

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

DECISION

**in Appeal under Section 42ZA (10)
of the Solicitors (Scotland) Act
1980 as amended**

by

**IAIN MATHESON, Chief Legal
Officer, Fife Council, Fife House,
North Street, Glenrothes, Fife**

Appellant

against

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

First Respondent

and

**Robert Vaughan of R. S. Vaughan
and Company, 114 Union Street,
Glasgow**

Second Respondent

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 as amended by Iain Matheson, Chief Legal Officer, Fife Council, Fife House, North Street, Glenrothes (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society (hereinafter referred to as "the First Respondent") dated 28 November 2013 not to uphold a complaint of unsatisfactory professional conduct made in respect of two Heads of Complaint against Robert Vaughan of R. S. Vaughan and Company, 114 Union Street, Glasgow (hereinafter referred to as "the Second Respondent").

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First Respondent and the Second Respondent. Answers were lodged for the First Respondent and the Second Respondent.
3. Having considered the Appeal with the Answers the Tribunal resolved to set the matter down for a hearing on 3 April 2014 and notice thereof was duly served on all parties.
4. The hearing took place on 3 April 2014. The Appellant was represented by Iain Matheson, Chief Legal Officer, Fife Council, Glenrothes. The Law Society were represented by their fiscal Paul Marshall, Solicitor, Edinburgh. The Second Respondent was represented by William Macreath, Solicitor, Glasgow.
5. It was confirmed that the facts were not in dispute and that the Appeal was to proceed by way of submissions from all parties. Parties referred to their written submissions.
6. The Complaint as made by the Appellant to the Scottish Legal Complaints Commission comprised 2 Heads of Complaint.
 - a) that the Second Respondent charged fees which were found to be so unfair and unreasonable by the Auditor of the Court of Session that for the months of January and February 2010, they were reduced by more than 50%.
 - b) that the Second Respondent failed to comply with the outcome of the Taxation Report of the Auditor of the Court of Session dated 25 February 2011 on his invoices for the period from April 2009 to December 2010 in that he failed to reimburse the Appellant the sums which had been over-billed.
7. The facts in the case are as set out on pages 19 and 20 of the Report by the Law Society's Complaints Investigator and the letters dated 22 August 2012 and 5 July 2013 from the Auditor of the Court of Session.

8. Having carefully listened to the submissions from all parties, the Tribunal Confirmed the Determination of the Law Society in respect of both Heads of Complaint. The Tribunal did not consider it necessary or appropriate to order a taxation of new by the Auditor of Glasgow Sheriff Court.

9. Having heard further submissions on expenses and publicity, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 3 April 2014. The Tribunal having considered the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 made by Iain Matheson, Chief Legal Officer, Fife Council, Fife House, North Street, Glenrothes (hereinafter referred to as “the Appellant”) against the Determination made by the Council of the Law Society of Scotland (hereinafter referred to as “the First Respondent”) dated 28 November 2013 not to uphold a complaint of unsatisfactory professional conduct in respect of two Heads of Complaint against Robert Vaughan, Solicitor of R. S Vaughan and Company, 114 Union Street, Glasgow (hereinafter referred to as “the Second Respondent”); Confirm the Determination of the Law Society of Scotland in respect of both Heads of Complaint; Find the Appellant liable in the expenses of the First Respondent, the Second Respondent and the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society’s Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity will include the names of the parties.

(signed)

Alan McDonald

Vice Chairman

10. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Appellant and the First and Second Respondents by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

In this case the Appellant had lodged an Appeal against a Determination by the First Respondent that the Second Respondent was not guilty of unsatisfactory professional conduct. No evidence was led as the facts in the case were not in dispute. The issue in dispute was whether or not the fees charged by the Second Respondent for work carried out during January and February 2010 were fair and reasonable and whether the Second Respondent should have complied with the Auditor's report and whether the Second Respondent's conduct in charging the fees that he did and failing to comply with the Auditor's report amounted to unsatisfactory professional conduct.

SUBMISSIONS FOR THE APPELLANT

Mr Matheson emphasised the important issue at stake in this Appeal and pointed out that it concerned public funds and accountability. Mr Matheson stated that he thought insufficient weight had been given to the written evidence from the Auditor of the Court of Session. The Second Respondent had charged fees which were unfair and unreasonable and had failed to comply with the taxation report from the Auditor of the Court of Session. Mr Matheson then read from his written submissions.

1. I would like to emphasise that the decision to appeal to the Discipline Tribunal is not one which was taken lightly. I considered it necessary to Appeal as there is an important issue at stake regarding accountability for the expenditure of public funds. I had fully anticipated that this complaint would have concluded with the determination by the Law Society's Professional Conduct Sub Committee. However, on reading the terms of The Sub Committee's decision, I was concerned that they had given insufficient weight to the very clear written evidence given on behalf of the Auditor of the Court of Session.
2. My complaint as made to the SLCC and as summarised by them in their letter dated 28 February, 2012 (Production 1) was that:-

