

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

**DECISION**

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

**by**

**ELIZABETH REID BLAIR,  
Solicitor, Creag-an-Iar,  
Corriecravie, Isle of Arran**

**Appellant**

**against**

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

**First Respondent**

**and**

**GRAEME CROMBIE MILLER,  
Solicitor, 1252 Shettleston Road,  
Glasgow**

**Second Respondent**

1. An Appeal was lodged with the Scottish Solicitors' Discipline Tribunal under provisions of Section 42ZA(10) of the Solicitors (Scotland) Act 1980 by Elizabeth Reid Blair, Solicitor, Creag-an-Iar, Corriecravie, Isle of Arran (hereinafter referred to as "the Appellant") against the Determination made by the Council of the Law Society (hereinafter referred to as "the First Respondent") dated 22 March 2011 in respect of a decision not to uphold a complaint of unsatisfactory professional conduct against Graeme Crombie Miller, Solicitor, 1252 Shettleston Road, Glasgow (hereinafter referred to as "the Second Respondent").

2. In accordance with its Rules, the Appeal was formally intimated on the First Respondent and the Second Respondent. Answers were lodged for the First Respondent. The Second Respondent did not enter the process.
3. The case called on 19 October 2011 for a procedural hearing. The Appellant was present and represented herself. The First Respondent was represented by Jim Reid, Fiscal. The matter was adjourned to a preliminary proof to determine the nature of the relationship between the Second Respondent and Mrs A.
4. The case called on 14 November 2011 to ascertain the parties state of preparation. The Appellant was present and represented by Miss Bain. The First Respondent was represented by Jim Reid, Fiscal. It was agreed that a two day preliminary proof be fixed in respect of whether or not Mrs A was employed or controlled by the Second Respondent.
5. When the case called on 1<sup>st</sup> and 2<sup>nd</sup> March 2012 the Appellant was present and represented herself. The First Respondent was represented by Jim Reid, Fiscal. The Tribunal heard evidence and submissions over two days.
6. Having considered the evidence and submissions, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh 2 March 2012. The Tribunal having considered the Appeal under Section 42ZA(10) of the Solicitors (Scotland) Act 1980 made by Elizabeth Reid Blair, Solicitor, Creag-an-Iar, Corriecravie, Isle of Arran (hereinafter referred to as “the Appellant”) against the Determination made by the Council of the Law Society (hereinafter referred to as “the First Respondent”) dated 22 March 2011 in respect of a decision not to uphold a complaint of unsatisfactory professional conduct against Graeme Crombie Miller, Solicitor, 1252 Shettleston Road, Glasgow (hereinafter referred to as “the Second Respondent”); Confirm the Determination of the First Respondent dated 22 March

2011; Find no expenses due to or by either party; Direct that publicity be given to this decision and that this publicity should include the name of the Appellant but that any such publicity shall be deferred until the outcome of any possible police investigation or criminal proceedings arising as a result of this hearing.

**(signed)**  
**Chairman**

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

**IN THE NAME OF THE TRIBUNAL**

**Chairman**

**NOTE**

When the matter called for a procedural hearing on 14 November 2011 it was agreed that a preliminary proof would be required in respect of whether Mrs A was employed or controlled by the Second Respondent. Two days were set down for this on 1<sup>st</sup> and 2<sup>nd</sup> March 2012.

When the case called on 1 March 2012, Mr Reid advised that in connection with the order issued by the Tribunal for the production of Forms ET1 and ET3 from the Employment Tribunal of Mrs A, Mr Miller had confirmed that he would allow these forms to be lodged but he still did not have them in his possession. Mr Reid explained that the forms were to be faxed from the Employment Tribunal office to Mr Miller's office this morning and then they would be faxed on to the hotel so that the Tribunal could have the documents.

Ms Blair stated that she had hoped to see the documents before the start of the Proof and felt that she was unprepared for this last minute delay caused by Mr Miller. The Chairman pointed out that the Tribunal could hear other evidence with regard to the relationship between Mrs A and Mr Miller and that the forms ET1 and ET3 would not be determinative but would be just one adminicle of evidence. Ms Blair stated that form ET1 gives the date that the employment started and form ET3 asks the employer to confirm if he agreed with this. The issue in this case was who employed Mrs A in July 2009. The Chairman pointed out that he had some expertise in the area of employment law and that the ET1 and the ET3 would be important evidence but would not necessarily be determinative and asked Ms Blair if she wished to lead other evidence.

Ms Blair stated that it was unfair for the case to begin without all the evidence being available. The Chairman enquired how the ET1 form and ET3 form would affect the other evidence. Ms Blair stated that it would have an impact but did not expand on this. Ms Blair stated that the hearing was just in relation to the employment relationship between Mrs A and Mr Miller and that she would not be calling Ms B or Mr C as witnesses for this. She advised that Mr D could not be traced. Despite carrying out extensive searches it would appear that there was no such person in

Scotland or the UK and he had been the sole director of Bankford in July 2009. The only address given was Flat 1/1, 1236 Shettleston Road, Glasgow which was the work offices of Miller Stewart. The Chairman again asked what prejudice would be caused to Ms Blair by presenting the rest of her evidence before the form ET1 and ET3 were available. He pointed out that the Proof would not be concluded without having these forms. Mr Reid stated that he did not see what would be in the forms that would prevent other evidence being led. The Chairman indicated that Ms Blair should commence her case but she would not require to conclude her evidence prior to seeing the forms ET1 and ET3.

