed within the facts, circumstances and documentation arising out of the Complainer's Financial Compliance Department's inspections of the Respondent's practice on 7 October 2014 and 2 February 2015.

As mentioned, those averments are contained in Statements of Fact 4.1 (a), (b) and (c).

The Fiscal stated that he understood that the Respondent's objection was that all the Respondent could be prosecuted for before the Tribunal were the two issues referred to the Law Society by the SLCC. He invited the Tribunal to consider the terms of the summary of complaint remitted to the Law Society by the SLCC and compare it with the averments of misconduct at 4.1(a) and (b) of the Complaint before the Tribunal. He submitted that that was exactly what the Respondent was being prosecuted for. The summary of complaint made reference to the two inspections of October 2014 and February 2015. Anything that the inspectors considered was a breach of the Accounts Rules should have been included in the Accounts Certificate. The Society took the view that the Accounts Certificate for the period July 2015 was inaccurate. The second element of the misconduct was the Respondent's failure to cooperate.

The accounts inspections of October 2014 and February 2015 bring about the allegations of professional misconduct. He submitted that the description of the other averments within the Complaint as "scene

setting" was correct. They put the averments of misconduct into context. Some of the rule breaches noted within the inspections of October 2014 and February 2015 dated back to previous inspections. All the Respondent was being prosecuted for was not disclosing the breaches highlighted in the two accounts inspections of October 2014 and February 2015 within the Accounts Certificate.

The 2007 Act does not define what the Law Society can look at when carrying out its statutory function to investigate the complaint remitted to them by the SLCC. In his submission, the Law Society was entitled to look at all of the relevant background information. He submitted that it was important to have in mind that the Respondent had accepted that the executive summaries were true and accurate. Section 51(1) of the Solicitors (Scotland) Act 1980 allowed the Law Society to investigate the complaint of misconduct and to prosecute it by appointing a Fiscal. There were no restrictions placed on that investigation.

He submitted that the Respondent's objection to the various averments had no arguable basis apart from potentially in relation to Accounts Certificate for the period ending 31 January 2016 referred to in averment 4.1(c).

He emphasised that he did not accept that the inclusion of this second certificate was an addition to the complaint referred to the Law Society by the SLCC as it clearly arose from the two accounts inspections which were referred to in the complaint remitted to the Law Society.

He emphasised that the Respondent's preliminary plea related only to Complaint 1825 and not to Complaints 1852 and 1866.

SUBMISSIONS IN RESPONSE

The Respondent emphasised to the Tribunal that all of the information objected to by the Respondent now was known to the Law Society at the time the matter was referred to the SLCC. The fair thing for the Law Society to do was to specify all of the heads of complaint. If matters arose in the course of the investigation then they should have been referred as a separate complaint to the SLCC. The Complainers Production 9.1, the email from the Law Society dated 28 August 2015, sent to him following the submission of the account certificate for the period end 31 July 2015, restricts the Accounts Rules breaches to historic credit balances and the issue of the trial balance.

The Fiscal submitted in response that it would be a perverse argument that the Law Society could only prosecute using the narrative of the complaint remitted to it. If he had submitted a Complaint to the Tribunal with only an averment of misconduct restricted to those terms then the Respondent would have had a legitimate complaint that he had not been given fair notice. The original Complaint had been adjusted to include additional information as requested by the Respondent to give him fair notice. The only issue that potentially could be considered additional to the complaint remitted by the SLCC was the reference to the second Accounts Certificate in averment 4.1(c). It remained his submission that, because this second Accounts Certificate arises out of the same two inspections which were specified within the complaint remitted by the SLCC, the Complainers were entitled to bring it into play.

DECISION

In his oral submissions, the Fiscal conceded that the SLCC was created by the Legal Profession and Legal Aid (Scotland) Act 2007 as the gateway for all complaints against solicitors in Scotland.

