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

D E C I S I O N

in Complaint

by

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

against

DAVID BAIRD MACADAM Solicitor, 26 Kirk Brae, Edinburgh

Respondent

1. A Complaint dated 28 March 2008 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that David Baird Macadam, Solicitor, 26 Kirk Brae, Edinburgh (hereinafter referred to as "the Respondent") be required to answer the allegations contained in the statement of facts which accompanied the Complaint and that the Tribunal should issue such order in the matter as it thinks right.

2. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers and a Note of Adjustments to those Answers intimating preliminary pleas were lodged on behalf of the Respondent.

3. Having considered the documentation lodged, the Tribunal resolved to set the Complaint down for a procedural hearing on 26 June 2008 and a further procedural hearing also took place on 29 July 2008. A Debate in relation to the preliminary pleas was fixed for 7 October 2008 but was subsequently postponed with the consent of the Tribunal.

4. A further Debate on the preliminary pleas was fixed for 26 November 2008. The Complainers were represented by their Fiscal, Paul Reid, Solicitor Advocate, Glasgow. The Respondent was not present but was represented by Mr Andrew, Solicitor, Edinburgh and Mr Summers QC.

5. The Tribunal heard submissions by both parties on the first and second preliminary pleas and after consideration of the Notes of Argument and the authorities lodged by both parties, Repelled those pleas. The Tribunal adjourned this matter and later fixed a further diet of debate to hear submissions about the third preliminary plea.

6. The continued debate took place on 4 September 2009. The Complainers were again represented by their Fiscal Paul Reid, Solicitor Advocate, Glasgow. The Respondent was not present but was represented by Ms Cruickshank, Solicitor, Edinburgh and Mr Summers QC. The Tribunal heard submissions by both parties on the remaining preliminary plea and having considered these submissions, the Notes of Argument and authorities lodged by both parties, Sustained the remaining plea in law and deleted the averments in the Complaint other than 1.1, 9.1 and 11.1(ii). The remaining averments in the Complaint to be answered by the Respondent were those in relation to a failure to reply to the Law Society. The Tribunal directed that written reasons would be issued in due course and that a full hearing in relation to the remaining averments be fixed for 30 September 2009. The Tribunal determined that no expenses should be due to or by either party in relation to the proceedings to date.

7. The Complainers decided to take no further action in respect of Articles 9 and 11.1(ii). The matter accordingly called for a procedural hearing before a differently constituted Tribunal on 30 September 2009 when the remainder of the Complaint being Articles 9 and 11.1 (ii) was dismissed with no expenses due to or by either party.

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

Edinburgh 4 September 2009. The Tribunal having considered the Complaint dated 30 September 2008 at the instance of the Council of the Law Society of Scotland against David Baird Macadam, Solicitor, of 26 Kirk Brae, Edinburgh; Repels the Respondent's first plea in law in relation to competence, Repels the second plea in law in relation to the relevance of the averments of the conduct of the Respondent prior to the date of his entry to the profession ; Sustains the third plea in law in relation to specification and deletes the averments in the Complaint other than 1.1, 9.1, and 11.1 (ii); Find no expenses due to or by either party in relation to the proceedings to date; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but that such publicity should be deferred until the conclusion of the substantive hearing in relation to this Complaint.

(signed)
Alistair Cockburn
Chairman

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

Edinburgh 30 September 2009. The Tribunal having considered the remaining averments in relation to Articles 9 and 11.1 (ii) of the Complaint dated 30 September 2008 at the instance of the Council of the Law Society of Scotland against David Baird Macadam, Solicitor, of 26 Kirk Brae, Edinburgh; On the motion of the Complainers Dismiss the remainder of the Complaint in respect of Articles 9 and 11.1 (ii) and Find no expenses due to or by either party in respect of the proceedings subsequent to 4 September 2009 and Direct that publicity be given to this decision and that publicity can now be given to the Decision of 4 September 2009.

(signed)
Alistair Cockburn
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 Respondent by recorded delivery service on

IN THE NAME OF THE TRIBUNAL

Chairman

NOTE

Following service of the Complaint, Answers and a Note of Adjustments to those Answers intimating preliminary pleas were lodged on behalf of the Respondent. In response a Note of Argument for the Complainers was lodged. Subsequently a Record was prepared and lodged. Written submissions for the Complainers and the Respondent on the preliminary pleas were lodged together with a number of authorities for both parties.

A debate took place on 26 November 2008.

26 NOVEMBER 2008

Mr Summers indicated that he wished to argue all three preliminary points and had prepared written submissions.

A number of authorities were lodged by the Respondent - the case of Stewart Buchanan Gauges Limited –v- BEC (Scotland) Limited and Kevin Murphy CA76/14/99, and excerpts from the following texts – Macphail on Sheriff Court Practice (Third Edition), McCall Smith & Sheldon on Scots Criminal Law (1997) and Gordon on The Criminal Law of Scotland (2001).