- (a) Mr. Vaughan charged fees which were found to be so unfair and unreasonable by the Auditor of Court that for the months of January and February 2010 they were reduced by more than 50%; and
 - (b) Mr. Vaughan failed to comply with the outcome of the taxation report of 25 February, 2011 on his invoices for the period of April, 2009 to December, 2010 in that he failed to reimburse the Council the sums which have been over-billed.
- 3. At the heart of this appeal is the question whether the fees charged by the Respondent for work carried out during January and February, 2010 were “fair and reasonable” in terms of Rule 11 of the 2008 Solicitors (Scotland) (Standards of Conduct) Practice Rules (the Rules) (Production 2). It is my submission that the fees charged in those two months were not fair and reasonable and that the evidence available is sufficient, on the balance of probabilities, to demonstrate that this is the case.
- 4. If what I am maintaining is correct then there has been a breach of the Rules. Rule 11.1 states that “the fees charged by solicitors must be fair and reasonable in all the circumstances.” Compliance with this Rule is mandatory by virtue of Clause 3(1) and failure to comply may be treated as unsatisfactory professional conduct in terms of Clause 4.
- 5. When considering my complaint the Sub Committee failed to properly address the question as to whether the fees charged by the Respondent were fair and reasonable. Instead of addressing this question, the sub-committee focused on whether the Respondent was entitled to disregard the outcome of the taxation. For the reasons set out in the answers which I submitted I consider that the Sub-Committee failed to properly address whether it was reasonable for the Respondent not to comply with the outcome of the taxation. However, in addition, the Sub Committee failed to address the first part of my complaint which was whether the fees in question were fair and reasonable.
- 6. The basis for my assertion that the fees charged were not fair and reasonable is the taxation report issued by the Auditor of the Court of Session dated 25th

February, 2011(production 3). In respect of the invoices presented to my employer for the months of January and February, 2010 the Auditor reduced the fees payable by more than 50%. Given the extent of the reduction the sums invoiced cannot be described as “fair and reasonable” in terms of the Rules.

7. The fee invoiced for the month of January, 2010 was £9,547.50 (production 4) and the Auditor taxed the fee payable as £3,762.50, a reduction of £5,695. The fee invoiced for the month of February, 2010 was £11,970.50 (production 5) and the Auditor taxed the fee payable as £4,304.70, a reduction of £7,665.80.
8. The Respondent’s position is that the Auditor’s findings were flawed in terms of the procedure adopted and the information considered. My submission and the position of the Auditor is that the procedure adopted by the Auditor was not flawed and that there was no failure on the Auditor’s part to take account of all the relevant information.
9. If it is assumed that the Auditor did not invite the Respondent to make representations prior to the completion of the Taxation Report and if it is assumed that this did amount to a procedural deficiency then in my submission any potential prejudice to the Respondent has been addressed by virtue of the fact that the Respondent has subsequently had the opportunity to make representations to the Auditor which representations have included the submission of a report by a firm of law accountants dated 21 December, 2011 (production 6). The representations and the report have been considered by the Auditor and the Auditor has concluded that the taxation did not require “to be re-opened or otherwise revisited”. The Auditor has also confirmed that the information identified by the Law Accountant as possibly having been overlooked had, in fact, been taken into account by the Auditor when conducting the taxation.
10. The “Guidelines on Form of Accounts and Taxation 2005” (The Guidelines) (production 7) are relevant to this appeal. I understand that the guidelines do

not have a status equivalent to the Rules, however I also understand that non-compliance with the guidelines will be taken into account should it be alleged that there has been a breach of a Rule or unsatisfactory professional conduct. Where a solicitor has chosen to depart from the guidelines, they will be required to justify their decision if a claim or complaint is made.

11. These guidelines at Para 2(b) under the heading “Disputed Accounts” provide that “when the party paying, whether client or third party, requires that the solicitor’s account be taxed, the Solicitor cannot refuse to concur in the reference unless the solicitor and client have entered into a written fee charging agreement.....” In this case, there was no written fee charging agreement, the Respondent having agreed that he would be paid at the rate of £150 for each hour worked (production 17).
12. The guidelines go onto state in paragraph 2(b) that, - “it is for the Auditor to determine the procedure to be followed. In normal cases this will be a diet of taxation which should be intimated to the client by the solicitor”. The guidelines do not state that there will always be a diet of taxation or there must be a diet of taxation simply that this is likely in normal cases. I would submit that the circumstances in this case were not normal and that a diet of taxation was therefore not an essential requirement. I would also like to highlight that the Guidelines have been revised since 2005 and that the current Guidelines state “the decision of an Auditor on matters of Taxation will be Final and Binding” (Paragraph 3F).
13. This complaint has its origins in the fact that by e-mail dated 31st August, 2010 (production 8) I invited Mr. Vaughan to enter into a joint remit for taxation. Mr. Vaughan did not agree to this and there followed an exchange of e-mails in which he suggested that a formal taxation was not necessary (productions 8 to 14 refer). In my opinion this was conduct which breached the requirement in the Guidelines that a Solicitor cannot “refuse to concur in the reference” to taxation.