Before the Tribunal was a Complaint suggesting professional misconduct by a practitioner. This clearly falls within Section 2(1)(a)(i) of the 2007 Act. Following accounts inspections, the Law Society had referred a complaint against the Respondent to the SLCC. That complaint had been considered by the SLCC in accordance with its statutory procedures. As a result, the SLCC remitted the matters back to the Law Society to be investigated as a question of professional misconduct. The exact terms of the summary of complaint remitted by the SLCC to the Law Society for investigation was as follows:-

"1. Mr Whelan submitted, to the Law Society, an Accounts Certificate for the practice unit's accounting period ending 31 July 2015 which failed to disclose breaches of the Law Society of Scotland Practice Rules 2011 ("the Practice Rules") which had been identified at previous financial compliance inspections of the practice unit in October 2014 and February 2015 despite having agreed to make those disclosures together with an explanation of the remedial action taken in respect of them, thereby serving to mislead the Law Society as to the practice unit's compliance with the Practice Rules during the relevant period.

2. Mr Whelan in the period after submission by him to the Law Society of an Accounts Certificate for the practice unit's accounting period ending 31 July 2015, failed to respond, or at least delayed unduly in responding, to the reasonable enquiries of the Law Society in respect of matters arising from that Accounts Certificate and prior financial compliance inspections of the practice unit, in breach of

his duty in terms of Rule B6.18. 7 of the Practice Rules to provide reasonable co-operation to persons authorised by the Law Society in the conduct of the said inspections."

Complaint 1825 was submitted to the Tribunal that included averments of professional misconduct as follows:-

4.1 The Complainers aver that the Respondent has been guilty of acts or omissions which singularly, or in cumulo, constitute professional misconduct on his part within the meaning of the Solicitors (Scotland) Act 1980 as amended, Section 53. In particular, the Complainers aver that:-

(a) The Respondent submitted an Accounts Certificate for the practice unit's accounting period ending 31 July 2015 which failed to disclose breaches of the Law Society of Scotland Practice Rules 2011, as condescended upon, which had been identified at previous financial compliance inspections of the practice unit on 7 October 2014 and 2 February 2015, despite having agreed to make those disclosures together with an explanation of the remedial action taken in respect of them, thereby serving to mislead the Complainers as to the practice unit's compliance with the Practice Rules during the relevant period.

(b) The Respondent in the period after submission by him to the Complainers of an Accounts Certificate for the practice unit's accounting period ending 31 July 2015, failed to respond, or at least delayed unduly in responding, to the reasonable enquiries of the Complainers in respect of matters arising from that Accounts Certificate and prior financial compliance inspections of the practice unit, in particular in breach of his duty in terms of Rule B6.18. 7 of the Practice Rules to provide reasonable co-operation to persons authorised by the Complainers in the conduct of the said inspections.

(c) The Respondent submitted to the Complainers Accounts Certificates dated 13 August 2015 for the six month period to 31 July 2015, and dated 11 February 2016 for the six month period to 31 January 2016, which he knew were inaccurate thereby the true financial position of the firm was not evident to the Complainers.

The Tribunal agreed with the submissions of the Fiscal that the averments within the statement of facts and the averments of duty were the background circumstances against which the misconduct was said to have occurred. There was no suggestion within Complaint 1825 that the purported individual breaches of the Accounts Rules in themselves amounted to misconduct.

The Tribunal noted that the summary of complaint referred by the SLCC made reference to breaches of the Practice Rules 2011 which had been identified in the inspections of October 2014 and 2015 without further restricting the nature of the breaches.

The Tribunal considered that on a plain reading of the summary of complaint there were two complaints remitted to the Law Society for investigation:-

1. That the Respondent had submitted "an Accounts Certificate" which failed to disclose breaches; and

2. That the Respondent had failed to respond or at least delayed unduly in responding to the Law Society in the period after submission of the Accounts Certificate period ending 31 July 2015.