Mr Reid advised that he had only been provided with a written submission the day before and had today received a slightly different version containing authorities not referred to in the earlier submission. He advised that consideration of the revised submission might alter the approach that he was to take.

The Tribunal allowed Mr Reid a short adjournment to consider his position.

Following the adjournment, Mr Reid made a motion to adjourn the hearing. He advised this was the second diet of debate which had been fixed in this case and after the first, parties were required to lodge their authorities ten days before the next hearing. He stated that the Respondent's written submission had been received late, and that he had only had sight of it the day before. Mr Reid stated that he accepted

that in many respects the written submission lodged that day was just an amplification of the submission received the day before but he submitted that it does stray into areas which he requires to research and that as a result he is unable to argue the points today without access to a library. He stated that there are additional authorities that he would wish to have checked. He stated that he was concerned that if he went ahead today, the Law Society's position may be compromised. He stated that he was also concerned that the outcome of this process may have a bearing on the Judicial Factory. Mr Reid stated that he wished an opportunity to prepare fully for the debate.

In response Mr Summers stated that Mr Reid's submission mischaracterised the situation and that the only authorities referred to which differed from those in the original submission were a couple of photocopies of excerpts from textbooks which identify what embezzlement means. Mr Summers stated that he would have hoped that these would have already been known to the Fiscal. He submitted that the rest of the submission had just been tidied up and that repetition and typographical errors have been removed.

In response to a question from the Tribunal as to the late lodging of the submission, Mr Summers replied that he had not heard from the Fiscal that this would be an issue. He stated that the substantive question is whether there is prejudice arising from the provision of the material at this juncture. He stated that he was struggling to see what prejudice there was.

In response to a question from the Chairman, both parties agreed that they were prepared to proceed with submissions on the first two preliminary pleas today and to further adjourn the debate as regards the remaining plea. The Tribunal therefore agreed to hear submissions regarding the pleas in relation to competency and relevancy.

SUBMISSIONS ON BEHALF OF THE RESPONDENT IN RELATION TO THE FIRST AND SECOND PRELIMINARY PLEAS RELATING TO COMPETENCY AND RELEVANCY

Mr Summers referred the Tribunal to his written submission dated 25 November 2008 and stated that he wished to amplify a number of points made within that submission.

Mr Summers stated that where A is said to have committed professional misconduct what is ordinarily meant by that is that A, while a member of the relevant profession, behaved himself in a way inconsistent with the standards of that profession. He stated that a second proposition follows from that – where it is suggested that conduct prior to becoming a member of a relevant professional body can retrospectively be characterised as conduct amounting to professional misconduct, clear words are required in the statute to permit such conclusion. He stated that his third proposition follows on from his second – conduct prior to entering a profession may clearly be relevant to the fitness of an individual to practise but it is a matter of legislative judgment as to the level of scrutiny employed. Mr Summers stated that his fourth proposition was that where conduct comes to light subsequent to entry which tends to suggest that the individual may be unfit to join the profession the governing statute may specify what that behaviour may consist of as does the Solicitors (Scotland) Act 1980 at Section 53(1)(b).

Mr Summers stated that the success or failure of his submission turns on the wording of that Act. He stated that in the English authorities a different statute is being looked at which has different words.

Mr Summers referred the Tribunal to the wording of Section 53 which states:

> "(1) Subject to the other provisions of this Part, the powers exercisable by the Tribunal under subsection (2) shall be exercisable if –
>
> (a) after holding an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct, or
>
> (b) a solicitor has (whether before or after enrolment as a solicitor), been convicted by any court of an act involving dishonesty or has been sentenced to a term of imprisonment of not less than two years, or
> (c) ….."

Mr Summers submitted that conduct has to be professional misconduct. A person may have been in another profession before qualifying as a solicitor. Mr Summers

submitted that the said section identifies conduct worthy of blame committed in a professional capacity and that is the nature of professional misconduct. He stated that this is a very straightforward and simple point.

Mr Summers stated that it is clear that the Law Society as it applies the said Act is entitled to look at the solicitor's prior life but what the Act does not do is open the whole of prior life to scrutiny; an indiscretion committed as a student is not opened up to scrutiny. However, the Act identifies what sort of behaviour the Law Society is entitled to take into account. The type of prior behaviour mentioned in Section 53(1)(b) being a conviction for dishonesty or being sentenced to a term of imprisonment for not less than two years. Mr Summers submitted that Section 53 stipulates the behaviour capable of opening up the jurisdiction of the Tribunal.

Mr Summers referred to the authorities relied on by the Complainers. He referred the Tribunal to Page 3 of his written submission, and to the quotation from the case of In Re A Solicitor (Ofosuhene) [1997] EWHC Admin 173.

In response to a question from the Tribunal, Mr Summers indicated that he had not applied his mind to the position of a trainee solicitor as opposed to a solicitor. He stated that in this case the Respondent had been a partner for two months before the issues came to light. He had been a trainee in another firm. There was no suggestion that he acted inappropriately as a trainee for M G Brown.