14. I remained of the view that a formal taxation was required and, not being clear as to the best way of moving matters forward, I discussed the position with the then Principal Clerk to the Auditor of the Court of Session. The Principal Clerk, Ms A, advised me that given the circumstances in that the Council was the paying party rather than the client, a joint remit was not required and that I was entitled to request a taxation. I therefore sent my e-mail dated 10th September, 2010 (production 14) to Mr. Vaughan requesting a formal taxation and setting out my reasons for this. In answer 6 for the Respondent it is stated that “taxation properly so-called may only proceed before the Auditor of the Court of Session on the basis of a joint remit.....”. I make reference to that passage from the Respondent’s answers because my starting point was to secure progress by way of a joint remit but this was not agreed to by the Respondent.
15. The Respondent has presented a report by a Law Accountant (production 6) giving a potential explanation for the discrepancy between the Respondent’s fee notes in question and the outcome of the taxation by the Auditor. The Law Accountant’s explanation is based on what the Respondent could have invoiced if the fee was based on units charged per sheet for the preparation of the Holmes report. However this is not the basis on which the Respondent was to be paid. This report is therefore irrelevant with the consequence that there is no evidence to contradict the evidence of the Auditor. I submit that this report is clearly not a sufficient justification for the discrepancy. I would refer to the following paragraphs from the Auditor’s letter dated 22nd August, 2012 addressed to the Law Society’s Complaint’s Investigator (production 15).

“As for the opinion of Mr. B, I can confirm that the papers considered by the Auditor did include a draft version of Mr. C’s report on the HOLMES documents. It extended to 200 pages and was sent to this office under cover of a letter dated 22nd October, 2010 from Vaughan and Company, a copy of which is enclosed. I can also confirm that the work carried out by Mr. Vaughan in connection with the preparation of Mr. C’s report was taken into account by the Auditor when taxing the relevant charges. The Auditor does

not, therefore, consider that this taxation requires to be re-opened or otherwise revisited.”

16. The fact that the Respondent was fully aware of what was happening and was participating in the Taxation process is the key factor which distinguishes the circumstances in this case from the circumstances in the case of Firm A and another. In that case, the disputed account was referred to taxation outwith the knowledge of the party that prepared it. Clearly that is not the case here. I am not aware of what communication passed between the Auditor and the Respondent but it is clear that the Respondent could have made representations to the Auditor if he wished to do so. I would also like to highlight that the Auditor’s Taxation Report is dated February, 2011 two years prior to the date of Lady Paton’s decision in the case of Firm A and another.
17. I would submit that if the “balance of probability test” is applied then the evidence points to the fees for the two months in question as being unfair and unreasonable. In addition there has clearly been a failure to reimburse the sums over-billed.
18. Is the Respondent justified in failing to comply with the terms of the Auditor’s taxation report? That is the question for the Tribunal to decide, however, what I am asking is that you give due consideration to the evidence offered by the Auditor. In particular, the fact that the Auditor has reviewed his initial decision in the light of the representation’s made by the Respondent and in the light of the points made in the Law Accountants report. Having reviewed the position the Auditor is standing by his report.
19. I had hoped to lead evidence from the Auditor at this hearing but the Auditor cannot attend. I attach email from his clerk in this connection dated 13 March, 2014. The Auditor has confirmed that his position remains as previously set out in the correspondence referred to (production 16).
20. In addition to addressing the question of compliance with the Auditor’s Report there is also the question as to whether the invoices were “fair and

reasonable". I submit it is necessary for the Tribunal to consider and answer this question in isolation from the second part of my complaint which relates to the non-compliance with the Auditor's Report. I submit that if the balance of probabilities test is applied to the question as to whether the fees charged were "fair and reasonable" then the answer must be that they were not. There is no credible evidence to justify a departure from the decision of the Auditor. The Auditor has reviewed his initial decision in the light of the representations made by the Respondent and has concluded that this taxation does not "require to be reopened or otherwise revisited."

21. I submit that the decision of the Sub-Committee be reversed and this appeal upheld.

SUBMISSIONS FOR THE FIRST RESPONDENT

Mr Marshall submitted that this was a normal case where there was a disputed account and accordingly it would be expected that written representations would have been allowed. Mr Marshall then took the Tribunal through his written submissions.

- This is an appeal against a determination of no unsatisfactory professional conduct.
- The complaint is (1) that the Solicitor's fees were found by the Auditor to be unfair and unreasonable and (2) that the Solicitor failed to comply with the Auditor's report which required reimbursement.
- The complaint relies on a taxation process and report by the Auditor of the Court of Session in connection with a disputed account.
- In preparing that taxation report the Auditor failed to provide parties with an opportunity to make representations.
- The Law Society had regard to this failure in determining the complaint.
- It considered that the taxation process had been flawed.
- In the circumstances it was not satisfied the conduct complained of amounted to unsatisfactory professional conduct.
- The Law Society's determination is correct.

- As a result of the procedural flaws the taxation was not fair and should not bind the Solicitor.
- It would be inappropriate to find unsatisfactory professional conduct on the basis of the taxation.
- The Tribunal should order a taxation of new by the Auditor of Glasgow Sheriff Court.

Appeal against determination of no unsatisfactory professional conduct

This is an appeal under section 42ZA(10) of the Solicitors (Scotland) Act 1980 against the decision of the Law Society that the Solicitor is not guilty of unsatisfactory professional conduct ('UPC')

Section 42ZA(1) sets out the Council's powers in connection with a complaint of UPC. It provides:-

'(1) Where a conduct complaint suggesting unsatisfactory professional conduct by a practitioner who is a solicitor is remitted to the Council under section 6(a) or 15(5) (a) of the 2007 Act, the Council must having –

- (a) investigated the complaint under section 47(1) of that Act and made a written report under section 47(2) of that Act;*
- (b) given the solicitor an opportunity to make representations, determine the complaint.'*

Section 42ZA(10) contains the relevant appeal provision:-

'(10) A complainer may, before the expiry of the period of 21 days beginning with the day on which a determination under subsection (1) not upholding the conduct complaint is intimated to him, appeal to the Tribunal against the determination.'

