

**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**

**against**

**JOHN ATUAHENE, Solicitor, 72  
Hawkshead Road, Paisley, and  
RICHARD THOMAS  
THORBURN, Solicitor,  
Thornhome House, By Carluke**

1. A Complaint dated 13 July 2005 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society (hereinafter referred to as "the Complainers") requesting that John Atuahene, Solicitor, 72 Hawkshead Road, Paisley (hereinafter referred to as the "First Respondent") and Richard Thomas Thorburn, Solicitor, Thornhome House, By Carluke (hereinafter referred to as the "Second 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 Respondents. Answers were lodged by both Respondents. A Record was prepared and lodged with the Tribunal. Preliminary pleas were intimated on behalf of the Second Respondent.
3. In terms of its Rules the Tribunal appointed a preliminary hearing to be fixed on 1 February 2006 and notice thereof was duly served on the Respondents.
4. At the hearing on 1 February 2006 the Complainers were represented by their Fiscal, Valerie Johnston, Solicitor, Dunfermline. Both Respondents were

present and represented themselves. The First Respondent had not lodged and confirmed he did not wish to make any preliminary plea.

5. The Fiscal, in the course of her submissions, sought leave to lodge a Minute of Amendment to which there was no objection from the Second Respondent. As this was directed to the complaints he had raised this was allowed to be received and the record amended in terms thereof. The question of reprinting the record was reserved at this stage.
6. Having heard submissions by the Second Respondent and by the Fiscal on behalf of the Complainers and having considered these submissions together with the written submissions lodged by the Fiscal, the Tribunal dismissed the pleas of ultra vires, and relevancy and continued the plea of oppression until after evidence has been led. The Tribunal Directed that written reasons be issued in due course and that the Complaint should be set down for a hearing on a date to be later assigned. The Tribunal decided that the issue of expenses be reserved until the conclusion of the matter. The Tribunal pronounced an Interlocutor in the following terms :-

Edinburgh, 1 February 2006. The Tribunal having considered the Complaint dated 13 July 2005, at the instance of the Council of the Law Society of Scotland against John Atuahene, Solicitor, 72 Hawkshead Road, Paisley and Richard Thomas Thorburn, Solicitor, Thornhome House, By Carluke, Dismiss the Second Respondent's preliminary pleas of ultra vires, and relevancy, continued consideration of the plea of oppression until evidence has been led and adjourned the Hearing of the Complaint to such future date as may be fixed; Direct that the issue of expenses be reserved until the conclusion of the matter and Direct that publicity be given to this Decision but that such publicity be deferred until a date to be agreed by the Tribunal.

(signed)

**K R Robb**

**Vice Chairman**

7. A copy of the foregoing Interlocutor together with a copy of the Decision 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

**K R Robb**  
**Vice Chairman**

**NOTE**

Preliminary pleas were submitted on behalf of the Second Respondent and the case was set down for a debate on these preliminary pleas on 1 February 2006. The First Respondent was present and confirmed that he did not wish to make any preliminary pleas.

**SUBMISSIONS FOR THE SECOND RESPONDENT**

The Second Respondent advised that his preliminary pleas were three-fold; firstly ultra vires, secondly relevancy and thirdly oppression.

In relation to the first preliminary plea of ultra vires the Second Respondent stated he agreed with most of the Fiscal's written submission. He advised that he had opportunity to consider the two authorities relied on by her, the earlier case of Glasgow Corporation-v-Flint 1966 SC 108 and the later case of Stewart-v-Perth & Kinross Council 2004 SLT 383. The Second Respondent submitted that the main issue in relation to his first argument is the specific authority of the Council of the Law Society to make the "accounts rules". He acknowledged there is a general power under Section 34 of the Solicitors (Scotland) Act 1980 (hereinafter referred to as "the 1980 Act") and a specific power under Section 35 of that Act.

In terms of Section 34(1) -

"...the Council may, if they think fit, make rules for regulating in respect of any matter the professional practice, conduct and discipline of solicitors and incorporated practices..."