### **Evidence for the Appellant by Ms Elizabeth Blair**

Ms Blair was sworn and of consent allowed to give her evidence by referring to a typed statement and copies were made available to all parties. Ms Blair stated that she dealt with chamber and private client work and had her own practice on the Isle of Arran and had had this since 2000. Ms Blair referred the Tribunal to Production 6 of the Appellant's Productions being the Employment Tribunal Judgment in respect of the case by Mrs A against Miller Stewart Limited. She also referred the Tribunal to Production 4 being a letter by Mrs A dated 28 April 2010 to the Law Society. Ms Blair stated that Mrs A had told Ms Blair's mother that she had a relationship of employer / employee with Mr Miller. The Chairman pointed out that at this stage Ms Blair required to give evidence rather than make submissions and advise the Tribunal of her knowledge with regard to the relationship between Mr Miller and Mrs A. Ms Blair stated that Mrs A took Mr Miller to an unfair dismissal tribunal and to do this you had to be employed for at least a year. Mrs A had been working for Mr Miller since 2009. The Chairman pointed out that Ms Blair could speak to matters seen, observed and/or told to her and also letters received but that the Tribunal would draw inferences from the content of the documents. The Chairman suggested that she drew certain documents to the Tribunal's attention.

Ms Blair then read out her statement and referred to production 5 being a letter from Mr McCann on behalf of Mr Miller which stated that there was no contractual relationship between Mr Miller and Mrs A. Production 3 was the letter from Mr Miller stating that Arran Property is the trading name of Bankford Limited and that

Mr Miller was the landlord and that Arran Property sent clients to Miller Stewart. Ms Blair stated that this information was different from the information given to her by Ms E to the effect that Mr Miller ran the office. Ms Blair referred the Tribunal to the Employment Tribunal Decision in the case of Ms E where Mr Miller praises Ms E as being the highest fee earner. Ms Blair particularly referred the Tribunal to paragraph 31 of this Employment Tribunal Decision where it is stated that although not known to Ms E, since the commencement of her employment she had been paid by another of Mr Miller's companies namely Bankford Limited and it was not until the beginning of June that her wages were paid by Miller Stewart Limited. The Employment Tribunal decided that she had been employed by Miller Stewart Limited since her employment commenced. Ms Blair stated that this was because Bankford Limited and Miller Stewart Limited were one and the same. Ms Blair stated that this practice was in place for a number of Glasgow employees. Mr Miller stated that he was only the landlord but Ms Blair questioned what kind of lease would state that the firm make payment of wages. Ms Blair stated that there did not appear to be a lease so there was just an informal arrangement. There was no lease because it was one and the same company.

Ms Blair then referred to the emails sent to her mother by Mrs A in the Appellant's Additional List of Productions. The email of 11 April 2011 states that Mrs A started working at Arran Property on 6 January 2009 and that her payslips said Bankford Limited which was trading as Arran Property. Another email states that this changed six months prior to the Employment Tribunal when it was changed to Miller Stewart Limited. Ms Blair submitted that the staff at Arran Property and Miller Stewart Limited were not informed of any change they only found this out by carrying out research. Ms Blair referred to the P45 lodged by the First Respondent which states that Mrs A left Bankford Limited on 31 March 2010. Ms Blair again referred to the Employment Tribunal Decision in respect of the case of Ms E where it stated that Mr Miller was in serious financial difficulties in 2009 / 2010. Ms Blair stated that this was odd because Mr Miller despite this asserted that he purchased an estate agency on Arran round about this time. Ms Blair referred to various documents which she had not been allowed to see due to the Law Society adopting a third party procedure approach. She stated however that information was supplied to her in the reports prepared by the reporter Mr H. The Law Society were advised by the reporter that Mr Miller sold Arran Property in June 2007 in an employee buy-out and that he bought it

back in 2010. Ms Blair stated that the Productions lodged on her behalf were very abbreviated and were submitted without her knowledge because her agents had stated that the Tribunal would have all the case history papers. Ms Blair stated that she required to make a motion to allow further documents to be lodged late. Ms Blair was allowed an adjournment to look at her file to see what documents she wished to lodge. During the adjournment the forms ET1 and ET3 arrived.

After the adjournment, Ms Blair made a formal motion to be allowed to lodge as late Productions the Findings made by the Tribunal against Mr Miller on 29 October 2008 specifically the last page and the report by Mr H, case manager in respect of the case specifically pages 15 and 16. Mr Reid stated that he had no objection provided it was limited to these particular pages. The Tribunal accordingly allowed these pages to be lodged.

Ms Blair stated that Mr McCann advised the Tribunal in 2008 that the Respondent sold his estate agency in an employee buy-out. She referred to pages 15 and 16 of Mr H's report where Mr McCann claims that the Respondent had relinquished the estate agency practice in 2007 and Mrs A was not an employee in 2009. Ms Blair stated that Mr Miller applied to rejoin GSPC on 15 February 2010. Bankford Limited took over Arran Property in October 2007 and traded as a non solicitor agency. Mr McCann submitted that the detailed arrangements between the parties were confidential but Mrs A was not an employee at any time before the Respondent gave up business and only became an employee after February 2010 due to the operation of TUPE.