The Chairman asked Mr Summers to consider the situation where a law student got a solicitor to sit an exam and then obtained the degree credit and became a member of the profession. He asked if Mr Summers was suggesting that the Tribunal could not take into account that the solicitor made a false representation. The Chairman asked Mr Summers if he was arguing that the Tribunal are inhibited from dealing with such an individual because that happened before he was admitted as a solicitor.

In response Mr Summers stated that if it emerged that the solicitor had been practising that would be a continuing act by holding himself out as a solicitor on a daily basis. He stated that the Tribunal could look at it from the point of view of the university and criminal sanctions are available to the university. He stated that the issue is that in

continuing to represent himself as something he is not is a continuing act so professional misconduct arises as a continuing act.

In relation to the English authorities, Mr Summers submitted that he finds it almost impossible to understand how a misdemeanour committed by someone outwith the profession can be counted as professional misconduct.

Mr Summers referred the Tribunal to paragraph 6 of his written submission which makes reference to the case of Ofosuhene and to the judgment of Lord Justice Rose at paragraphs 11 – 17 of that judgement where Lord Justice Rose states that you cannot look for guidance to other statutes governing other professions.

Mr Summers stated that the precursor to jurisdiction is that the person must be a solicitor. He submitted that the question is then how "professional misconduct" is interpreted within the Section 53. Mr Summers submitted that the Tribunal should look at what the words ordinarily mean. He stated that unless there is some definition in the statute it should be construed in ordinary language. The person in the street would think that professional misconduct would be conduct against one's professional standards. Was someone guilty of professional misconduct when he climbed the flag post on Labour Day and burned the flag? No, because he was a student then. Mr Summers submitted that if someone was previously a member of another profession and did something against the standards of that profession such an act would not be professional misconduct as a solicitor. Mr Summers submitted that the Tribunal must not allow anxiety at the nature of the allegations made in this Complaint to deflect from the main task of determining what amounts to professional misconduct in this Complaint.

Mr Summers stated that Section 53(1)(b) of the said Act directs the Tribunal to look back to previous conduct. He submitted that that implies that the Tribunal should not look back unless in those circumstances.

Mr Summers stated that if this was England, he accepted that the Judgement of Lord Justice Rose in the Ofosuhene case at paragraphs 13 and 14 (as detailed in the written submission) would bind him and he would not be able to make this point. However

Mr Summers drew attention to the different Scottish legislation and stated that the drafters of Section 53 have anticipated this issue and have used words to identify behaviour which would open up the jurisdiction of the Tribunal.

The Chairman suggested that the phrase "professional misconduct" is defined by the test in the case of Sharp –v the Law Society of Scotland 1984 SC 129 and suggested that this test is what applies to members of the profession, no matter when the misconduct took place.

Mr Summers submitted that that construction is strange and absurd and means that conduct when it occurred could not be so characterised. He stated that the premise of that proposition is that at the point of entry to the profession, conduct perpetrated one year or ten years before could be characterised as professional misconduct retrospectively.

The Chairman suggested that when one applies one's mind to what may be "serious and reprehensible conduct" one does not apply one's mind to the length of experience in the profession.

Mr Summers submitted that in this case what we have are acts committed before the Respondent entered the profession, in some cases many years before. The essence of what is being alleged is that acts committed in 1996 when a cheque was paid into the MacFactor Homes account with the knowledge of the Respondent could not be professional misconduct then but when he entered the profession that act can now be characterised as professional misconduct. Mr Summers submitted that the argument made by the Complainers is that if there is gross misconduct on an individual's part it is accepted that it could not be professional misconduct at that stage but when he later enters the profession it could be judged against that standard.

Mr Summers asked the Tribunal to consider what minimum standard, behaviour needs to cross before pre-entry conduct comes to the notice of the Tribunal and whether action can be taken in relation to that conduct. Mr Summers submitted that it is the Tribunal's task to look at the words of Section 53.

Mr Summers submitted that on entry to the profession the Respondent's application form which was lodged had questions on it regarding previous convictions and bankruptcy. This is to allow the Law Society to deal with pre-entry behaviour.

The Chairman suggested that a reason why Section 53(1)(b) is there is to prescribe a different procedure. There is no inquiry necessary for cases in involving convictions falling within that subsection. In such cases it is only necessary to aver the existence of such a conviction and to produce the relevant extract. The Chairman suggested that the task of the Tribunal is to come up with a definition of what professional misconduct means.

Mr Summers stated that all he was seeking to take from Section 53(1)(b) is a modest point which is that there are words in this statute which divert you to pre-entry conduct.

The Chairman asked whether Mr Summers was suggesting that the English Tribunal are not satisfying themselves that what is proved amounts to professional misconduct when they strike off.