Whereas under Section 35(1) -

"the Council shall, subject to Section 34(2) and (3), make rules (in this Act referred to as "accounts rules") .....

The Second Respondent submitted that it was important to note that these rules, under section 35, are known as the "accounts rules" and are a separate set of rules. He

stated that Parliament has made this distinction. His objection was that there is nothing in Section 35 which covers the operation of accounts by a solicitor in relation to his own business. He submitted that Section 35 is directed solely to clients' business and that this is a material distinction.

The Second Respondent submitted that the first and most obvious difference under Section 35 of the said Act is that the Law Society are required to make rules whereas under Section 34 they may make rules. The Second Respondent submitted that it is instructive to look at the terms of Section 37 of the 1980 Act. That section contains the accountant's certification provisions. The Second Respondent stated that there are no rules as to accountant's certification in force at this time and therefore the issue does not relate to the present case. However, this section is instructive as it says in subsection 3 that –

“ the Council shall make rules....”

The Second Respondent submitted that there is a requirement to make rules as in the case of the “accounts rules” and there is reference elsewhere in the Act to the accountant's certification rules. The Second Respondent submitted there is a proviso under subsection 6 of Section 37, which provides –

“.....

(6) If the Council are of the opinion that satisfactory evidence of compliance with the accounts rules for the time being in force will be secured by some other method other than by delivery of an accountant's certificate under subsection (2), they may make rules –

(a) prescribing –

- (i) that other method;
- (ii) the terms and conditions to be observed in connection therewith; and
- (iii) the procedure to be followed by solicitors or incorporated practices desiring to adopt that other method, and

(b) containing such incidental, consequential and supplementary provisions relative thereto as the Council may consider necessary or proper;

and a solicitor who satisfies the Council that he or, as the case may be, an incorporated practice which satisfies the Council that it is complying with rules made under this subsection shall not be required to deliver an accountant's certificate in pursuance of subsection (2)."

The Second Respondent stated that there are no "accountant's rules" and that from 1997 the Solicitors (Scotland) Accounts Rules have provided an alternative way under reference to subsection 6. He submitted that this decision is at least a questionable one. He submitted that the Law Society has taken the view that it has the right to make this option for the whole profession. The Second Respondent submitted that the Law Society is a public body and takes its obligations seriously but that it seems to him that they have chosen to do something outwith their remit. He submitted that Section 37 of the 1980 Act gives the option of an alternative to individual solicitors and not to the Law Society. In his view, the Law Society does not have the right to exercise the option in Section 37(6)(a)(iii). The Second Respondent submitted however, that the use of the word "desiring" makes it clear that the option is given for the individual practice. He submitted that this Act is quite carefully drafted with specific provisions and that it is important when looking at the decisions in both of the cases referred to by the Complainers that the exact message conveyed by the specific provisions are looked at in each case. He stated that in each case the arguments raised were rejected.

The Second Respondent indicated that he thought it useful to draw the Tribunal's attention to the historical basis for these provisions as contained in the Legal Aid and Solicitors (Scotland) Act 1949, Section 20 (hereinafter referred to as the 1949 Act). The Second Respondent submitted that the 1949 Act was the precursor to Sections 34 and 35 of the 1980 Act and that it is possible to see some of the wording carried through to the 1980 Act. The Second Respondent referred to subsection 1 of the 1949 Act –

(1) "The Council of the Society shall make rules –  
 (a) as to the opening and keeping by solicitors of accounts and the deposits at banks for moneys not belonging to them....."

Section 35 of the 1980 Act repeats this wording.

Subsection (c) of Section 1 of the 1949 Act goes on to say –

“(c) subject to the provisions of the Sixth Schedule to this Act, as to the action which the Council may take to enable them to ascertain whether or not the rules are being complied with;

and may, if they see fit, make rules for regulating in respect of any other matter the professional practice, conduct and discipline of solicitors.”

This is the same wording as is now found in Section 34 of the 1980 Act. The Second Respondent submitted that from the outset there has been a distinction between the “accounts rules” and other rules and it is important to notice that the investigations referred to in subsection (a) of Section 20 of the 1949 Act are specific to the “accounts rules”.