Ms Blair stated that not having had the ET1 and ET3 forms had jeopardised her evidence because her submissions would have been different. The Chairman pointed out that she was only presenting evidence at this time and that she would be able to make submissions in respect of the forms later on in the proceedings. At this stage the Chairman clarified directly from Mr Miller whether he sought to avoid production of the ET1 and ET3 forms under the rules. Mr Miller stated that he created one document and the other was created by Mrs A and he had accordingly asked her if she wished the document to be produced but because of ongoing issues on Arran she had stated that she would not allow him to disclose this. Mr Miller stated that he had advised Mrs A that there was an order but she was very unhappy for her information



to be put into the public domain. Mr Miller stated that he could not argue that the documents fell within the exception but he would only wish disclosure to the parties in the room. The Chairman stated that generally what was produced to the Tribunal must be kept confidential and he asked all parties present to respect his advice that these should not be disseminated outside the Tribunal. Mr Miller stated that on this basis he was happy for the forms to be lodged. Documents ET1 and ET3 were lodged with the Tribunal. The Tribunal then adjourned for lunch to give Ms Blair an opportunity to peruse the forms ET1 and ET3.

On resuming, Ms Blair indicated that she wished an adjournment to take advice from her solicitors with regard to the forms ET1 and ET3 because she was not an employment law expert. The Chairman pointed out that the documents contained allegations and answers and enquired as to what evidence Ms Blair would require to give in connection with the forms. She stated that she could not give any evidence with regard to what was in the documents. She however indicated that she wished to ask her solicitors' questions. The Chairman indicated that he understood that her solicitors were no longer acting for her but she indicated that they were only not appearing today but they may be in the future. The Chairman indicated that it was a matter for submissions and that Ms Blair could make submissions with regard to the content of the forms ET1 and ET3 at a later stage. The Chairman accordingly allowed cross examination at this stage.

### **Cross Examination of Ms Blair by Mr Reid**

Ms Blair stated that Bankford Limited and Stewart Miller Limited were the same. The Chairman enquired as to whether Ms Blair was discriminating between Miller Stewart Limited and Mr Miller. Ms Blair stated that as he was a sole practitioner it was one and the same. Mr Reid pointed out that Bankford Limited's records showed a Mr D as a sole director but Ms Blair stated that he did not exist. Ms Blair stated that Bankford Limited and Arran Property were operating as estate agents and solicitors. In July 2009, Mr Miller owned ten shares in Bankford Limited and he resigned as a director and was then reappointed and then resigned again. Ms Blair stated that she did not understand how he could reappoint himself as a director when he had sold the company. At the end of 2007 he was not a director or company secretary of Bankford

Limited. Ms Blair submitted that although Mr McCann made submissions with regard to TUPE there was no evidence of this. Ms Blair stated that she did not know whether in April 2010 Miller Stewart Limited took over the estate agency. Ms Blair stated that under TUPE, employees transferred to the new business but employees must be notified and this was not done in this case. Mrs A and Ms E stated that there was no transfer. Ms Blair referred to the email from Mrs A and stated that the staff were not informed or consulted. Ms Blair accepted in response to a question from Mr Reid that she had researched employment law but she did not know about the procedures. Ms Blair stated that she thought the name was changed from Bankford Limited to Miller Stewart Limited just to get back on the GSPC. Ms Blair stated that Mr Miller had always been a member of the GSPC. That he reapplied to come back in was just hearsay from Mr McCann. Ms Blair stated that when Ms E started in August 2010 she was getting ten settlements a month on Arran but Mr Miller stated that he was only the landlord and did not do any work on Arran. Ms Blair pointed out that Mrs A mentions on her ET1 the problems. Ms Blair stated that the Employment Tribunal found that Ms E was getting wages from Bankford Limited and she worked at the Glasgow office. The Chairman pointed out that the email from Mrs A indicates that her view is that when she first started she was working with Bankford Limited and then six months before the Employment Tribunal, it changed to Miller Stewart. The Chairman pointed out that it was irrelevant if the transferor or transferee consent to a TUPE arrangement, it would transfer automatically if there were no objections. The Chairman further pointed out that Mrs A indicates in her email that she was aware of the change of name. The Chairman enquired of Ms Blair whether her position was that there were two independent companies with different personas but either could be in the control of Mr Miller who could still have influence over Mrs A. Ms Blair stated that she did not know what Mr Miller had above his shop in 2001 by way of a title, it may have said "Miller Stewart Solicitors and Estate Agents" but he may have traded as Arran Property.

Ms Blair confirmed that she had no re-examination of herself.

### **Evidence of Janet Rankin Blair**

Janet Blair confirmed that she was the Appellant's mother. She advised that she received two phone calls from Mrs A. Janet Blair stated that she knew Mrs A's husband and it was general knowledge on Arran that she had been sacked and she stated that she told Mrs A's husband that she would like a word with Mrs A. Mrs A phoned her on 25 March 2011 and said that she had been sacked and taken to an Employment Tribunal and had won. Janet Blair stated that she asked Mrs A when she started work for Graeme Miller and she said 6 January 2009. There was no doubt that he was her boss from that time. Janet Blair stated that Mr Miller said at the Discipline Tribunal in 2008 that he had sold the company to his manageress. This was told to the Tribunal by Mr McCann on behalf of Mr Miller. Janet Blair referred to the emails sent to her by Mrs A. The emails were to the effect that Mr Miller was her boss. Janet Blair stated that Bankford Limited and Miller Stewart were one and the same. The Chairman pointed out that the witness required to speak to what was in her knowledge and not her opinion with regard to why something was done by someone else. The Chairman asked Janet Blair to tell the Tribunal what passed between her and Mrs A which was relevant to the employment relationship between Mrs A and Mr Miller. Janet Blair stated that in the second phone call made in late October 2011 Mrs A was down because Mr Miller was taking her to court. She said she started her own estate agency business and some of the clients had wished to come with her. At this stage, Ms Blair referred Janet Blair to the Affidavit previously prepared and she confirmed that she had signed it and it was correct.

