

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

D E C I S I O N

**in Appeal under Section 42A(7) of the
Solicitors (Scotland) Act 1980**

by

**A & R ROBERTSON & BLACK WS
and JOHN P GRAY, Solicitors, Bank
Street, Blairgowrie, Perthshire**

Appellants

against

**THE COUNCIL OF THE LAW
SOCIETY of SCOTLAND, formerly
of 26 Drumsheugh Gardens,
Edinburgh and now Aria One, 144
Morrison Street, Edinburgh**

First Respondent

and

MR A and MISS B

Second Respondents

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under the provisions of Section 42A(7) of the Solicitors (Scotland) Act 1980 by A & R Robertson & Black WS and John P Gray, Solicitors, Bank Street, Blairgowrie (hereinafter referred to as "the Appellants") against a Finding made by the Council of the Law Society of Scotland (hereinafter referred to as "the First Respondent") dated 28 September 2010, that the Appellants had provided an inadequate professional service in relation to their clients

Mr A and Miss B (hereinafter referred to as “the Lay Complainers”) and a Direction that (i) that the Appellants’ fees for the attorney period and the administration of the estate period combined shall be restricted to £34,388.88 plus VAT, that the Appellants shall refund any fee paid in excess of £34,388.88 plus VAT to the estate of the late Mr C, that the Appellants will refund to the estate the sum of £13,143.16 for work before the attorney period and not individually costed since 1991, that the Appellants should refund to the estate the sum of £3,007.23 for duplicate charging, that the Appellants shall refund to the estate the sum of £1,169 for tax penalties incurred, that the Appellants shall refund to the estate the sum of £6,160 plus VAT in respect of charges for the Law Accountant’s fees, that the Appellant shall refund to the estate the Auditors fee amounting to £4,828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007 and that the Appellants shall pay by way of compensation the sum of £2,000 to the estate of the late Mr C.

2. After hearing evidence and receiving detailed submissions from parties over a number of days, the Tribunal pronounced an interlocutor on 20 December 2011 Quashing the Determination in respect of the attorney period as set out in the Law Society’s Determination paragraphs 1, 2, 5 and 7 (page 35/225); in respect of the administration of the estate paragraphs 1, 2, 3, 5, 6 and 9 (page 36/226); in respect of the administration and sale of Property 1 paragraphs 1, 2, 3, 4 and 6 (pages 36, 37/226, 227); in respect of the administration and sale of Property 2 paragraphs 1, 2, 3, 4, 5, 6, 7 and 9 (page 37/227); in respect of the administration and sale of the Property 3 paragraphs 1, 2, 3 and 5 (page 38/228); in respect of the administration and sale of Property 4 and premises to the rear thereof paragraphs 1, 2, 3, 4, and 6 (page 38/228) and the Determination and Direction (page 39/229) that the appellants refund to the estate the sum of £13,143.16 for work before the attorney period and not individually costed since 1991 and the Determination and Direction that the Appellants refund to the estate the sum

of £1169 for tax penalties incurred; Quashing the Determination and Direction that the Appellants should refund to the estate the sum of £3007.23 for duplicate charging; Quashing the Determination and Direction that the Appellants shall refund to the estate the auditor's fee amounting to £4828.31 inclusive of VAT for the preparation of the certificate dated 17 August 2007; Varying the Determination that the Appellants' fees for the attorney period and executry period combined should be restricted to £34,388.88 and that the Appellants should refund anything in excess of this to the executry, and instead Directing that the Appellants repay any fees charged to the extent that these exceed the sum determined by a taxation of new as reasonable remuneration for the actings of the Appellants during the attorney period and the executry period; this taxation of new to be carried out by the Auditor of Glasgow Sheriff Court; it being for the Appellants to determine if they wish the taxation to be on the basis of oral representations or written submissions and the taxation shall be intimated on all parties; the Auditor's fees shall be payable by the Law Society and/or the Appellants as may be determined by the Auditor; in the event that the Auditor determines that the Appellants should make payment of the taxation fee or any part thereof, the Tribunal so order that the Appellants pay within one month of the taxation fee or the part there payable by them being intimated to them; Varying the Determination and Direction that the Appellants shall pay by way of compensation the sum of £2000 to the estate of the late Mr C and instead Direct that the Appellants shall pay the sum of £500 by way of compensation to the estate of the late Mr C; Confirming the Determination and Direction that the Appellants shall refund to the estate the sum of £6160 plus VAT in respect of charges for the Law Accountant's fees. Of Consent Finding the First Respondent liable to the Appellants in the Expenses incurred by the Appellants up to and including the hearing on 26 January 2011 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; Quoad Ultra making no finding of expenses due to or by any party; Directing that publicity will be given to this Decision and that this publicity will include the name of the Appellants.

