THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
The Scottish Solicitors' Discipline Tribunal Procedure Rules 2008

DECISION

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

by

JOHN HARDEY, 73 Stonefield Road, Blantyre

Appellant

against

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

First Respondent

and

ALAN COWAN, Solicitor Advocate, Messrs Simpson & Marwick, 58 Albany Street, Edinburgh

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 John Hardey, 73 Stonefield Road, Blantyre (hereinafter referred to as "the Appellant") against the Decision by the Council of the Law Society (hereinafter referred to as "the First Respondent") dated 3rd March 2011, not to uphold a complaint of unsatisfactory professional conduct in respect of Head of Complaint 1A, Head of Complaint 1B and Head of Complaint 6 against Alan Cowan, Solicitor Advocate, Messrs Simpson & Marwick, 58 Albany Street, Edinburgh (hereinafter referred to as "the Second Respondent")

2. In accordance with the Rules of the Tribunal, the Appeal was formally intimated on the First Respondent and the Second Respondent. Answers were lodged on behalf of the First Respondent and the Second Respondent.

3. Having considered the Appeal with the Answers, the Tribunal resolved to set the matter down for a procedural hearing on 7 July 2011 and notice thereof was duly served on all the parties.

4. The hearing took place on 7 July 2011 and the Tribunal heard preliminary submissions from the Appellant and the Second Respondent. The Tribunal Determined that it would require to hear oral evidence in the case and the matter was adjourned to 10 October and 7 November 2011. When the case called on 10 October and 7 November the Appellant was present and represented himself, the First Respondent was represented by Mr Reid, Solicitor Advocate, Glasgow. The Second Respondent was present and represented by Mr Dunlop, Counsel. The Tribunal heard evidence from various witnesses. The Appellant confirmed that he was not to proceed with his Appeal in relation to Head of Complaint 6. The matter was then adjourned part heard until 9 January 2012 when further evidence was led. The matter was then adjourned until 11 June 2012 and parties were asked to lodge written submissions with the Tribunal.

5. The case called on 11 June 2012 when the Tribunal heard three motions from Mr Hardey, one of which was allowed and two were withdrawn. The Tribunal heard submissions from all parties and then adjourned to consider its decision.

6. The Tribunal re-convened on 17 July 2012 to conclude its deliberations. Due to the Tribunal not being quorate on 11 June and 17 July 2012, due to a delay in the re-appointment of one of the members, the Tribunal reconvened on 27 September 2012 with the shorthand writer's notes

from 11th June 2012 and remade and validated its decision. This procedure was agreed in advance by all parties.

7. The Tribunal carefully considered all the oral and written evidence in this case. Having concluded its deliberations, the Tribunal found the following facts established:

7.1 Given the history between Mr Hardey and Mr Cowan, Mr Cowan would have known on 12 January 2007 that he had undertaken to appear on behalf of Mr Hardey in terms of his letter of 11 January 2007.

7.2 On 3 December 2008 at a hearing on expenses before Temporary Judge Wise, Mr Cowan incorrectly claimed to the Court that he had not undertaken to appear for Mr Hardey.

7.3 When Mr Cowan's letter of 11 January 2007 was then produced to the Court, he was completely contradicted by it and sat silent before Temporary Judge Wise.

7.4 Mr Cowan had known since September 2006 that Mr Hardey did not own the property.

7.5 It was only after the averment that Mr Hardey was proprietor came out of the Record that plea to title to sue could have been debated.

7.6 A general plea of no title to sue had been on record since 2007 but was not supported by any averments at that time.

7.7 At the hearing on 3 October 2008 Mr Cowan used the word "recently" in the course of his submissions relating to the issue of title to sue.

8. In light of the facts found and taking account of the detailed submissions made on behalf of all parties, the Tribunal Quashed the Determination of the Law Society and upheld the Complaint in respect of Head of Complaint 1A and Confirmed the Determination of the Law Society in respect of Head of Complaint 1B.

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

Edinburgh 27 September 2012. The Tribunal having considered the Appeal by John Hardey, 73 Stonefield Road, Blantyre (hereinafter referred to as "the Appellant") against a Decision by the Council of the Law Society (hereinafter referred to as "the First Respondent) dated 3 March 2011, not to uphold a complaint of unsatisfactory professional conduct in respect of Head of Complaint 1A and Head of Complaint 1B against Alan Cowan, Solicitor Advocate, Messrs Simpson & Marwick, 58 Albany Street, Edinburgh (hereinafter referred to as "Second Respondent"); Quash the Determination of the Law Society in respect of Head of Complaint 1A and Uphold Head of Complaint 1A; Confirm the Determination in respect of Head of Complaint 1B; Make no award of Compensation.

(signed)
Vice Chairman

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

IN THE NAME OF THE TRIBUNAL

Vice Chairman

NOTE

When the Complaint called before the Tribunal on 7 July, Mr Hardey referred to his note of submissions in which he put forward his motion to amend paragraph 1 of his Appeal by deleting the letters "mis" from the word "misconduct" in the 5th line. Mr Hardey explained that this had been a typing error and he was fully aware that he could only appeal the failure by the Law Society to make a finding of unsatisfactory professional conduct against Mr Cowan. Mr Reid on behalf of the Law Society and Mr Dunlop on behalf of Mr Cowan indicated that they had no objection to this and it was accordingly agreed that the Appeal be so amended.

Mr Dunlop then referred to his Note of Argument for the Second Respondent. Mr Dunlop indicated that Mr Hardey in his Appeal stated that the Law Society had erred by failing to send Mr Cowan to the Tribunal for prosecution for misconduct. Mr Dunlop pointed out that there was no power in the legislation for the Law Society to do this and in terms of Section 42ZA, the Council of the Law Society must determine issues of unsatisfactory professional conduct. Mr Dunlop submitted that Mr Hardey made allegations in his Appeal that what Mr Cowan had done was professional misconduct, for example Mr Hardey alleged that Mr Cowan had lied to the Court, which if true would amount to professional misconduct. Mr Dunlop referred the Tribunal to the definition of "unsatisfactory professional conduct" in the Legal Profession and Legal Aid (Scotland) Act 2007. Given that unsatisfactory professional conduct was conduct which did not amount to professional misconduct, it followed that if Mr Cowan's conduct was sufficiently serious to amount to professional misconduct, it could not be unsatisfactory professional conduct and the Tribunal accordingly could not make such a finding. There was no power in these proceedings for the Tribunal to make a finding of professional misconduct and Mr Dunlop accordingly submitted that the Appeal in its terms was inept.

Mr Reid referred to the productions lodged by him with the Tribunal. He submitted that throughout the correspondence contained in the productions Mr Hardey referred to Mr Cowan being guilty of professional misconduct rather than unsatisfactory professional conduct.

Mr Hardey thereafter moved to amend his Appeal to delete the paragraphs in his grounds of appeal 1a and 4, where he suggests that the Law Society should have sent the matter to the Scottish Solicitors' Discipline Tribunal. Mr Dunlop and Mr Reid indicated that they had no objection to this amendment and this was allowed.

Mr Hardey stated that if Mr Cowan had lied to the Court, which could amount to professional misconduct, there was no reason why it could not also be unsatisfactory professional conduct. Mr Hardey stated that he did not categorise the issues as being either professional misconduct or unsatisfactory professional conduct, it was the Law Society that did this. The Law Society proceeded on the basis that Mr Cowan's conduct could meet either of the tests. Mr Dunlop pointed out that the greater does not include the lesser and there was no overlap between unsatisfactory professional conduct and professional misconduct. If it was professional misconduct it could not be unsatisfactory professional conduct. Mr Dunlop submitted that Mr Hardey had used the wrong proceedings and what he should have done was to try and persuade the Law Society to take a complaint of professional misconduct to the Tribunal against Mr Cowan.

The Tribunal considered that it was not in a position at this stage to say that the Appeal was inept. As the Appeal had not yet been heard, the Tribunal could not come to a conclusion that the facts would inevitably result in a finding of professional misconduct rather than a finding of unsatisfactory professional conduct. The Tribunal however had concerns that the Lay Complainer would be unable to obtain the result he desired and the Chairman accordingly gave the Lay Complainer a warning with regard to potential liability for expenses and allowed him time to consider his position.

After the adjournment Mr Hardey confirmed that he wished to continue with his Appeal. He stated that the Law Society had advised him in their letter of his right to appeal the lack of a finding of unsatisfactory professional conduct. If the Tribunal found that the conduct amounted to only professional misconduct he may be looking for expenses and he suggested that a further debate on the issue should be fixed. The Chairman clarified that the Tribunal had already ruled that the Appeal was competent to continue and that it was up to him whether he wished to continue. Mr Hardey

indicated that he wished to continue and wished matters to be remitted to the Law Society. It was however pointed out that this was not a course of action which was competent under the legislation. Mr Hardey clarified that he was appealing heads of complaint 1A, 1B and 6 and was not challenging the other heads of complaint. It was clarified that Mr Dunlop would be leading 2 witnesses and Mr Hardey would also be leading 2 witnesses and it was anticipated that the case would probably take 2 days.

In connection with Mr Hardey's second preliminary point, he indicated that he wished to make a submission that the Law Society had dealt with matters unfairly and accordingly the Appeal should be allowed. Mr Dunlop pointed out that the rules relating to Appeals did not allow this as the Tribunal only had certain powers and could either quash the determination, award compensation or confirm the determination, there was no power for the Tribunal to send the matter back to the Law Society to reconsider. Mr Hardey asked the Tribunal to quash the determination due to unfairness on the part of the Law Society. Mr Reid indicated that the Tribunal would require to hear evidence before a decision could be made on this. The Tribunal was of the view that it was not possible to quash the determination on the basis of unfairness at this stage in the proceedings and that the Tribunal would require to hear evidence and submissions before the matter could be ruled on. The Tribunal indicated that it would hear submissions on this as a preliminary point at the start of the substantive hearing but would not be able to come to a conclusion until the evidence had been led. The matter was then adjourned to 10 October and 7 November 2011 for substantive hearings. The Tribunal requested that if part 2 of Mr Hardey's preliminary point was to be insisted on, written submissions be provided to the Tribunal.

When the case reconvened on 10 October 2011, Mr Hardey advised that he would like to present his Appeal in the same manner as a normal Sheriff Court Appeal. He stated that he did not think there was a need to examine the facts in this case and he would direct the Tribunal to the productions lodged and the papers that were before the Professional Conduct Committee. Mr Hardey stated that his position was that the Professional Conduct Committee proceeded in error in connection with construction of the facts. Mr Hardey stated that he did not think that it was necessary for him to give evidence but that he would do so if required. Mr Hardey clarified that there was

a difference of opinion with respect to the interpretation of the evidence which was before the Law Society. He however accepted that there was a dispute on the facts between him and Mr Cowan. Mr Hardey however stated that he was going to ask the Tribunal to find that the Law Society had misdirected itself on the evidence before it.

Mr Dunlop stated that this was a case where there was a plain factual dispute. For example in respect of Head of Complaint 1B, the question was whether or not Mr Cowan said "recently". In connection with Head of Complaint 6, Mr Hardey's position was that Mr Cowan moved that the amendment process be continued to the hearing on expenses whereas Mr Cowan's position was that he did not do this. Mr Dunlop pointed out that the Tribunal could not send the matter back to the Law Society, the power was to determine the Appeal. Accordingly, if the Tribunal found that the Law Society had misdirected itself the first thing the Tribunal required to do was to set out the facts proved. It followed that the Appellant was required to produce evidence to back up his account of the facts.

Mr Reid stated that his position was neutral and that the Law Society had made their decision on the basis of what was presented to them at the time. In response to a question from the Chairman, Mr Reid stated that the productions lodged were the papers which were before the Law Society when they made their decision. Mr Dunlop stated that he accepted that the productions were a complete set of papers and moved the Tribunal to allow him to lodge late productions including the record. Mr Hardey confirmed that he had no objection to this and it was allowed. Mr Dunlop also pointed out that the Law Society had Simpson & Marwick files before them when they made the decision and these had not been produced. Mr Dunlop pointed out that the grounds of Appeal stated that there was no finding in fact etc and he wished the opportunity to provide evidence from Mr Cowan. Mr Hardey stated that the crux of the appeal was that the Law Society made an error in construction of the evidence and the Tribunal was there to look at what the Law Society did. Mr Hardey said that he would be happy for the Tribunal to quash the Law Society's determination and then the Law Society could look at it again.

Mr Reid stated that the Law Society's preference was that the matter be dealt with on the basis of the submissions and the paperwork provided to the Law Society. However Mr Hardey's Appeal went further than that.

Decision on Whether to Allow Evidence to be Led

The Tribunal considered that in this particular case there was such a dispute with regard to what the facts were that the Tribunal would be unable to make a sound decision on the facts without evidence to establish exactly what the facts were. In terms of Section 53ZB(2) of the Solicitors (Scotland) Act 1980 the Tribunal may quash the determination being appealed against and make a determination upholding the complaint. It is accordingly not open to the Tribunal merely to quash the Law Society's determination and the Tribunal will require to make a determination on the facts. The Tribunal accordingly decided that it would be necessary to hear evidence in this case. This will however not necessarily be the case in all Section 42ZA appeals.

Evidence From the Appellant

Mr Reid objected to Mr Hardey taking all his notes with him when giving evidence. Mr Hardey however explained that he was using his own grounds of appeal and productions which were highlighted to make it easier for him to present his case. This was accordingly allowed. Mr Hardey explained that he had qualified as a solicitor but had not done his traineeship yet. He had been involved in a lot of litigation. This particular litigation was in connection with noise from a nursery next door to him and he had taken an action in the Court of Session. Mr Cowan acted for the defender. Mr Hardey stated that there were a lot of negotiations between him and Mr A, Mr Cowan's senior partner. Mr A had offered him a Bar traineeship but Mr Cowan had objected to this. Mr Hardey explained that he had been involved in a damages action against the Law Society and Mr Cowan had acted for the Law Society. It was a pre-condition of the offer of the Bar traineeship that there was no ongoing action and Mr and Mrs B's action went on and on. Mr Hardey stated that there were a lot of misrepresentations by Mr Cowan to the Court but that there were only three that he could prove. In connection with Head of Complaint 1B, the issue was whether or not

the word "recently" was used before Lord Emslie, in respect of the title to sue matter. There was a hearing on 3 October 2008 on expenses. There had been an action of interdict between 2005 and 2007 but the nursery moved in 2007 and accordingly it was only the expenses issue that was left. Lord Emslie asked why the title to sue matter had been raised so late. Mr Cowan had introduced the plea of "no title to sue" in April 2008 and Lord Emslie asked why this could not have been brought earlier. Mr Cowan told Lord Emslie that this was because he had only recently learned that Mr Hardey did not own his own house. Mr Hardey explained that he had complained to his advocate at this time because this was not correct. Mr Hardey then referred the Tribunal to page 46 of the Law Society's Second Inventory of Productions, being his opposition to the motion which was lodged in January 2007. In this Mr Hardey stated that the property was not owned by him and accordingly Mr Cowan knew in January 2007 that Mr Hardey did not own the property. Despite this it was not until April 2008 that the minute of amendment was lodged to include this. Mr Hardey then referred the Tribunal to page 150 of the Law Society's 2nd Inventory, being the minute of amendment lodged by Mr Cowan in April 2008 which included a new plea in law stating that the pursuer, not being the proprietor of 73 Stonefield Road, Blantyre and having no title to sue, the action should be dismissed. Mr Hardey submitted that if this matter had been raised earlier matters would not have gone past a preliminary diet. Mr Hardey also referred to pages 154 and 155 of the Second Inventory of Productions for the Law Society which were title searches which were also done in April 2008. At this stage Mr Hardey attempted to lodge authorities but there was an objection by Mr Dunlop and the Chairman advised that this was more a matter for submissions. Mr Hardey stated that before April 2008 Mr Cowan only had a generalised pleas in law which was not the same as a plea of no title to sue. Mr Hardey submitted that what Mr Cowan had said to Lord Emslie was false.

Mr Hardey then referred the Tribunal to page 203 of the Law Society's Second Inventory of Productions being Head of Complaint 1B that was agreed with the Scottish Legal Services Commission. Page 125 of the Law Society's Second Inventory was the Reporter's report. Mr Hardey emphasised that he did not say that Mr Cowan had lied. He stated that Mr Cowan had given false and misleading information. In connection with the closed record, Mr Cowan stated that the plea on the record averred that the pursuer lacked right, title and interest, and was corrected in

April 2008 and done properly. Mr Hardey referred the Tribunal to page 208 of the Law Society's Second Inventory, where the Law Society's decision stated that Mr Hardey's advocate had not corroborated Mr Hardey. Mr Hardey also referred to pages 81 and 106 of the Law Society's Second Inventory where the Law Society stated that he did not produce evidence that Mr Cowan had said "recently". The Law Society's Answers at page 4 said the same thing. Mr Hardey submitted that was false and that the Reporter had withheld a document from the Professional Conduct Committee which had misdirected itself with regard to the evidence. Mr Hardey referred to page 119 of the Law Society's Second Inventory being an email by Ms D to Ms C in connection with a previous email which did not reach Ms C. Mr Hardey then referred the Tribunal to page 121 being Ms C's response to the investigator's query. In this she confirms that Mr Hardey's account was correct. This response was given despite the unrealistic time pressure during the Christmas period. Page 198 was an email from Ms C confirming that Mr Cowan did advise the Court that he had only "recently" learned that Mr Hardey did not own the property. Mr Hardey submitted that this corroborated his complaint. This email was however not in the papers which were before the Professional Conduct Committee. Page 191 was the reporter's supplementary report which does say that Ms C corroborates Mr Hardey's version. Elsewhere it is stated that Mr Hardey's account is not corroborated and Mr Hardey submitted that this did not make sense. Mr Hardey further submitted that the Law Society had accordingly not taken proper account of the evidence. The Law Society had then tried to undermine this as collusion but Mr Hardey pointed out that Ms C is a respected advocate. Page 66 was Mr Cowan's letter written on 30 November 2009 where Mr Cowan states that he has no recollection of using the word recently which is different from a positive denial. Later on Mr Cowan does positively deny using the word "recently". Mr Hardey submitted that the Law Society erred in law by saying that there was no corroboration. Page 134 is Mr Hardey's letter setting out his position with regard to misapplication of evidence. Page 161 was Ms C's written notes to Judge Wise and showed that there was no doubt that it was only in April 2008 that the issue of title to sue was properly brought to bear.