Test for UPC

The test for UPC is contained at section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007:-

'Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to

professional misconduct and which does not comprise merely inadequate professional services’

Powers of the Tribunal on appeal: UPC

Section 53ZB(2) sets out the Council’s powers in connection with an appeal under section 42ZA(10):-

‘(2) On an appeal to the Tribunal under section 42ZA(10) the Tribunal –

- (a) may quash the determination being appealed against and make a determination upholding the complaint;*
- (b) if it does so, may, where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct;*
- (c) may confirm the determination.’*

The Council invites the Tribunal to confirm the determination in accordance with section 53ZB(2).

The original complaint

The Appellant made a complaint about the Solicitor to the Scottish Legal Complaints Commission (‘SLCC’). He complained:-

1. The Solicitor charged fees which were found to be so unfair and unreasonable by the Auditor of the Court of Session that for the months of January and February 2010 they were reduced by more than 50%.
2. The Solicitor failed to comply with the outcome of the Taxation Report on 25 February 2011 on his Invoices for the period of April 2009 to December 2010 in that he failed to reimburse the Council the sums which had been over-billed.

Relevant Law Society guidance on taxation

This matter concerns a taxation process and report made by the Auditor of the Court of Session on 25 February 2011. At that time the Law Society's published guidance in connection with taxation procedure was the *Guidelines on the Form of Accounts and Taxation 2005* ('the 2005 Guidelines').

Under a heading of **2.Taxation** that guidance provided:-

(a) *Remit*

The essence of taxation is that it proceeds upon either a remit by the Court or a joint reference by both the Solicitor and the party paying, including non-contentious cases in (c) below.

(b) *Disputed Accounts*

*When the party paying, whether client or third party, requires that the Solicitor's account be taxed, **the Solicitor cannot refuse to concur in the reference unless the Solicitor and client have entered into a written fee charging agreement in which the actual fee has been agreed as opposed to the basis on which the fee is to be charged. The Solicitor must forthwith submit the file and all relevant information including a note of fee or detailed account to the Auditor. It is for the Auditor to determine the procedure which should be followed. In normal cases this will be a diet of taxation which should be intimated to the client by the Solicitor. Evidence of such intimation, which may be by ordinary first class post, may be required if the client does not appear at the diet. If either of the parties wishes to make written submissions, the Auditor will ensure that each party is fully aware of the other's representations.*** [my emphasis]

At (d) the 2005 Guidelines suggest a style for a formal remit by the parties, but go on to state:-

"This however, is not essential; all the Auditor requires is to be satisfied that the client is concurring in the request for taxation and accepting that it will be binding."

In my submission the value of this guidance is that it gives the Auditor, solicitors and clients a reasonable expectation of the process which will be followed in relation to disputed accounts.

Law Society investigation

The Appellant's Complaint was considered by the SLCC. By letter of 28 February 2012 the SLCC advised the Appellant that they considered the complaint consisted of service and conduct elements. The complaint was remitted to the Council to consider the conduct elements.

The Council appointed a Complaints Investigator (CI) to investigate whether or not the conduct complained of amounted to either professional misconduct or unsatisfactory professional conduct. This Appeal is concerned only with the decision of UPC.

The CI conducted an investigation which included making contact with the Appellant, the Solicitor and the office of the Auditor of the Court of Session. At the conclusion of the investigation the CI produced a report which has been lodged by the Solicitor.

That report sets out:-

- the papers which the CI had the opportunity to review (see **3. Papers Considered**);
- the evidence which the CI identified as relevant (see **6. Evidence**);
- The facts which the CI found established (see **7. Facts found**).

On page 20 at **8. Definitions and sanctions** it can be seen that the CI expressly considers the legal test for unsatisfactory professional conduct contained in section 46 of the 2007 Act. The CI goes on to note that UPC complaints must be proved on the balance of probabilities.

Summary of the Complaints Investigator's Conclusions

These are set out at page 21 of the Report under **9. Conclusions**. I do not propose to review the 20 conclusions in their entirety. I would simply wish to draw the following points to Tribunal's attention:-

- The relevant Law Society Guidance, *the 2005 Guidelines*, specifically the *Disputed Accounts* section of the *2005 Guidelines* at paragraph 2(b) apply to the current matter. (Conclusion 1)