3. The Decision of the Tribunal of 20 December 2011 was appealed by the Appellants to the Court of Session. The Court of Session allowed the appeal on the ground set out in Statement XII of the petition (lack of opportunity to make submissions to the auditor); Quashed the finding of inadequate professional service (IPS) insofar as based on overcharging of fees; Quashed the directions that compensation of £500 be paid and that publicity be given; Confirmed the determination that the sum of £6,160 plus VAT in respect of the law accountant's fee should be refunded to the executry estate; and Remitted the case to the Tribunal for reconsideration in the light of the new taxation (that reconsideration to include questions of IPS, compensation, publicity and expenses); Quoad Ultra the appeal was refused.
4. The case called before the Tribunal on 3 September 2013. The Tribunal remitted the Appellants' fees for the attorney period and executry period combined to a taxation of new to be carried out by the Auditor of Glasgow Sheriff Court and parties were ordered to report to the Clerk on the outcome of the taxation and advise the Tribunal on whether any further procedure was necessary.
5. The case called before the Tribunal again on 17 November 2016. The Law Society were represented by their fiscal Sean Lynch, Solicitor, Kilmarnock. The Appellants were represented by Walter Semple, Lay Representative Glasgow. The Lay Complainers were in attendance with their solicitor but did not take part in proceedings.
6. Mr Semple indicated that the Appellants had entered into a Minute of Agreement with the executors to the effect that £26,000 was to be paid by the Appellants to the estate. The executors' solicitor was present and

confirmed that the executors wished to withdraw their claim for compensation. It was not therefore necessary for the Tribunal to consider an order for repayment of fees or compensation. The only matter which remained for the Tribunal's consideration was the head of appeal regarding the allegation of overcharging. The Tribunal heard submissions on the allegation of overcharging, expenses and publicity.

7. Having considered productions lodged and the submissions made on behalf of the Appellants and the First Respondents, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 17 November 2016. The Tribunal having considered the Appeal under Section 42A of the Solicitors (Scotland) Act 1980 by A & R Robertson & Black WS and John P Gray, Solicitors, Bank Street, Blairgowrie ("the Appellants") in respect of a Finding of Inadequate Professional Service and the Decision of the Inner House of the Court of Session dated 19 April 2013, Having previously determined that there was an inadequate professional service in respect of the charging of the law accountant's fee without proper consent, Quash the finding of inadequate professional service in respect of the charging of excessive fees separate to the law accountant's fee; Having been advised that the parties had entered into a Minute of Agreement with regard to repayment of fees and compensation and that the claim for compensation was withdrawn, allow the claim for compensation to be withdrawn and make no order with regard to repayment of fees or compensation; Find the First Respondent liable to the Appellants in the expenses incurred by the Appellants up to and including the hearing on 26 January 2011 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; *Quoad Ultra* find no expenses due to or by any party;

Direct that publicity will be given to this Decision and that this publicity will include the name of the Appellant but should not identify the deceased, his executors or the Appellants' former clients.

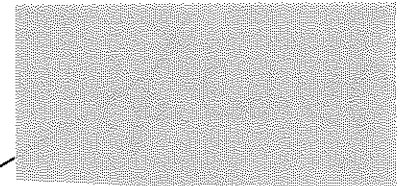
(signed)

Alistair M Cockburn

Vice Chairman

8. A copy of the foregoing together with a copy of the Decision certified by the Clerk to the Tribunal as correct were duly sent to the Appellants by recorded delivery service on 4 JANUARY 2017.