Mr Summers submitted that it is a far wider task. The English Tribunal are looking at whether what a solicitor has done in a former life has impacted on his fitness to be a solicitor. The Tribunal's role is to look at the words of the statute given their ordinary meaning. The Tribunal should look at the words of the statute and ask if there is anything else which entitles the Tribunal to give the words other than their ordinary meaning.

The Chairman suggested that professional misconduct must surely be interpreted against the background of the Tribunal's duty to protect the interests of the profession.

Mr Summers stated that he would have had no difficulty if what the Fiscal had tried to do was to say that his role is to prove that the Respondent was involved in a scheme to embezzle and that he was going to identify the facts from which the correct inference can be drawn regarding that, for example, bank statements identifying money from an unknown source. However, Mr Summers submitted that is not the way that the

Complaint has been framed in this case. He accepted that in order to prove the Respondent committed professional misconduct there requires to be evidence that there was a pattern of behaviour in his pre-entry life. Mr Summers submitted that this Complaint does not do that, it characterises the behaviour as professional misconduct whether before or after entry. He submitted that it is open to the Tribunal to rely on behaviour pre-entry to prove post-entry professional misconduct as the inference will grow more steadily as the extent of pre-entry behaviour mounts.

SUBMISSIONS ON BEHALF OF THE COMPLAINERS IN RELATION TO THE FIRST AND SECOND PRELIMINARY PLEAS RELATING COMPETENCY AND RELEVANCY

In response Mr Reid stated that he wished to draw the Tribunal's attention to his written submissions and invited the Tribunal to take these into account when considering the preliminary pleas.

Mr Reid stated that he was seeking to rely on the application of the English Authorities regarding the standard applied in England. He stated that Mr Summers made reference to paragraph 14 of the decision in Ofosuhene and also relies upon Sir Thomas Bingham's comments in the case of Bolton-v-The Law Society [1994] 1 WLR 512 which are referred to in Ofosuhene.

Mr Reid invited the Tribunal to adopt a wider and more expansive interpretation of professional misconduct. He submitted that professional misconduct can pre-date entry. He invited the Tribunal to follow the same approach as the English Courts. He stated that his understanding was that there is no limitation on their powers either.

The Chairman invited Mr Reid to address the Tribunal further as to why the interpretation should be wider.

Mr Reid stated that the approach taken by the English authorities is that in order to enjoy the benefits of professional certification, certain standards need to be met. He stated that dishonesty has been held to be professional misconduct. Mr Reid stated that Section 53(1)(b) is an emphasis by the legislator of the standards required. He stated that in non-section 53(1)(b) cases an inquiry has to be held.

FURTHER SUBMISSIONS ON BEHALF OF THE RESPONDENT IN RELATION TO THE FIRST AND SECOND PRELIMINARY PLEAS RELATING TO COMPETENCY AND RELEVANCY

Mr Summers stated that there was a point of clarification he wished to make. He stated that there are allegations in the Complaint which are alleged to have taken place after the Respondent's entry to the profession so the whole Complaint cannot fall today.

The Chairman asked Mr Summers if he still required a proof before answer if the Tribunal find in favour of the Respondent today.

Mr Summers stated there is still another preliminary plea which he hoped the Tribunal would uphold and then he would be left with a Complaint alleging failure to respond only.

DECISION IN RELATION TO THE FIRST AND SECOND PRELIMINARY PLEAS RELATING TO COMPETENCY AND RELEVANCY

The Tribunal agreed with Mr Summers that whether or not there is jurisdiction is dependent solely on the legislative provisions i.e. Sections 51 and 53 of the Solicitors (Scotland) Act 1980. Mr Summers submitted that the inclusion of the words "whether before or after enrolment as a solicitor" where they occur in s53(1)(b) means that in interpreting s53(1)(a) the relevant conduct can only be post admission. He stated in paragraph 4 of his submission –

"The Complainer's principal proposition is that "professional misconduct" requires the person in question to be at the relevant time a "professional" subject to the discipline of the legal profession. Where a person is not a member of the profession (or indeed any profession) he is answerable for his conduct in the same way as any member of the public and may be prosecuted. Upon entry to the profession he becomes liable to its discipline. It is submitted that unless the misconduct was misconduct when it took place it cannot become professional misconduct thereafter by virtue of the person joining the legal profession."

Mr Summers stated in paragraph 5 of his submission –

"Section 53(1)(a) and (b) of the Solicitors (Scotland) Act 1980 provide as follows –

> (The) powers exercisable by the Tribunal under subsection (2) shall be exercisable if
>
> (a) after holding an inquiry into a complaint …the Tribunal is satisfied that he has been guilty of professional misconduct, or
>
> (b) a solicitor has (<u>whether before or after enrolment as a solicitor</u>) been convicted by any court of an act involving dishonesty….