Mr Hardey then went on to address Head of Complaint 1A. Mr Hardey submitted that Mr Cowan had incorrectly claimed that he had not undertaken to appear on behalf of Mr Hardey. The issue was that the undertaking had been given and was not kept. Mr

Hardey explained that Mr Cowan had enrolled 3 motions to call on different days and he had challenged this. Mr Cowan had undertaken that he would act on behalf of both parties on 12 January 2007 and have matters continued until 16 January. This undertaking was given in writing to Brodies. Mr Hardey referred to the record and the interlocutor of 12 January 2007, which shows that Mr Hardey was marked as being "no appearance". When Mr Hardey saw this he wondered about the undertaking and was concerned because it had implied that he had been discourteous to the Court. If a party did not appear they could be held in default and the one of the options for the judge could have been to have the case thrown out. Mr Hardey explained that in an action of expenses, each party attacked each other's conduct. Ms C attacked Mr Cowan because the undertaking was given and then breached and this was done before Judge Wise at the expenses hearing. Mr Cowan, in the afternoon, denied that he gave such an undertaking and this was false. Mr Hardey referred to page 125 of the Law Society's Second Inventory of Productions where the Reporter had accepted Mr Cowan's explanation that he was confused about the two dates. Mr Hardey then went on to refer to page 104 being part of the Reporter's report where it is stated that Mr Cowan's position was that there could not have been any agreement for him to appear on behalf of both parties. Mr Hardey stated that Mr Cowan had said at the time that he found it offensive that he was accused of breaching an undertaking. Mr Hardey referred to page 207 being the Committee's report which refers to Mr Hardey's case being backed up by his advocate and Mr Cowan's being backed up by Judge Wise and where the Committee takes as material the fact that the Judge did not seek any further information from Mr Cowan. Mr Hardey however pointed out that Mr Cowan had originally said that he did not accept that he gave an undertaking which was different from what the Committee found, which was that he could not recollect having given an undertaking. Mr Hardey referred to page 46 of the Law Society's First Inventory of Productions which was Mr Cowan's response to the Complaint in June 2009 where he says that he indicated to the Court that there could not have been an agreement for him to appear on behalf of both parties on 12 January. The Law Society's opinion was that it was not a problem because any solicitor could forget but this was not what Mr Cowan had said. Mr Hardey referred to page 58 of the Law Society's First Inventory of Productions being an email from Ms C in connection with her recollection which stated that Mr Cowan's response was that no undertaking was given, which was not the same as saying he could not remember. Ms

C then gave Mr Cowan a copy of his own letter of 11 January 2007. Mr Hardey pointed out that on 16 January, Lord Brailsford had said that it was kind of Mr Cowan to have the case continued in the absence of Mr Hardey. Mr Hardey then referred to page 54 of the Law Society's First Inventory being the note by Judge Wise which stated that Mr Cowan said he could not remember any such agreement but Mr Hardey pointed out that the Judge also stated that her notes did not record his words specifically and were based on pure recall years later. This was different from Mr Hardey's position, Ms C's position and Mr Cowan's first statement. At page 74 of the Law Society's Second Inventory of Productions Judge Wise states that given the passage of time she is unable to give a clear recollection of matters. Mr Hardey also referred the Tribunal to page 133 of the Law Society's Second Inventory being his response of 25 January 2011. Mr Hardey stated that he accepted that mistakes could be made but that there was a duty to correct them and a reasonable solicitor would do so and Mr Cowan had time to do this before the hearing recommenced on 4 December 2008.

Mr Hardey then stated that he had reflected on matters and had now decided not to proceed with his Appeal in respect of Head of Complaint 6. Matters were too complicated to prove and he felt that there was too much of a margin for doubt and it would be too difficult for him to discharge the onus upon him. He accordingly confirmed that he would delete ground 1c of his Appeal.

Mr Hardey stated that he now wished to give evidence with regard to the Law Society acting unfairly because he was not given a copy of Judge Wise's notes. Mr Dunlop objected stating that this did not have any bearing on the Appeal. Mr Dunlop stated that it was a question for the Tribunal whether the complaint was made out on the evidence. Mr Hardey stated that his Appeal was asking the Tribunal to quash the Law Society's decision because it was improperly made and there were no restrictions in the Act. He could appeal on the grounds of error of law and manifest unfairness. Mr Dunlop referred the Tribunal to Section 53ZB(2) which states that the Tribunal must quash and make a determination. To do this the Tribunal must take a view on what has happened. Mr Hardey stated that in respect of points 2 and 4 in his Appeal he felt he needed to give evidence about what had happened. He stated that because he had a right of appeal he could not judicially review what the Law Society had done. He

stated that the hearing before the Tribunal was not a retrial but was looking at the Law Society's decision and he should be able to raise issues of fairness. Mr Dunlop stated that if the Tribunal found that the Law Society had acted unfairly this was irrelevant because the Tribunal had to decide whether it was correct to make the decision or not.

Decision of Whether to Allow Mr Hardey to Lead Evidence in Respect of Grounds of Appeal 2 and 4

The Tribunal noted the wording of the Act which stated that on an appeal the Tribunal may quash the determination being appealed against and make a determination upholding the complaint. However the Tribunal considered that any unfairness or impartiality in the way that the Law Society made its decision is relevant to the Tribunal's decision as to whether or not to quash the Law Society's determination. The Tribunal accordingly considered that what had happened during the Law Society's consideration of the evidence was relevant. The Tribunal accordingly allowed Mr Hardey to continue with his evidence.

In connection with Appeal ground 2, Mr Hardey referred the Tribunal to page 59 of the First Inventory of Productions for the Law Society being a letter from the Law Society stating that they would not provide Mr Hardey with a copy of Judge Wise's note as the statements had been voluntarily provided to assist with the investigation of a 3rd party Complaint. Mr Hardey submitted that this lack of access was unfair as Judge Wise was an essential witness and he was unable to comment on her note.

In connection with ground of Appeal 4, Mr Hardey stated that fairness and neutrality were paramount. He explained that he possessed three Inner House Decrees against the Law Society in connection with their repeated and endemic mishandling of his affairs. He had been prevented from becoming a solicitor, there had been media reports and the Ombudsman had been involved. The evidence had been misapplied.

Mr Hardey stated that he did not need to give further evidence with regard to Ground of Appeal 3.

In connection with the issue of professional misconduct versus unsatisfactory professional conduct he stated that this was a matter of submissions and he submitted that both the First and Second Respondents were barred from taking objection to a finding of unsatisfactory professional conduct. Mr Dunlop stated that it was agreed that the Law Society had considered whether or not the conduct amounted to professional misconduct or unsatisfactory professional conduct and had not made a finding of unsatisfactory professional conduct. There was accordingly no need for Mr Hardey to give evidence with regard to this matter.

Cross Examination of the Appellant By Mr Reid

Mr Reid referred Mr Hardey to page 217 of the Law Society's Second Inventory of Productions where it was stated that Mr Hardey believed a course of misrepresentation by Mr Cowan may be evident. Mr Hardey stated that he did not use the word lie but had said false and misleading. Mr Hardey stated that in respect of Mr Cowan denying the use of the word "recently" Mr Hardey was not saying that he was lying to the Court because it had been said that if it was a lie it was professional misconduct and therefore could not be unsatisfactory professional conduct. Mr Hardey stated that lying may have been intrinsic.

Mr Hardey stated that he did not know why it had taken him so long to complain. He advised that he was an executor in a large estate and was busy and that he had made the complaints within the timescale. He clarified that he was offered a job in writing on 16 January 2007 by Simpson & Marwick but it was conditional upon no ongoing live litigation. Simpson & Marwick were involved in acting for other clients in actions against Mr Hardey. Mr Hardey stated that he found out later that Mr Cowan had objected to him getting a Bar Traineeship. He however stated that it was himself who had reneged on the offer of the traineeship. Mr Hardey stated that the decrees that he had obtained against the Law Society were for reduction of a decision to refuse to issue him a practising certificate (twice), and a finding that it was incompetent to refuse to give him a traineeship for only 18 months. He also had got a decree against Simpson & Marwick and costs awarded to him. There had been a settlement involving the insurers because there was a serious risk that the action

would be lost because senior members of the profession were against Mr Hardey and prejudiced against him.

Mr Reid referred Mr Hardey to page 215 and Mr Hardey said that there was an inherent misapplication of evidence and he was not provided with a copy of the note. There was a persistent allegation by the Law Society that there was no corroborative evidence and the Reporter did not put Ms C's email to the Professional Conduct Committee. Mr Hardey stated that he instructed Brodies to act for him but he also had a lot of input into the case himself. He accepted that there may have been a cross over between who was acting when. There were however no appearances by him, although he did the pleadings himself. Mr Hardey stated that he specifically remembered Mr Cowan using the word "recently" because he complained about it at the time and he sacked Brodie's trainee due to her use of her hand to stop him speaking. Mr Hardey stated that there was no difference between the word "recently" and "only recently". Mr Hardey stated that he had no problem conceding that the inference was that Mr Cowan had been lying but that was not the only inference that could be drawn.

Cross Examination of the Appellant by Mr Dunlop

Mr Hardey advised that he had obtained a law degree in 1995 and a diploma in 1996 and had sat qualifications for the Bar but he was not a qualified solicitor. He did however have an entrance certificate and a dispensation so that he could do his training in 18 months. He was not a member of the Law Society. In connection with Head of Complaint 1A, Mr Hardey stated that the proof was in February 2007 and there was a motion by Mr Cowan in December 2006. The motion was meant to call on 10 January 2007 and Mr Hardey stated that he was unaware that Mr Cowan had spoken to Brodies about having it call instead on 12 January but this may have happened. Mr Hardy accepted that the interlocutor of 10 January 2007 had called and been continued to 12 January 2007. There had been an appearance by Aird, his representative, at the last minute which was consistent with page 42 of the Law Society' First Inventory of Productions, that there had been some confusion with regard to what was going on at that stage. Mr Hardey stated that there was a delay in him obtaining the 12 January interlocutor but he accepted he had seen it by May 2007

and did not make a complaint about the content until after the hearing with Judge Wise on 3 December 2008. Mr Hardey accepted that he may not have mentioned previously that Mr Cowan was offended by the suggestion of a breach of undertaking. Mr Hardey stated that Mr Cowan had scored out 15 years of his life. Mr Hardey stated that he accepted that Judge Wise had not asked Mr Cowan for any further clarification. Mr Hardey accepted that the expenses of the hearing in January 2007 had been dealt with on 16 January 2007 and the amendment expenses had been dealt with by April 2007. Mr Hardey accepted that it looked as if the issue of the undertaking made no difference to Judge Wise in her decision on expenses. Mr Hardey indicated that he accepted that Mr Cowan's submissions may have concluded on 3 December rather than going on to 4 December. Mr Hardey accepted that his letter at page 9 of the Law Society's First Inventory of Productions dated 7 January 2009 related to the January 2007 hearing and nothing else. Page 19 of the Law Society's Second Inventory of Productions was a letter by Mr Hardey dated 23 September 2009. Mr Hardey accepted that this was made just before the time limit expired and related to Head of Complaint 1B only. Page 7 of the Law Society's Second Inventory of Productions was a letter from Mr Hardey in December 2009 relating to Heads of Complaint 2, 3, 4, 5 and 6. Mr Hardey accepted that the complaint was made just before the one year time limit expired. Mr Hardey stated that he did not have the time or energy to make the complaint sooner. Mr Hardey accepted that he put down on the help form that he suffered irritation and anger as a result of what had happened. Mr Hardey accepted that all the matters were in the past by the time of his first complaint in January 2009. He accepted that he trawled around and sent complaints in in parts and Mr Hardey accepted that he conducted himself in this matter due to a legitimate grievance against Mr Cowan and that he did not like Mr Cowan. He however stated that these were not vexatious complaints. Mr Hardey stated that Mr Cowan protracted the litigation in the knowledge that this would frustrate Mr Hardey's Bar traineeship with Simpson & Marwick. The outcome of the hearing on expenses in December 2008 was the same as what Mr Hardey had offered a year earlier. Mr Hardey stated that he offered dismissal but Mr Cowan insisted on abandonment. Mr Hardey stated that he did not know that you could abandon and seek dismissal. Mr Hardey accepted that expenses were the crux of the matter and that Mr Cowan did not want to accept no expenses due to or by, as Mr Cowan's client wanted to make a claim for expenses. Mr Hardey said that the likely

outcome of Mr Cowan's actions was that his traineeship would not be implemented and this led to raised eyebrows by him. Mr Hardey stated that Mr Cowan must have a grievance against him because he objected to his traineeship. Mr Hardey accepted that he had made various threats to send Mr Cowan to the Law Society and that he may have said that it would take years. Mr Hardey stated that he would be judicially reviewing the Law Society due to the fact that they did not provide Ms C's email to the Professional Conduct Committee. Mr Dunlop referred Mr Hardey to page 48 of the Law Society's First Inventory and Mr Hardey accepted that it included an accurate quote from him to the effect that "there are set to be years of legal ramifications over this matter and my dissatisfaction at your own personal conduct, part of which is now under investigation by the Society". Mr Hardey stated that he did not accept that this was harassment.

Mr Dunlop then referred Mr Hardey to page 133 of the Law Society's Second Inventory of Productions, being Mr Hardey's letter to the reporter. Mr Hardey accepted that page 140 used strong language with regard to fairness and incompetence but Mr Hardey did not accept that this was intemperate. He stated that to globally throw everything out was wrong. Mr Dunlop then referred Mr Hardey to page 200 of the Law Society's Second Inventory of Productions, being a letter to Ms D at the Law Society which referred to a deliberate attempt to ignore information prejudicial to the complainee. Mr Hardey stated that he had had previous dealings with Miss D in connection with his sister's complaint regarding a breach of interdict which was not upheld. Mr Hardey stated that Miss D ignored important and relevant information. Mr Hardey stated that he held 25 Court decrees and accepted that he said he was going to judicially review the Law Society over the matter. Mr Hardey also accepted that he had said in his letter that he would be taking matters against Miss D personally and he indicated that this had probably been pointless and he only did it because he was upset. He did not accept that he wrote the letters in a harassing way. Mr Hardey objected to this line of questioning. Mr Dunlop stated that as credibility was important in this case, it should be allowed. Mr Hardey stated that the innuendo was of bullying and there was no basis for this in the Answers.

As credibility is at issue in this case, the Tribunal felt that the questions were acceptable in the context of cross examination and allowed the questioning to continue.

Mr Hardey accepted that he wrote to two witnesses in Mr and Mrs B's case stating that in the event that his action was unsuccessful he intended to convert his own property into a small pub/club with a beer garden or into a DSS hostel. Mr Hardey explained that the witnesses were his neighbours and had decided to give evidence to say that the nursery was not causing a nuisance. Mr Hardey stated that he forgot when he was writing to the witnesses that they were witnesses and had thought of them as neighbours. Mr Dunlop pointed out that in the letter, Mr Hardey actually referred to them as being witnesses but Mr Hardey explained that he had forgotten the ramifications of them being witnesses. Mr Hardey did not accept that he had bullied them. Mr Hardey accepted that he would probably not have converted his house but it had been discussed. His thinking was that "they could have some too". Mr Dunlop put to Mr Hardey that if he fell out with someone he would resort to Court. Mr Dunlop asked Mr Hardey how many actions were ongoing. Mr Hardey again objected to the line of questioning but the Tribunal allowed it to continue. Mr Hardey stated that he had 5 actions against Mrs B and 1 against her husband, which had been in connection with the security light on his property, which was shining into Mr Hardey's bedroom window.

At this point the matter was adjourned part heard until 7 November 2011.

When the case called on 7 November 2011, Mr Dunlop asked the Tribunal to allow him to lodge a Secondary Inventory of Productions late. Mr Hardey objected saying that he could not read the Productions and that he had had no opportunity to deal with the issues raised in the Productions in his evidence. Mr Reid said he had no objections to the Productions being lodged late. Mr Dunlop explained that the Productions were prompted by the evidence which had been led on the last occasion. He explained that it was only paragraph 2 of the Notes which he intended to refer to. Mr Dunlop read out paragraph 2 of the Notes and Mr Hardey then withdrew his objection. The Tribunal allowed the Productions to be lodged.

Mr Dunlop then continued with his cross examination of Mr Hardey.

Mr Dunlop questioned Mr Hardey with regard to the 20 litigations raised by him. Mr Hardey objected to the question saying that other litigation was irrelevant and a lot of the actions remained live and that he was under oath at a Sheriff Court Proof and did not want to be led inadvertently into breaching an undertaking given to the Court. Mr Hardey also alleged that Mr Dunlop was trying to attack his character. Mr Dunlop pointed out that this objection had been ruled on on the last occasion. Mr Hardey stated that Mr Dunlop was only raising these matters to annoy him but if the matters were raised he would have to respond in detail. Mr Dunlop stated that he only wished to pick up a couple of questions in connection with the litigation.

The Tribunal allowed the questioning to continue but asked that Mr Dunlop not ask questions which would go into any detail with regard to live proceedings. Mr Hardey confirmed that he had been Pursuer in not more than 30-50 cases but a lot of these related to him being Pursuer in an executry capacity rather than a personal capacity. Five cases were live and one case was not ongoing. Mr Hardey confirmed that Mr and Mrs B had moved house. Mr Hardey confirmed that Mr Dunlop had acted for him in a case by him against Ms F, his mother. Mr Hardey again objected because Mr Dunlop had been his former solicitor and had lost the case. The Tribunal allowed Mr Dunlop to continue with his questions after Mr Dunlop confirmed that he would not ask any questions where he had an ongoing duty of confidentiality. Mr Hardey explained that he took a case, lost it but he then won and had the Decision reduced. The Chairman indicated that the Tribunal was not sure of the relevance and was finding it hard to follow. It was clarified that the Decree was reduced of consent. Mr Hardey stated that the Decision was reduced because Lord McFayden made an error of law. Mr Hardey confirmed that Lord McFayden had been critical of him and stated that as the Decree had been reduced it was like it had never existed. Mr Dunlop clarified that the Decision was a matter of public record. Mr Hardey however stated that he had asked for it to be removed. Mr Hardey stated that the best way forward was for him to give a brief synopsis of what had happened in the case. He advised that 20 years ago there was a family breakdown and he had a dispute with his mother with regard to a plot of ground. The family sued each other and Mr Hardey's mother raised actions. Lord McFayden found that the document produced had been obtained on force and fear and

Mr Hardey lost the first judgment and the Inner House reclaiming motion but there was earlier evidence that the land had been signed to him which meant that he could not have exhorted the documentation and accordingly Lord McFayden was wrong. Mr Hardey stated that he had to sort matters out himself. At this stage the Chairman asked Mr Dunlop to move on.