IN THE NAME OF THE TRIBUNAL



Alistair Cockburn

Vice Chairman

NOTE

When the case called on 17 November 2016, there was no shorthand writer present. The Tribunal directed that the proceedings be recorded electronically according to Rule 46 of the Scottish Solicitors' Discipline Tribunal Rules 2008.

The Appellants were present and represented by Mr Semple, a former solicitor who appeared as a lay representative on behalf of Mr Gray. The Law Society was represented by their Fiscal, Sean Lynch, Solicitor, Kilmarnock. The Second Respondents were present with their solicitor but did not take part in the proceedings.

The parties indicated that agreement had been reached between the executors and the Appellants whereby it was no longer necessary for the Tribunal to consider making an order for repayment of fees or compensation. The Appellants had that morning entered into a Minute of Agreement with the executors to the effect that the firm would pay £26,000 to the estate in question. This payment was to cover the sum taxed off by the auditor and included an element of compensation. The executors' representative confirmed that the executors wished to withdraw their claim for compensation. The only matter which remained for the Tribunal's consideration was the head of appeal regarding the allegation of excessive fees. The Tribunal heard submissions on overcharging, expenses and publicity.

SUBMISSIONS FOR THE APPELLANTS

Mr Semple referred to his written submissions which are reproduced below.

1. The Inner House remitted the case back to the Tribunal for reconsideration in the light of the new taxation, that reconsideration to include questions of Inadequate Professional Service (IPS), compensation, publicity and expenses.
2. The taxation has now been carried out by the Auditor at Glasgow Sheriff Court. Attached are his Final Report and his Notes both issued on 2 August 2016. [128]

IPS considered in light of the new taxation.

3. The key to interpreting the judgement of the Court is at paragraph 23. "It is not in fact clear from the Tribunal's interlocutor, Decision or Note that the taxation was necessarily ordered in terms of that statutory provision (Solicitors Scotland Act 1980 section 42A (2) (c)). In my submission, it is clear that the decision of the Tribunal was not made in terms of that statutory provision. The reason for ordering a new taxation was not IPS. It was failure of the first taxation. The Tribunal was not in a position to decide that there had been overcharging fees because the purported taxation had failed. The Tribunal therefore made no finding of IPS in relation to overcharging fees.

The Tribunal ordered a new taxation because it did not consider that what was done by the (Court of Session) Auditor was done was a proper taxation on joint instructions but was merely an assessment of fees (lines 1 and 2 on page 50 of the Tribunal decision).

4. In this case a normal taxation procedure was started in April 2007. Procedural difficulties were caused by the failure of the Court of Session Auditor and the advisers of the Complainer to conduct a proper taxation. The taxation was not completed until August 2016. The Appellants are bound by the result of the taxation to refund the amounts taxed off. This Tribunal does not need to make a finding of IPS to require the Appellant to refund the amount taxed off. This is enforceable by virtue of the completion of the taxation procedure.
5. The discussion of IPS at paragraph 19 of the court judgement was necessarily hypothetical. The court could not know the result of a future taxation. The court referred back to the Tribunal the decision as to whether the facts in this case amounted to IPS. This decision is at large for the Tribunal.

6. In this case the Appellants accepted in 2007 that they must agree to a taxation of their fees and be bound by the result. This was not a taxation imposed by the Law Society or the Tribunal using powers under the Solicitors Act. The Appellants followed the customary and obligatory procedure to review their fees. It is difficult to understand how this can be IPS.
7. At paragraph 19 of its judgement, the court accepted that if the solicitor's fee is excessive, the services provided by the solicitor are not of the quality which would be expected for that price. That raises the question of what are excessive fees for the purpose of IPS.
8. The court refers to the case of *McCull v the Council of the Law Society of Scotland 1987 SLT 524*. The court refers to section 42A (2) (a) of the Solicitors (Scotland) Act 1980 which allows the Council to reduce fees "indicative of the fact that IPS includes overcharging of fees".
9. The facts in *McCull* are readily distinguished from the facts in this case. The *McCull* case related to professional misconduct, not IPS. At page 524 in the report of the *McCull* case, the court said "Following a complaint at the instance of the Law Society of Scotland, the Scottish Solicitors Discipline Tribunal found an enrolled solicitor practising on his own account, who had a power of attorney from his client, guilty of professional misconduct in respect that he charged his clients grossly excessive fees, made improper use of his clients funds and was in breach of rule 6 (c) and (d) of the Solicitors (Scotland) Accounts Rules 1981 in that the fee notes in question had been debited to the clients account without her authority knowledge or consent.... The solicitor had given evidence to the effect that the fee notes had been prepared and charged to the clients account by his unqualified office manager, without his knowledge." At page 525 it is

recorded that on taxation the fees charged to the client had been overstated by more than 100%.