### **Cross Examination of Janet Blair by Mr Reid**

Mr Reid enquired as to why Mrs A would have phoned Janet Blair in 2011 when there had been email correspondence between Mrs A and Janet Blair in September 2011 in connection with the feud between them and police involvement. Janet Blair said that she was not sure about the date of the second phone call and it could have been earlier in October 2011. Janet Blair stated that the police dismissed the claim by Mrs A and said she was a "bam pot". Janet Blair stated that there was presently a charge of breach of the peace ongoing against Mrs A in respect of her threatening Ms Blair's nieces with a gun. The Chairman enquired as to whether Ms Blair wanted the Tribunal to find Mrs A's evidence truthful and Ms Blair stated that Mrs A refused to come as a witness. Ms Blair stated that she wished to adjourn to seek advice from her

own solicitors and wished to ask further questions of Janet Blair which were not relevant to what had been raised in cross examination. The Chairman did not allow the further questions to be asked but allowed Ms Blair a short adjournment to speak to her solicitors.

Ms Blair advised that she had taken advice from her solicitors and wished to state that the ET1 showed that Mrs A began work for Mr Miller on 6 January 2009.

### **Evidence for the Respondent**

Mr Reid led the evidence of Graeme Crombie Miller who confirmed he had been a solicitor since 1993 and was a director of Miller Stewart Limited. Mr Miller confirmed that his main place of business was in Glasgow and that he purchased the business in Arran at the end of 2001 as a going concern and operated as a solicitor and estate agent trading as Miller Stewart Solicitors and Estate Agents. He was registered with GSPC. Mr Miller advised that he resigned from GSPC in 2006 / 07 in connection with the Arran office and Miller Stewart ceased to trade and another company Bankford Limited came in and traded as Arran Property, estate agents. Mr Miller stated that he set this up and there was also a conveyancing network which was its main business. Mr Miller advised that he had been a director and shareholder but in July 2009 he only held ten shares and was not a director. Bankford Limited operated until he rejoined the GSPC at the end of 2010 or it might have been February 2010. Mr Miller stated that at this time Miller Stewart Limited took over the estate agency of Arran Property and took over all the employees that were on the Island including Mrs A and she became a Miller Stewart employee. At this stage Mr Reid referred Mr Miller to the Law Society Production being a P45 for Mrs A. Mr Miller stated that this was produced by Bankford Limited's payroll and had 31 March 2010 as a leaving date because this was when Mrs A moved to Miller Stewart Limited. Mr Reid referred Mr Miller to Production 6 being the Employment Tribunal Decision. Mr Miller explained that when Miller Stewart took over the employees from Bankford Limited TUPE applied so there was a continuity of employment. As at July 2009, Mr Miller stated that he had no involvement with Bankford apart from ten shares and had no control over Mrs A. The two people that were the directors were Mr D and Ms F who were in control. Ms F resigned around the end of 2009 and Mr D became the sole

director. Ms F lived on the island and Mr D was in Glasgow and they ran the company. They were employees and directors. Ms F remained as an employee after she had resigned as director because she was moving to the mainland and she would not be there. The Chairman questioned as to why she resigned as a director rather than employee if she was to be working in Glasgow and Mr Miller stated that Ms F had been the manager for Arran and Mr D was the manager for Glasgow. Mr Miller explained that the conveyancing network was a web based network built for mortgage advisors, estate agents, financial services advisors etc who could log in and refer business to solicitors. Mr Miller explained that there was an understanding with Bankford Limited that all legal work would be referred to Miller Stewart and as a quid pro quo Bankford Limited had offices in his property and did not pay any rent. From the end of 2007 to 2010 Bankford Limited and Arran Property was run by Ms F and Mr D. In 2010 GSPC agency was taken on. Mr D had had an illness and died at Christmas so Mr Miller either had to go back to Arran or the shop would close.

#### **Cross Examination of Mr Miller by Ms Blair**

Mr Miller confirmed that Mr D was not a solicitor and that the conveyancing network did not do conveyancing but were a marketing system and a web platform. Solicitors paid a fee or a contribution towards the software costs. Mr Miller stated that he was the only solicitor to hold shares. He explained that other solicitors paid for access to Bankford's conveyancing network by a combination of annual fees, monthly fees or on a block basis. Mr Miller stated that he was not aware of an employee buy-out. In June 2007 Ms F worked for Mr Miller. Mr Miller objected to answering the question about his relationship with Ms F but this objection was overruled by the Chairman and Mr Miller confirmed that Ms F was his life partner. Mr Miller confirmed that Bankford Limited's company secretary was Ms G who was a friend of his and used to work in his office.