The Respondent observes that the two provisions are worded differently and submits that soundly construed it is only where a solicitor has been convicted of an act of dishonesty that the Tribunal would be entitled to rely on conduct prior to the Respondent's entry into the profession. Had the intention been to hold persons responsible for breach of the standards applicable to the legal profession prior to their entry into that profession he states that these words would have appeared in both subsections (a) and (b)."

However, in the view of the Tribunal, subsections (1) (b) and (c) of Section 53 control the requirements for inquiry and nothing more. Sections 53(1)(b) and (c) obviate the need for any inquiry. There are therefore only two requirements for both sections 53(1)(a) and (b) to apply and result in the powers in s53(2) potentially being exercised, either -

> (a) after holding an inquiry into a complaint …the Tribunal is satisfied that a solicitor has been guilty of professional misconduct,
>
> or
>
> (b) a solicitor has (whether before or after enrolment as a solicitor) been convicted by any court of an act involving dishonesty or has been sentenced to a term of imprisonment of not less than 2 years

In relation to Section 53(1)(b) there is no need for inquiry, the Complainers only need to aver that there is evidence that a solicitor has been convicted of an offence of dishonesty or that a sentence of 2 years imprisonment has been imposed.

The Tribunal then considered the question: What is "professional misconduct" ?
There are only two possible interpretations. Either it is misconduct of some kind occurring solely during membership of the profession, or it is conduct which in the view of the professional members at the time, requires opprobrium in terms of the Sharp test. In addition to describing professional misconduct as "serious and reprehensible behaviour" Lord Emslie stated in his judgement in the case of Sharp –v- The Law Society of Scotland 1984 SC 129 -

"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 made."

The Tribunal were referred to the decision in the English case of In Re A Solicitor (Ofosuhene) [1997] EWHC Admin 173 where the English statutory provisions place no limitation of time on the conduct complained of against the solicitor. However, the case was of interest in that the charge was "being guilty of professional misconduct whilst an unadmitted clerk". At paragraph 14 of the judgement of Lord Justice Rose he states -

"It is entirely consonant with this purpose that the tribunal should exercise jurisdiction over one who is a solicitor by reference to past behaviour whatever his or her status at the time of that behaviour."

There is no suggestion that it would be incongruous or an oxymoron to attribute the conduct of an individual as professional misconduct before he had gained entry to the profession.

Other authorities referred to concentrated more on the right of the professional body to refuse admission by reference to prior conduct and it was not disputed that the Law Society of Scotland at the time did not require an applicant for admission to declare previous convictions or conduct which if known would have an adverse effect on the reputation of the profession if he were to be admitted.

In the view of the Tribunal, the reasoning in the Sharp decision is authority for the proposition that the whole circumstances therefore permit a varying standard of conduct according to the degree of culpability. The Tribunal do not feel constrained to interpret the phrase "professional misconduct" relative to the period of time in the profession, the Tribunal prefers the interpretation that it is merely descriptive of the type of conduct that will result in the powers contained in s53 (2) being exercised.

The Tribunal therefore Repels the Respondent's pleas in law numbers 1 and 2.

The debate was adjourned to a date to be fixed.

4 SEPTEMBER 2009

SUBMISSIONS FOR THE RESPONDENTS ON THE THIRD PRELIMINARY PLEA RELATING TO SPECIFICATION

Mr Summers stated that one of the features of the Record is to provide a clear understanding as to matters of fact on which the Fiscal will rely. One of these facts is the knowledge on the part of the Respondent of the fraudulent scheme. Mr Summers submitted that this is not a case of guilt by association. He stated that it is clear that the Record in seeking to focus knowledge, willing participation or permitting the scheme which requires a knowledge of what was being done on the part of the Respondent. If that is what is being sought to prove, the Respondent requires to know what evidence there is of this which the Law Society intends to rely on. The Tribunal will require to know this too, otherwise it could be a long unwieldy hearing.

Mr Summers submitted that it is open to the Fiscal to invite the Tribunal to say that possible inferences can be drawn from conduct. He stated that he did not know how precisely the Fiscal is seeking to prove his case. Is the Fiscal saying that as

Respondent was married to and in business with his wife who was guilty of a fraud that it is therefore incredible for the Respondent to have known nothing about the fraud? Mr Summers submitted that if there is a "smoking gun" which shows that the Respondent was involved in the scheme, it is only fair that the Record discloses these facts and allows fair preparation to be made on that basis. Mr Summers stated that the standard of proof is beyond reasonable doubt and that as the Respondent's representative he requires a Record which outlines the material by which it is proposed to prove the case against the Respondent.

Mr Summers referred the Tribunal to the averments of duty in Article 10 of the Record, listed at sub paragraphs (a)- (g). He stated that the crux of this is summed up by the passage at Article 10.1 –

"In particular the Respondent on a repeated basis willingly permitted or assisted in a scheme of embezzlement of client funds from the firm Macadams Solicitors utilising them for his own personal gain".