10. In the present case, the client was kept informed of the charges being made, the solicitor employed a reputable, independent, external law accountant to fix his fees, and when the Glasgow Sheriff Court Auditor carried out the audit, the overall amount taxed off was 16.4% which was well within the normal range of amounts taxed off.

11. The Glasgow Sheriff Court Auditor set out at paragraph 2 on pages 5 and 6 of his Note a Table of the amounts taxed off. Overall he taxed off £24,273.94 from an account of £148,121.28. He taxed 16.4% off compared with 27.3% taxed off by the Court of Session Auditor. He recorded his view that the taxed executry fees for the Appellants of £50,966 for work spanning over two years from the date of death were not exceptionally high for such an executry even though they did not complete all the executry work before their withdrawal in November 2006. The Auditor showed in the Table at paragraph 5 on pages 16 and 17 of his Report that the fee rates charged by the Appellants did not differ materially from the Law Society's Guidance rate and in 2006 were slightly less than the Law Society's Guidance rate. He explained that this comparison shows that there is no exorbitant overcharging rate applied by the Appellants and indeed some "under charging" when compared with the Law Society's Guidance rate.

12. At paragraph 8 the Auditor refers to evidence that Mr A was aware of fee levels being charged during the attorney period. At paragraph 16 on page 30 the Auditor provides his "neutral" observation in relation to overall fairness to the solicitors charging the fees and the parties ultimately paying them. He states that the purported overcharging by 37.5% could more accurately have been described using the usual taxation terminology by stating that the Auditor of the

Court of Session had taxed off 27.3% from the fees rendered by the Appellants (saying exactly the same thing arithmetically but expressed in more neutral terms). The Auditor adds that taxing 27% (or more) of any account of fees is very common indeed in his experience.

13. The “37.5% overcharge” used by the Law Society was arrived at by calculating the total taxed off of £40,407 as a percentage of the total allowed by the Court of Session Auditor of £107,714. The Glasgow Auditors figure of 16.4%, using the usual taxation terminology, is calculated by taking the amount taxed off of £24,274 as a percentage of the amount charged of £148,121 which is 16.4%. If the Law Society had used the usual taxation terminology, the Court of Session Auditor’s calculation would have been £40,407 as a percentage of the amount charged of £148,121 which is 27.3%.
14. In the *McColl* case (at page 525) the amount taxed off was £3048.10 p ex VAT compared with the total amount of fees charged of £5798.10 ex VAT. The amount taxed off was therefore 52% of the amount charged leading to a recoverable fee of less than one half of the amount charged. The extent of the overcharge in the *McColl* case allowed the amount charged to be described by the court as grossly excessive.
15. Whilst taxing off over 50% in the *McColl* case was found to be grossly excessive, it would be an unprecedented and unrealistic result if taxing off, in an agreed taxation, any modest amount such as an amount of 16.4% were found to be excessive fee charging for the purposes of IPS.
16. Where the Glasgow Auditor has stated at paragraph 16 on page 30 of the report, that taxing off 27% of any account of fees is very common indeed, taxing off

16.4%, which applies in this case, should not be described as charging an excessive fee for the purposes of IPS.

17. At paragraph 19 of its judgement, the court accepted a submission that if the fee is excessive, the services provided by the solicitor are not of the quality which would be expected for that price, and that the corollary of excessive fees is that the service was not adequate for the price. This cannot be interpreted to mean, for example, that if competing solicitors offer to carry out a task such as a criminal trial for different fees and the solicitor who charges a lower fee achieves success, the quality of his service must be inferior to the other solicitor who would have charged a higher fee. Excessive in this context must refer to abnormal or grossly excessive.
18. Nor can it be interpreted to mean that every time a modest amount is taxed off the solicitors account the solicitor is potentially liable to a charge of IPS. An excessive fee as referred to by the court must be interpreted as a fee which is abnormal or grossly excessive.
19. The fees charged by the Appellants should not be found to be IPS because:
 - There has been no finding of IPS.
 - The Appellants agreed in 2007 to the taxation and to be bound by it.
 - The amount taxed off of 16.4% was well within normal expectations.
 - The amount taxed off was not excessive for the purpose of IPS.