The Tribunal did not accept the Fiscal's submissions that the addition of a second inaccurate Accounts Certificate was simply an expansion of an already existing complaint because it arose out of the two accounts inspections referred to by the SLCC. It seemed to the Tribunal that the same argument applied to the wording of the Summary of Complaint remitted by the SLCC as to the content of Complaint 1825 namely that the alleged misconduct was the submission of an inaccurate Accounts Certificate, not the breaches of any Accounts Rules. Accordingly, the Tribunal concluded that the issue of the Accounts Certificate for the period ending 31 January 2016 was a new and additional complaint. That being the case, the Tribunal was presented with a Complaint of misconduct which had not previously been referred to the SLCC. Consequently, the matter had come before the Tribunal though a process which had deprived the Respondent of the protections provided by the Statute for the eligibility of such complaints. This, the Tribunal concluded, was manifestly unfair to the Respondent and the Tribunal determined to uphold his plea to the competency in relation to any reference to the Accounts Certificate for the period of 31 January 2016.

Consequently, the Tribunal deleted reference to that Accounts Certificate within averment 4.1(c) and deleted averments 2.11 and 2.13 from within the statement of facts.

The Tribunal invited both parties to make submissions with regard to the remaining substantive issues. It was agreed that as the Fiscal was inviting the Tribunal to consider the averments of professional misconduct for each Complaint separately, it would appropriate for the parties to address each Complaint in turn.

COMPLAINT 1825

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal submitted that there were three averments of misconduct, although they all arose out of one Accounts Certificate. He invited the Tribunal to hold that the evidence of the two witnesses was credible and reliable and that no real challenge had been taken to it by the Respondent. The Tribunal had no reason not to accept their evidence in its entirety.

He submitted that the Tribunal was entitled to hold that averment 2.5 was established in its entirety. The inspection of 2015 was a follow up to the inspection of 2014 and the Tribunal could find that averment 2.7 was established by the evidence of the two witnesses.

It was admitted that the Accounts Certificate was submitted and disclosed no Accounts Rules breaches. The Tribunal had heard evidence that it should have disclosed breaches of Rules B6.7.4 and B6.11.1.

The Respondent had admitted averments 2.9, 2.10 and 2.12 in their entirety and these are the averments of fact supporting the averment of misconduct 4.1(b) and the breach of Rule B6.18.7. Throughout the course of this Complaint, the Respondent has accepted that he did not deal with the issues as he should have done but he has focussed on other issues.

The Respondent had submitted an inaccurate Certificate which was misleading. There was a delay in him dealing with matters thereafter even though he knew that the Certificate was inaccurate and the true financial position of the firm was not known as a result. The Fiscal made reference to the Tribunal decision Law Society-v-Jacqueline Johnston [20 March 2019]. He submitted that there were a number of similarities between that case and the Respondent's situation. He emphasised that there had never been any suggestion of impropriety on the part of the Respondent and that these were technical breaches of the Accounts Rules rather than a deliberate course of conduct. He submitted that the Respondent had simply not dealt with matters appropriately. He invited the Tribunal to uphold that professional misconduct had been established in relation to averments 4.1(a), (b) and (c).

SUBMISSIONS FOR THE RESPONDENT

The Accounts Certificate now before the Tribunal failed to disclose four historic credit balances and problems with the trial balance. The Law Society were already fully aware of these breaches as they had

in fact identified them. He had not tried to mislead the Law Society in any way. He had provided explanations with regard to the problems with the trial balance and the historic credit balances.

He understood why the Accounts Rules existed and that it was important to have them to protect client funds. His firm's float was always way in excess of what was required and client funds were never put at risk.

The Law Society were aware of the problems he was having resolving the four historic credit balances. With regard to the practice loan he accepted that he might be wrong but his conduct was not deliberate and it was not his intention to misstate the financial position of the firm.

Whilst he accepted he might have made mistakes, he did not accept these mistakes amounted to professional misconduct as they were not serious and reprehensible. In hindsight, he accepted he should have done more to resolve the issues but did not accept that his failures were serious and reprehensible.

He accepted he had delayed unduly in dealing with matters but in his own mind he had not thought he had not done anything wrong. Eventually all matters were answered. The delay in him responding to the email of 28 August until 26 November, was not an unreasonable one in the circumstances.