Mr Miller stated that he sold up in 2007 mainly due to Ms Blair although he had never met her in the past apart from seeing her at the previous Discipline Tribunal. Mr Miller explained that the estate agency business was a small part of what his firm did and had limited profitability and due to the problems he had in Arran which were mostly linked with Ms Blair, he decided that the profits did not justify the rest of the

business. Mr Miller stated that he did not speak at the Discipline Tribunal in 2008 and that it was the profitability and the problems which led to the commercial decision. Mr Miller believed that Mr McCann stated to the Tribunal in 2008 that Reid Blair were running a marketing campaign which damaged Miller Stewart and led to financial problems. Mr Miller stated that he did not remember Mr McCann stating that Ms Blair took 100% of his business. Mr Miller stated that he had no idea how many properties he sold on Arran and that he would be very surprised if Ms Blair had only sold one house. Mr Miller stated that Ms Blair could not have taken over 100% of the sales. Mr Miller stated that in respect of Production 4 for the Appellant being Mrs A's letter, he would assume that she was referring to the period of the complaint as she was replying to the Law Society's questions in connection with the complaint. Mr Miller stated that he did not know why there was no record of Mr D in the Register of Births and that Mr D died in December 2011. The Chairman queried as to whether this was only a few months ago and Mr Miller confirmed that it was. It was put to Mr Miller by a Tribunal member that he had previously said that Mr D had died at Christmas 2009. Mr Miller then accepted that this was actually the correct date. The Chairman put it to Mr Miller that he had a rather cavalier attitude in his answers and Mr Miller again confirmed that it was definitely Christmas 2009 that Mr D died.

Mr Miller explained that Company House allow you to put an address which is a solicitors address or the address of the contact for privacy reasons which is why Mr D's home address was not on the Register. Mr Miller stated that he would be surprised if the girls in the office did not know about Mr D. He confirmed that Mr D died in Glasgow Royal Infirmary. The Chairman did not allow Ms Blair to ask questions with regard to why the Forms ET1 and ET3 were not lodged earlier.

Mr Miller confirmed that prior to Ms E's redundancy, the business was running at a loss. He confirmed that what he had said to the Employment Tribunal in connection with the losses in respect of Ms E's case was correct. Mr Miller stated that he purchased back the estate agency on Arran because it was going to close and he got work from it. He stated that Arran Property was very successful and if it had closed he would have had an empty shop and they had a business plan to put it into rentals which made a lot of money. Mr Miller stated that he did not wish to answer the

question with regard to how much he paid to buy it and the Chairman did not allow the question.

Mr Miller explained that he resigned in June 2007 and then was reappointed as a director and then resigned again because he had to sign the accounts. He stated that Ms F regarded herself as just responsible for the running side of it, not the financial side as she was risk adverse. In response to a question from the Tribunal in connection with what happened to Bankford Limited after Ms F had resigned and Mr D had died, Mr Miller stated that the company was left in limbo and it just ceased. Accountants got involved to try and sell conveyancing network. Mr Miller confirmed that the board of the company in December 2009 was Mr D. The Chairman enquired as to how Bankford Limited continued to operate with employees and a bank account when there were no directors, Mr Miller stated that he and Ms F between then had the majority shareholding and accordingly had control. Mr Miller stated that Mr D's family were not interested and he did not know how many shares Mr D had. He then indicated that Mr D had the balance of the shares. Mr Miller stated that the company was not wound up, it ceased and was run off. After a lot of questioning from the Tribunal, Mr Miller accepted that between December 2009 and end of March 2010 Miller Stewart did run Arran Property.

Mr Miller stated that Ms E worked for Bankford Limited but he employed her with Miller Stewart for a couple of months because she was good but it did not work out. In response to a question from the Chairman, Mr Miller confirmed that the employees were aware of who was important and would have known the link between Ms F and himself but Mr Miller stated that his life partner was on the island and it was not him that was in control. In response to a question from the Tribunal, Mr Miller stated that at the Employment Tribunal for Mrs A he just accepted that TUPE operated. In response to a question as to who sold Arran Property to Miller Stewart Limited, Mr Miller stated that he did not pay any price for it. All the employees became Miller Stewart Limited employees. Mr Miller stated that Mr D died on 28 December 2009 and that the employees were controlled by Miller Stewart between December 2009 and April 2010.

#### **Re-Examination of Mr Miller by Mr Reid**

Mr Miller confirmed that Mr D did indeed exist. The employees were paid by Miller Stewart after Mr D's death.

At this point the matter was adjourned part-heard to 2 March 2012.

When the case called on 2 March 2012, Ms Blair advised that she had instigated a search in the Register of Births, Marriages and Deaths. She had obtained a report from CIS Claims Investigations Limited who had carried out a search in the Register for the period between 2007 and 2010 and found no death certificate for Mr D with the date of birth which had been given in this case. The only death certificate for a Mr D was dated 3 January 2011 in relation to someone who was a Clerk. Ms Blair asked to present this evidence to the Tribunal. The Chairman indicated that there was a problem with allowing this evidence at this stage in the proceedings but if Ms Blair formed the view that the evidence given by Mr Miller was incorrect and he had been lying to the Tribunal, there were other avenues open to her in respect of this matter. Mr Reid indicated on behalf of the Law Society that he would be interested to know whether or not Mr D had indeed died and he would investigate the matter. Ms Blair indicated that she would give Mr Reid a copy of the documentation. The Tribunal refused her motion to lead additional evidence at this stage.

### **Submissions from the Appellants**

Ms Blair referred the Tribunal to the two Employment Tribunal Judgments in the Productions. In connection with Ms E, Bankford Limited paid her and she worked for them from 24 August 2009 to 10 June 2010 and it was only the June 2010 payslip which came from Miller Stewart. Ms E was able to go for unfair dismissal despite the fact that she had worked there for less than a year because she had made a protective disclosure. Ms E could not understand how she could be an independent consultant because she was not a solicitor.