Mr Summers stated that what is being alleged is that either the Respondent permitted something to happen, as he may not have been the author of the fraud, or alternatively, that he assisted in the fraudulent scheme

Mr Summers advised that Tribunal that Mrs Macadam was imprisoned for a period of 3 years on 10 December 2008 on a charge of embezzlement. The Respondent was not prosecuted.

Mr Summers stated that what the Respondent now faces is a complaint of embezzlement. He stated that the Fiscal makes the point that what is before the Tribunal it is not embezzlement, but professional misconduct on the basis of embezzlement. Mr Summers submitted that the Respondent is being asked to defend a complaint of embezzlement and that the Record at some points does not support that case. Mr Summers then gave some examples of this:-

- Article 3.1 - The explanation of Macadams Limited's incorporation

- Article 3.2 - The explanation of what the Judicial Factor found after her appointment. The difference between the corporate entity of Macadam Limited and Macadams Solicitors not being brought to the client's attention.
- Article 3.3 - Lending institutions did not know either about the two different entities.

Mr Summers referred to a sentence in Article 3.3 –

"The setting up of the company and the manner in which the Respondent allowed funds to be placed in the company bank account was a deliberate deception on the part of the Respondent."

Mr Summers submitted that this is not to do with embezzlement. He stated that it may inform another charge of misconduct but is nothing to do with embezzlement.

Mr Summers submitted that the essential point is that it is damaging material but it is not connected with the averments in the Complaint. Embezzlement is about misappropriation of funds and he submitted that these averments should be treated as irrelevant.

Mr Summers submitted that a fault line runs through the entire pleadings. He stated that this is an attempt by the Complainers to deploy the material set out in paragraph 2.3, which narrates a series of dealings and assertions made about these dealings into several key areas of the Complaint. He stated that there are detailed pleadings in Article 4 of the Complaint regarding a client Ms A and the essence of the complaint concerning that client is set out at Article 4.2. Mr Summers referred the Tribunal to Article 4.2 and stated that the averments from Article 2.3 are referred to and incorporated into this Article. Mr Summers submitted that the pleadings are linked back to Article 2.3 as the basis for the complaint in relation to Ms A.

Mr Summers referred the Tribunal to Article 5.1 of the Complaint and stated that the averments from Article 2.3 are again incorporated into this Article which deals with a complaint about the Mr B Executry. The same reference is incorporated into Article

7.1 of the Complaint which deals with a complaint about the Ms C Executry. Similarly the same reference is incorporated into Article 8.1 of the Complaint which deals with a complaint about the Ms D Executry and is referred to in Article 10 which deals with averments of duty. Mr Summers referred the Tribunal to the following sentence from Article 10 –

"In particular the Respondent on a repeated basis willingly permitted or assisted in a scheme of embezzlement of client funds from the firm Macadams Solicitors utilising them for his own personal gain."

Mr Summers submitted that in order to prove this Complaint the Record is constantly referring back to Article 2.3 for the detail of the misconduct. Mr Summers submitted that Article 2.3 does not begin to achieve that objective. Mr Summers referred the Tribunal to Article 2.3 as this is central to the case. He asked the Tribunal to consider the exact wording of Article 2.3 on page 5 of the Record.

Mr Summers summarised what one is able to derive from that paragraph.

1. According to the Complaint, the Respondent was in a partnership called MacFactor Homes. Mr Summers submitted that this fact is in dispute.
2. From line 5 downwards, the Respondent paid money into the MacFactor Homes bank account to allow payments to be made to clients.
3. At this time (Mr Summers submitted that it is not specified what time is being referred to and that timing is important here) the Judicial Factor identifies considerable sums of money being paid from Macadam Solicitors. The timing is important because the Respondent was not always a partner.

Mr Summers submitted that it is not clear from the Record whether the Complainers are alleging that the Respondent was committing embezzlement or that his former wife was and he knew about it. Mr Summers submitted that the Record does not specify how either alternative is going to be proved.

In response to a question from the Chairman, Mr Reid confirmed that the Complaint does not suggest that the Respondent ought to have known what happened.

Mr Summers stated that he noted this and that the gist of the Complaint was therefore that either the Respondent knew of the scheme or that he deliberately closed his eyes to it.

Mr Summers submitted the other crucial part of this Article concerns the Respondent's part in the embezzlement. He referred the Tribunal to line 16 of Article 2.3, where the word "theft" is mentioned. –

"In this fashion the Respondent was responsible for the theft of monies from clients of the firm Macadams Solicitors."

Mr Summers submitted that it is embezzlement, not theft which is alleged. Mr Summers asked the Tribunal to consider how this Complaint informs those representing the Respondent on a factual basis of the Respondent's knowledge of what was happening. Mr Summers stated that the Complaint sets out that the Respondent was a solicitor, and pointed out that this is not correct as some of the executries pre-dated his joining the profession. Mr Summers submitted that there is no strict liability. He stated that just because someone is a solicitor does not mean that they are guilty when something goes wrong.