Mr Dunlop referred Mr Hardey to Production 1, page 6 of the First Inventory of Productions for the Law Society being Mr Hardey's complaint to the SLCC. Mr Hardey explained that the letter of 11 January 2007 had been lodged as a Production but when he went home that night he found the letter and gave it to his Counsel but he did not have any need to do this as the letter was already lodged as a Production. Mr Hardey conceded that what he had said on his form about the letter being hurriedly found could have been better phrased.

Mr Hardey confirmed that he drafted the pleadings and Mr Dunlop referred him to the closed Record, page 4 where in the Conclusions Mr Hardey states he is pursuer, proprietor and occupier of 73 Stonefield Road, Blantyre. Mr Hardey accepted that this was not true. Mr Dunlop also referred Mr Hardey to Page 158 of the Law Society's Second Inventory of Productions being the Notice to Admit for the Defender which states that the Pursuer was not and never had been proprietor of 73 Stonefield Road, Blantyre. Mr Hardey explained that his father's estate had owned 73 Stonefield Road, Blantyre and he was an executor in his father's estate but he accepted that he did not personally own the property. Mr Dunlop referred him to Page 155 of the Law Society's Second Inventory of Productions being the Search Sheet showing Mr E and Ms F as the owners. Mr Hardey stated that his mother and sister now owned the property. Mr Hardey explained that he was in infeft as the executor and therefore could bring the action but he does not own the property personally. Mr Hardey stated that he did not know why paragraph 2 was in the Notice to Admit stating that the Pursuer was not a member of the Law Society. Mr Hardey stated that Mr Cowan wrote to Bruce Ritchie saying that he had misstated his status because he had put in an action that he was Pursuer and a member of the Law Society. Mr Hardey explained that he had got confused between member and entrant. The Law Society later apologised because they had tried to intromit in his process. Mr Hardey accepted that he might have put in that he had been academically qualified as a solicitor since

1996. Mr Dunlop referred Mr Hardey to Page 161 of the Law Society's Second Inventory of Productions. Mr Hardey stated that this was Ms C's written notes and he did not draft it. He explained that he gave his Counsel some notes on a disk and that she used his notes and played around with them. Mr Dunlop referred Mr Hardey to Page 43 of the Law Society's Second Inventory of Productions where he states in his letter to the SLCC that Mr Cowan stated that the reason the plea to title to sue had never been taken and the cause never taken to procedural roll was because the Defender had only recently learned that Mr Hardey did not own his property. Mr Hardey was adamant that this was entirely right. Mr Hardey stated that he knew that Mr Cowan's position was that plea in law 3 was a plea in connection with the title to sue. Mr Hardey stated that he did not recall whether Mr Cowan referred Lord Emslie to plea in law 3. He explained that Mr Cowan was seeking expenses against him because of his actions during the action. When Mr Cowan stated that he had only recently found out Mr Hardey tugged Counsel's gown immediately. Before Lady Dorrian in April 2008 Mr Hardey opposed the receipt of the Minute of Amendment because it was close to the Proof and was introducing a new defence. Mr Hardey stated that he accepted that Mr Cowan said it was not a new plea because plea in law 3 was already in. Mr Dunlop then referred Mr Hardey to Page 24 of the Record and to plea in law 3 which stated that the pursuer not having the right title and interest to seek remedy of the Defender's actions etc. Mr Hardey confirmed that he accepted that Mr Cowan's position was that this was a plea in relation to title to sue but there were no supporting averments. Mr Hardey stated that he could not remember whether Mr Cowan said this to Lord Emslie. Mr Hardey accepted that plea in law 3 had been on record since May 2007. Mr Dunlop put to Mr Hardey the possibility that Mr Cowan had stated that it had only recently become possible to go to debate on the issue. Mr Hardey said no. Mr Dunlop put it to Mr Hardey that if he averred that you are the proprietor and yet the other side says you are not this cannot be determined at a debate because there is a question of fact in dispute. Mr Hardey said that he did not know that. Mr Hardey accepted that in answer to Mr Cowan's Minute of Amendment he deleted the averment that he was the owner. Mr Hardey would not accept that he had got it wrong in connection with what Mr Cowan had said to Lord Emslie. Mr Hardey stated that Mr and Mrs B were there at the hearing before Lord Emslie and that it was possible that there was evidence that they had told Mr Cowan with regard to the ownership of the house.

Mr Hardey stated that throughout the action there had been a series of events which had led to an increase in animosity towards Mr Cowan. Mr Hardey denied that he acted aggressively to confrontation. He accepted that he had raised six actions against his neighbours and had a Deed in respect of an action against his mother reduced due to force and fear and had written to Mr Cowan to warn of years of legal ramifications but did not accept that this was a vendetta. Mr Hardey clarified that he was only going ahead with his appeal in respect of the points that he could prove and he was just seeking a legal remedy. He pointed out that he was the one who did not take up the traineeship.

Re-Examination by the Appellant of himself

Mr Hardey apologised for his loss of composure during cross examination. He stated that he felt he was being deliberately upset on irrelevant matters. He submitted that Mr Dunlop was trying to paint a picture of him as a bully which was unfair. He referred to Page 200 of the Law Society's Second Inventory of Productions which was his letter to Ms D. He explained that he was a disgruntled complainer who had a right to take an objection in connection with a complaint that had been mishandled. He stated that his language was not improper and that Ms D had not expressed any concern with regard to the contents of his letter to her. In connection with the letter sent to his neighbours, he had known his neighbours for 20 years and had written to say that he was disappointed to see they were on Mr and Mrs B's witness list. There had been no attempt to bully and his neighbour had not taken exception to it. Mr Hardey explained that he had not taken account of the legal ramifications but accepted that it was wrong. An explanation was given to Judge Wise and it was left at that.

Mr Hardey explained that he had been involved in a 20 year dispute in connection with a forged Will and that most of the actions that he was involved in were in his capacity as an executor. He stated that it was unfair of Mr Dunlop to impugn him for an action that he lost for him. The actions taken against Mr and Mrs B were due to their conduct. Mrs B had stated that he was a pervert and a paedophile and he had to take defamation action. Mr and Mrs B had now offered a global settlement proposal. Mr Hardey stated that his dispute with Mr and Mrs B was made worse due to Mr

Cowan and the fees that he charged. Mr and Mrs B had recently asked Mr Hardey to show mercy. Mr Hardey submitted that Mr Cowan's clients were now attacking him. Mr Hardey stated that he was not embellishing his account and not exaggerating and that his animosity towards Mr Cowan did not affect him telling the truth. Mr Cowan had his own animosity agenda. He stated that if there was a settlement with Mr and Mrs B they would meet his legal fees. He referred to Page 151 of the Law Society's Second Inventory of Productions being the Minute of Amendment in connection with the plea in law. Mr Hardey stated that this had been the first time that this issue had been properly raised and it did not exist before this. This Minute of Amendment was in the papers before Lord Emslie and the case was adjourned before Judge Wise in December in connection with expenses.

In response to a question from the Tribunal, Mr Dunlop stated that Mr Cowan found out that Mr Hardey did not own his house in August 2006 and that Mr Cowan would lead evidence with regard to this.

Legal Issues

Mr Hardey indicated that he now wished to raise a legal point in connection with a concession made by Mr Dunlop at the last hearing. Mr Hardey made a formal request to have the Shorthand Writer's notes extended so that the concession given by Mr Dunlop could be clarified. Mr Dunlop confirmed that he was happy to concede on behalf of Mr Cowan that all the matters were live before the Tribunal and that the Law Society's report had referred to tests for unsatisfactory professional conduct and professional misconduct. The Law Society applied the issue of unsatisfactory professional conduct during their disposal. Mr Hardey stated that as this concession had been clarified by Mr Dunlop he would not require the Shorthand Writer's notes to be extended.

Mr Hardey advised that Ms D was the Law Society's Complaints Investigator who had been on his witness list since 3 October 2011 and had confirmed that she would be willing to attend today. Paul Reid then sent correspondence saying that the witness would not be coming as she was not needed. Mr Hardey stated that she was an important witness and was required to speak to the decision making process where

evidence was mis-applied and mis-directed. Mr Hardey submitted that it was not correct for Mr Reid to approach the witness and keep her away. In response to a question from the Chairman with regard to exactly what evidence he wished to obtain from Ms D, Mr Hardey stated that Ms D had issued the report on which the PCC made their decision. Ms D had stated that Mr Hardey did not have any supporting evidence of his complaint and this was not true and was a mis-direction in law and fact. Mr Hardey explained that he wished this explained. Ms D had had Ms C's statement which corroborated Mr Hardey's case and she had not put this relevant information to the PCC. She had also not altered her report. Mr Hardey stated that he was entitled to have this matter clarified.

Mr Reid stated that he had advised Ms D not to attend today. She had not been on Mr Hardey's witness list until 3 October 2011. On 10 October 2011 Mr Hardey had stated that he did not intend to lead evidence. His evidence was to the effect that he thought Ms D was involved in a conspiracy. Mr Reid submitted that Ms D was not the decision maker and that he would be able to address any difficulties in connection with collation of evidence in his submissions. Mr Reid stated that Mr Hardey had not complied with the rules of procedure in connection with citing witnesses.

Mr Dunlop stated that the Tribunal's task was to decide whether the charge was made out and he was not sure what assistance Ms D could give as she was only the recommendation maker.

Decision with regard to Ms D's attendance as a witness

The Tribunal indicated that the Tribunal had no power to compel a witness to attend. The Tribunal however consider that it may be relevant what Ms D put before the Committee and the Tribunal could not really understand why the Law Society were not prepared to cooperate. The Tribunal accordingly asked Mr Reid to reconsider his position over lunch. Mr Reid stated that he might be able to get Ms D to the Tribunal that afternoon. It however became apparent that due to childcare commitments this was not possible. Mr Reid however indicated that he would ensure that Ms D would be available on the next date.

Evidence from Ms C

Mr Hardey then led evidence from his witness, Ms C. Ms C confirmed that she was a solicitor advocate and had been an advocate prior to this. In the past she had been legal assistant to the Lord President. She had a number of diplomas and had received the highest marks in her Bar exams. She confirmed that she had acted as Mr Hardey's advocate in several actions. In respect of the recent action in the Court of Session against Mr and Mrs B, this concluded with a hearing on expenses and last called before Judge Wise and was dismissed with no expenses. Mr Hardey referred Ms C to the hearing on expenses before Lord Emslie on 3 October 2008. This did not go ahead because there was an agreement between parties that there was not enough time and accordingly it was adjourned. The hearing took 2 days before Judge Wise. Mr Cowan was seeking expenses against Mr Hardey due to Mr Hardey's conduct during the proceedings. The subject of title to sue was brought up. Ms C stated that her submissions to Judge Wise were that she was seeking expenses due to Mr Cowan's conduct. One of the grounds for this was that Mr Cowan stated to Lord Emslie that he had only recently become aware of the lack of title to sue but he had been notified in January 2007 that Mr Hardey did not own his premises. Ms C stated that she knew for sure that Mr Cowan had said this because it was in regard to this conduct that she had made an argument for expenses. Ms C stated that she thought Lord Emslie expressed concern as to why it had not been raised earlier and taken to procedural roll. Mr Hardey referred Ms C to Page 46 of the Law Society's Second Inventory of Productions being the Form of Opposition dated 8 January 2007 which stated that the property was not owned by the Pursuer, it was only occupied by him and was owned by his mother and sister. Ms C stated that this made it clear that Mr Cowan had been told on 8 January 2007 that Mr Hardey did not own the house. Mr Cowan had attended the hearing on 8 January 2007. Ms C stated that she remembered Mr Hardey complaining about this at the time of the hearing before Lord Emslie. Ms C said that Mr Cowan ought to have known in January 2007. Mr Cowan could accordingly have taken a plea of title to sue in January 2007. He attempted to do this in April 2008 before Lady Dorrian but he could have done it 1 ½ years earlier. Ms C stated that Mr and Mrs B were present in Court on 3 October 2008. Ms C explained that Mr Cowan attempted to argue that plea in law 3 raised the issue but there were no averments on record to justify him doing that. Mr Dunlop objected to the questions in connection

with evidence of law. Ms C stated that it was for Judge Wise to decide on the issue of title to sue and that Mr Cowan had said that there were sufficient averments on record but she (Ms C) said there were not. Mr Cowan had a bare plea in law which was common in a lot of records for this type of case. Page 151 of the Law Society's Second Inventory of Productions was a Minute of Amendment and this was the first time that averments like these were made and the Proof was to be shortly thereafter. Page 155 of the Law Society's Second Inventory of Productions was the Title Search and the Notice to Admit was done on 4 April 2008. Ms C confirmed that Mr Cowan stated at the hearing on expenses in October 2008 that he had only recently learned that Mr Hardey did not own his home.

Mr Hardey referred Ms C to Page 119 of the Law Society's Second Inventory of Productions being an email to her which she did not receive. Ms C stated that Page 121 was her response dated 21 December 2010. She confirmed that this was consistent with her evidence today. She stated that she was brief in her response. In respect of Page 198 of the Law Society's Second Inventory of Productions, Ms C confirmed that she wrote this and that it was consistent with her evidence today. Ms C stated that she had extensive discussions with Mr Hardey with regard to the use of the word "recently". She indicated that she did not know what happened after she had sent in her response to the Law Society.

At the hearing before Judge Wise on expenses on 3 and 4 December 2008, each party attacked each other's conduct to seek expenses. Ms C stated that one of the attacks by her on Mr Cowan related to Mr Cowan's undertaking to appear for Mr Hardey before Lord Brailsford. Page 30 of the Law Society's First Inventory of Productions was a letter of 11 January 2007 in which Mr Cowan stated that if an appearance was required, his firm would appear on behalf of both parties. Ms C stated that she was not aware what happened thereafter. Page 31 was the Interlocutor where the Pursuer was marked as absent/no appearance. Ms C stated that failure to appear in Court was a discourtesy and technically could put a person in default. Ms C stated that she thought that Lord Brailsford at the hearing on 16 January 2007 praised Mr Cowan for agreeing to appear for both parties on the 12 January 2007. There was no mention that he had earlier agreed to appear for both parties. Ms C stated that she produced the letter of 11 January to Judge Wise. She indicated that she did not know what happened at the

hearing on 12 January 2007. Ms C explained that Mr Hardey gave her 50 pages of documentation. She thought she was still making submissions at the end of the first day. She indicated that she thought Mr Cowan responded to the criticisms with regard to the undertaking to the effect that he could not recall because he had had a difficultly. Ms C was referred to Page 58 of the Law Society's First Inventory of Productions being her email where she wrote that Mr Cowan's response to her submission was that no such undertaking was given and she confirmed that she did write that and that must have been her position in 2009 but she did not recall it. Ms C stated that there were extensive Productions in the case and that Mr Cowan would have familiarized himself with the Productions but she could not state what was in his mind. She remembered that she had to rush about to find the letter because Mr Cowan stated that he could not remember and did not have the file. Mr Cowan indicated that he was not aware of the undertaking. Ms C stated that she could not remember if there was any response after the letter of 11 January was produced. Ms C stated that there was a lot of animosity on both sides in connection with the action which she found unprofessional. Mr Cowan and Mr Hardey murmured insults to each other as they walked past each other in the door way coming in and out of the Court. Ms C stated that she had 12 years experience and had acted for Mr Hardey in a lot of successful actions. Mr Hardey had also acted on his own and had been very successful. She would not say that Mr Hardey was a vexatious barrack room lawyer. Ms C stated that she aware of Lord McFayden's case and it affected Mr Hardey for 3 or 4 years after that. It had started with a dispute with regard to his mother and a loan. Mr Hardey had had the action reduced and got Decree to land which was one of 24 Decrees he held. Ms C stated that in law the effect of a reduction is to treat it as a pro non descriptor.

Mr Reid indicated that he had no questions in cross examination.

Cross-Examination of Ms C by Mr Dunlop

Ms C stated that in connection with the comments between Mr Cowan and Mr Hardey she had no idea what was said but on two occasions when they passed each other they murmured in an insulting manner. The tone and the way they brushed past each other made it clear that they were insulting. In connection with Lord Brailsford and the hearing on 16 January 2007, Lord Brailsford thought that Mr Cowan had appeared for

Mr Hardey out of kindness. Mr Dunlop referred her to Page 54 of the Law Society's First Inventory of Productions being Judge Wise's Note. She stated that she agreed with paragraphs 2 and 3 on page 2 of the Note. She stated that Judge Wise did not ask Mr Cowan to respond. In December 2008 Ms C stated that she put forward long submissions and read them out in Court. She accepted that the written submissions did not mention the use of the word "recently". Ms C clarified that the written submissions were from her consultation with Mr Hardey and he had lodged 50 pages of notes with her. She had to take a lot out but the rest raised legitimate concerns. It was on the second day that the issue in connection with the word "recently" was raised. Ms C stated that she accepted that there was bare plea to title on record as was the case in all actions of that type. The Minute of Amendment was opposed partly because it was a new defence. Mr Cowan resisted this by saying that plea in law 3 had been in since May 2007. Mr Dunlop put to Ms C that Mr Cowan had said that it had only recently become possible to debate the title to sue. Ms C accepted that Mr Hardey designed himself as the owner in the record. Ms C said that she did not know if this remained on the record until April 2008. In April 2008 Mr Hardey admitted that he was not the proprietor. Ms C stated that she agreed that it was only when the averment that he was the owner was deleted from the record that they could have a debate on it. She however disagreed with the contention that Mr Cowan said that it was only recently that there could be a debate on it. Ms C stated that she remembered it very well because she knew that it was not right that Mr Cowan had only recently been aware of Mr Hardey's lack of title. Ms C accepted that Mr Cowan drew the Judges attention to plea in law 3 which had been in the record for a long time and was not new. Mr Cowan used the bare averment to say that the issue was not new but it was a new defence and he was not entitled to do this in terms of the Rules of Court at that stage in the proceedings. Ms C was unable to specify which particular rule. Mr Hardey objected to questions in connection with the law but this was allowed as Mr Hardey's questions on aspects of law had also been allowed. Mr Dunlop referred Ms C to Page 122, Paragraph 3 of the Law Society's Second Inventory of Productions. Mr Hardey objected as this was not a live issue which was subject to appeal. Mr Dunlop stated that it went to credibility and reliability. The question was allowed provided an eye was kept on how relevant it was. Ms C stated that she was agreeing with the comments made by Mr Hardey and that if she said that at the time it must be correct. Mr Dunlop referred Ms C to Page 74 of the Law Society's Second Inventory

of Productions where Judge Wise states that the Defender did offer practical remedies. Ms C however clarified that what she was saying in her email of 21 December was that no concessions had been made and this was in relation to the question of expenses. Mr Dunlop proceeded to refer Ms C to other paragraphs in the same email in connection with matters which were not presently under appeal. The Tribunal pointed out that the difficulty with this was that there had not been any evidence on the matters and the Tribunal would accordingly not know what the correct facts were unless evidence was led. Mr Dunlop indicated that he did not wish to pursue the matter further in the circumstances.