- The Principal Clerk to the Auditor at the relevant time, Ms A, advised the complainer that a joint remit would not be necessary. There was no intimation of the date of the taxation and the Solicitor had no opportunity to make representations. (Conclusions 2 and 3)
- The decision of *Firm A v The Council of the Law Society of Scotland* (19 April 2013) contained similar facts. In that decision the Tribunal expressed concerns at the ability of the Law Society to make a judgment on an account when there had been no opportunity for the firm of solicitors to make representations to the Auditor. In that case the Tribunal ordered a new taxation in light of concerns with the Auditor's approach. It considered that what had happened in *Firm A* was not a proper taxation, rather it was an assessment of fees. It ordered a taxation of new, to be intimated on all parties, and be carried out by the Auditor of Glasgow Sheriff Court. This approach was approved of by the Inner House. The Solicitor had proposed the same way forward in the current matter, but the Appellant had rejected this proposal. In *Firm A* the Inner House allowed the firm of solicitors' appeal on the grounds that they had been denied the opportunity to make submissions to the Auditor. (Conclusions 4-13)
- The CI did not consider that a valid and binding taxation had taken place. By e-mail of 29 September the Solicitor stated that he reserved the right to make representations in connection with the account. Ms A, now departed from her position as Principal Clerk to the Auditor, advised that had she known the account was in dispute she would have followed the dispute procedure. In those circumstances the CI did not consider that a valid and binding taxation had taken place. There was an inherent flaw in the procedure adopted by the Auditor, partly as a result of the Auditor not being aware the account was in dispute. The solicitor should have been given an opportunity to lodge representations with the Auditor (Conclusions 14-16)

- The Solicitor failed to comply with the Taxation Report of 28 February 2011 but there was an inherent flaw in the taxation procedure. It was noted by the CI that the Solicitor's legal representative had advised that what had occurred was a fee assessment and not a diet of taxation. It could not be said that the Solicitor charged fees which were found to be unfair and unreasonable. Therefore there was no evidence to meet the test of UPC . The solicitor was entitled to accept legal advice and not comply with the taxation due to the procedural flaws. The CI was satisfied that the Solicitor had not acted in such a way as to satisfy the test for UPC. (Conclusion 17-20)

The CI recommended that no further action be taken.

The Law Society's determination of no UPC

The Professional Conduct Sub-Committee considered the complaint on 28 November 2013. At that time the Sub-Committee had before it the CI's report and responses from both parties.

The Sub-Committee noted that:-

1. Neither party had been given notice of when the Taxation was to take place;
2. The case of Firm A contained a number of similar facts including the fact that there was no formal taxation and neither party had been invited to make submissions to the Auditor;
3. The Auditor may not have followed an appropriate procedure;
4. The Auditor may have misunderstood the disputed nature of the account;
5. The Solicitor had proposed a new taxation.

The Sub-Committee considered that there were compelling reasons for the Solicitor not to have complied with the Taxation Report based, among other things, on the procedure adopted by the Auditor.

In those circumstances the Sub-Committee considered the test of UPC and considered that the test had not been met given the factual background. The Sub-Committee considered that it was being asked to make a decision on the Solicitor's conduct in relation to a taxation which on the face of it had been procedurally flawed. The Sub-

Committee determined that the Solicitor's conduct did not amount to UPC being conduct which fell, on the balance of probabilities, below the standard which could reasonably be expected of a competent and reputable solicitor.

Submission on the Council's determination

Under section 42ZA(1) of the 1980 Act the Council requires to investigate complaints of UPC, give the solicitor an opportunity to make representations, and then make a determination. In my submission it has complied with these requirements and has made a reasonable decision which the Tribunal should confirm.

The CI has carried out an investigation, concluded the Auditor's procedure was flawed, and presented the relevant information supporting that conclusion to the Sub-Committee. Was the Council correct to determine that it could not make a finding of UPC as a result of the taxation procedure adopted by the Auditor?

The Council was correct to make that determination because the taxation was not fair. It was not fair because the Auditor did not follow an appropriate procedure which would have afforded the Solicitor the opportunity to make representations in connection with the disputed account. As a result the taxation report cannot stand. Without the taxation report the Law Society does not have the evidence necessary to support a finding of UPC.

The main failure identified by the Council is the failure of the Auditor to provide the Solicitor with an opportunity to make representations in connection with a disputed account.

Effect of failure is the key – the taxation procedure was unfair

The *effect* of the failure is the main question for the Tribunal to consider in deciding whether or not the Council's determination should be confirmed or quashed. (The precise reason for the Auditor's failure to allow representations is of secondary importance.)

Where an account is in dispute, as was the case here, then in order to ensure a fair decision is made the Auditor should allow both parties the opportunity to make representations. In my submission the failure to do so is significant, because it renders the process unfair.

This conclusion is consistent with the decision in *Firm A* where the parties agreed that “*there had been a breach of natural justice by not offering the firm of solicitors an opportunity to explain their position to the Auditor*”.

I would also submit that this is consistent with the *2005 Guidelines* which state the normal position in disputed accounts is that there will be a diet of taxation and that if either of the parties wishes to make written submissions, the Auditor will ensure that each party is fully aware of the other’s representations (paragraph 2(b)). That is also consistent with the *2011 Guidelines* referred to by the Auditor, which state that the Auditor will establish whether parties wish to proceed by oral or written representations (paragraph 3(e)).

The Council’s CI has correctly identified the key procedural flaw of failure to allow the opportunity for representations. The Council’s Sub-Committee has recognised the procedural flaw as significant and concluded that it would not be safe to make a determination on conduct which flows from the taxation report.

As a result the Council has determined, correctly, that it could not make a determination of UPC in respect of:

- (1) The Auditor’s report on the fees charged; and
- (2) Non-compliance with the Auditor’s report.

In my submission that is the correct decision because the taxation was not fair, and cannot be safely relied upon. The Tribunal should confirm the Law Society’s determination.