In connection with Mrs A's Employment Tribunal, she was employed from 6 January 2009 to 18 August 2010 when she was dismissed and the Employment Tribunal held the dismissal unfair. Ms Blair stated it was clear from the ET1 form that Mrs A had a



concern that she and another member of staff had been put in a position that they did not want to be in because they were honest people. Both these ladies worked for Mr Miller and were instantly dismissed. In connection with whether Mrs A was employed by Mr Miller on 29 July 2009 when the email was sent from the Arran office, Ms Blair submitted that the Law Society were submitting that at that time Mr D was responsible for Mrs A. However Ms Blair pointed out that she only found out yesterday that Mr D had died and assumed that the Law Society had not known this either. Ms Blair submitted that Mr D did not exist and was a figment of Mr Miller's imagination. Ms Blair submitted that Mr Miller had been lying under oath and was guilty of a criminal offence and of acting in a manner not consistent with being a competent and reputable solicitor. Ms Blair again referred to the ET1 form which stated that Mrs A had been asked to buy the business on 13 August by Mr Miller. Ms Blair stated that before Mr Miller could offer to sell the business to an employee he would have to have control of the business. Ms Blair submitted that it was unclear what legal standing Bankford Limited had. Mr Miller said the sole director died on 28 December 2009 but also gave a conflicting date and stated "nothing is happening with Bankford". Ms Blair stated that if this was the case how could Mr Miller offer the business for sale to Mrs A. Ms Blair stated that the assets of the deceased should vest in the executors and yet Mr Miller was unaware whether or not Mr D's estate had been wound up. Ms Blair questioned how Miller Stewart could have acquired Bankford Limited unless Mr Miller had always been a shadow director of Bankford Limited. Ms G was a formal legal secretary and had retired from Bankford Limited on 1 January 2009 and she had appointed Mr D as sole director and company secretary. This may however have been in respect of a person who did not exist. There was no record of Mr D's birth. The only other person who was a director of Bankford Limited was Ms F who was a former employee of Mr Miller and joined in 2002. She left her husband in 2006 to live Mr Miller and they have been living together for six years. Mr Miller was the employer of Ms G and Ms F and was Ms F's partner. Ms Blair submitted that Mr Miller was a shadow director i.e. not a named director but wielding influence over named directors and other officers of the company. This was the HMRC definition. Ms Blair questioned how Mr Miller could sack Mrs A in the absence of any successor to Bankford Limited. Mrs A did not refer to Mr D. Ms Blair questioned how the P45 could be issued when the sole director had died on 28 December 2009 and no successor had been appointed. Ms Blair stated that Mr Miller

alleged that TUPE applied some time between February and March 2010. However how could Mr Miller take over Bankford Limited when Mr D had died and the estate had not had confirmation. Ms Blair submitted that Mrs A did not receive a P45. Ms Blair submitted that it was not credible that Mr Miller was unaware of any executors in respect of Mr D's estate.

In respect of Ms E's Employment Tribunal, the Tribunal found Ms E's evidence reliable and preferred it to that of Mr Miller. Ms E was employed in the Glasgow office but Bankford Limited paid her. Ms E advised Ms Blair that half of the staff were paid in this way but they were all working for Mr Miller. Mr Miller's submission that he did not initially employ Ms E was inconsistent with the facts.

Ms Blair referred the Tribunal to Production 3 being the letter from Mr Miller dated 18 February 2010 which indicated that Arran Property sent business to him. Ms Blair queried how Bankford Limited could send business to Mr Miller when Mr D had died on 28 December 2009. Ms Blair pointed out that in this letter Mr Miller states that he is not a shareholder but that Mr Miller stated in his oral evidence to the Tribunal that he held ten shares. Ms Blair referred the Tribunal to Production 4 being Mrs A's letter and submitted that it was strange that Mrs A made no mention of the alleged demise of Mr D on 28 December 2009. Ms Blair submitted that Mr Miller had always been in charge of the Arran office not just as landlord. Mr Miller stated that he had not seen Mrs A's letter but this was refuted by the Law Society. Ms Blair referred to Production 5 being a letter from Mr McCann which made no reference to Mr D's death and Mr McCann seemed unaware that Mr Miller had ten shares in Bankford Limited and also seemed unaware that half of Mr Miller's Glasgow staff were paid by Bankford Limited. Mr McCann also seemed to be unaware of the Employment Tribunals.

Ms Blair stated that Mr Miller indicated that a new company was formed called Bankford Limited. Ms Blair questioned how it could be described as a new company when it was set up by Mr Miller and he appointed Ms G and Ms F who had been his employees. Mr Miller stated that in early 2010 his company began paying the wages of Bankford Limited staff even though there was no obligation to do so. Ms Blair

pointed out the unusual lease position and submitted that the two companies Bankford Limited and Miller Stewart Limited were owned and run by Mr Miller.

Ms Blair referred to her additional Productions being the emails from Mrs A which state that Bankford Limited changed to Miller Stewart six months before her Employment Tribunal on 24 February 2011 which would be September 2010 which was impossible because Mr D died on 28 December 2009. Mrs A also indicated that the change was made to accommodate Miller Stewart's GSPC application for Arran. Ms Blair submitted that Mr Miller had always been in sole charge of the Arran office. Ms Blair stated that Mrs A infers in her emails that she needed to establish whether she could contact Mrs B and if Mr Miller was only a landlord why did Mrs A need to check whether Miller Stewart was a member of the GSPC.

Ms Blair referred to Production 2 of her additional productions being Bankford Limited Company Register Information which confirms that Mr D was appointed a director on 1 January 2009. Production 3 is an affidavit from Janet Blair indicating that Mrs A advised that her employer was always Mr Miller and makes no mention of Mr D. Ms Blair referred to the report from Mr H and suggested that there should be some written confirmation in connection with assets being transferred under TUPE. Ms Blair submitted that a P45 should not have been issued if TUPE had applied as there was no leaving date. Ms Blair referred to the Discipline Tribunal hearing in 29 October 2008 and stated that there was no reference to TUPE but to an employee buy-out in June 2007 which was different. This was a different version of events. In response to clarification from the Chairman, Ms Blair confirmed that the P45 was at odds with what Mrs A stated in her email in connection with when the takeover took place.