Compensation, Publicity and Expenses.

20. The court has determined that the Appellant must repay to the clients the amount of the law accountant's fees of £6160 plus VAT. That decision is not subject to review by this Tribunal. However, what happened should be taken into account in relation to compensation, publicity and expenses.

21. The Law Society issued a Guidance Note on 1 February 2003 [130] regarding fees for preparation of an account. This Guidance was reissued revised on 19 August 2005 [131]. The 2003 Guidance includes the first paragraph “An Auditor or law accountant’s fee for assessing the solicitors fee from a file is not chargeable to the party paying without prior agreement.” The third paragraph states “it is however open to solicitors to agree in advance with the client – in a terms of business letter – that the fee for assessing will be chargeable.” The Guidance dated 19 August 2005 repeated the 2003 Guidance with the omission of the first paragraph referred to. The Solicitors (Scotland) (Client Communication) Practice Rules 2005 made terms of business letters obligatory with effect from 1 August 2005.

22. The terms of these Guidance Notes should have been specifically drawn to the attention of the Tribunal. They include the possibility to regulate the fees for preparation of an account by contract. They included no additional requirement such as that set out by the Tribunal at page 52 of their Note: “The Tribunal consider that it is unreasonable without the greatest clarity to expect a client to pay for such an outlay which may have been needlessly incurred because the client might just have accepted the solicitor’s fee in the first place.” The Law Society is Regulating Authority. It had a duty to put the Guidance fairly before the Tribunal. It did not do so.

23. The Note accompanying the decision of the Tribunal at pages 49 to 52 was quoted verbatim by the Inner House at pages 4 and 5 of their decision. The Law Society failed to inform the Inner House of the Law Society’s Guidance that fees for preparation of an account could be charged to the client if the client agreed.

24. On 10 January 2006 John Gray of the Appellants telephoned the Law Society and spoke to Morag Newton. A file note of the conversation between Mr. Gray and Mrs. Newton on 10 January 2006 is attached [133]. Morag Newton had facilitated a workshop on Solicitors Accounts Rules at a sole practitioner's conference held by the Law Society in Glasgow on 26 November 2005 which John Gray had attended. A copy of the program is attached [132]. The Appellants regret that this has only become available at this stage. The explanation is that it was stored on a computer disk by the Appellants as a miscellaneous document but not with reference to the (Mr A and Mrs B) case. It was discovered by Mrs. Margaret Kerr an employee of the Appellants on 21 September 2016 filed as a miscellaneous document. The emails provided by Mrs. Kerr are attached [134]. They show that Mr. Gray did take steps to find out from the Law Society that he could charge the law accountant's fees to the clients provided he had the clients' agreement. Mrs. Kerr is here today if the Tribunal wishes to hear her.
25. Mr C died on 10 September 2004. At that time, it was not the practice of the Appellants to issue a terms of business letter for executry work. They were not obliged to do so. Terms of business letters were not obligatory until 1 August 2005, some months after the death of Mr C. It seems grossly unfair that after Mr. Gray sought the advice of the Law Society about whether he could charge the law accountant's fees to the client if they agreed, and followed their advice, the result should be a finding of IPS against him.
26. Mr. Gray behaved properly and appropriately in asking the Law Society and observing the advice received. Although because of the decision of the Inner House, the finding of IPS is not before the Tribunal for review, the Appellants submit that the actions which were taken by Mr. Gray should be taken into account by the Tribunal in fixing publicity and expenses.

27. The Appellants submit that many of the matters which have been the subject of continuing controversy in this case have arisen because of failure of the Law Society to take account of the flawed taxation. The Appellants accepted the clients' request for taxation. The correspondence is produced at the Appellants' First Inventory of Productions to this Tribunal at documents 101 and 102. The Law Society refused to take this essential procedural defect into account in issuing their determination.