Tribunal inherent power to order a new taxation by the Auditor of Glasgow Sheriff Court

I would also submit that the Tribunal can and should order that a new taxation is carried out by the Auditor of Glasgow Sheriff Court, as was the procedure ordered by

the Tribunal in *Firm A* and approved of by the Inner House of the Court of Session. In that case at paragraph 22 Lady Paton stated:-

*‘We consider that Parliament clearly intended that both the Council and the tribunal should have the power to send a case to an Auditor of court to have questions relating to the appropriate level of fee answered. While both section 42A(4) and 53A(4) specify a particular Auditor – the Auditor of the Court of Session – it is our opinion that the tribunal also has an **inherent power** to undertake or order such inquiry as is necessary to determine inter alia the amount of fees and outlays which a solicitor is entitled to charge, including a **remit by the tribunal ex proprio motu to another Auditor of court**, such as the Auditor of one of the sheriff courts, in order to ascertain the said amount of fees and outlays in a case such as the present – as happens, for instance, where the Auditor of the Court of Session has a conflict of interest.’*

In my submission the Tribunal should make such an order and remit to the Auditor of Glasgow Sheriff Court for the reasons set out in *Firm A*. The Auditor of the Court of Session is clearly conflicted because it is his process that has been challenged.

Lady Paton concluded ‘ *We agree with the tribunal that it is necessary that such a new taxation should take place, with opportunity for the appellants to present submissions, and to do so before an Auditor who has not previously considered these fees’.*

I would submit that it would be appropriate for the Tribunal to make the same decision in this matter.

The review by the Auditor of the Court of Session should not be relied upon

The Appellant places importance on the fact that the Auditor has reviewed his report in light of the concerns raised with the taxation process and ‘stands by his report’ (para 18 of the Appellant’s written submission). *Firm A* provides authority for the submission that the Auditor of the Court of Session should not consider this matter a second time because he has a conflict of interest. For the same reason – conflict of interest – I would submit that it would not be appropriate for the Tribunal to rely on the Auditor’s review of his original decision in deciding this appeal. A new and fresh taxation should be carried out by a wholly independent Auditor.

SUBMISSIONS FOR THE SECOND RESPONDENT

Mr Macreath referred to his written submissions.

1. The Respondent was instructed to represent a retired Detective Chief Superintendent who was indicted to appear for Trial at the High Court of Justiciary. The Appellants were responsible for meeting legal expenses incurred by the retired officer.
2. The Appellants instructed interim taxation of the Respondent's accounts for the period April 2009 to December 2010. The criminal case had not concluded at the time of the instruction and the Trial had as yet not commenced.
3. The complaints under consideration by the Law Society of Scotland were (a) that the Respondent charged fees which were found to be so unfair and unreasonable by the Auditor of Court that for the months of January and February 2010 they were reduced by more than 50%; and (b) that the Respondent failed to comply with the outcome of the Taxation Report of 25th February 2011 on the invoices for the period April 2009 to December 2010 in that the Respondent failed to reimburse the Appellants the sums which had been allegedly overbilled.
4. The report of the Auditor of 25th February 2011 was objected to by the Respondent.
5. The Respondent did not comply with the Taxation Report for cogent and compelling reasons.
6. The Respondent had made his files available to the Auditor. He did so in the legitimate expectation that in accordance with settled practice and authority he would be asked to adjust a joint remit before any taxation could proceed. The Respondent anticipated he would receive notification of a Diet of Taxation and would be given the opportunity to make representations.

7. There was a breach of natural justice as the Respondent was not offered an opportunity to explain his position or to make representations to the Auditor.
8. The Practice Guidelines dealing with business accounts in force at the relevant time were “The Form of Business Accounts and Taxation published in November 2005” (“the November 2005 Guidelines”). The guidelines are advisory in nature conferring no rights on any person.
9. The Auditor did not follow the November 2005 Guidelines. This was a disputed account and the Respondent was offered no opportunity to present submissions. Letters of Mrs D, the Principal Clerk to the Auditor refer to the Practice Guidelines “The Forms of Business Accounts and Taxation published in December 2011 (“the December 2011 Practice Guidelines”).
10. Ms A, former Principal Clerk to the Auditor, advised the Complaints Investigator at the Law Society of Scotland that had she known the account was in dispute she would have recommended to the Auditor that he follow the dispute procedure requiring a taxation with parties invited to lodge submissions in writing or to present them orally at any Diet of Taxation.
11. The Auditor did not follow the procedure appropriate for dealing with a disputed account. Section 2 Para 2(b) of the November 2005 Guidelines refer to the Hearing of disputed accounts. The Auditor must determine the procedure and there must be a Diet of Taxation intimated to parties. This permits parties such as the Respondent to make written representations and that the Auditor must ensure that each party is aware of the other’s representations. The Auditor did not follow the November 2005 Guidelines for disputed accounts.
12. Mrs D, formerly Principal Clerk to the Auditor, refers to the December 2011 Practice Guidelines at Para 3 (e) which paragraph places an obligation on the Auditor to establish whether parties wish to proceed by way of oral or written representation. The Auditor failed to take steps to establish whether or not

parties wished to proceed by way of oral or written submissions. No opportunity was afforded to make representations on the part of the Respondent. In any event the December 2011 Practice Guidelines are not the relevant Guidelines.