Ms Blair explained why she had not brought extra witnesses. Mr D had died but Ms E and Mrs A had refused to come and give evidence. Ms Blair submitted that Mr McCann on Mr Miller's behalf had advised the Discipline Tribunal in October 2008 that Ms Blair took over 100% of his business and that he sold out in an employee buy-out. Ms Blair however submitted that if Mr Miller could not make success of a business in a property boom, how could his unqualified staff do better.

**Submissions on behalf of the First Respondent**

Mr Reid clarified that the matter before the Tribunal was an Appeal in respect of the Law Society's Decision making no finding of unsatisfactory professional conduct. The preliminary point being dealt with at the proof was in connection with the email sent by Mrs A on 29 July 2009 and whether or not Mr Miller was Mrs A's employer. Mr Reid stated that the standard of proof was a balance of probabilities and the Tribunal had to ask itself whether there was sufficient evidence to show that Mrs A was an employee of Mr Miller. Mr Reid stated that the two witnesses led on behalf of the Appellant did not give direct evidence with regard to the relationship between Mrs A and Mr Miller. There was no doubt that Mrs A started work on 6 January 2009 and was employed by Bankford Limited trading as Arran Property. In July 2009 Mr Miller was not a director or secretary of Bankford Limited and only had ten shares out of 100 in the company. Bankford Limited had two directors being Ms F, his life partner and Mr D. Bankford Limited ground to a halt in around January 2010 after the death of Mr F in December 2009. Miller Stewart took over the estate agency business in January 2010. Mrs A's employment ended in August 2010. Mr Reid clarified that although the ET1 stated that it ended in January 2011 this could not be correct as the ET1 was done in November 2010 and the ET3 giving a date of 18 August 2010 was the correct date. Ms Blair stated that she agreed that this was the correct date. Mr Reid submitted that there was no evidence to show that Mrs A was employed by Mr Miller or Miller Stewart Limited as at July 2009.

Mr Reid referred to the evidence of Janet Blair and the phone conversation in March 2011. Mrs A did not include a statement to say that Miller Stewart was her employer. In respect of the phone call in October 2011 despite being pressed by the Chairman Mrs Janet Blair did not state that such a statement was made. The emails from Mrs A in April 2011 referred to Mrs A working for Bankford Limited and going to Ms F for queries until she left when Mrs A then answered to Mr Miller. Mr Reid submitted that this was in line with Bankford Limited ceasing in January 2010. Mr Reid stated that despite Mrs A having won an Employment Tribunal against Mr Miller she still did not state that he was her employer at the relevant time. Mr Reid pointed that it was not clear what Mrs A was being asked for in her email. Mr Reid pointed out that the relationship between Mrs A and Janet Blair had to be looked at in light of the clear

friction between them and police involvement at the time. Mr Reid submitted that it was surprising given this that Mrs A phoned Janet Blair for a friendly call in October 2011. Mr Reid further submitted that the email from Mrs A referred to matters being brought back in to the GSPC Scheme which suggested that Arran Property was not in it before. The Chairman pointed out that if there was no solicitor involved in Arran Property then there could not be any GSPC agency.

Mr Reid referred to Mrs A's Employment Tribunal Decision and submitted that TUPE applied if Miller Stewart stepped in and Bankford Limited ended as there would be continuity of employment and Miller Stewart would be the employer at the date of the Employment Tribunal which would explain why the Tribunal Decision was against Miller Stewart. Mr Reid pointed out that only the Tribunal Decision was available and accordingly the detail could not be known. Mr Reid submitted that it made no difference why Miller Stewart moved out of Arran. Ms E was doing Arran conveyancing but as Bankford Limited passed conveyancing to Miller Stewart there was nothing untoward about this. Mr Reid said that the fact that Ms F had a significant shareholding in Bankford Limited did not mean that Mr Miller had direction and control. There was nothing from Mrs A to suggest that she was under the day to day control of Mr Miller. There was accordingly insufficient evidence to suggest that Mr Miller was exercising direction and control over Mrs A.

Ms Blair stated that the complaint in connection with the police between Mrs Janet Blair and Mrs A was a civil matter.

## **DECISION**

The Tribunal considered all the evidence led before it very carefully. The Tribunal has to decide whether or not there was an employment relationship between Mrs A and Mr Miller or whether Mrs A was an individual who was subject to the direction and control of Mr Miller when the email was sent in July 2009. The Tribunal considered that it was most unfortunate that none of the employees who worked for Bankford Limited or Miller Stewart Limited were present to be able to give direct evidence about the situation. The email from Mrs A in April 2011 states that she was employed by Bankford Limited until six months before her Employment Tribunal. There was no

evidence to suggest that Mr Miller or Miller Stewart Limited employed Mrs A as at July 2009. The Tribunal however has to consider whether or not Mr Miller as a solicitor exercised direction and control over Mrs A in July 2009.