The Second Respondent submitted that there are important consequences from this distinction. He noted the reference in the Fiscal’s written submissions to Section 41 of the 1980 Act which deals with the power to seek the appointment of a judicial factor. He stated this is a useful allusion as the reference under Section 41 is specific –

“where the Council, in exercise of any power conferred on them by the accounts rules, have caused an investigation to be made of the books, accounts and other documents of a solicitor or an incorporated practice, and on consideration of the report of the investigation, the Council are satisfied....

(a) ....

the Council may apply to the court for the appointment of a judicial factor...”

The Second Respondent submitted that Parliament by primary legislation - in Section 41 of the 1980 Act, clearly limits the use of a judicial factor to cases where the Society has previously carried out an inspection under the “accounts rules”. Section 41(a) makes specific reference to the “accounts rules” and (b) and (c) follow on from that. The argument for the Complainers is that they are not limited in the same way; their inspections are more general in that they refer to liabilities exceeding assets. The Second Respondent submitted that his argument is that a reading of the

legislation indicates why the Complainers have made a mistake – they have failed to read these references to liabilities exceeding assets and maintaining the books etc. by reference to the “accounts rules”. The Second Respondent stated that he understood the Complainers argument is that these particular subsections have a general reference and that they are not limited to the “accounts rules” as defined in the Act.

In response to a question from the Tribunal the Second Respondent directed the Tribunal to the Complainer’s written submission and stated that he took issue with the argument on page 5 thereof, in particular the sentences -

“Obviously this would not be possible to do unless the Society had access to the solicitor’s whole books. Equally it is neither in the interests of the solicitor’s branch of the profession as a whole nor in the public interest in relation to that profession for a solicitor to practice when he is or may be insolvent.”

The Second Respondent stated that the Complainers are not reading the words carefully enough and seeing the words in the context which they are used. He submitted that the context is that the “accounts rules” are specifically limited to dealing with clients’ money and do not cover the solicitor’s own business. The Second Respondent submitted that exactly the same point could be made in relation to Section 40 of the 1980 Act which contains the powers where there is a failure to comply with the accounts rules; subsection (1) (a) and (b) refer specifically to the “accounts rules” under Section 35 and then the accountant’s certificates rules under Section 37. The Second Respondent submitted that there is an important distinction and that the question is this - is it for the Law Society to decide not to maintain that distinction.

The Second Respondent submitted that the Glasgow Corporation –v- Flint case helps in this argument. That case related to payments made by a Local Authority who had statutory powers and claimed to be able to make payments under an implied power ancillary to its main purpose. The Second Respondent took no issue with the test as quoted in the Complainer’s submission. He stated that on applying that test that there were very specific powers which had been given by Parliament to the Local Authority



and where there are specific provisions it is not for a party to extend the power or get round restrictions by using implied powers.

The Second Respondent stated that the Complainers referred to Lord Wheatley's judgement at page 129 of the Glasgow Corporation –v- Flint case where he stated -

“I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.”

However, he referred the Tribunal to the next paragraph of the judgement where Lord Wheatley quotes from Lord Dunedin's judgement in the case of D & J Nicol –v- Dundee Harbour Trustees 1915 S.C. (H.L.) 7 –

“ “Incidental” in my view means incidental to the main purposes of the main business.”

Lord Wheatley continues –

“In the admitted absence of any statutory authorisation for it, it becomes a question of fact whether a particular expenditure by a council may be fairly regarded as incidental to, or consequential upon, the main purpose of the main business of the council.”

The Second Respondent also made reference to the quote from Lord Hunter in the Glasgow Corporation –v- Flint case on the previous page of Lord Wheatley's judgement –

“The main difficulty involved in any case of *ultra vires* arises from considering what is implied as incidental – a question that must be determined according to the facts of each individual case.”

The Second Respondent submitted that whilst there is guidance to be found in previous cases, each case has to be looked at on its own particular merits.