In response to a question from the Tribunal, the Respondent stated that, with the benefit of hindsight, he accepted he should have disclosed the historic credit balances and the issues with the trial balance in the Accounts Certificate.

COMPLAINT 1866

SUBMISSIONS FOR THE COMPLAINERS

This Complaint arises as a result of an inspection that occurred in October 2016. The Fiscal invited the Tribunal to accept the evidence of his two witnesses in its entirety insofar as it related to this inspection. He asked the Tribunal to bear in mind that the Respondent had admitted that the executive summary produced following this inspection was true and accurate.

The Respondent admitted averment 2.2(ii)(c). The only evidence of any advice received from an accountant came from the parole evidence of the Respondent. The Respondent had indicated that in hindsight he should have included the loan in the trial balance. Perhaps in hindsight the Respondent

should have had a letter from the accountant to produce to the Law Society. He submitted that the failure to include the loan within the trial balance was a prima facie breach of the Accounts Rules.

The Respondent admitted averments 2.3, 2.4 and 2.5 in their entirety. He submitted that all Rule breaches had been established. He invited the Tribunal to uphold all of the averments of misconduct in the five sub paragraphs of 4.1 on the basis of the parole evidence, documents and Joint Minute.

SUBMISSIONS FOR THE RESPONDENT

The Respondent pointed the Tribunal to his Answers. Whilst the auditors indicated that they came across these issues frequently, he did not have many clients who had large cash transactions. The risk in relation to the Money Laundering Regulations for his firm was low.

His firm float was at all times in excess of client funds.

No complaint was generated by a client.

In hindsight, perhaps he should have brought his accountant as a witness.

The Tribunal had to deal with this Complaint separately to the others and he invited the Tribunal to accept that the breaches were not serious and reprehensible conduct.

In answer to a question from the Tribunal, the Respondent confirmed that, in relation to averment 2.2(iii)(a), the records of staff training with regard to money laundering procedures were kept on his laptop not on the office computer.

COMPLAINT 1852
SUBMISSIONS FOR THE COMPLAINERS

The Fiscal noted that the Respondent had admitted all of the averments of fact.

The Respondent had not produced evidence that he disputed the fee note.

The Fiscal submitted that the affidavit was largely irrelevant as the witness did not give evidence and it was not part of any Joint Minute. This amounted to a description of the witness's practice only.

The Respondent had received correspondence, he knew that the work would be done and subsequently chose not to pay the fee. The Respondent accepted that a solicitor has a personal liability for Counsel's fees. A failure to pay such a debt has long been held to be an issue of professional misconduct. Here, the length of time taken to pay the fee – 33 months – was a substantial aggravation particularly having regard to the numerous reminders.

He invited the Tribunal to hold that the misconduct averred in 4.1(d), (e) and (f) was established.

SUBMISSIONS FOR THE RESPONDENT

The Respondent stated that he had not instructed Counsel's Opinion. Providing an Opinion in the circumstances of the case being dealt with was not routine. There was no evidence that the Respondent instructed the Opinion to be prepared.

The appeal was one being privately funded and there was no purpose to be achieved by obtaining Counsel's Opinion.

He conceded that he was responsible for any work he instructed Counsel to undertake. He submitted that it was not an absolute right of Counsel to be paid for any work Counsel chooses to do.

He invited the Tribunal to find him not guilty of professional misconduct as (1) he did not instruct the work to be carried out and (2) the averments involved only one invoice for a small amount.

DECISION

The standard of proof to be adopted by the Tribunal in this case was one of beyond reasonable doubt. The test for professional misconduct is a well-known one and is set out within Sharp v The Law Society of Scotland 1984 SLT 313 where it is said:-

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

the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

The Tribunal found both witnesses for the Complainers to be credible and reliable.

The Tribunal required to consider each Complaint individually.