Mr Miller set up Bankford Limited and put the secretary in place who then resigned and his life partner, Ms F and a Mr D appear to have been the directors in July 2009. The Tribunal however has grave concerns with regard to Mr Miller's evidence in respect of Mr D. The Tribunal considered that Mr Miller was a stranger to the truth and that the only parts of his evidence which were credible were those where he made admissions against his interest. Mr Miller originally stated that Mr D died in December 2009 and thereafter stated that he died in December 2011. Mr Miller then went on to confirm to the Chairman that this was just a few months ago. Later in his evidence however he confirmed that Mr D had indeed died in December 2009 and that as a result of this Bankford Limited had no directors. He eventually, after pressing questions from the Tribunal, accepted that Miller Stewart took over Bankford Limited at the beginning of 2010. Mr Miller was unable to explain why Mr D's beneficiaries were not interested in Mr D's value in Bankford Limited which Mr Miller eventually accepted under questioning was a large shareholding. The remainder of the shares appear to have been owned by Mr Miller who had ten shares and Ms F who had 41 shares giving Mr Miller and Ms F the majority shareholding in Bankford Limited. It appears that Mr Miller ran Miller Stewart as an individual or limited company and owned the offices of Bankford Limited where Arran Property Estate Agency business was transacted. It further appears that Bankford Limited did not pay any rent and there was no lease but in return for this Bankford Limited sent all the legal work to Miller Stewart. From this evidence, the Tribunal inferred that Mr Miller's association with Bankford Limited extended beyond his ten shares and that there was no true commercial relationship between landlord and tenant. Given that Mr Miller and his life partner had a controlling interest in Bankford Limited, Mr D was in a position to exercise control over Mrs A but there is no evidence that he actually did this on a day to day basis. Mrs A states in her email that if she had any queries she first went to Ms F until she left and then she answered to Graeme Miller. Mr Miller's evidence is to the effect that Ms F left in late 2009. However the company documentation in respect of Bankford Limited shows that Ms F was a director until 21 February 2011 when she resigned. This is inconsistent with Mr Miller's evidence.

The evidence in respect of the Employment Tribunal, in respect of Mrs A, is not particularly helpful as it is in summary form and merely confirms that an award was made in respect of unfair dismissal. The ET1 and ET3 are only of direct relevance as an employment record where evidence is given and where that evidence is repeated before this Tribunal or contradicted. It does not directly bear on the matter of the relationship at the relevant time. The dates of employment in the ET1 and ET3 state the beginning of the continuous employment relationship but there can be many changes before the date of termination caused by mergers, acquisitions etc and the applicability of the TUPE regulations. The P45 is a form for revenue purposes and is required to change the nominated employer but there is no need for this to be issued to the employee.

In respect of Ms E's Employment Tribunal and the facts stated at paragraph 31 of that Decision, the Discipline Tribunal is not in a position to accept this as fact as it is not known what evidence was led before the Employment Tribunal and it is not a declarator. It is also not completely clear what "the Respondent's company" means.

There seems to be some consistency of evidence in respect of the fact that there was a change from Bankford Limited to Miller Stewart Limited some time in 2010. Paragraph 31 of Ms E's Employment Tribunal suggests that this took place in June 2010, Mrs A's email in April 2011 suggests that it was August 2010 and Mr Miller states it was January 2010. There is accordingly a complete variance in relation to dates. The Tribunal accordingly can accept that there was a change from Bankford Limited to Miller Stewart Limited but it is not possible to state on exactly which date this occurred other than that it was during 2010 and accordingly post dated July 2009 when the email was sent.

It is also very difficult for the Tribunal to ascertain exactly who was in charge at Bankford Limited and when. Ms Blair's evidence indicates that there is no Mr D with the date of birth given born in Scotland according to the checks made by Ms Blair. Mr Miller declared that he was very close to Mr D which makes it implausible that there was such confusion in his mind with regard to the date of death. The Tribunal was extremely troubled by the nature of the evidence given by Mr Miller which was

inconsistent and the Tribunal considered that Mr Miller lacked credibility and reliability. The nature of the evidence especially in connection with the death of Mr D causes the Tribunal real concern in connection with whether Mr D existed. The Tribunal hope that this is a matter which the Law Society will investigate. The Tribunal has suspicions that Mr Miller may have been lying but this does not allow the Tribunal to uphold that the opposite must be the case. The Tribunal require proper evidence in order make such a finding and there is a paucity of evidence led before it. Other sources may have been available but the Tribunal can only look at the evidence presented to it.

It is disappointing that the Law Society do not appear in their investigations or in their evidence to the Tribunal to have sought evidence from employees of Arran Property as to who gave them instructions as to their day to day work. Due to the paucity of evidence the Tribunal is unable to determine on the balance of probabilities, that Mrs A was either an employee of Miller Stewart or Mr Miller or that Mr Miller was exercising direction and control over Mrs A in July 2009. This Appeal must accordingly fail.

In connection with expenses, the Tribunal enquired of Mr Reid whether or not the Law Society had taken any precognitions from employees of Arran Property, Mr Reid replied that he did not think so. The Tribunal's view is that the Law Society should have done more to obtain information from the employees who would be in a position to say who was in control of the day to day running of Bankford Limited and Miller Stewart Limited. Due to this fact and also due to serious concerns with regard to the evidence of the Law Society's witness, the Tribunal considered it appropriate to find no expenses due to or by either party.

In connection with publicity, Mr Reid made a motion that publicity be deferred until the outcome of any possible police investigation or criminal proceedings arising out of this matter. The Tribunal consider that this would be appropriate in this case and so ordered. The Tribunal advised all parties that apart from stating the fact that the Tribunal has confirmed the Law Society's Determination and found no expenses due



to or by either party, no further information should be divulged to any person outside the Tribunal room until such time as publicity was given to the Tribunal Decision.

**Chairman**