13. The correspondence from the Auditor and Clerk displayed a misapprehension as to the nature and purpose of the procedure to be followed to determine the account on an interim basis.
14. It is submitted that what transpired before the Auditor was not a valid taxation and in any event was vitiated by procedural unfairness and breach of natural justice by not offering the Respondent an opportunity to explain his position to the Auditor.
15. The complaint is based upon the proposition that the fee to which the Respondent was entitled was fixed by the purported taxation. Since the Professional Conduct Sub Committee found that the purported taxation did not bind the Respondent then that is fatal to the complaint and the complaint falls to be dismissed.
16. The decision of the Extra Division in *Firm A -v- The Council of the Law Society of Scotland* (2013) CSIH 30 is authority for the following propositions:-
 - (i) That only a taxation properly so called proceeding on a Joint Remit can be binding upon parties; and
 - (ii) The taxation of a disputed account requires to be conducted in accordance with the principles of natural justice.

That decision is in point. The Professional Conduct Sub Committee agreed that the Respondent for compelling reasons did not comply with the report of 25th February 2011. The test for professional misconduct and unsatisfactory professional conduct were considered by the Professional Conduct Sub Committee and following debate determined that neither test had been met.

Reference is made to the third page of the Professional Conduct Sub Committee decision which is produced by the Appellant. The Report by the Complaints Investigator which narrates the evidence and facts found, the Complaints Investigator's conclusions and recommendations to the Professional Sub Committee are attached. In particular reference is made to the findings in fact which are found at page 19 of the report and to the conclusions at page 21 of the report.

Accordingly, the Appeal should be dismissed.

Mr Macreath added to his written submissions and stated that it was accepted that overcharging of fees might amount to unsatisfactory professional misconduct but questioned whether there was an overcharging in this case. Even if there was, it had to be established that the overcharging crossed the threshold to amount to unsatisfactory professional misconduct. It was rare, in his submission, that fees would be so grossly excessive that they would obviously amount to unsatisfactory professional conduct. Fee disputes involve subjectivity and Mr Macreath referred to the email from the Second Respondent reserving the right to argue the seven factors. Mr Macreath submitted that the question which had to be asked was whether there had been a conclusive assessment of fees properly chargeable. The files were sent informally to the principal clerk at the Auditor's office. There was no formal remit, no notices and accordingly it was an assessment of fees rather than a formal taxation. No oral or written representations were requested. Mr Macreath submitted that there were two routes to a taxation, one which was ordered by the court or by a joint remit. There is an obligation for a solicitor to agree a joint remit. The Second Respondent stated that he would concur and he sent his files but he did not agree to a taxation without the requirements of natural justice giving him the right to make representations. Mr Macreath explained that the Holmes Report was a software system used by the police and was very complex. The Secondary Complainer had no intimation of the diet of taxation and no opportunity to make submissions to justify the fees that he had charged. Proper argument required to be made to explain the position with the Holmes Report. Mr Macreath stated that if it was a joint remit it would require to be adjusted and the terms agreed between the parties and then the Auditor would proceed on the basis of the joint remit, this had not been done here and

there was no taxation. What had happened in this case was that the Appellant had had these fees assessed. Mr Macreath referred to the Court of Session case of Firm A as being the authority that only a joint remit or an order of the court could result in a binding taxation. Mr Macreath pointed out that the Auditor had offered to carry out another taxation at a reduced fee. Mr Macreath submitted that as there had not been a valid taxation it was not appropriate for the Tribunal to refer the matter to another taxation. Mr Macreath stated that he advised his client to dispute the Auditor's report.

FURTHER SUBMISSIONS FOR THE APPELLANT

Mr Matheson stated that in his view there had been no breach of natural justice and the Secondary Complainer was not automatically entitled to make submissions. In the case of Firm A, the Law Society had conceded that it was not a fair taxation so the court did not apply its mind to this issue. Mr Matheson referred the Tribunal to the case of Pentland-Clerk Petitioner 2011 SLT 795, where it was said that if it had not been for the consensus, the court found it difficult to accept that the Auditor was a tribunal for the purposes of Article 6 of the European Convention on Human Rights in his own right and that a taxation of expenses were in and of themselves, proceedings that had to be Article 6 compliant. Mr Matheson submitted that the Second Respondent's files were the evidence and although the Second Respondent had an expectation that he would be allowed to make submissions, he had no entitlement in terms of the practice guidelines. Mr Matheson stated that it was for the Auditor to determine the procedure to be followed, it was not necessary for there to be a diet of taxation. Mr Matheson stated that because there was no request for representations this did not invalidate the Auditor's decision, it was a business matter rather than a matter dealing with civil rights. Mr Matheson explained that he tried to obtain a Joint Remit but did not get anywhere and so he contacted the Auditor's office and asked for suggestions.

In response to a question from the Tribunal, Mr Matheson stated that he declined to accept the offer of a joint taxation made by the Second Respondent because the

Council had already paid for one taxation, which the Auditor stated was ok. Mr Matheson questioned if there was another taxation, who would pay for it and emphasised that it would only be appropriate to cover 2 months rather than the whole period. In response to a further question from the Tribunal, Mr Matheson stated that he expected the Second Respondent to contact him once the Auditor's report was issued. Mr Matheson explained that he was new to the issue of taxations and was not sure which way to go and that was why he took advice from the Auditor. The Auditor's clerk advised him that it was not necessary for him to require a joint remit. Mr Matheson explained that he had been asked by his Committee to make sure that he was satisfied that the scale of fees being charged was appropriate. In response to a further question from the Tribunal, Mr Matheson stated that the Auditor had a discretion and made a decision based on the files. The Auditor had been asked about it and stated that he was satisfied with what he had done. Mr Matheson submitted that he could not have given any further information to the Auditor. In response to a further question from the Tribunal, Mr Matheson stated that he understood that the Auditor's report to be a taxation and to be a binding decision.