The Second Respondent submitted that the case of Stewart-v-Perth & Kinross Council was instructive in two respects. He explained that this was a case where the Council imposed conditions on a second-hand car dealers licence. They were entitled to use the Civic Government (Scotland) Act 1982 to impose conditions regarding record keeping but they took it upon themselves to require very specific records to be kept for customers. The Court in that case accepted that this practice had been widespread amongst Local Authorities for many years. However, the Court in that case found the conditions were ultra vires. The Second Respondent quoted from Lord Hope's judgement at paragraph 28 where he stated –

“But it is clear that the discretion which is vested in the licensing authority is not unlimited. The authority is not at liberty to use it for an ulterior object, however desirable that object may seem it to be in the public interest”.

The Second Respondent submitted that it was clear from this case that it was not the Council's motive which was in question; the question was whether or not they had the power to do what they did. The Second Respondent submitted that the decision in the Stewart case applies to this present case. The Law Society has good reasons for trying to do what it wants to do however he submitted it does not have power to do it.

The Second Respondent referred to paragraph 37 of the of Stewart-v-Perth & Kinross Council case where Lord Hope further stated –

“But wide support for the condition is not enough to make it legitimate. That depends on the intention that is to be ascribed to Parliament.”

The Second Respondent suggested that the Law Society may be seeking to rely on its powers in terms of Section 1(3) of the 1980 Act which states –

“the Society may do anything that is incidental or conducive to the exercise of these function or the attainment of those objects”.

However, he submitted that if the Society is allowed to rely on that provision then that takes the Tribunal into a wide ranging enquiry in relation to the function and objects of the Law Society itself. He submitted that whether the Tribunal function is to do that is a matter for the Tribunal to decide. He submitted that this would open the door to a very wide enquiry and that he did not think that it was necessary.

The Second Respondent's second preliminary plea was to the relevancy of the Complaint. The Second Respondent conceded that the quotation from Sheriff McPhail at page 8 of the Complainer's submission is correct and uncontroversial. The Second Respondent referred to the quotation from Professor Wilson on page 10 of the Complainer's submission where he was quoting from an American lawyer –

“The effect of the relevancy plea is neatly shown in the American lawyer's classification of defences into three types. There is, “No I didn't” - a denial of the facts; then there is “Yes, but” – the facts are admitted, but the action cannot succeed because of some other facts – the condonation of adultery, for example; thirdly there is “So what” – even if the facts are true they do not afford the remedy sought – that is the idea of relevancy.”

He submitted that the 1980 Act at various points states that breach of the rules may amount to professional misconduct but the Act does not say that a breach of the rules is by itself professional misconduct, there must be something more to the conduct or in relation to the effect of the conduct or perhaps an accumulation of a course of conduct. He submitted that there must be something in the circumstances, which gives it the character of professional misconduct. The Second Respondent submitted that his main criticism is that this issue is not addressed in any shape or form in the Complaint. There is a list of alleged breaches and no evaluation. He submitted there is nothing in the Complaint to direct him to how or why the circumstances alleged amount to professional misconduct or should be regarded as professional misconduct.

The Second Respondent submitted that there is one reference in the Complaint to matters being taken in cumulo but that still does not describe the actual character and the quality of the acts or omissions which are complained of. He advised that he is

left wondering in what way do the matters alleged indicate someone who should be censured for some reason and there is no indication of the inherent quality of these acts which makes them reprehensible.

The Second Respondent submitted that unless in the pleadings there is something, which spells out what the breach is, the Complaint is not relevant. He stated that the Complainers could be more specific, they could illustrate how the rules apply in practice. He referred to page 58 of the Record where it states in the Complainer's Averment at paragraph 14.2 –

“The trial balance contained a suspense account with £139.34 which had not moved since 10 May 2003”.

He submitted that the Tribunal should ask itself the question “so what” in relation to that sentence. What conclusion is the Tribunal meant to draw from that sentence? The Second Respondent explained that the above sentence was in the context of an inspection having taken place in October 2003. There was a period between 10 May and October 2003, a period of four to five months when the trial balance had not moved. The Second Respondent submitted that the real question is what is the criticism which has been implied? He then referred back to the Record at page 59 –

“It was noted that there were discrepancies within the purchase prices paid. The full purchase price of a property was not shown through the records.”