At this stage the matter was adjourned part-heard until 9 January and 20 February 2012.

When the case called on 9 January 2012, Mr Hardey lodged a First and Second Inventory of Productions for the Appellant and Mr Reid lodged a Third and Fourth Inventory of Productions on behalf of the Law Society. It was clarified that no party had any objection to these Productions being lodged late and the Productions were allowed.

Mr Hardey then called Ms D as a witness.

Evidence from Ms D

Ms D confirmed that she was employed as a complaints investigator with the Law Society and had handled the complaint from Mr Hardey in connection with Mr Cowan. Ms D confirmed that she looked at the issue of whether or not there was conduct amounting to professional misconduct or unsatisfactory professional conduct. She concluded that no action was necessary. Mr Hardey referred Ms D to Page 203 of the Law Society's Second Inventory of Productions and Ms D confirmed that the heads of complaint were as set out in 1A and 1B as were agreed with the Commission. Mr Hardey also referred Ms D to Page 191 being her supplementary report which she confirmed was prepared for the Conduct Committee in response to a letter received from Mr Hardey. Ms D confirmed that Mr Hardey was not given a copy of the whole of the report that she originally prepared but he did get the

conclusions and it was when he responded by letter to these that Ms D prepared the supplementary report. Ms D stated that she did not know whether Mr Hardey had been told that she had done a supplementary report. Mr Hardey referred Ms D to the paragraph in the supplementary report where it is stated that Ms C and Mr Hardey corroborated each others recollection of events in respect of Mr Cowan advising the Court that he had only recently learned that Mr Hardey did not own his own residence.

Mr Hardey also referred Ms D to Page 119 of the Law Society's Second Inventory of Productions being an email by her to Ms C. Ms D confirmed that Page 121 was Ms C's response of 21 December 2010 and that Ms C said that Mr Hardey's account was correct. Ms D explained that this was why she put in her supplementary report that Ms C had corroborated Mr Hardey. Page 126 of the Law Society's Second Inventory of Productions was a letter sent to Mr Hardey with details of the report. Mr Hardey referred Ms D to the second paragraph of this which stated that Mr Hardey had not produced any evidence to show that Mr Cowan had stated that he had only recently learned that Mr Hardey did not own the house. Ms D explained that when she first looked at Ms C's response she did not read it properly and thought that she was only corroborating the issue of when Mr Cowan was told that Mr Hardey did not own his own house. Ms D indicated that once she read Mr Hardey's response to her report she realised her mistake and corrected it in the supplementary report. Ms D stated that she accepted that the first report was incorrect because she had not fully appreciated what Ms C had stated. Ms D however explained that although she had indicated in her supplementary report that the facts were corroborated, she still preferred Mr Cowan's explanation with regard to what he had said due to the fact his plea in law indicated that he had known earlier that Mr Hardey did not own his own house. Ms D explained that she had to balance the evidence and decide which evidence she preferred and she did this and then made her recommendation to the Committee. Ms D stated that it looked as if the Committee decision had overlooked her supplementary report but that she was not part of the decision making process. She stated that her supplementary report would have been before the Committee together with the original report and letters from Mr Hardey.

At this stage Mr Dunlop objected on the basis that there was a risk that Mr Hardey was seeking to re-run the complaint before Ms D. He was cross-examining the decision maker when it was a matter for the Tribunal to decide. Mr Hardey stated that the crux of the appeal was that the Law Society had misconstrued relevant evidence before them. He stated that he was not re-running the case and that his interpretation of Section 42ZA was different from Mr Dunlop's who was saying that what had happened in the Law Society's decision making process was irrelevant. Mr Hardey submitted that he was entitled to allege what had happened in the Law Society's decision making process was irregular and unfair.

The Tribunal had already ruled on this point in considering whether or not to allow Mr Hardey to lead evidence in respect of grounds of appeal 2 and 4. The Tribunal's view is that any unfairness or impartiality in the way that the Law Society made its decision is relevant to the Tribunal's decision as to whether or not to quash the Law Society's Determination. The Tribunal accordingly allowed Mr Hardey to continue with his questioning but asked him not to go in to the whole matter all over again.

Mr Hardey asked Ms D why if the original report was wrong this part of it was not deleted. Ms D explained that the process was that a report was prepared which was then followed by a supplementary report which dealt with any alterations which were required. Mr Hardey then referred Ms D to Page 207 of the Law Society's Second Inventory where the Committee decision states that Mr Hardey's advocate did not support what Mr Hardey said that Mr Cowan had said in Court. Ms D stated that she could only comment on what she had prepared. She indicated that the papers were all before the Professional Conduct Committee but it looked to her as if they may not have made the correct comment and perhaps had not read the supplementary report. Ms D stated that she was entitled to draw her conclusion. Ms D stated that she did not deliberately ignore or misconstrue anything. Mr Hardey referred her to Page 198 being the email to Ms C and her reply. Mr Hardey asked Ms D why this email had not been before the Committee. Ms D stated that the Committee did not receive all the documentation. It was clarified that Ms D did the first report and then obtained more information from Ms C and accordingly the January email from Ms C would not have been referred to in the original report. Ms D confirmed that she did not attach the email to the supplementary report and the Committee accordingly did not see the

email. She submitted that it was not necessary to do this because she dealt with the issue in her supplementary report. Ms D explained that the Committee would not be given every piece of information.

Mr Hardey then referred Ms D to Page 134 of the Law Society's Second Inventory and quoted from his letter of 25 January 2011 to Ms D. Ms D accepted that Mr Hardey stated in that letter that Mr Cowan did not lodge the notice in connection with no title to sue until April 2008. Ms D stated however that when she wrote the report Mr Cowan had given an explanation and she preferred his account. Ms D stated that she may have been wrong but she could not change it now.

Mr Hardey then referred Ms D to Page 104 of the Law Society's Second Inventory of Productions being Ms D's report which stated that Mr Cowan said at the time of the hearing on expenses that there could not have been any agreement for him to appear for both parties on 12 January 2007. Mr Hardey also referred Ms D to Page 125 of the Law Society's Second Inventory of Productions where she states in her report that she was satisfied that Mr Cowan did state in Court that he had not undertaken to appear on behalf of Mr Hardey on 12 January 2007. Ms D accepted this. Mr Hardey then referred Ms D to Page 46 of the Law Society's First Inventory of Productions being Mr Cowan's response where it is stated by Mr Cowan at that time that he indicated to the Court there could not have been an agreement for him to appear on behalf of both parties on 12 January 2007. Ms D confirmed that this was Mr Cowan's position. Mr Hardey then referred Ms D to Page 58 of the Law Society's First Inventory of Productions being Ms C's email of 21 August 2009 in which Ms C states that Mr Cowan's response to her submission was that no such undertaking was given. Ms D said that she could not recall this but accepted that it was as written and that it was consistent with what Mr Cowan had said. Mr Hardey then referred Ms D to Page 207 of the Law Society's Second Inventory of Productions being the Professional Conduct Committee's Findings. Mr Hardey pointed out that the Committee found that Mr Cowan had stated that he could not recollect the undertaking being given. Ms D stated that she could not comment on this, that it would not be something that was plucked out of the air and it was maybe based on other documentation. Ms D stated that there were a number of Court hearings and she concluded that Mr Cowan's explanation was reasonable and accepted that it was a simple error. Mr Hardey put to Ms D the fact

that the letter giving the undertaking was in the Court process mitigated against him having forgotten. Ms D stated that she could not comment because she could not remember. Ms D stated that the complaint agreed between Mr Hardey and the SLCC was that Mr Cowan had given misleading information to the Court and that the word "lie" was not specifically used. Ms D stated that she could not recall whether Mr Hardey used the word "lie" at all. Ms D stated that in order to be professional misconduct there would need to be an intention to deceive. She clarified that the Law Society's statutory duty was to investigate and see whether or not the allegation amounted to professional misconduct or unsatisfactory professional conduct.

Mr Hardey then referred Ms D to the Appellant's Second Inventory of Productions being newspapers articles. The Chairman questioned whether Ms D would be able to answer questions on these articles. Mr Hardey stated that it was relevant to the background of the way that the complaint had been dealt with by the Law Society which was not at arms length. Ms D stated that she had never heard of Mr Hardey when she was doing the report and was not part of the public relations team of the Law Society. Mr Hardey indicated that he would not pursue his questions in respect of this matter.

Mr Hardey then referred Ms D to Page 200 of the Law Society's Second Inventory of Productions being his letter to Ms D dated 24 February 2011. Ms D stated that she accepted that when Mr Hardey wrote the letter he may not have known about the supplementary report. Ms D stated that some complainers were very nasty and the language used by Mr Hardey in the letter was highly critical but not unreasonable and that she had had far worse. Ms D stated that Mr Hardey's responses in respect of the complaint procedure were always long, detailed, challenging and perhaps aggressive but this was his right.

In connection with the report from Temporary Judge Wise, Ms D explained that as the complaint was from a third party and the complainer was not the client, the Law Society would not copy correspondence to the complainer as a matter of course due to client confidentially. The Law Society now however had a different approach and it may well be that Temporary Judge Wise's report would have been copied to Mr Hardey if the complaint was being dealt with now. Ms D stated that she could not

comment on whether it had been unfair. She explained that now each piece of information would be assessed to see if there was a confidentiality issue. Mr Hardey referred Ms D to Page 59 of the Law Society's First Inventory of Productions which made it clear that although Mr Hardey asked for copies of statements he would not receive them. Ms D confirmed that this was correct. Mr Hardey then referred Ms D to the Appellant's First Inventory of Productions and a letter of 11 January 2011 where Ms D sent Mr Hardey a copy of Ms C's email. Ms D accepted that this was inconsistent with the previous letter but explained that the third party process had moved forward by January 2011 and that she sent the email to him because Ms C was his advocate.

There was no cross examination by the Law Society or on behalf of Mr Cowan.

Motion by Mr Hardey

Mr Hardey then made a Motion in respect of head of complaint 1B that the Tribunal should allow the appeal summarily due to the concession made by Ms D that the Professional Conduct Committee's Finding that there was no supportive evidence by Ms C was incorrect and the Professional Conduct Committee accordingly had erred in law.

Mr Reid asked the Tribunal to refuse the Motion at this stage as it was not appropriate to deal with submissions until the end of the case.

Mr Dunlop stated that Mr Hardey's interpretation of Section 53ZB(2) was that if an error could be shown then the appeal should succeed. Mr Dunlop however pointed out that the fact that there was an error did not mean that Mr Cowan was guilty of unsatisfactory professional conduct. It also did not necessarily mean that Mr Hardey's complaint was valid. Mr Dunlop stated that the Tribunal could not possibly find unsatisfactory professional conduct proved without hearing from Mr Cowan.

Mr Hardey stated that he was not suggesting that the Tribunal could make a finding of unsatisfactory professional conduct but he wished the Tribunal to Quash the Decision and remit it back to the Law Society. Mr Dunlop pointed out that there was no power

for the Tribunal to remit it back to the Law Society and that the Professional Conduct Committee could not hear evidence.

Decision On Mr Hardey's Motion

The Tribunal repelled Mr Hardey's Motion. The Tribunal had already ruled in making its decision on whether or not to allow evidence to be led, that the terms of Section 53ZA(2) of the Solicitors (Scotland) Act 1980 state that the Tribunal may Quash the Determination being appealed against and make a Determination upholding the complaint. The Tribunal accordingly cannot just quash the Law Society Determination and remit the matter back to the Law Society. The Tribunal had accordingly previously decided to hear evidence in the case and determined that it must now go on to hear evidence from Mr Cowan.

Evidence from Mr Cowan

Mr Dunlop referred Mr Cowan to Page 41 of the Law Society's First Inventory of Productions and Page 59 of the Law Society's Second Inventory of Productions and Mr Cowan confirmed that these were his responses to the complaints and were prepared by him. Mr Cowan confirmed that he knew that these were to be submitted to the Law Society and that they were true and accurate and he wished to adopt them. Mr Cowan confirmed that he stated that there could not have been an agreement to appear on behalf of Mr Hardey on 12 January 2007. Mr Cowan stated that he did not think that he qualified this to say that he could not recall such an agreement. Mr Dunlop referred Mr Cowan to Page 54 of the Law Society's First Inventory of Productions being Temporary Judge Wise's response where it is stated that Mr Cowan stated that he could not remember an agreement. Mr Cowan clarified that he was not adopting this as his position. Mr Cowan stated that he accepted that he was wrong when he said that there could not have been an undertaking to appear. Mr Cowan explained that the Interlocutor recorded that he appeared for Mr and Mrs B and there was no appearance for Mr Hardey and accordingly Mr Cowan thought that there could not have been an agreement or the Interlocutor would have reflected this. Mr Cowan pointed out that there were three hearings within seven days in January 2007 and an issue was raised by Brodies for Mr Hardey in connection with one of the three

hearings. The question of a motion called when Mr Cowan had asked for the hearing to be continued so when he read in Mr Hardey's submissions that an issue was being taken with regard to not appearing for both parties, Mr Cowan got the hearings mixed up. Mr Cowan clarified that this issue was raised for the first time at the hearing on expenses. Mr Cowan stated that at this stage he did not recall and assumed that there had been no undertaking to appear. Mr Cowan stated that he did not have the whole files with him as they were substantial and it was only a hearing on expenses.

In connection with head of complaint 1B, Mr Cowan stated that he did not say that he had only recently learned that Mr Hardey did not own his own property. Mr Cowan clarified that he first became aware that Mr Hardey did not own his own property in September 2006 when Mr and Mrs B sent him a title check which showed this. The notice of opposition also indicated this but Mr Cowan already knew by this time. Mr Cowan stated that he was not trying to justify to Lord Emslie why the notice was not taken. He explained there was a delay on that day and he had had discussions with Ms C as to whether it was worth starting on that day and it was agreed that the matter should be continued. Lord Emslie was ok with that but he then raised the matter of whether the parties intended to address the Court on the merits of the action. Mr Cowan stated that he said he did intend to and there would be an issue in connection with the title to sue and referred him to plea in law 3 which had been on record since May 2007. Mr Cowan referred to the closed record at Page 24 of the Second Respondent's Productions. Mr Cowan clarified that he referred Lord Emslie to this and he did not suggest that it was not a plea of no title to sue. Lord Emslie however asked if the case had been taken to procedural roll and Mr Cowan stated that it had not and referred to the most recent Minute of Amendment where Mr Hardey took out his averment that he was the owner. Mr Cowan referred to Page 4 of the record where Mr Hardey had averred that he was the owner. Mr Cowan explained that there was no merit in taking the matter to the procedural roll debate where there was still an issue with regard to the facts. Mr Cowan advised that he pointed out that it was only during the course of the amendment procedure that Mr Hardey took out his averment with regard to him being the owner. Mr Cowan stated that the lodging of the notice to admit and the title search were done at the same time as the Minute of Amendment deleting the averment with regard to Mr Hardey owning his house. Mr Cowan stated that he could not recall using the word "recently" but if he had it would have been in

the context that it was only recently that Mr Hardey took out the averment with regard to being the owner. Mr Cowan stated that he did not take notes at the time but knew that he would not have said that he had only recently become aware that Mr Hardey was not the owner but may have said that Mr Hardey had only recently confirmed that he was not the owner. Mr Cowan then referred to his manuscript notes which had been lodged as Production in connection with the hearing before Lady Dorrian in April 2007 where there was a motion to allow the Minute of Amendment to be received which was opposed. Mr Cowan read out his notes in connection with title to sue. At this date the Pursuer was not disputing the ownership issue but was relying on the fact that the Defender should have raised the matter earlier. Mr Cowan stated that his response was that it had been on record since May 2007. Lady Dorrian did not raise as an issue that the matter should have been specified in more detail. Mr Cowan confirmed that he had been with Simpson and Marwick since 2001 and was a solicitor advocate and had never had any disciplinary proceedings taken against him. He indicated that these proceedings would have a negative impact on him.

There was no cross examination by Mr Reid.

Cross Examination of Mr Cowan by Mr Hardey

Mr Cowan confirmed that he knew in September 2006 that Mr Hardey did not own the house. Mr Cowan accepted that it was not until April 2008 that the title to sue was lodged. Mr Cowan however pointed out that the title to sue was on record in plea in law 3 since May 2007. Mr Cowan explained that it did not occur to him that he could make a no title to sue argument until he researched it and became aware of English cases which made him think that a mere licensee may not have a title to sue although the position was not clear in Scotland. This was when he introduced plea in law 3 in May 2007. Mr Cowan explained that his approach was that it was for the Pursuer to prove the title to sue if this was not admitted by the Defender and accordingly the plea in law was sufficient to raise it. Mr Cowan accepted that perhaps he should have put in averments in May 2007 that Mr Hardey was not the proprietor. Mr Cowan did not accept that he wanted to become involved in a long lucrative case and accordingly prolonged matters. Mr Cowan accepted that he advised Mr Dunlop with regard to the light issues with the Mr and Mrs B. Mr Cowan stated that he did this to illustrate that

the proceedings against Mr and Mrs B were one of a number of cases. Mr Cowan stated that he did not have any animosity towards Mr Hardey. Mr Hardey started to ask questions with regard to the blocking of the traineeship and with regard to other Court actions. The Chairman indicated that it was not appropriate to go into detail with regard to these issues.