In response to a question from the Tribunal, Mr Marshall stated that a solicitor cannot refuse to enter into a joint remit and there is no need for a formal written remit but what had happened in this case was that the Appellant had asked for an assessment of fees but the Auditor carried out a taxation which was unfair because of the lack of opportunity for the Second Respondent to make any representations. Mr Marshall stated that for a decision to be fair, representations should have been allowed.

In response to a question from the Tribunal, Mr Macreath stated that the Secondary Respondent had a legitimate expectation that he would have an opportunity to make representations. Mr Macreath submitted that what should have happened was that Mr Matheson should have got an assessment from the Auditor and intimated this to the Second Respondent and asked for his submissions. His remedy would have been to sue the Second Respondent through the courts and if necessary get an order from the court for a remit for a taxation. Mr Macreath pointed out that his client had offered a

fresh taxation for the 2 months concerned and who met the costs of a taxation would depend upon the outcome.

Mr Matheson stated that his information with regard to the taxation process came from the Auditor's office. He indicated that he had considered withholding payment of fees but did not think that this was conducive to the provision of the best defence in the case that was ongoing. Mr Matheson stated that he was not really aware at the time, whether the account was disputed or not. Mr Matheson confirmed that he was not taking the issue of inadequate professional service any further. Mr Matheson and Mr Macreath indicated that they had no issue with the Tribunal referring the matter to the Auditor but Mr Matheson indicated that the Council would not want to pay the whole costs of this.

DECISION

In an Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980, the Tribunal is considering a Decision made by the Law Society. In this case the facts as found by the Law Society were not disputed. There was no challenge to the fairness of the Law Society procedures and the Tribunal saw no defects in the detailed reasoned decision given by the Law Society Sub Committee. The Tribunal accordingly saw no reason to interfere with this Decision.

The Tribunal however had sympathy for Mr Matheson. It is clear that there is some uncertainty surrounding the whole issue of taxation procedure. The Tribunal can understand why Mr Matheson felt that he had followed the correct procedures given the advice he received from the Auditor's office. The Auditor clearly has the power to set his own procedures and is of the view that he stands by his report. The Auditor however did offer to do a joint taxation of new with reduced fees. It may be that there was some confusion in this case as to whether or not, at the time the Auditor carried out the assessment/taxation of the Second Respondent's fees, the fees were in dispute. The Second Respondent and his solicitor are both firmly of the view that it was a legitimate expectation that in a case such as this the Second Respondent would have been given the opportunity to make representations. It is clear from the email of 29

September 2010, sent by the Second Respondent, that he reserved the right to make representations in connection with an uplift in the fee rate. It would appear that the Second Respondent never had an opportunity to do this.

The Law Society guidance on taxation, which was in force at the time of the Second Respondent's actings, states that a taxation proceeds either by a remit from the court or on joint reference by the solicitor and the party paying. It further states that in respect of disputed accounts the solicitor cannot refuse to concur in the reference. The guidance however also states that if either party wishes to make written submissions, the Auditor will ensure that each party is fully aware of the other's representations. This did not happen in this case. There accordingly must be questions about the fairness of the procedure and the Tribunal consider that there are similarities with the case of Firm A, where the Court of Session agreed that it was necessary that a new taxation should take place with an opportunity for solicitors to present submissions in respect of their account.

The Tribunal consider that this is an area where more firm guidance in relation to the appropriate procedure to be followed would be helpful. This would avoid a situation such as this arising again in the future. However, in this case, given that there is doubt about what the correct procedure is and that there is disagreement between competent and reputable solicitors about whether or not a binding taxation took place in this case, the Tribunal cannot find on the balance of probabilities, that the Second Respondent's conduct is conduct which is not of a standard which could reasonably be expected of a competent and reputable solicitor and the Tribunal accordingly confirmed the Determination of the Law Society. There is nothing in this case to cast the Law Society's Decision into question.

The Tribunal do not consider it necessary or appropriate to order a taxation in this case but suggest that parties sort matters out between themselves.

The Tribunal then heard submissions on expenses and publicity.

None of the parties had any submissions to make with regard to publicity and the Tribunal ordered that publicity be given in the usual way. Both the First and Second

Respondents moved for expenses to follow success as is normal process. Mr Matheson stated that the legitimate areas which require to be addressed warranted the bringing of the Appeal and asked the Tribunal not to award expenses against the Council.

Although the Tribunal has some sympathy for Mr Matheson's position, the bringing of the Appeal resulted in both the First and Second Respondents having to enter into the process and defend the Appeal. Nothing new arose at the appeal stage and the Second Respondent had offered to enter into a joint taxation and the Auditor offered to do this at a reduced fee. Accordingly the Tribunal saw no reason to depart from the usual practice of awarding expenses against the losing party.

Vice Chairman