The Second Respondent submitted that he did not know what point the Complainers were making in relation to these two sentences and did not know what question arose as a result. He submitted that it was not clear what criticism the Law Society was making of him. Were the Complainers saying that the money handled by him as a lawyer was incorrectly accounted for? Or was it a criticism of the figures in the accounts that the money received or paid out was wrong? Or was it something different. The Second Respondent submitted that his guess is that it was something different, but submitted that he shouldn't have to guess, when he is in the position of being before the Discipline Tribunal.

The Second Respondent referred the Tribunal to the next paragraph on page 59 of the Record -

“There were delays in forwarding deeds to the Keeper for registration or no evidence that deeds had been registered.”

The Second Respondent submitted that this was a question for the inspectors, not for the Tribunal. He submitted that if the inspectors were not satisfied they could have enquired of him. He submitted that the Complaint is full of instances like that.

The Second Respondent submitted that the impression that he got from reading the Complainer’s written submission is that the Complainers frankly do not take seriously their duty to act fairly. He submitted that they do have a duty to act fairly and submitted that they have acted in a way that suggests that they believe they can act in any way they like.

The Second Respondent submitted that the question of no valid notice given of inspections took him to his final preliminary plea, that of oppression. He referred to page 6 of the Complainer’s written submissions where Rule 19 of the Solicitors (Scotland) Accounts, Accounts Certificate, Professional Practice and Guarantee Fund Rules is quoted –

“19(1) to enable the Council to ascertain ... (whether the rules are being complied with and whether the practice is being conducted in a manner as may put the public at risk)... the Council may, by written notice, require any solicitor to produce at any time fixed by the Council and at a place to be fixed by the Council, or in the option of the solicitor at his place of business documents records and other information concerning the conduct of his practice.”

.....

(5) A written notice given by the Council to a solicitor under paragraph (1) ... shall be sent by recorded delivery post to the solicitor at his place of business ... and shall be deemed to have been received by the solicitor within 48 hours of the time of posting.”

The Second Respondent submitted that this is the basic rule under which all regular routine inspections are carried out. He then referred to the first two sentences of the second paragraph on page 7 of the Complainer's written submission which states –

“The requirement on the Council is to give “written notice”. No minimum time is specified. It is deemed to have been received at latest 48 hours after the time of posting.”

The Second Respondent stated that the arrangements for the inspection on 3rd/4<sup>th</sup> July 2004 must raise the question of fairness. A recorded delivery letter was sent on the Friday which was not delivered, due to the office not being open at the weekend, and the inspectors arrived on the Monday morning with copies of the letter. There had therefore been no notice. The inspectors set out to conduct an inspection without notice and expected to be able to do that. The Second Respondent submitted that it is blatantly unfair to have a rule saying that notice must be given and then to ignore that rule. The Second Respondent submitted that this was a matter for the Tribunal, but that in his submission the whole circumstances relating to the inspection and the question of notice were questionable and it is open to the Tribunal to decide to uphold that the inspection was unlawful.

In conclusion, the Second Respondent submitted that it is open to the Tribunal if, on a reading of the Complaint, it considers that the Complainers have acted unfairly and oppressively and that it would be unjust for the Complaint to proceed. The Tribunal should uphold his plea and dismiss the Complaint.

In response a question from Mrs Johnston, the Second Respondent confirmed that he was making this plea not solely in respect of that particular inspection but more generally in relation to the whole circumstances of the Complaint against him.

### **SUBMISSIONS FOR THE COMPLAINERS**

Mrs Johnston indicated that when she prepared her written submission she had to do that on the basis of assumptions as to what the Second Respondent was alluding to in his Answers. Mrs Johnston therefore wished to specifically answer the Second

Respondent's points. She stated that the Second Respondent appeared to be saying that the Law Society, irrespective of the general provisions in the 1980 Act regarding the promulgation of Rules and the general statement of the Society's objects and powers in Section 1 of that Act, is not entitled to incorporate any other elements into the "accounts rules" because Section 35 specifically states "moneys not belonging to them" and the fact that Section 35 is headed up as "Accounts rules".