Mr Cowan stated that Ms C was only saying what Mr Hardey had told her immediately after the hearing in connection with the use of the word "recently". Mr Cowan stated that Ms C's evidence was incorrect. Mr Cowan stated that Mr and Mrs B were in Court and knew that Mr Cowan had known for some time that Mr Hardey did not own his own house and he would not accordingly have said something like this in front of them. Mr Cowan stated that they were not witnesses because he thought it was wrong to ask them and it would be unfair.

The Chairman indicated to Mr Hardey that he had perhaps cut him off a bit quickly in connection with his examination of Mr Cowan in connection with the traineeship and other Court issues but Mr Hardey stated that he was quite happy to move on anyway.

In connection with head of complaint 1A, Mr Cowan confirmed that the hearing before Temporary Judge Wise was a hearing which determined the expenses. At the hearing each party attached the other's conduct. Mr Cowan stated that he was looking for expenses because Mr Hardey had been unsuccessful in the action. There was a two day hearing on expenses. Mr Cowan confirmed that he prepared for the hearing but that he focused on relevant matters and did not read through all the Productions as it was just a hearing on expenses. Mr Cowan accepted that for a solicitor to breach an undertaking was a serious matter and he could see why Ms C raised this as a matter relevant to expenses. Mr Cowan however stated that this was not why he had denied breaching the undertaking. Mr Cowan said that he did not accept that he had breached the undertaking, his recollection was that he thought that he had said that he appeared for Mr Hardey of consent but in the Interlocutor recorded that Mr Hardey was absent. Mr Cowan explained that he stated that he was appearing for the Defender and of consent for the Pursuer and he told Lord Brailsford this. Mr Cowan stated that he did not say to Temporary Judge Wise that he took offence with regard to the allegation of a breach of undertaking but confirmed that he would have taken offence if he had

been accused of this when he had not done it. Mr Cowan explained that Temporary Judge Wise read the rest of Ms C's written submissions over lunch time which included the stuff with regard to the breach of the undertaking. Mr Cowan stated that he also looked at this over lunch time and accordingly was aware on the afternoon of the first day that this allegation had been made. Mr Cowan stated that he did not read the papers that evening because he had finished his submissions and Ms C was to do further submissions the next day. He accepted that he could have checked it and looked for the letter of 11 January as Ms C's submissions referred to this letter. Mr Cowan stated that although he had read Ms C's submissions, he had not read them thoroughly. Mr Cowan stated that on the second day Ms C did refer to the letter. Mr Hardey then referred Mr Cowan to the letter of 11 January 2007 which stated that Mr Cowan would appear for both parties. Mr Cowan stated that he accepted that this was an undertaking but pointed out that an undertaking was more usually used to refer to a more formal agreement given to the Court. Mr Cowan pointed out that he moved the Court to continue the motions as per the agreement in the letter of 11 January. Mr Hardey then referred Mr Cowan to Page 31 of the Law Society's First Inventory of Productions being the Interlocutor which states that there was no appearance by the Pursuer. Mr Cowan stated that he did not know why it stated this and there must have been a misunderstanding by the Clerk and Lord Brailsford. Mr Cowan explained that the Clerk did not ask him who he appeared for because when he came into Court Lord Brailsford was already dealing with business and accordingly there was no opportunity for this.

Mr Hardey referred Mr Cowan to Page 14 of the Law Society's First Inventory of Productions being Mr Cowan's response to the complaint in respect of this matter. Mr Cowan stated that Lord Brailsford did suggest that the motions could be granted because Mr Hardey was not present but he must have misunderstood the situation. Mr Cowan said that Lord Brailsford had already read the papers before he came on to the bench and Mr Cowan's view was that Lord Brailsford was already minded to allow the motions having read the papers.

Mr Cowan accepted that on 16 January Lord Brailsford commented on the fact that Mr Cowan could have moved the motions on 12 January and may have said that it

was kind of him to allow the matter to be continued until the Tuesday. Lord Brailsford was still confused and Mr Cowan accepted that he did not say anything to correct him.

Mr Cowan accepted that he no longer acted for Mr and Mrs B and they had a new solicitor being a Mr E. Mr Hardey asked further questions with regard to settlement of the action but then withdrew the questions after an objection.

Mr Hardey then referred Mr Cowan to the Appellant's First Inventory of Productions and a letter dated 29 April 2008 from Mr Hardey to him in connection with the judgment that was reduced. Mr Cowan accepted that he indicated to Ms C that he intended to use quotes from the McFayden judgment in respect of the reduced decision at the first proof. Mr Cowan however clarified that he did not know until after this that the judgment had been reduced. Mr Cowan accepted that Mr Hardey's letter of 29 April 2008 advised him of this and attached a letter from Greens. Mr Cowan however stated that his interpretation of the letter from Greens was that it was only because they could not follow their usual practice of publishing the reduced decision that they took the original decision off the record. Mr Cowan also clarified that he did not found upon Lord McFayden's comments in the Mr and Mrs B decision. Mr Cowan stated that he disagreed with Mr Hardey's view on the law on reduction and felt that the comments by Lord McFayden in respect of Mr Hardey's credibility was still stood.

There was no re examination by Mr Dunlop.

Mr Hardey indicated that he was not ready to proceed to submissions as he required to prepare properly. Mr Dunlop advised that he had unfortunately double booked himself for the 20 February 2012 due to an error and that he was prepared to proceed to submissions today. Mr Hardey objected to Mr Dunlop's motion to change the date of the next calling of the case as the date had been agreed between all parties and Mr Hardey's request for an adjournment to go a wedding on a previous occasion had been refused.

The Tribunal considered that Mr Dunlop could be in professional difficulty as he had two professional engagements on the same day and his code of conduct might mean

that he would be unable to attend on 20 February 2012. The Tribunal accordingly was willing to offer one alternative date being 12 March 2012. Parties indicated availability on this date and the date of 20 February 2012 was accordingly converted to 12 March 2012. The Tribunal considered that in this case, given the length and complexity, written submissions would be required and accordingly it would not be possible for Mr Hardey to start on his submissions today. The Tribunal accordingly directed that written submissions be with the Tribunal by 29 February 2012 and the matter would continue on 12 March 2012.

The hearing date of 12 March 2012 required to be postponed to 11 June 2012 as Mr Dunlop and Mr Reid were to attend a colleague's funeral. When the case called on 11 June 2012 the Tribunal asked Mr Hardey to address it in respect of his three motions.

Mr Hardey first spoke to his motion asking the Tribunal to issue a ruling that both Respondents were legally barred from challenging the present competency or locus on the basis that unsatisfactory professional conduct was not a competent issue or a viable alternative disposal, from the facts of the decision making process now under review. Mr Hardey referred to his submissions and stated that Ms D and conceded that the Law Society had treated the Complaint as one of unsatisfactory professional conduct and the Law Society were accordingly barred from arguing that the Appeal was not competent because matters could only amount to professional misconduct. The Second Respondent had also acquiesced in this due to concessions made. Mr Hardey stated that to raise this now would be unfair on him because he had been told that there was no objection to this issue. Mr Hardey referred to the explanatory note which went with the Legal Profession and Legal Aid (Scotland) Act 2007 where it is provided under Section 53ZA of the Act that where the Tribunal do not uphold professional misconduct but consider that the conduct may be unsatisfactory professional conduct the matter could be remitted to the Law Society. Mr Hardey submitted that this showed that the facts could amount to either unsatisfactory professional conduct or professional misconduct and that unsatisfactory professional conduct was a weaker alternative.

Mr Reid stated that the matter had been raised by Mr Dunlop at the hearing on 7 July 2011 but Mr Hardey had then amended his grounds of Appeal. Mr Reid invited the Tribunal to take this into account in the overall context of the submissions.

Mr Dunlop stated that it was not in doubt that the Appeal was against a failure to find unsatisfactory professional conduct. Mr Cowan was asking the Tribunal to uphold the Decision that there was no unsatisfactory professional conduct. The facts were either unsatisfactory professional conduct or they were not. Mr Dunlop clarified that he has no point to make about competency.

Decision Of The Tribunal In Respect Of Mr Hardey's Motion To The Effect That The Respondents Were Legally Barred From Challenging The Competency Of The Appeal

The Tribunal had already noted that Mr Dunlop had conceded that all matters were live before the Tribunal and that the Law Society report had referred to tests for unsatisfactory professional conduct and professional misconduct. The Tribunal accordingly granted Mr Hardey's motion.

Mr Hardey then moved to his motion to be allowed to recall himself as a witness to lead evidence in respect of admissions made in the letter from the RSA now lodged by him. Mr Hardey submitted that attacks had been made on him by the First Respondent in the submissions which were not put to him in evidence, claiming that his evidence was littered with conspiracy theories and that he was paranoid. Mr Hardey stated that even if he did use the word conspiracy this is because of the facts and the way that the Law Society had treated him. Mr Hardey explained that he could not refer to the letter from RSA on oath because it was confidential. He submitted that he was now however released from his duty of confidentiality due to the claims made by the Law Society. Mr Hardey referred to the fourth paragraph of the letter which stated that Mr Hardey had been able to demonstrate bad faith on behalf of the Law Society and referred to the position whereby senior members of the Law Society had formed a view in advance of any evidence that Mr Hardey was not a fit person to admitted to the profession. Mr Hardey submitted that against this background it could not be claimed that he was paranoid. He asked that Mr Reid withdraw the allegations.

Mr Reid stated that he had no intention of withdrawing his submissions because he was satisfied on the basis of the evidence, what was stated in the grounds of Appeal, the Productions and the language and actions of Mr Hardey, that Mr Hardey did hold the view that the Law Society had deliberately manipulated things. Mr Reid submitted that there was basis for this and that it was a matter for the Tribunal whether or not they accepted this. Mr Reid stated that it was not necessary for Mr Hardey to give more evidence. Mr Hardey alleges conspiracy and bias but Mr Reid submitted that he knew nothing about the letter which Mr Hardey had now lodged until today.

Mr Dunlop submitted that it was for the Tribunal to decide the matter on the evidence. The Chairman indicated to Mr Hardey that it would be for the Tribunal to take its own view on the evidence and enquired whether Mr Hardey wished to pursue the matter. Mr Hardey indicated that it was a matter for the Tribunal to judge and he accordingly withdrew his motion in connection with him recalling himself as a witness to give evidence. Mr Hardey indicated that he would also withdraw his motion with regard to having the shorthand writer's notes extended in relation to his evidence but he wished to continue with his motion to have the shorthand writer's notes extended in respect of Ms C's evidence. Mr Hardey stated that Ms C's evidence corroborated the Appellant's case but that Mr Dunlop had submitted that she did not. Mr Hardey submitted that Mr Dunlop was making the same mistake that the reporter made. Mr Reid stated that it was not necessary to have the shorthand writer's notes extended as the Tribunal would have its own notes. Mr Dunlop stated that the Tribunal had heard the evidence and would take a view and pointed out that Mr Hardey agreed that Ms C had stated that Mr Cowan indicated he had only recently learned that Mr Hardey had no title to sue.

Mr Hardey said that the point went to the crux of the matter. Submissions on behalf of Mr Cowan stated that that was all that Ms C had stated but this was not the case. She also gave a range of evidence on other points.

Decision Of The Tribunal In Respect Of Mr Hardey's Motion That The Shorthand Writer's Notes Be Extended In Respect Of Ms C's Evidence

The Chairman indicated the Tribunal would leave consideration of this motion until after submissions had been heard. When submissions were concluded the Tribunal would then decide whether or not it was necessary to have the Shorthand Writer's Notes extended. This would depend on how much importance required to be attached to Ms C's exact words in the Tribunal making its findings in fact.

SUBMISSIONS FOR THE APPELLANT MR HARDEY
(Mr Hardey's written submissions are incorporated below)

By the present appeal the Appellant seeks to quash the first respondents' disposal of 3 March 2011 relative to his complaint against one Alan Cowan.

The Heads of Complaint at issue are 1A and 1B. No challenge is made to the remaining Heads in the above disposal. Heads of Complaint 1A and 1B now form Grounds of Appeal 1a and 1b respectively. The Appellant further has a second Ground of Appeal regarding unfairness anent a Note of Temporary Judge Wise. A further fourth Ground of Appeal founds upon a series of past dealings, issues and litigation with the first Respondents so as to impugn the neutrality of the decision-making process now at issue.

Heads of Complaint 1A and 1B are in the following terms:

"1A. On 3 December 2008 at a hearing on expenses before Temporary Judge Wise, Mr Cowan incorrectly claimed to the Court that he had not undertaken to appear for Mr Hardey. Mr Cowan stated that the Court had indeed proceeded on 12 January 2007 on the basis that Mr Hardey was absent (and technically in default).

When Mr Cowan's letter of 11 January 2007 was then produced to the Court, he was completely contradicted by it and sat silent before Temporary Judge Wise."

"1B. At a hearing on expenses before Lord Emslie on 3 October 2008 – Mr Cowan stated that there was an issue on Mr Hardey's title to sue because he (Mr Hardey) did not own his residence. Although Mr Cowan had never proceeded to procedure roll debate on that he wished to raise it as part of Mr Hardey's overall conduct as pursuer.

When Lord Emslie questioned this omission Mr Cowan then stated that the reason the plea to title to sue had never been taken and the cause never taken to procedure roll was because the defender had only "recently" learned that Mr Hardey did not own his residence and therefore had no reason to ever raise the matter earlier. This was wholly inaccurate and wrong. Mr Cowan and the defender knew Mr Hardey did not own his own house by virtue of an earlier notice of opposition to an earlier motion dated 12 January 2007 in which Mr Hardey had made this fact clear."

The present appeal relates to the first respondents' failure, acting through their Professional Conduct Committee, to find Unsatisfactory Professional Conduct relative to both Heads of Complaint 1A and 1B. For brevity, *Unsatisfactory Professional Conduct* and *Professional Conduct Committee* are later referred to as *UPC* and *PCC* respectively.

Heads of Complaint 1A and 1B have now been fully canvassed in 3 days of evidence and need no further introduction. Since the Grounds of Appeal pertained to challenge on the basis of procedural error and unfairness, the Appellant had originally intended to present his case simply by reference to lodged documentation illustrating such errors and unfairness. Such a course would have obviated the need for witnesses and would have been far more expedient. Mr Reid, on behalf of the First Respondents did not object to this course. Mr Dunlop however, on behalf of the Second Respondent, did object. He insisted on evidence being heard right to the merits and facts at issue. He insisted that evidence was required in order to address the issues and insisted that the only way the appeal could be determined was by way of evidence to the merits and facts at issue. By this course Mr Dunlop was departing from the normal function of an Appellate Court which merely examines what took place in the first instance process and rules accordingly. Rarely, if at all, does an Appellate Court retry the matter de novo with a view to reaching its own determination and conclusion of the facts and merits at issue. This point will be looked at in more detail later.

Mr Dunlop's insistence was however countenanced by the Tribunal, with the result that 3 days of evidence then ensued. The First Respondents called no witnesses and did not seek to lead any evidence regarding their detailed Answers. The Second

Respondent only called the complainee, Mr Alan Cowan. The Appellant called himself and two other witnesses in order to lead his case. These being Ms. C and Ms D respectively.

It is therefore necessary to look at the witnesses and their evidence in part one. Thereafter a disposal will be sought in part two.

Before doing so however it is essential to point out that the evidence of the Appellant's witnesses relative to Head 1A need not be looked at in any detail. That is because Mr Cowan admitted in his evidence the essential facts of Head 1A. This evidence will be examined in detail later. Given such admissions, there is therefore no issue with the vast majority of the essential facts of Head 1A. There is therefore no need to critically examine the evidential input of other witnesses on this Head, since, as stated, Mr Cowan supplied the necessary input himself. Therefore, analysis of the evidence of Ms C and Ms D (infra) need not concern itself with any reference to Head 1A. Furthermore, in Head 1A the Appellant does not insist on the words: *"Mr Cowan stated that the Court had indeed proceeded on 12 January 2007 on the basis that Mr Hardey was absent (and technically in default)"*. These words had been superfluous to the crux of the complaint. They had essentially been inserted as general information as opposed to a specific line of complaint. Such references should have been deleted much earlier. For present purposes therefore, there is no issue with these words and they do not form any part of the present appeal.

PART ONE: EVIDENCE

Ms C

Ms C was a model witness. She gave her evidence in a composed and dignified manner. She lacked any rancour or hostility. She certainly was not prepared to simply agree any suggestion put to her by the Appellant. On the contrary, she had occasion to correct the Appellant once or twice in that the question posed was not one for herself. Ms. C had no vested interest in these proceedings. She had no reason whatsoever to lie or give embellished or untrue evidence. Indeed, this may have been so obvious from the content of her evidence and her demeanour in the witness-box that neither

respondent suggested this to her in cross-examination. Indeed, Mr Reid had no cross-examination of Ms. C and thereby did not seek to undermine or challenge her evidence.

Ms. C was both credible and reliable. This is hardly surprising given that she was the former Legal Assistant to the Lord President of the Court of Session. Such an elite position is granted to few and then only to the best. This is not only in terms of intellect and legal skills but, more crucially, trustworthiness. Ms. C would have signed *The Official Secrets Act* for that position. A person of such trustworthiness is simply not going to come to these public proceedings and start lying or giving incredible or unreliable evidence over a matter of which she had no real interest, reason or motive to do so.

Mr Dunlop had some cross-examination where he put to her Mr Cowan's version of events (infra). Ms. C refuted this version. Mr Dunlop did not put to Ms. C that she was giving false or exaggerated evidence or that her present motives may have been untoward. In general, Mr Dunlop's cross-examination was fair. It did not however prejudice or undermine the Appellant's case in any.

As regards Head of Complaint 1A (Ground of Appeal (1a), for the reason already referred to there is no need to presently analyse any evidence of Ms. C on this matter.