Complaint 1825

The Respondent had admitted producing an Accounts Certificate dated 13 August 2015 for the period to 31 July 2015 and submitting same to the Complainers. He admitted that the Certificate failed to disclose any breaches of the Practice Rules 2011.

The Complainers led evidence from two witnesses and lodged an executive summary which described rule breaches following inspections in 2014 and 2015. The Respondent admitted in the Joint Minute that the executive summary was true and accurate.

The executive summary, and the evidence of the two witnesses, described breaches of Rule B6.11, in relation to historic credit balances. Whilst the Respondent had given explanations for the retention of these funds, the explanations did not prevent the balances from being in breach of the rule.

The Respondent was instructed on 2 February 2015 that these rule breaches required to be noted in the relevant Accounts Certificate.

The other rule breach that the Complainers submitted should have been included in the Accounts Certificate related to the problems with the firm's trial balance in relation to what was referred to as "a firm loan" that was not reflected in the firm's records.

The onus of proof rests throughout these proceedings with the Complainers and there was no obligation on the Respondent to produce evidence in his defence.

The contents of the inspection reports indicate that the loan was reflected as a liability within the annual accounts for the firm; interest for the loan was charged to the firm in its profit and loss account; the bank statement for the loan was in the name of the firm. The Respondent agreed on 26 May 2015 that the loan would be treated as a business loan and included within the trial balance. He was instructed to include this breach within his Accounts Certificate. The Respondent's evidence in relation to the loan was

confused and confusing. The Tribunal was satisfied beyond reasonable doubt that the facts in relation to this issue had been established and that the Respondent should have included this within his Accounts Certificate.

The Tribunal accepted the Respondent's explanation that his failure to include these items within the Accounts Certificate was not deliberate. It did not accept the Respondent's submission that as the inspection team were aware of these breaches that it should conclude that the inaccurate Accounts Certificate did not serve to mislead the Complainers. The Accounts Certificate procedure is extremely important in order to protect the public. The Law Society, in exercising its role to protect the public, uses the Accounts Certificate procedure to supervise a firm's compliance with the Accounts Rules. The executive summary produced after an inspection demonstrates this, for example by stating that progress in resolving any issue highlighted during the inspection will be monitored under the Accounts Certificate process.

The Tribunal was satisfied that the factual content of averment 4.1(a) was established.

With regard to averment 4.1(b), the Respondent had agreed the facts. These facts clearly amounted to a failure to respond or at least an undue delay in responding to the Complainers' enquiries. The Tribunal was satisfied that this was a breach of Rule B6.18.7.

With regard to averment 4.1(c), the Tribunal interpreted that averment as involving a degree of knowledge on the part of the Respondent that inferred a deliberate act on his part. The Tribunal were not satisfied on the evidence before it that this had been established.

The Tribunal thereafter had to consider whether paragraphs (a) and (b) amounted to misconduct. It took the view that the Accounts Certificate procedure was of such fundamental importance there was a significant duty upon the Respondent to ensure that the Accounts Certificate was accurate. In the circumstances of this case, the Tribunal were satisfied that the facts established in relation to paragraph (a) in themselves amounted to misconduct.

This Tribunal has repeatedly emphasised the importance of solicitors cooperating with the Law Society when it is exercising its regulatory function. There is little point in having rules to protect the public interest unless the Society can ensure that the rules are complied with. That requires solicitors to cooperate with their regulatory body. The Respondent in this case had clearly failed to cooperate and the Tribunal were satisfied that paragraph (b) amounted to misconduct in its own right.

Complaint 1852

The Tribunal was not satisfied that the Complainers had established beyond reasonable doubt that the Respondent had instructed Counsel's Opinion to be prepared. It accepted the Respondent's explanation with regard to this matter. Accordingly, the Tribunal found the Respondent not guilty of professional misconduct in relation to Complaint 1852.

Complaint 1866

The Respondent admitted the majority of the facts within this Complaint.

He had not admitted 2.2(i)(b) in the Joint Minute but after the Fiscal's motion to amend the figure involved there, he indicated that he admitted the averment.