Mr Summers moved on to his next point which related to the following phrase in Article 2.3 –

"The Respondent was in control of the bank account operated by MacFactor Homes during this period."

Mr Summers indicated that there is a glimmer of something here which could tie the Respondent to the embezzlement if the Article was properly pleaded. However, he submitted that there is no detail here, for example, no averments that the bank accounts were sent to the house. Mr Summers submitted that it is not sufficient in such an important case as this for a single sentence to be used to specify how the Respondent can be liable for embezzlement.

Mr Summers stated that to understand the point that he had just made, the Tribunal should turn to the averments regarding the Ms A Executry at Article 4, pages 12- 15 of the Record. He submitted that there are a whole series of averments there which demonstrate a classic example of the problems in these pleadings. All the payments referred to were made before the Respondent was a solicitor, so if knowledge is to be based on imputed knowledge as a solicitor, he was not a solicitor at the material time.

Mr Summers submitted that the only other material which potentially might infer knowledge on behalf of the Respondent is found at Article 2.1 in the following sentence -

" The Respondent was at all material times married to, living together with and sharing joint and family finances with the solicitor Valerie Elaine Mackenzie Macadam who was formerly the sole practitioner of and responsible for running the firm Macadams Solicitors prior to the assumption of the Respondent as a Partner in that firm on 1st October 2003."

Mr Summers submitted that if that is what is relied upon, it is grossly inadequate. There needs to be something more thorough and detailed than what the Complaint contains. It is not enough to say he was living with a convicted fraudster.

Mr Summers concluded by commending his detailed Note of Argument to the Tribunal, which includes examples of the fundamental issues which he had highlighted.

Mr Summers stated that this is the second Complaint that the Law Society has raised against the Respondent. The first was withdrawn. Mr Summers stated that his written submission has been in the hands of the Fiscal for almost a year and he invited the Tribunal to uphold his pleas and dismiss the sections of the Complaint as requested and not give the Fiscal another opportunity to amend. Mr Summers submitted that there is an expectation for people like the Respondent that such matters should be dealt with as expeditiously as possible.

In response to a question from the Chairman, Mr Summers accepted that the test of relevancy should be applied to the weaker of the two alternative arguments.

SUBMISSIONS FOR THE COMPLAINERS ON THE THIRD PRELIMINARY PLEA RELATING TO SPECIFICATION

Mr Reid commended the terms of his written submission to the Tribunal. In relation to the criticism directed at Article 2.3, he submitted that based on the averments of the Society he will seek to prove that there was a scheme of embezzlement in the firm of Macadams Solicitors. There were two separate bank accounts set up and used to launder the ill gotten gains. Mr Reid stated that he had written to those instructing Mr Summers to advise them that he is not aware of any evidence of the Respondent paying in any of the monies.

Mr Reid submitted that the essence of his argument is as set out in the Complaint. The Respondent was married to Valerie Macadam and they were living together at the time of the embezzlement. They worked closely together and set up MacFactor Homes Limited together and that entity carried on as a partnership. They set up Macadams Limited together and both entities were used to launder clients' money. Mr Reid stated that he will lead evidence to prove that MacFactor Homes was a very modest entity not worth much money with only small amounts of money going through its bank account. Mr Reid stated that in particular he would prove that bank statements were delivered to the Respondent and that he was involved in meetings with bank officials, correspondence with accountants and the Inland Revenue regarding both entities which he operated from the address of the company. He would seek to prove that payments of a considerable size of around £511,000 were received into the accounts during the period when the Respondent was a solicitor. He would also seek to prove that payments totalling around £4 million were received by Macadams Limited and that the company was doing next to no business at the time those payments were received.

Mr Reid stated that he will prove that there was substantial activity in the accounts which the Respondent was made aware of, and he did nothing. Mr Reid stated that he will attempt to prove that the Respondent either knew about the scheme or turned a

blind eye. Mr Reid stated that there are averments about what the Respondent did with the money and that he would attempt to prove that. Mr Reid stated that that is the essence of his case and submitted that there are ample averments in the Record.

In response to a question from the Tribunal as to how the Complaint specifies that the Respondent was either aware or turned a blind eye to the scheme, Mr Reid stated that there are averments about the use of the embezzled funds. Mr Reid stated the Tribunal should read Article 2 as a whole. He submitted that the crux of his case is the Respondent's control of the bank accounts, the fact that there were small amounts going through those accounts then that changed to millions of pounds and the fact that the Respondent used some of the funds.