As regards Head of Complaint 1B (Ground of Appeal (1b), Ms. C corroborated the Appellant's case. She went on to confirm that April 2008 was the first time that Mr Cowan had made a proper title challenge. She confirmed that on 16 April 2008 before Lady Dorrian, she had objected to Mr Cowan's Amendment to this effect on the basis it construed an entirely new line of defence very late in the litigation. She confirmed she later complained of this at the final Hearing on expenses before Temporary Judge Wise on 3 December 2008. She specifically refuted the contention put to her by Mr Dunlop that Mr Cowan had a proper plea to title to sue all along and that it was a live issue long before his April 2008 Amendment to this affect. She confirmed that Mr Cowan's generalised third plea-in-law, as existing prior to April 2008 with no supporting averments, could not have constituted a proper plea to title to sue. She pointed out that a plea to title to sue had to be specifically averred, and spoke to this

being the normal practice. Being an Advocate of 10 years, with the highest Bar Exam marks, a solicitor with Messrs. Bishops before that and now a Solicitor Advocate, Ms. C was well qualified and placed to speak to that and the legal effects of Mr Cowan's title challenge (or the lack of it).

Ms. C's evidence was favourably supported by the law on this matter. With reference to a challenge by a plea to title to sue Court of Session Rule 18.1 at C159 states: *"'No title to sue: the pursuer having no title to sue [or no interest] to sue [because state reason] the action should be dismissed.' The ground of objection must be specifically averred: North British Railway Co. v Brown & Co. (1857) 19D. 840"*.

The case of *North British Railway Co*. states in its rubric at page 840: *"Observed, Parties are bound to specify objections to title, and have no right under a general plea to maintain objections of which notice has not been given"*.

Macphail's Sheriff Court Practice (2006) states at page 336: *"No title to sue… the usual form of the plea is: 'The pursuer having no title to sue, the action should be dismissed.' The grounds of objection must be specifically averred",* (again citing the above case of *North British Railway Co*.

Ms. C specifically recalled that Mr Cowan stated to Lord Emslie that the defender had only "recently" learned that the Appellant did not own his house and that he had no title to sue. She confirmed this was in response to His Lordship's query as to why, if Mr Cowan wanted to raise lack of title as an issue at the expenses Hearing, the matter had never earlier proceeded to procedure roll debate on that.

Ms. C spoke to having given two statements to the Law Society to this effect and confirmed that these constituted pages 121 and 198 in the First Respondents' second inventory. Ms. C specifically confirmed that Mr Cowan's submissions were incorrect because he had known from the Notice of Opposition of 8 January 2007 that the Appellant did not own his house. Ms. C spoke to such Notice of Opposition (page 48 in the First Respondents' second inventory). Ms. C confirmed that at the Hearing on

expenses before Temporary Judge Wise she later took exception to the accuracy of such submissions made by Mr Cowan before Lord Emslie.

Clearly therefore, the accuracy of such submissions must have had a contemporaneous impact on Ms. C. This bears heavily on the probability that the submissions complained of were indeed made in the first place.

Ms. C further confirmed that the Appellant had vociferously complained to her during the Hearing before Lord Emslie regarding the accuracy of such submissions. So the accuracy of such submissions must have had a contemporaneous impact on the Appellant also. This further bears heavily on the probability that the submissions complained of were indeed made in the first place.

For the avoidance of any doubt, the Appellant concluded his examination of Ms. C by putting to her *verbatim* Head of Complaint 1B, and asking if such events had transpired. Ms. C confirmed they had. This Head of Complaint has therefore been corroborated in its entirety and is therefore capable of being proved beyond reasonable doubt, let alone on a balance of probabilities.

Ms D

Ms D was also a good witness. The Appellant has no reason to question her honesty. There certainly was no rancour or hostility. She could however have been more candid than she actually was. Much of her attitude was: *"the decision was made by PCC and that is nothing to do with me"*. It will be remembered that she adopted such a position in correspondence to the Appellant dated 31 October 2011, when she realised she was required as a witness here.

Unfortunately, such an attitude loses sight of the fact that the PCC based its decision on the Report of Ms. D. If this Report was tainted in inaccuracy, then it automatically follows that any error of the PCC in countenancing and applying such inaccuracy would be directly consequent to Ms. D's own actions. The obtuse reluctance of Ms. D to easily recognise this detracts slightly from her candour.

This having been said however, the Appellant elicited from Ms. D all he required. This is as follows.

As regards Head of Complaint 1A (Ground of Appeal 1a), for the reason already referred to there is no need no presently analyse any evidence of Ms. D on this matter.

As regards Head of Complaint 1B (Ground of Appeal (1b), Ms. D confirmed that there was indeed corroboration of this Head of Complaint by Ms. C. Ms. D went on to confirm that any suggestion that there was no such corroboration was wrong. Ms. D specifically confirmed that the finding on page 208 of the disposal of the PCC (as is numbered in the First Respondents' second inventory) that there was no corroboration or supportive evidence was erroneous. Her exact words to this finding were: *"It looks to me as if the Professional Conduct Committee have not made correct comment there"*. She also stated that the Professional Conduct Committee *"had not fully understood"* the content.

Clearly the PCC erred in holding that no such corroboration or supportive evidence was provided. This has essentially been admitted by Ms. D and in any event is obvious to anyone who can read. Further evidential analysis is therefore not needed here, but will be provided in the interests of completeness and emphasis of such error.

In her Initial Report (undated, but around 12 January 2011) Ms. D found on page 30 (page 106 in the First Respondents' second inventory) that there was no supportive evidence or corroboration from Ms. C.

In her evidence, Ms. D stated that by his letter of 25 January 2011 the Appellant had taken exception and pointed out that Ms. C's e-mailed statement of 21 December 2011 did indeed provide corroboration and supportive evidence. Ms. D stated that it was in direct response to such criticisms that she then felt compelled to e-mail Ms. C on 31 January 2011 seeking further input. This was given by Ms. C's e-mailed reply on the same day. All three e-mails and the Appellant's letter of 25 January are

presently lodged in the First Respondents' second inventory at pages 121, 198 and 133 respectively. In her evidence Ms. D had before her and spoke to these documents.

In her evidence Ms. D further stated that it was then in direct response to Ms. C's supportive e-mail of 31 January 2011 that she then issued a Supplementary Report for the attention of the PCC. The Supplementary Report is presently lodged in the First Respondents' second inventory at page 190. Ms. D spoke to it and confirmed that, therein, she specifically narrated that Ms. C corroborated the Appellant. So, the Supplementary Report said something different from the Initial Report with the result that there existed two reports with two different and conflicting views by Ms. D regarding the issue of supportive evidence or corroboration from Ms. C.

In her evidence however, Ms. D stated that she had not felt compelled to put Ms. C's supportive e-mail of 31 January 2011 in the papers before the PCC. So, the PCC never saw it. This was despite Ms. D having felt compelled to seek this further supportive e-mail following the Appellant's written criticisms of 25 January supra of Ms. D's finding that there was no supportive evidence or corroboration. Ms. D further stated in evidence that despite all this however, she had not felt compelled to correct her Initial Report notwithstanding that it erroneously stated that there had been no supportive evidence or corroboration. According to her evidence, she felt that the Supplementary Report satisfactorily clarified the issue and that this "clarification" discharged her from any onus or necessity to alter the erroneous references in the Initial Report.

It is very clear therefore that this whole casual approach caused the PCC to err as it did. Ms. D admittedly left in place the Initial Report which contained clearly incorrect information and indeed was actually outdated because it omitted any reference to Ms. C's supportive e-mail of 31 January 2011, which obviously post-dated it. It is clear that the PCC simply proceeded to countenance the erroneous view of the Initial Report of there being no supportive evidence or corroboration. The PCC either misread or ignored the Supplementary Report which had specifically confirmed that there was indeed corroboration afforded by Ms. C. This error may be understandable given that on the one hand the PCC was faced with Ms. D's Initial Report saying that there was no supportive evidence or corroboration by Ms. C; whilst on the other, the

Supplementary Report suggested there was. Matters were totally exacerbated by the fact that Ms. D admittedly did not feel compelled to put before the PCC the supportive e-mail of Ms. C of 31 January 2011. Had she done so, then it is entirely likely that the PCC would not have erred as it did. Ms. D responded with offence to the suggestion that such failures had been manipulation of the evidence. If such failures were not deliberate manipulation, then at the very least they were essential errors. Ms. D could give no reason for the failure to put the supportive e-mail before the PCC. Her whole account of this episode was unconvincing.

The error of the PCC was essentially caused by Ms. D's failure and omissions. At the very least she ought to have deleted in the Initial Report the erroneous findings therein stated of there being no supportive evidence or corroboration. She admittedly failed to do so, and by her own evidence had no problem with such an erroneous and factually incorrect position remaining in the papers before the PCC. This was despite the fact that in issuing a Supplementary Report saying there was indeed corroboration and having had sight of Ms. C's related e-mail of 31 January 2011, Ms. D knew, because it was now obvious, that her Initial Report was factually incorrect on this important evidential issue. This omission was quite wrong. Whatever the reason for Ms. D's omissions, the fact that the PCC adopted the erroneous view that it did was because it obviously countenanced Ms. D's Initial Report which contained the errors of which she admittedly failed to correct. This failure was exacerbated by her concurrent failure to put Ms. C's supportive e-mail of 31 January 2011 before the PCC. So, it was a double failure resulting in double unfairness and prejudice to the Appellant.

In such circumstances, it is very clear that the PCC erred crucially both in law and in fact in opining that Ms. C provided no supportive evidence or corroboration. The evidence was misapplied by the PCC, not least because it did not have sight or cognisance of Ms. C's e-mail of 31 January 2011. This error is fundamental and is of such weight so as to completely undermine the dismissal of this Head of Complaint.

As stated above, the fact that Ms. D is not prepared to recognise any of this reflects poorly on her overall candour. The error complained of under this Ground of Appeal is proven from the evidence of Ms. D alone, wholly in addition to the related evidence of the Appellant and Ms. C.

Mr Reid and Mr Dunlop had no cross-examination of Ms. D, and did not seek to undermine or challenge her evidence. The fact that neither Mr Reid or Mr Dunlop (especially Mr Reid) did not feel compelled to attempt to correct or refute any of this in any cross-examination of Ms. D is of strong moment also.

As regards Ground of Appeal 2, Ms. D confirmed that there was no real reason for the Appellant not getting a copy of the Note from Temporary Judge Wise. She admitted that Temporary Judge Wise was speaking to matters that took place in an open Court, of which could have been legitimately reported in the media. As such, there was no question of any client confidentiality or privilege, which is the normal reason for not supplying information to a complainer in a third party complaint. Ms. D admitted that there was a degree of procedural confusion over the refusal to make the Note available to the Appellant. She spoke to her letter of 11 January 2011 (production 2 on the Appellant's first inventory). She admitted that by this letter she had given the Appellant a copy of the Note of Ms. C and that this was despite Ms. C and her colleague, Ms. F, having earlier told the Appellant in writing that no such copy would be given. Ms. D spoke to such earlier letters of refusal, being the First Respondent's productions 39 and 10 respectively. Ms. D could not explain why both she and her colleague earlier adopted and maintained such refusal, but then inconsistently departed from that anyway. As such, the divergence in reasoning was not reconcilable and was confused and erroneous. Ms. D even went on to candidly suggest that had matters taken place presently, then the Appellant would in all likelihood have been given a copy of the Note of Temporary Judge Wise. In such circumstances Ms. D effectively admitted that there was no valid basis for the withholding of the Note from Temporary Judge Wise and that the procedure in doing so was confused and erroneous. She admitted that supportive weight to Mr Cowan was applied by this Note and that the Appellant had no opportunity to examine, analyse or contradict its content. The errors and unfairness the Appellant complains of under this Ground of Appeal have essentially been admitted (or at least established) from the content of the evidence of Ms. D herself.

Again, the fact that neither Mr Reid or Mr Dunlop (especially Mr Reid) did not feel compelled to attempt to correct or refute any of this in any cross-examination of Ms. D is of further strong moment.

The Appellant

The Appellant spoke to both Heads of Complaint 1A and 1B (Grounds of Appeal 1a and 1b) together with Ground of Appeal 2 anent the Note of Temporary Judge Wise. He further spoke to Ground of Appeal 4 with regards to a series of past dealings, issues and litigation with the First Respondents.

Not surprisingly, the Appellant's evidence was a mirror image of both Heads of Complaint 1A and 1B, given that these terms had of course been earlier agreed between the Appellant and SLCC and had formed his stated position throughout. Again, the Appellant's evidence on Grounds of Appeal 1a, 1b, 2 and 4 was all in the terms of which he had drafted in the Form of Appeal, as his stated position. For present purposes therefore, all key facts as narrated in both Heads 1A and 1B, and in Grounds of Appeal 1a, 1b 2 and 4, were deponed to by the Appellant. Further exploration and narration of all this would therefore be unduly repetitive. It should be enough for present purposes to proceed on the basis that the Appellant spoke to the foregoing matters in their entirety and that such matters have therefore been spoken to in his evidence.

In the Appellant's cross-examination, Mr Reid posed a very limited cross-examination. He did not explore Head of Complaint 1A in any way. With regards to Head of Complaint 1B, Mr Reid briefly (and fairly) sought confirmation from the Appellant whether he was certain Mr Cowan had submitted to Lord Emslie in the manner complained of, and in particular whether he had specifically used the word "recently". The Appellant had little hesitation in confirming this and firmly standing by the position he had deponed to in his evidence-in-chief. As stated, this being a mirror image of the terms of this Head of Complaint as earlier agreed between the Appellant and SLCC. Mr Reid also enquired as to why the Appellant felt prejudiced by not obtaining the Note of Temporary Judge Wise in terms of Ground of Appeal 2. The Appellant pointed out that he was denied any fair opportunity to analyse its

content or make comment on it. Mr Reid also sought clarification of the past issues and litigation referred to in Ground of Appeal 4. Such details were given. These being that amongst other things, the Appellant possesses three Inner House decrees against the respondents (with two others settled). This was consequent to their repeated mishandling of his affairs. He confirmed that the respondents had also settled a substantial damages action he had pursued in which Messrs. Simpson & Marwick had actually acted for the First Respondents. Also, that the First Respondents have suffered a series of unfavourable related media reports anent such matters. On terms of this background the Appellant suggested that it cannot be said that the First Respondents treated him with total impartiality or neutrality. The background history plainly grounded the severe possibility for conscious or subconscious bias against him in the present complaint. The Appellant stated that although such matters *per se* could not automatically ground the present appeal, their very existence could be looked at in aggregation to the identified errors the Appellant presently complains of. In essence, the Appellant spoke to all the facts narrated in his fourth Ground of Appeal. No challenge or repudiation was made by Mr Reid to any this. Mr Reid did not put to the Appellant that he was giving false or exaggerated evidence or that his present motives may have been untoward. He led no witnesses to repudiate any of this. In general, Mr Reid's cross-examination was fair. It did not however prejudice or undermine the Appellant's evidence in any.

The conducting of the cross-examination by Mr Dunlop was very different however.

In the case of *Mathieson v Marsh*, 1996 SC 25, the Court commented on the party litigant defender's cross-examination as having been *"studded in irrelevancies"*. The Court further commented that it had been *long, repetitive* and that the party *had pursued lines with dogged determination which were peripheral to the main issues.*

Such an adverse description squares entirely with Mr Dunlop's cross-examination of the Appellant. It was studded in irrelevancy. It lasted well over three hours. The vast majority of that time was spent by Mr Dunlop questioning the Appellant on matters in no way connected with the present issues. Mr Dunlop seemed committed to turning this matter into an examination of the personal life of the Appellant and his associated business elsewhere. All that was nothing to do with the present appeal. The Appellant

is not on trial here or under any investigation whatsoever. Mr Dunlop's conduct constituted a brazen attempt to divert attention away from the present facts at issue and to focus on entirely irrelevant issues. The Appellant estimates that out of his three hour cross-examination, no more than 20% of that was spent by Mr Dunlop on the matters at issue. His demeanour was forceful and not necessary.

Unfortunately, Mr Dunlop was given far greater latitude in his cross-examination than he should have been. He was afforded a fairly uninterrupted and unfettered width by the Tribunal. As this extended to more and more irrelevancy the Tribunal should have interrupted to protect the Appellant witness. This did not happen and the Appellant was eventually forced to start objecting to the questions on the grounds of irrelevancy and that the matter was being turned into a free for all. The Appellant's necessity to do so forced him into a very unfair position. That was because the Appellant was not represented and was therefore forced to act as his own representative even whilst giving evidence. So, whilst giving evidence on the one hand, the Appellant had to voice any necessitated objection as his own legal representative on the other. Therefore, in no way should the making of objections be interconfused with any suggestion that the Appellant was avoiding answer. These are two different things, i.e. if the Appellant had been legally represented then he would have expected his representative to object on the same basis as the Appellant did.

Some of the objections were sustained and others were not. Mr James Hastie seemed especially keen to countenance Mr Dunlop's peripheral enquiry. The Appellant noticed that Mr Hastie advised the Chairman to repel the Appellant's objections to relevance and to maintain the questions. It is with especial reference to such countenance that the Appellant would now make the following observation.

As the Appellant stated in evidence, this Tribunal is not a Court of Law in the normal sense. Although Tribunals and Committees of Enquiry have been authoratively defined as performing a similar function to a Court of Law, they have substantial differences. In the first place, these proceedings have no power to compel the attendance of a witness. There is no power to order productions. There is no power to force the answer of a question under sanction of Contempt of Court. These proceedings have little or no power in the way of sanction towards a witness (or

anybody). There is no absolute privilege. Therefore, there can be no doubt that generally these proceedings lack the due formality and sanction of a matter conducted in a Court of Law. Whilst a Tribunal is tasked with performing a legal function, there is far less formality.

It flows from this that Mr Dunlop did not have the free reign he presumed he was entitled to. The scope and invasion of Mr Dunlop's irrelevant questions should have been curtailed to a more moderate cross-examination, generally commensurate with establishing the facts at issue. This is not a criminal trial in a forum where Mr Dunlop may find more unrestricted latitude. There can be no doubt that Mr Dunlop vastly exceeded what was reasonable and relevant. He should not have been entitled to act in such a manner or to raise matters that did not bear in any way towards the facts at issue. In answer to the Appellant's objections, Mr Dunlop repeatedly maintained that his questions went to the Appellant's credibility. Credibility is one thing, but an unrestricted *free for all* is quite another matter. No other party to these proceedings behaved in such a manner towards any other witness. This includes the Appellant in his cross-examination of Mr Cowan.

In order to illustrate this point it is important to briefly look at some of the matters put in the cross-examination.