28. The taxation carried out by the Glasgow Sheriff Court Auditor has materially changed the facts which the Tribunal should take into account in awarding expenses. The expenses were previously awarded following a purported taxation by the Auditor of the Court of Session which the Law Society described in its determination as resulting in an overcharge of 37.5%. The Glasgow Auditor taxed off 16.4%. This change is significant. The Appellants submit that the amount taxed off is not abnormal or unreasonable or, in the circumstances of this case, large enough to warrant a finding of excessive fees for the purpose of IPS.

29. Appearing before Glasgow Sheriff Court auditor, the Law Society relied on the case of *Baxendale-Walker v The Law Society 2007 EWCA Civ 233*. This is an English case which may be unreliable authority in Scottish practice. That decision relied heavily on statements made at paragraph 38 by Lord Bingham CJ in the case of *City of Bradford Metropolitan the Booth 2000 COD 3388*. He there summarised the wider considerations to be taken into account beyond the principle that expenses should follow success. According to Smith and Barton on SSDT published in 1995 at pages 41 and 42, that has always been the situation as regards this Tribunal: "the Tribunal usually applies the general rule that expenses follow success but in a significant number of cases that rule is modified or not followed."

30. In this case about 73 complaints were lodged with the Law Society. If the Tribunal accepts the Appellants submission on IPS, the appellants are left with only 1: the finding of IPS relating to refund of the law accountant's fee. In that case the appellants in good faith sought the advice of the Law Society and followed it. This process started in 2007 and has imposed a huge burden of work and stress on the Appellants since then. It has resulted in them being vindicated, except possibly as regards the law accountant's fees.
31. Compensation has now been dealt with in a signed agreement between the appellants and Mr A and Mrs B.
32. For the reasons given the Appellants submit:
 - The expense of these proceedings of this should be borne by the Law Society
 - That in these circumstances it is inappropriate that publicity should be ordered.

SUBMISSIONS FOR THE FIRST RESPONDENTS

Mr Lynch suggested that Mr Semple's submissions conflated the question of taxation of sums off and overcharging. Mr Lynch urged the Tribunal to take the approach taken by the Court in MacColl v The Council of the Law Society of Scotland 1987 SLT 524. In his submission, rather than expressing the issue as a 16.4% tax-off, this case should be approached as a 19.59% overcharge and this figure in his submission was redolent of IPS. Mr Lynch submitted that nothing said by the Appellants should persuade the Tribunal that the conduct did not constitute inadequate professional services. Mr Lynch submitted that the usual orders should be made with regard to publicity and that expenses should not be awarded against the Law Society. In relation to the hearing on 17 November 2016, Mr Lynch submitted that expenses should be awarded against the Appellants if the Law Society were to be successful.

DECISION

The Tribunal carefully considered the submissions made on behalf of the Appellants and Respondents, in particular whether the overcharge constituted an inadequate professional service in the circumstances.

The Tribunal found that there was no inadequate professional service in respect of charging of fees in relation to the Appellants' actings. This decision excluded the charging to the client of the law accountant's fee which the Tribunal had previously decided did constitute IPS and was confirmed by the Court of Session. The Tribunal noted the Auditor's remarks on p30 of his report that taxing 27% or more off any account of fees is very common indeed. The figure taxed off by the Auditor of Glasgow Sheriff Court was in fact 16.4%. The Tribunal determined that taxing off 16.4% from the fees was not evidence of excessive fee charging in the particular circumstances of this lengthy and complicated case. This finding was specific to the facts and circumstances of this particular case and it should not be inferred that the Tribunal supports a proposition that a taxing off of 16.4% will never constitute inadequate professional services.

Having decided that there was no inadequate professional service with regard to the alleged overcharging of fees, the Tribunal affirmed its previous decision as it was of consent that the First Respondent should be liable to the Appellants for fees up until 26 January 2016. Thereafter, considering matters in the round, the Tribunal was of the view that it was appropriate to find no expenses due to or by either party.

In the circumstances publicity must follow the Decision. However, the Decision need not identify the deceased, his executors or the Appellants' clients. Publication of their identities might damage their interests given the financial information disclosed in the course of the case.



Alistair Cockburn
Vice Chairman