Mrs Johnston submitted that the Rules which have formed the basis for this prosecution are called the Solicitors (Scotland) Accounts, etc, Fund Rules 2001 (hereinafter referred to as the "2001 Rules") and specifically state within the Rules that they are made by the Council of the Law Society of Scotland under Section 34 and Section 35 as referred to at the top of page 2 of the written submission. Mrs Johnston advised that the Rules are therefore not restricted to being purely "accounts rules" and therefore have to be looked at as rules which the Law Society have regarded as necessary to comply with their objects, which include not just the promotion of the interests of the solicitors profession but also the interests of the public in relation to that profession. Mrs Johnston submitted it is not for the Second Respondent to state that the Law Society has no power to promulgate rules covering those objects. She submitted that there are specific statutory references to the holding of clients' money and that there is an obvious reason for that, but that audits also check the practice of firms in relation to the operation of the Guarantee Fund and all these provisions are dependent on these rules and the application of the provisions within these rules.

Mrs Johnston referred to the case of Glasgow Corporation -v-Flint, which makes reference to matters incidental to the main purpose of a Local Authority. Mrs Johnston submitted it is clear that the objects of the Society are mainly concerned with protecting the public and regulating the practice of the solicitors profession and that the 2001 Rules can be reasonably regarded as necessary for the main purpose of the Law Society to administer its obligations regarding the Guarantee Fund and to ensure that practices are run in a manner which comply with its provisions.

In relation to the question of oppression, Mrs Johnston submitted that the Second Respondent conceded that this issue is mainly dependent on the evidence which will

be led at the hearing. Mrs Johnston submitted that this issue does not depend on the interpretation of Rule 19 as it is clear where there is serious concern regarding the management of a business and the question of compliance with accounting restrictions that the Society has authority to inspect practices on written notice being given. Mrs Johnston submitted that written notice was given on the occasion the inspectors carried out the particular inspection referred to. It was said that it was unfair that notice was received when the practice was closed. However, she said the inspectors did not proceed with the inspection at that time. They had copies of the notice with them. They came back the following day and carried out the inspection. Mrs Johnston submitted that when it is considered what was discovered in the inspection it cannot be seen to be unfair to act speedily and that the rules do not provide for a minimum period of notice. Mrs Johnston submitted that in the whole context of looking at the two practices of the Respondents she did not accept it was open to the Tribunal to consider that the Law Society's conduct could be seen to be oppressive or unfair. Mrs Johnston submitted that she appreciated that this matter would depend on the evidential position. However, looking at the Record she submitted that the Law Society's conduct was justified. She did not accept there was any unfair or oppressive conduct in relation to the inspections.

She also rejected the Second Respondent's submission that the Tribunal was entitled to dismiss the entire Complaint for the same reasons. Mrs Johnston submitted that the Record contains a Complaint alleging a pattern of behaviour and a straight denial of the factual position by the Second Respondent. She submitted that even if the Tribunal felt it may wish to censure the conduct of the inspectors it would be imperative to hear the factual position in advance of such a decision being taken.

In relation to the Minute of Amendment which she lodged today, Mrs Johnston submitted that it makes clear and specific which rules apply to each averment and fully incorporates them into each averment of duty. Mrs Johnston asked the Tribunal to delete the words "and retain returned cheques" from Complainer's Averment 24.26 paragraph (a) at page 110 of the Record.

Mrs Johnston submitted that it is for the Tribunal to decide what conduct is or is not reprehensible in relation to a finding of misconduct. She stated that the Complaint



makes it clear that there are duties incumbent on a solicitor and specifies what they are in detail in each particular section. Mrs Johnston submitted it is a matter for the Tribunal to decide what amounts to professional misconduct either individually or in cumulo and stated that she cannot see how there can be a question of irrelevancy when the Complaint is specific and the duties are substantially admitted.