The fact that the Appellant has business elsewhere in the form of unrelated civil litigation is nothing to do with these proceedings. Such matters remain *sub judice* and for all the Tribunal knows could be entirely well founded. The Tribunal is not entitled to take such matters into account in such circumstances. If the Tribunal is not entitled to apply weight to such matters then it automatically follows that Mr Dunlop should have been stopped on the basis of irrelevancy. The best example of Mr Dunlop's irrelevancy relates to his attempted use of a former property dispute between the Appellant and his mother. Mr Dunlop's attempted use of this was almost obsessive-like. This attempted use was not only irrelevant but was actually entirely misleading.

It is therefore important to look at this, since this conduct may have an overall bearing on the conduct of the Second Respondent during these proceedings. It will be appreciated that poor, misleading conduct during these proceeding would reflect

poorly on the Second Respondent and possibly bear on the eventual outcome. Before looking at this however, it is firstly reiterated that the Appellant has been accepted by the Law Society of Scotland as a fit and proper person. No litigation or former property dispute barred that. If the Solicitor's governing body took such a view then that reflects favourably on the Appellant and unfavourably on Mr Dunlop's cynical attempt to undermine the Appellant on such matters. The Appellant spoke to all this.

The background is that owing to a family breakdown the Appellant was involved in a land dispute with his mother. This dispute will now haunt the Appellant for the rest of his life. In a perfect world, a dispute of this nature and relationship would not occur. Unfortunately in the real world they sometimes do. The dispute was commenced in 1989 onwards and culminated in Court of Session proceedings in which the Appellant was represented by Mr Dunlop!

The Appellant was to initially lose at first instance proof before Lord Macfadyen in 1996. After dismissal of Mr Dunlop, the Appellant however went on to represent himself and to totally vindicate himself. The Appellant obtained a decree of declarator to the land at issue. This declared the land to be vested in the Appellant and he obtained title to it. Not only that, but the effect of this declarator was to undermine the judgement of Lord Macfadyen as having been fundamentally irrelevant and incorrect. The Appellant maintains that this error had been caused by the fundamental omissions of Mr Dunlop in not properly advancing the Appellant's case earlier. This being that the Appellant had already been in title to the ownership of the land before the proof of Lord Macfadyen. This was not properly explored or advanced. The proof before Lord Macfadyen had proceeded in the ignorance of all this.

Thus, the Appellant was to be successful in this matter and was to obtain the land at issue. The judgement of Lord Macfadyen had been erroneous and was accordingly reduced on such a basis. Therefore, far from having been unsuccessful with adverse findings, the Appellant was actually entirely successful. The Appellant spoke to all this in answer (under suffrage) to Mr Dunlop.

In such circumstances, the conduct of Mr Dunlop and Mr Cowan in therefore putting the nullified judgement and annulled findings to the Appellant was entirely unlawful

and misleading. In order to convey this it is crucial to briefly look at the legal effect of the reduction.

The effect of a reduction is to "annul" a decree. *Dunedin's Encyclopaedia of the Laws of Scotland* (1931) states at page 351: *"The object of the action of reduction is to annul some deed, decree or other writing against which the pursuer alleges sufficient legal grounds of reduction"*. Crucially, page 355 states: *"The effect of a decree of reduction is that the deed reduced ceases to be of any effect against the party who had obtained the decree"*. Similarly, on page 352 reduction is stated to *cut down* a deed or other document; and page 353 refers to reduction incurring the *cancellation* of a deed.

Consistently, *Stair Memorial Encyclopaedia* Volume 13 at Paragraph 64 states that anything judicially reduced becomes a *nullity* and the deed, decree or document reduced *ceases to be of any effect* against the party who obtained the reduction. A "nullity" is defined in the Chamber's Dictionary (1998 Edition) as being *"something without legal force or validity"; "nothingness"; "lack of existence, force or efficacy"*.

Again, *Bell's Digest of the Law of Scotland* (Seventh Edition) states at page 896: *"The effect of a decree of reduction is that the deed thereby reduced ceases to be of any effect against the party who has obtained it"*. Consistently, pages 893 and 895 state that the reduction has the effect to *set aside* a decree.

Mackay's Manual of Practice (1893) states at page 620 that: *"Reduction is the proper process for setting aside a decree....It is a means of annulling an ex facie valid decree...It is a means of quashing a judgement in respect of a formal but essential defect, which renders it null"*.

In the foregoing circumstances of clear and consistent authority, the judgement is deemed not to exist and treated as *pro non scripto*. The Tribunal may be interested to learn *ex parte* that The Law Society of Scotland were to take the exact same view. They investigated the judgement and commissioned a part-time Sheriff to research and report on the effect of the reduction. It was concluded that the judgement did not exist and was in no way detrimental to the Appellant's fitness to be a solicitor. Consistently *Green's Weekly Digest* had little hesitation in removing the judgement

from their website on discovery of the reduction. This was put to Mr Cowan by the Appellant and will be referred to later.

In the foregoing circumstances therefore, Mr Dunlop, under authority of Mr Cowan, put the nullified judgement and annulled findings to the Appellant in the direct knowledge that it did not exist and had been quashed. Mr Cowan has this knowledge because he admitted in cross-examination to the Appellant that by letter dated 29 April 2008 the Appellant had brought the reduction and its effect to him under threat of interdict. This letter remains lodged in the Appellant's first inventory and is fully referred to. Mr Cowan further admitted that the letter had been written to him following his earlier intention to put the judgement to the Appellant in the abortive proof with Mrs B in 2008. So, the present use constitutes the second attempt at such improper use.

In suggesting to the Appellant that he had wrongfully obtained a deed to land - in the knowledge that any findings to that effect had been quashed - Mr Dunlop and Mr Cowan were attempting to mislead this Tribunal. For such reasons the Appellant repeatedly objected to such attempted use over a 20 minute stand off with Mr Dunlop. The Chairman eventually had to order Mr Dunlop to move on. By that point however the Appellant's composure had been broken and Mr Dunlop's purpose had been cynically achieved.

Set aside the foregoing background, the actions of Mr Dunlop constituted a brazen attempt to hurt, antagonise and annoy the Appellant as a witness. It is improper to act in such a manner towards a witness. The 2006 Edition of *Macphail's Sheriff Court Practice* is clear on this at page 602 at 16.75.

This impropriety is easily demonstrated by the following analogy:-

Take for example the scenario where a declarator of non-parentage or illegitimacy is pronounced against a person despite opposition. Such a declarator could be hurtful and unwelcome. The recipient however maintains challenge and on proper cause goes on to reduce the decree of declarator. The automatic legal effect of this is that the person is no longer declared as a non-parent or as illegitimate. The declarator is

nullified and annulled. In such circumstances it would neither be appropriate or lawful to still refer to the erstwhile recipient as having been declared by a Judge as illegitimate or as a non-parent. Indeed, such an attempt could be defamatory depending on the circumstances. The present approach of Mr Dunlop totally disregards all this. His approach would be that the erstwhile recipient could *still* be questioned, challenged and undermined on the basis that a Court had found he was illegitimate or a non-parent. All this would be notwithstanding the fact that the Court's earlier decree and related findings had been annulled and that the erstwhile recipient is no longer legally deemed as illegitimate or non-parent. Such a course would be a piece of nonsense and is directly analogous as to what Mr Dunlop now attempts with the Appellant. Mr Dunlop's whole approach demonstrates a clear inability to understand (or a clear ability to flout) established law. The Tribunal is invited do take a view of this conduct as deliberate antagonism and hurt of the Appellant witness – wholly exacerbated by such antagonism and hurt having been attempted by the very individual who had acted in, and lost, the case of which he now seeks to impugn the Appellant on.

This foregoing final point should also be the subject of separate comment. Mr Dunlop sat through a four day proof beside the Appellant. He had sat with him in Consultations earlier. At all times Mr Dunlop was imparted with the Appellant's confidence, trust and most intimate inner thoughts on the case. Mr Dunlop was paid for all that. He was, and remains, bound by confidentiality. The Appellant's stated position to Mr Dunlop throughout all that was that he had done no wrong. He had not obtained a deed to land wrongfully. The land had been legitimately disponed by a proper written document in front of witnesses. The Appellant was to eventually prove that this was the case and obtained his title to the land. But the case had initially been lost at first instance before Lord MacFadyen. For Mr Dunlop to now twist that initial loss of a case - in which he was paid to ethically and legally represent the Appellant's best interests - absolutely stinks.

The Chairman viewed that there was no issue with Mr Dunlop acting in this way. The Appellant has reservations with that view. There can be no doubt that the possibility for a conflict of interest existed with Mr Dunlop attacking the Appellant, his former client, on the very case in which he had unsuccessfully represented him.

Mr Dunlop remains in possession of confidential information pertaining to the very issue he cross-examined the Appellant on in order to attain an advantage for his new client, Mr Cowan. In such circumstances, any reasonable observer would view that the possibility of conflict may exist. Actual conflict does not need to exist. It is enough that the possibility is created for conflict to manifest or crystallise itself. The foregoing conduct clearly attained that standard. If the Appellant is wrong in this, then at the very least this conduct was extremely betrayal-like and calculated to annoy the Appellant in cross-examination. Mr Dunlop had been exposed to the Appellant's most intimate thoughts on the matter and knew from such confidential information that the erstwhile case with has mother was a *very* raw nerve. Mr Dunlop has been exposed to various information and input from the Appellant on the matter. For Mr Dunlop to therefore tweak this raw nerve in the way he did was quite wrong. That is because he knew from earlier confidential discussions with the Appellant precisely how he would react when the matter was raised. He so knew because of the Appellant's past dealings with him and expressed confidences. The Appellant reacted in the entire way Mr Dunlop had cynically envisaged and anticipated. That is why Mr Dunlop so emphatically maintained this entirely irrelevant line during the above stand off, despite the fact that the matter had been reduced. This insistence was wholly exacerbated by Mr Cowan's admitted knowledge of this reduction supra. Mr Dunlop has acted in a potential conflict and he will now have to answer to that allegation in a future complaint to come.

Even if the Appellant is wrong in all this, he would nevertheless ask the Tribunal to put itself in his position: A former solicitor, now acting for an opponent, attacks the former client on the very case he had represented him in years earlier, in order to impugn the former client to the new client's advantage. The erstwhile solicitor then goes to suggest or imply that the Appellant's litigation elsewhere undermines his present credibility and otherwise renders him a vexatious litigant. Factiously speaking, it will be appreciated that if the Appellant is a vexatious litigant then Mr Dunlop was a willing party to that since he accepted payment to act for the Appellant in a number of earlier actions. This mendacity being quite profound.

In such circumstances any normal person would have taken offence and lost composure in the way the Appellant did. It was an act calculated by Mr Dunlop to

illicit the reaction it did, irrespective of how it may have ethically compromised him personally. The Appellant therefore invites the Tribunal to take this into account also.

In summation therefore, there are several relevant points to be taken into account from all this:

(i) Mr Dunlop and Mr Cowan acted unlawfully in attempting to put to the Appellant matters that did not exist and of which Mr Cowan clearly knew did not exist.

(ii) The matter was entirely irrelevant and constituted an obvious attempt to hurt, antagonise and annoy the Appellant as a witness.

(iii) The foregoing impropriety was exacerbated by it having been the Appellant's own former solicitor in the case who acted in the foregoing manner.

None of this reflects well on the Second Respondent. It goes to conduct during these proceedings, reflects poorly, and should be adversely taken into account.

Moving on, because of the undue width and utter irrelevancy of much of Mr Dunlop's cross-examination he may have unwittingly favourably tested and demonstrated the Appellant's overall credibility and reliability. This is due to the fact that since Mr Dunlop put to the Appellant various irrelevant collateral matters, the Appellant was entitled to put such matters to other witnesses in rebuttal and in defence of the collateral character attacks made on him by Mr Dunlop. All such issues had been sporadically raised by Mr Dunlop in cross-examination of the Appellant, and of which the Appellant could not possibly have prepared a manufactured answer for in advance.

So, in analysis of the Appellant's answers to Mr Dunlop's collateral questions to the Appellant, as against the later related account of other witnesses on the exact same issue, reference should be made to the following:-

(i) Ms. C was to confirm that there existed reciprocal animus between Mr Cowan and the Appellant. The Appellant had earlier spoken to that in Mr Dunlop's cross-examination. The Appellant had been frank and honest in this admission. Mr Cowan was not (infra).

(ii) Ms. C was to confirm that in actual fact the Appellant had won the case of Lord MacFadyen and had been vindicated in full. The Appellant had earlier spoken to that in Mr Dunlop's cross- examination.

(iii) Ms. C was to confirm that the Appellant had attained a large degree of success in litigation and had favourably attained over 20 Court of Session decrees, a number of which were at Inner House level. Such success demonstrated his litigations were with merit and that the Appellant could not be classed as a vexatious litigant consequent to any such litigations. The Appellant had earlier spoken to all this in Mr Dunlop's cross-examination.

(iv) Ms. C was to confirm that the Appellant had prepared for her written submissions for the Hearing on expenses before Temporary Judge Wise on 3 December 2008. These had been passed over at a Consultation on a memory stick. These were for assistance only. Ms. C substantially revised and reduced these to her own satisfaction. The Appellant had earlier spoken to all that in Mr Dunlop's cross-examination.

(v) Ms. C confirmed that the Appellant had vociferously complained to her during the Hearing before Lord Emslie that Mr Cowan's submissions that the defender had only "recently" learned the Appellant did not own his house and had no title to sue, were wrong and inaccurate. The Appellant had earlier spoken to such a contemporaneous complaint to Ms. C during Mr Dunlop's cross- examination.

(vi) It was also put to the Appellant during Mr Dunlop's cross- examination that at the opposed Hearing to have the Amendment received before Lady Dorrian on 16 April 2008, Mr Cowan had maintained that he already had a plea to title sue in terms of his existing third plea-in-law. The Appellant confirmed this was indeed the position advanced by Mr Cowan. The Appellant's evidence was thereafter favourably confirmed by the handwritten note of submissions prepared by Mr Cowan for such

Hearing and presently lodged by the Second Respondent. The handwritten note confirmed the exact same position the Appellant spoke to. It is of further moment that in making such an admission the Appellant was candidly conceding a position of which Mr Cowan could claim to his advantage. This is in respect that Mr Cowan's position before Lady Dorrian was not very consistent with what Mr Cowan is accused of having later stated before Lord Emslie. This divergence will be founded upon later. The present point however is that the giving of such a candid concession is always the sign of a good witness and reflects well on the Appellant.

(vii) Mr Dunlop put to the Appellant that by his letter of 24 February 2011 (page 200 in the First Respondents' second inventory) he had attempted to bully, threaten and intimidate Ms D. The Appellant refuted that, suggesting that his correspondence had been frank and strong but not untoward, bullying or threatening. He pointed out that he had legitimate concerns and was entitled to raise them. In examination by the Appellant Ms. D was to flatly refute Mr Dunlop's allegations and essentially agreed the Appellant's own account. Ms. D candidly confirmed that she had not felt bullied, threatened or intimidated in any way. She was dismissive of any suggestion to that effect. Ms. D went on to confirm that in her position strong correspondence from concerned and disgruntled complainers is routine. She confirmed that the Appellant's correspondence had been in strong and frank terms but certainly never improper or untoward. Therefore she had never felt compelled to take exception to the content of the letter. All this was what the Appellant had deponed to in repudiation of Mr Dunlop's related attack. Therefore, the very person Mr Dunlop claimed had been threatened by the Appellant was actually supportive of him and his testimony. Ms. D also confirmed that when the Appellant had issued the said correspondence of 24 February, he had done so in ignorance of the fact that Ms. D had issued a Supplementary Report highlighting the corroboration from Ms. C. She admittedly had not told the Appellant of this however. The Appellant's letter was concerned with Ms. D having ignored such corroboration. Clearly, Ms. D had felt compelled to deal with the issue, so it had been important. Had she told the Appellant she had done so, then the Appellant's concerns need never have arisen in the first place.

(viii) It is additionally pointed out that in cross-examination the Appellant gave unchallenged evidence to Mr Dunlop that he had repudiated Mr A's offer of a Bar

Traineeship. His evidence was that he eventually wrote to Mr A in May 2008 specifically stating that owing to contempt and disgust at the matters which had been taking place with Mr Cowan there was no prospect of him joining Simpson and Marwick. Clearly therefore, it was the Appellant who told Simpson and Marwick where to go and not the other way around. In his evidence Mr Cowan did not seek to challenge this account in any way. A strong inference can be presently gleaned from this. The repudiation of a Bar Traineeship with a firm of the status of Simpson and Marwick was a totally extreme and draconian act. No right-minded person would have done so without a valid basis. The Appellant's basis was the personal conduct of Mr Cowan. The present issues pertain to the conduct of Mr Cowan. This demonstrates that as far back as pre May 2008, the Appellant had difficulties with the conduct of Mr Cowan and had been openly voicing this to Simpson and Marwick. All this was going on before the eventual cessation of the Bar Traineeship in May 2008. This illustrates that the present issues of complaint - which were brought later - were not connected with the loss of any traineeship. The Appellant took the view he did of the conduct and chose to walk away, admittedly in disgust. The matters now at issue are inconsistent with revenge or malice because they are merely an extension of dissatisfaction mooted much earlier. This dissatisfaction voluntarily compelled (but did not force) the Appellant to act in the way he did. As stated, the dissatisfaction had to have been of considerable moment to compel such a draconian act. There is therefore a consistency with the Appellant's view of Mr Cowan. Whilst dissatisfaction relative to issues not connected to the present appeal may not be directly relevant to the facts at issue, at the very least it may bear on the Appellant's motives and illustrate that *animus* or revenge is not the guiding factor here. If Mr Dunlop was allowed to put to the Appellant that he was derived by ill-motive consequent to loss of a Bar Traineeship, then there can be no doubt that the Appellant is entitled to repudiate this by reference to the above facts given in evidence. So, the Appellant's credibility, in terms of motive, is actually strengthened and not weakened by this line.

(ix) The whole flavour of Mr Dunlop's cross-examination was to paint the Appellant as a vexatious idiot. Ms. C refuted that. In any event it will be appreciated that the best Q.C. in the world will not break an idiot telling the truth. It is additionally reminded that the Appellant gave unchallenged evidence to Mr Dunlop that Mr A the senior partner of Simpson and Marwick, personally made the offer of Bar Traineeship

to the Appellant. The Tribunal is entitled to make inferences here. There can be no doubt that as senior partner and Sheriff, Mr A was better qualified than Mr Cowan to form a view of the Appellant. This view was favourable and serves to fly in the face of the wholly inconsistent character Mr Cowan is desperately trying to paint in order to impugn him.