Paragraph 2.2(ii)(b) was not included in the Joint Minute but was clearly reflected within the executive summary referred to, and spoken to in evidence. The Tribunal were satisfied that this had been proved beyond reasonable doubt.

The Respondent had not admitted averment 2.2(ii)(e) within the Joint Minute but in the course of his evidence he conceded this and it was clearly covered by the executive summary. The Tribunal held that this had been established beyond reasonable doubt.

With regard to averment 2.2(iii)(a), the Tribunal accepted the Respondent's evidence that he held records of staff training in relation to money laundering procedures on his laptop and so this averment was not established.

The facts proved before the Tribunal established breaches of Rules B6.11, B6.7.3, B6.2.23 and B6.13 of the Practice Rules 2011.

The Respondent admitted the facts in relation to the averments relating to his failure to cooperate with the Law Society. Whilst it is noted that the Respondent subsequently provided a response to the original issues, this was only done by a letter dated 9 October 2018 when the correspondence had commenced on 22 November 2017. The Respondent had failed to respond to statutory notices. It was clearly established beyond reasonable doubt that the Respondent had failed or delayed in responding to correspondence and statutory notices issued by the Complainers.

It has already been said that compliance with the Accounts Rules and cooperation with the Law Society is extremely important if the profession is to maintain confidence with the public. To fail to cooperate with the Law Society acting in its capacity as regulatory body brings the profession into disrepute. The Tribunal were satisfied that the conduct described, *in cumulo*, met the test as described in Sharp.

SANCTION, EXPENSES & PUBLICITY

The Tribunal invited submissions from both parties with regard to the appropriate disposal, expenses and publicity.

The Fiscal submitted that the matter of sanction was one for the Tribunal. He confirmed that the Respondent had a clean record card. He moved for expenses, submitting that it was impossible to separate the elements where the Respondent was successful from the elements where he was not. He invited the Tribunal to order publicity in the usual manner.

The Respondent invited the Tribunal to consider that there was no personal gain as a result of any of this conduct. He accepted with the benefit of hindsight that he should have dealt with matters more expeditiously.

He emphasised that the three Complaints were not originally conjoined. He invited the Tribunal to restrict his liability for the Complainers' expenses to 50%.

He had no objection to an order for publicity.

DECISION ON SANCTION, EXPENSES AND PUBLICITY

The Tribunal considered that the fair way to deal with the question of sanction was to deal with the two Complaints as one conjoined matter.

The Tribunal accepted that it had not been the Respondent's intention to mislead anyone. It accepted that the Respondent had failed to perceive the importance of both complying with the Accounts Rules and cooperating with the Law Society.

The Tribunal considered whether the imposition of a Censure would be sufficient to deal with the matters. It was satisfied that the Respondent had displayed some insight in the course of the hearing,

albeit late in the day. The Complainers emphasised that there had been no question of financial impropriety on the part of the Respondent and that client funds were not at risk.

However, it is extremely important that solicitors comply with the Accounts Rules if the profession is to maintain its reputation and confidence of the public. Failing to cooperate with the profession's regulatory body is extremely damaging to the reputation of the profession. In this case, the Tribunal was faced with two separate courses of conduct where the Respondent had failed to cooperate with the Law Society. The Tribunal considered it important to mark the seriousness of this conduct both for the Respondent and for the profession. In these circumstances, it considered that a Censure in itself was not sufficient and determined that the Respondent would be Censured and Fined £2,000.

With regard to the question of expenses, the Tribunal considered it appropriate to mark in any award of expenses that the Respondent had had a degree of success. It considered that the fair award of expenses was one in favour of the Complainers but restricted to 75%, but only insofar as the expenses which have not already been dealt with.

With regard to publicity, many of the averments of fact contain the personal details of persons not involved in the hearing or in the making of the complaint itself. The import of the decision does not require them to be identified and so the Tribunal determined there should be publicity of the decision including the name of the Respondent and his firm but need not name any other person.

[redacted]

Catherine Hart

Acting Vice Chair