In response to a question from the Tribunal as to where fair notice of this is found Mr Reid directed the Tribunal to Article 2.3 of the Complaint. He stated that Article 2.3 avers that the Respondent was insolvent then a flood of money arrived in these accounts at the time he was a solicitor. Mr Reid stated that the paying out of the money is an example of how the Respondent would have noticed the large amounts of money. Mr Reid stated that he can prove that the Respondent knew what was going on. Mr Reid stated that he had correspondence which would show that the Respondent is an astute businessman who knew what he was doing. Mr Reid stated that he accepted that he would have to prove knowledge on the part of the Respondent before he could prove that he turned a blind eye. Mr Reid stated that he intended to lead evidence to demonstrate active involvement with the bank accounts. Mr Reid stated that he will lead evidence from bank managers and accountants who will speak to the fact that the Respondent was actively involved with the bank accounts and would argue over small charges levied on these accounts.

Mr Reid stated that he would hope to prove that when the money reached the accounts the Respondent was in control of those accounts.

In response to a question from the Tribunal as to what the phrase “at this time” four lines from the foot of page 5 of the Record referred to, Mr Reid stated that later at line 9 of page 6 of the Record this period was referred to in full -

"During the period between 18th March 2003 and 7th November 2003 the Respondent was at all times a solicitor."

FURTHER SUBMISSIONS FOR THE RESPONDENTS ON THE THIRD PRELIMINARY PLEA RELATING TO SPECIFICATION

Mr Summers submitted that it is not permissible to use an oral hearing to amplify the pleadings. He stated that he could see nothing in the Record which states that an inference can be drawn from a dormant account becoming an active one.

In relation to the significance of the words "at this time" Mr Summers accepted that this is a link to the later specified dates but submitted that this affects the rest of the pleadings as they mention times when the Respondent is not a solicitor.

Mr Summers submitted that justice would not be done on the basis of this Record.

DECISION ON THE THIRD PRELIMINARY PLEA RELATING TO SPECIFICATION

The Tribunal are aware that the test of relevancy is as expressed in Jamieson-v-Jamieson 1952 SC (HL) 44 -

"An action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved."

This can be summed up by asking; If the Complainers prove what they have averred, can they succeed? The averments to be considered when applying that test are those which pass the specification test. Is fair notice given of how it is intended to prove either (a) participation in the scheme or (b) having knowledge that the embezzlement was being committed and allowing it to continue and thereby "wilfully and deliberately made himself blind …." (as stated in page 6 of the Record).

Of consent the Tribunal requires to test the relevancy of the alternative statements of fact against the weaker alternative which is that outlined in (b) supra.

There are no averments as to the Respondent having knowledge. There are a variety of averments about some circumstances that give rise to an inference that it is possible or likely that he had knowledge of some matters relating to the business of Macadams Solicitors and MacFactor Homes. The Tribunal reached the view, however, that although from the verbal submissions of Mr Reid there are further factors that could have been averred they have not been. The Tribunal are quite satisfied that the crucial averment in the Complaint which is "being in control of the bank account" is entirely lacking in specification. There are no averments giving the Respondent notice of how the Complainers will prove this crucial averment.

Other averments are irrelevant as they give no indication of the inferences which the Complainers intend to draw from them. Examples of such averments are (i) that the Respondent was married to the perpetrator of the embezzlement; (ii) that clients of Macadams Solicitors had no connection with MacFactor Homes and (iii) that the Respondent was responsible for the legitimate activities of MacFactor Homes.

In the Tribunal's view, whatever is then left in the Complaint, even if proved, could not result in a finding of "having knowledge of the embezzlement scheme he permitted it to continue by turning a blind eye" that finding requiring to be proved to the standard of beyond reasonable doubt. The Tribunal therefore sustained the plea as to specification and deleted the averments in the Complaint other than 1.1, 9.1 and 11.1(ii).

The Tribunal then heard submissions on expenses. Mr Summers submitted that as he had been successful in having most of the Complaint deleted, expenses should follow success and expenses should therefore be awarded against the Complainers. Mr Reid submitted that the Tribunal should not award expenses against either party as there had been mixed success in relation to the preliminary pleas argued on two separate days of debate. Having considered these submissions the Tribunal decided that no expenses should be awarded against either party in relation to the proceedings to date for the reasons outlined by Mr Reid.

The Chairman indicated that the Tribunal's decision left the Complaint now relating only to an allegation of misconduct as detailed in Articles 9 and 11.1(ii) – a failure to respond to Law Society correspondence.

Mr Summers indicated that his client continued to dispute those averments.

Mr Reid indicated that given the Tribunal's decision he would require to take instructions as to whether the Complainers wished to proceed with the reminder of the Complaint.

The Tribunal adjourned the Complaint until 30 September 2009 for a substantive hearing in relation to the remaining averments. The Tribunal ordered that publicity be given to this decision but that such publicity should be deferred until the conclusion of the substantive hearing in relation to this Complaint.

In advance of the hearing on 30 September Mr Reid indicated that the Complainers did not wish to proceed with a hearing in relation to the remaining averments. On 30 September 2009 a differently constituted Tribunal considered a motion from the Complainers that the remaining averments in the Complaint be dismissed and agreed to dismiss the remaining averments in the Complaint with no expenses due to or by either party.

Chairman