Mrs Johnston submitted that if on looking at the factual position the Tribunal is of a view that there has been conduct as alleged, then, if this conduct breaches any or all of the duties to the extent that it is regarded as a serious and reprehensible departure from the standards expected of a professional solicitor then findings can be made on the basis of the averments of professional misconduct which are alleged.

In conclusion, Mrs Johnston stated that in her written submissions she has addressed certain aspects of the Complaint which she thought that the Second Respondent was alluding to. However the Second Respondent is also alluding to what he is being criticised for. Mrs Johnston submitted that the criticism is specific in the averment of misconduct – delays and failing to record deeds and discharges and she submitted that there are sufficient factual averments contained in the Complaint to support the averments of professional misconduct.

#### **FURTHER SUBMISSIONS BY THE SECOND RESPONDENT**

Upon application from the Second Respondent the Tribunal granted him opportunity to respond to the Fiscal's submission. He submitted that in relation to the title of the 2001 Rules what the Fiscal is saying is correct in that they cover a lot of different matters and are made under several sections of the Act. However, he submitted that such comment is part of the problem and not the answer and that as a result, a situation of confusion and difficulty has been created. He submitted that the 1980 Act provides for a clear distinction between the "accounts rules" and the other rules whereas the 2001 Rules actually blur that distinction.

The Second Respondent reiterated that his point was that the “accounts rules” are a distinct body of rules. They are separate and they must stand on their own. He submitted that the “accounts rules” have to be kept separate and that the other statutory authority does not affect the specific statutory authority given in relation to the “accounts rules”. The Second Respondent submitted that for instance reference is made to the Guarantee Fund; he stated that the obvious implication is that the Guarantee Fund is there to provide for dishonesty and is specific to that. He submitted there is no way that dishonesty and what borrowings a solicitor may have for his own firm are connected in any way. The Second Respondent made reference to the case of Glasgow Corporation –v- Flint and stated there are two main objects of the Society and that he does not argue with those. However, he submitted that the Society’s arguments are circular and that the argument that if the rules were not in place they couldn’t administer the Guarantee Fund is not relevant.

He then outlined two brief final points regarding notice. Firstly notice is either notice or it isn’t, sending a letter which could not bring the information to attention of a person is not notice. Secondly, the end doesn’t justify the means. The Law Society is saying what the inspectors found shows that they were right to carry out the inspections. The Second Respondent submitted this is very much the attitude of the Law Society and that this should not be supported by the Tribunal. Rules are there to be observed.

## **DECISION**

The Tribunal considered the Complainer’s written submission together with the oral submissions made by the Second Respondent and Mrs Johnston. The Tribunal considered each of the three preliminary pleas. In relation to the plea of oppression the Tribunal was of the view that this matter requires proof before the Tribunal can decide upon this issue. The Second Respondent’s assertions regarding oppressive behaviour are set out in his Answers and the alleged degree of oppression cannot be determined without the hearing of evidence.

In relation to the plea of relevancy, from its consideration of the Record the Tribunal was of the view that there are clear statements of factual breaches contained in the

Complaint as amended with the consent of the Second Respondent. There are also clear statements of duty on the Second Respondent which were substantially accepted and there are clear averments that these breaches amount to professional misconduct. Whereas the Second Respondent suggested that the Complainer's case implied a criticism of something over and above the breaches of the 2001 Rules, that is not averred by the Complainers and therefore does not enter into the Tribunal's deliberations.

In relation to the plea of ultra vires the Second Respondent submitted that Section 35 of the 1980 Act requires that there be separate "accounts rules". However, from perusal of the 1980 Act in Section 35 the term "accounts rules" is only a term of reference within the Act. There is not a stipulation that the "accounts rules" must be contained in a separate set of rules apart from any other promulgated by the Council of the Law Society of Scotland in pursuance of their statutory powers generally. In the judgement of the Tribunal when the Complainers carry out inspections they are doing so in terms of their general powers and not specifically in relation to the "accounts rules". The requirement to have "accounts rules" is met by the existence of the 2001 Rules. The application and enforcement of these rules is a matter for evidence.

**K R Robb**  
**Vice Chairman**