Notwithstanding the lengthy and various irrelevancies, Mr Dunlop concluded his cross-examination by not exploring Ground of Appeal 2 or 4 in any way.

In summation therefore, the Appellant would submit that he was a frank and honest witness. He was not evasive and spoke to all matters at issue. His emphasis was on relevance anent the facts at issue and not irrelevance. Unlike the Second Respondent, the Appellant stuck to the facts at issue and did not attempt to turn the matter into a slanging match. He admitted he did not like Mr Cowan. Such a frank admission reflects well on his candour. His account of events has been entirely consistent from the first day he made this complaint. The crux of the Appellant's credibility and reliability is however demonstrated by a range of other sources. In the first place, the Appellant's account of Head of Complaint 1B was corroborated in its entirety by Ms C. The Appellant's account of Head of Complaint 1A was then corroborated by Mr Cowan himself (infra). The Appellant's account of Ground of Appeal 2 anent the unfairness and irregularity regarding the Note of Temporary Judge Wise was essentially admitted and otherwise corroborated by Ms D. The Appellant's evidence that the PCC erred in Ground of Appeal 1b by finding that no corroboration was given by Ms C was essentially conceded and corroborated by Ms D.

All these matters constitute the facts at issue which found and ground the present appeal. These are the main matters the Appellant has to be prove. His evidence has been additionally favourably tested by a range of other maters, some collateral and some not. Much of these were introduced by Mr Dunlop and have backfired (supra) in respect that they favourably test the Appellant's credibility and reliability.

Alan Cowan

Mr Cowan's conduct in the witness–box was good and cannot be the subject of *prima facie* criticism. He lacked rancour and venom. He gave his evidence in a dignified and placid manner. He did not appear evasive and gave some concessions. He was courteous to the Appellant during his cross-examination. All the signals were that Mr Cowan was a good witness.

And that is the precise image that Mr Cowan wished to convey. Mr Cowan is a litigation expert, regularly appearing in contentious forums. He is vividly aware of what the Court looks for in its assessment of a witness. He is aware that the conduct in the witness-box can be an essential prerequisite to that assessment. He is aware that poor demeanour, rancour and emotional outbursts can negate such assessment. He is aware that dignity and courtesy, with the occasional concession, may bolster it. In fact, it is fair to say that Mr Cowan's conduct in the witness-box went more then behaving moderately and properly. Rather, that it was in fact clinically cold and totally dispassionate. This was to the point that one must consider whether it was in fact a total act. It will be appreciated that any normal person, on the receiving end of the present allegations, would not be very pleased if they were fabricated and false. That is Mr Cowan's position. As such therefore, clear displeasure could easily manifest itself in the witness-box. A witness is only human. It may therefore actually be of moment that Mr Cowan's conduct in the witness-box was as dispassionate as it was, so as to suggest it having been deliberately staged.

Various hallmarks exist for this conduct to have been deliberately staged to bolster credibility. In order to therefore *truly* evaluate Mr Cowan's credibility it is fundamentally important to look deeper at the content of his evidence. A closer inspection and more forensic analysis of this may raise the veil of honesty and lack of *animus* that Mr Cowan has attempted to portray.

In the first place, Mr Cowan had a clear motive not to tell the truth. In order to succeed, his account of events has to be preferred not only over that of the Appellant but also over that of Ms. C as well. Mr Cowan risks loosing this appeal if he is not believed. He risks the possibility of the complaint being upheld against him. All this could be a motive to give incorrect evidence. The Appellant earlier used Ms. C's good conduct in the witness-box to reflect well on her credibility. Mr Cowan's own conduct

was good. The fundamental difference however is that Ms. C had nothing to gain (or lose) by not telling the truth. In other words she had no motive not to tell the truth whereas Mr Cowan did.

As regards Head of Complaint 1A (Ground of Appeal 1a), Mr Cowan admitted in his evidence-in-chief that at the Hearing on expenses before Temporary Judge Wise on 3 December 2008, he had incorrectly claimed to the Court that he had not undertaken to appear for the Appellant on 12 January 2007. Mr Cowan's evidence was that he had stated to Temporary Judge Wise that there could not have been any such undertaking. This evidence was directly consistent with his earlier related statement to the Law Society (page 46 in the First Respondents' first inventory). It was also directly consistent with the evidence of the Appellant and the earlier statement of Ms. C to the Law Society (page 58 in the First Respondents' first inventory).

There is therefore no dispute about these facts. The First Respondents' PCC clearly erred in fact by finding that Mr Cowan had merely stated he could not remember any such undertaking. That was a different and less culpable submission. This point will be expanded later.

In cross-examination by the Appellant, Mr Cowan confirmed that when his letter of 11 January 2007 was then produced to the Court by Ms. C on 4 December 2008, he was completely contradicted by it. Mr Cowan then further admitted that he had sat silent before Temporary Judge Wise and had made no attempt whatsoever to candidly correct the obviously misstated position he had submitted to the Court the previous day. Mr Cowan could give no reason to the Appellant for this failure other than to reiterate that he had not felt compelled to do so. He did not feel that his failure was lacking in candour, and generally felt that he had done nothing wrong. No concession or regret was expressed towards any of this by Mr Cowan.

Mr Cowan did however concede that a solicitor breaching an undertaking to act for another in Court was professionally reprehensible and a matter worthy of consideration anent conduct in a litigation. Mr Cowan admitted that Ms. C had founded on this conduct before Temporary Judge Wise with a view to demonstrating

improper conduct during the litigation, and to have Her Ladyship take this into account in the consideration of the litigation's expenses. There is therefore no issue with the facts of such events.

In his defence, Mr Cowan claimed in chief that he had made an error of recollection before Temporary Judge Wise. In cross–examination by the Appellant Mr Cowan initially attempted to claim that he had not fully digested the Note of Submissions of Ms. C in which this attack had been made on the morning of 3 December 2008. In response, the Appellant pointed out to Mr Cowan that he had to have read and digested the Note on the point because he had immediately sought to repudiate the allegations when he rose to address the Court on his own submissions in the afternoon. On this, Mr Cowan immediately backtracked and conceded he had digested the point.

Mr Cowan agreed that the letter of undertaking had been lodged by the Appellant in an inventory on 4 April 2008 (it had been numbered 6/61 of process). So, 4 April 2008, and not 11 January 2007, would have been, at the very least, the nearest date to 3 December 2008 in which Mr Cowan would have had cognisance and reminding of his 11 January 2007 undertaking. So, the Law Society's finding that his forgetfulness could be excused by the fact that his undertaking letter had been written almost 2 years before the expenses Hearing on 3 December 2008 was further demonstrably erroneous since it did not take the considerably later date of 4 April 2008 into account in any way. This was despite the fact that in his earlier related statement to The Law Society (page 46 in the First Respondents' first inventory), Mr Cowan had himself told The Law Society that this letter had been lodged on the above date.

Accordingly, The Law Society had been made aware of all this and had erred anent (i) precisely what was said and (ii) the minimum date of Mr Cowan's cognisance of the letter of 11 January 2007, being 4 April 2008. There was (and can be) no real dispute with all that. In particular, the PCC had specifically found favour with the fact that "nearly two years" had elapsed since the letter was written in January 2007 and the Hearing at issue on 3 December 2008. Reference is made to page 207 of the First

Respondents' second inventory. This lost sight of the foregoing point and constituted a misdirection of the evidence.

The matter did not end there however. The Appellant went on to suggest to Mr Cowan that even the irrefutable date of 4 April 2008 may not have been the minimum date in which Mr Cowan would have had cognisance and reminding of his 11 January 2007 undertaking. The Appellant put to him that prior to the Hearing on 3 December 2008 Mr Cowan would have re-familiarised himself with the case productions and thereby would have attained cognisance around about then.

Mr Cowan however denied that he had re-familiarised himself with the productions before the Hearing of 3 December 2008. The appellant put to Mr Cowan that his account was not very probable because he had gone into copious details at said expenses Hearing on numerous other documents. Mr Cowan admitted that this especially included the Appellant's earlier letter to his neighbours of which Mr Cowan has also attempted to use against the Appellant in these proceedings as well. This letter had been lodged by Mr Cowan in the litigation on 10 April 2007 as Number 7/19 of process. This was considerably before the later lodging of the Appellant's own 6/61 of process on 4 April 2008 supra.

Clearly therefore, by inference, Mr Cowan had to have looked through the productions in preparation for the expenses Hearing to obtain any ammunition he felt he could use against the Appellant. Such an obvious course is not consistent with his present denial of not having done so.

The Appellant also pointed out to Mr Cowan that in the preparation for a case, re-familiarisation of papers before an important Hearing is normal and that he would have done this. The Appellant pointed out that the Appellant had personally done so a few days before the continuation of the present proceedings. A brief re-appraisal is usually enough. Mr Cowan maintained however that he had not done so. This was notwithstanding his admitted vigour and detailed examination of various other

productions lodged in the litigation's process. The Tribunal is therefore invited to take a view of this denial as being improbable and adversely reflective on Mr Cowan's present credibility.

Accordingly, in the above circumstances, the essential facts of Head 1A have therefore been established by Mr Cowan himself. The fact that both the Appellant and Ms. C gave the exact same account to the Law Society reflects well on their credibility, reliability and honesty. As proof of the essential facts of this Head however, comparative analysis of other evidence need not take place. Mr Cowan has himself provided the necessary input to prove the essential facts at issue.

As regards Head of Complaint 1B (Ground of Appeal (1b), in his evidence-in-chief Mr Cowan admitted that he actually knew in 2006 that the Appellant did not own his house. He deponed that his client had done a title check at the time and he had seen that.

In cross-examination by the Appellant however, Mr Cowan was not able to provide any convincing explanation as to why, if such knowledge had existed in 2006, it was not until April 2008 that such matters had raised their head. His evidence was that the Record closed in 2006 and in 2007 he discovered authority suggesting that lack of proprietorial title barred a remedy of interdict for nuisance affecting a property. He could not explain why, despite such 2006 and 2007 knowledge of the title check and authority, that he did not advance the matter until 2008. From all such knowledge he was in a position to do so in 2007 at the very latest. His evidence was vague and unconvincing.

Mr Cowan's inability to give a compelling satisfactory explanation for all this goes against him in respect that it provides weight to the question of whether Lord Emslie may have enquired as to why matters had never proceeded to procedure roll debate and any inability of Mr Cowan to give a satisfactory explanation for that. All this has a bearing on the probability of the direct facts at issue, namely whether Lord Emslie asked the question and Mr Cowan give the incorrect answer complained of. That is because if Mr Cowan cannot properly account for the above omissions and a question

mark *still* exists over the making of the challenge to title to sue, then it is more probable that Lord Emslie would have had his own concerns and query over this and that Mr Cowan could not have given a proper answer.

Mr Cowan's inability to provide a satisfactory explanation further mitigates against his evidence that all along he had a plea to title to sue in terms of his third plea-in-law. Ms. C was adamant that April 2008 constituted the first time that a title to sue challenge raised its head. As a Court of Session Practitioner, Ms. C was adamant that the third generalised plea-in-law could not constitute the challenge to title which Mr Cowan claimed it did. She was adamant that this constituted an entirely new line of defence made very late in the day. Ms. C confirmed that it was on such a basis that she objected to the receipt of the Amendment before Lady Dorrian on 16 April 2008. As earlier stated, Ms. C confirmed that a plea to title to sue had to be specifically averred in the pleadings and that a general plea-in-law, with no such averments, could not found such a plea. The authority for all this has already been mentioned earlier and is entirely consistent with that view.

So, again, if Mr Cowan cannot properly account for the above omissions and a question mark *still* exists over the making of the challenge to title to sue, then it is more probable that Mr Cowan could not have given a proper answer to any query by Lord Emslie and, in turn, it is more likely that any such response would have been incorrect.

In further cross-examination, Mr Cowan admitted to the Appellant that at the Hearing before Lord Emslie he had stated to His Lordship that he intended to raise lack of title to sue as a matter of conduct and as a basis for an award of expenses. This is exactly what Head Complaint 1B states and is entirely consistent with the evidence given by both the Appellant and Ms C. There is therefore no dispute on that.

The complaint is essentially concerned with what happened next. Namely, whether Lord Emslie then enquired why the matter never proceeded to procedural roll debate on the issue of title to use. In evidence, Mr Cowan did not accept that such enquiry from Lord Emslie was made. The Appellant and Ms. C deponed that it was indeed made.

The strongest proof of whether this enquiry was made may be by the plainest of natural inferences. This is in respect that any reasonable Lord Ordinary would have automatically asked the question at issue. Establishing title to sue is a most basic of prerequisites and regularly deliberated at procedure roll debate. It is submitted that in the circumstances where Mr Cowan admittedly stated to Lord Emslie that he intended to raise title to sue as an issue of conduct, then His Lordship would automatically have come back with a query as to why the matter had never been taken to procedure roll. Such a response is entirely predictable, probable and almost knee-jerk to the issue that Mr Cowan had laid down before His Lordship. Furthermore, Mr Cowan gave evidence in chief that his existing third plea-in-law - as existing prior to the 2008 Amendment - grounded a challenge to title. This can actually be used in support of the above inference. That is because if Mr Cowan did indeed have a challenge to title to sue arising from his third plea-in-law, then this existence of a plea to title to sue would have given an even more compelling reason for judicial query and explanation as to why the matter never proceeded to procedure roll.

Lord Emslie was faced with a totally capricious scenario: on the one hand, Mr Cowan contended that he intended to raise lack of title to sue as a matter of conduct and as a basis for an award of expenses. But on the other, the matter of title had never been raised at a procedural roll debate. This was despite, as Mr Cowan would contend, the competent existence of a challenge to title to sue via his existing third plea-in-law.

It is entirely unrealistic to expect a Judge of The Court of Session to countenance such a scenario without query or further ado.

The Appellant would therefore invite the Tribunal to make such an inference, wholly in addition to application of the account of the Appellant and Ms. C.

Mr Cowan further claimed in his evidence-in-chief that in any event he could not have proceeded to procedure roll at all. He claimed that because the Appellant was designated as heritable proprietor of the house at issue, then that was a matter of disputed fact and a matter of which could not have justified a remit to procedure roll. So, on the presupposition that it would not have been competent to go to procedure

roll anyway, Mr Cowan suggested that he could not have made the submissions complained of to Lord Emslie. The suggestion was also put to the Appellant and to Ms. C, both of whom repudiated it.

This explanation and hypothesis is unconvincing and simply not correct. Mr Cowan was adamant that his third plea-in-law constituted a valid title challenge. So, *on the application of his own hypothesis*, there existed a plea to title to sue on record long before April 2008. It was thereby open to Mr Cowan to go to procedure roll on his third plea-in-law and to ask the Court to fix a preliminary proof simply on the issue of title. This is a practice which regularly occurs at procedure roll, especially in relation to time bar where the Court requires factual enquiry before it can uphold a preliminary challenge and plea. Rule of Court 28.1(3a) specifically empowers the Court at procedure roll debate *"to allow parties a preliminary proof on specified matters or in respect of specified pleas"*. The commentary at Rule 28.1.5 clearly states: *"A preliminary proof.... is confined to where an issue is raised in the pleadings which could bar the action from proceeding. Such cases fall into three categories ...(c) cases which raise questions of title"*.

In such circumstances Mr Cowan could have made supporting averment founding upon the 2006 title check he claims Mr B exhibited to him. Mr Cowan could have led his 2006 title check and had it found at a preliminary proof that the Appellant was not a heritable proprietor. It would have then been immediately open to him, following the resumption of the procedure roll after the preliminary proof, to then attack the title on the basis of no title to sue.

Not just that, but it was open to Mr Cowan to lodge a Notice on the Appellant to admit that he was not heritable proprietor of his house. It was then further open to him to lodge the 2006 title check followed by a Notice on the Appellant to admit the validity of it. Mr Cowan knew or ought to have known that had he done this the Appellant would have had to admit both Notices. Such admissions would have created a basis for him to challenge the title at procedure roll since the Appellant had effectively admitted he did not own the house. It is reminded that it was not until April 2008 that Mr Cowan did all this i.e. he lodged a title check with a Notice to Admit it, as well as a Minute of Amendment with new supporting averments of the

Appellant not owning his house (all now lodged at pages 150-160 on the First Respondents' second inventory). The question must therefore arise as to why all this only belatedly took place in April 2008 and not much earlier. Mr Cowan was not able to give any compelling explanation for all this. It is plain that his actions were confused and erratic.

The question also arises as to why if Mr Cowan had a perfectly valid title challenge via his existing third plea-in-law, he had to then belatedly advance the April 2008 matters at all? If he is right then he did not need to do any of that a matter of weeks before an 8 day proof in May 2008. The doing of such acts contradict his own hypothesis that there existed a plea to title to sue on record long before April 2008.
The question also arises as to why if Mr Cowan had a perfectly valid title challenge existing via his third plea-in-law, then why did he not lodge or found upon the 2006 title check he claims Mr B gave him. Any reasonable solicitor would have done so. It is entirely implausible for Mr Cowan to suggest that on the one hand he had a valid plea to title existing in terms of his third plea-in-law - but on the other that he ignored and failed to use in support of it the 2006 title check he claimed Mr B gave him.

A web of confusion and inconsistency seems to exist in terms of all this. Such confusion and inconsistency gives yet further weight to the probability that a response to any related concerns of Lord Emslie probably would have been incorrect or inaccurate.

Mr Cowan is also asking the Tribunal to accept his version of events over that of the Appellant and Ms. C. Mr Cowan wants a corroborated account to be rejected in favour of an uncorroborated one. He was admittedly however in a position to call his former two clients as witnesses. Mr and Mrs B had been present in Court before Lord Emslie. Mr Cowan claimed in cross-examination that they could have been in a position to support him regarding his account of events before Lord Emslie. Despite that, Mr Cowan did not call them here. His failure to do so reflects very poorly and entitles this Tribunal to apply an inference as to this failure. Mr Cowan's explanation for this failure was totally unsatisfactory. In cross-examination he stated that he did not want to put Mr and Mrs B "through it". That is simply not a valid reason justifying the absence of a potential witness: the Appellant certainly did not want to

embarrassingly put Ms. C through the process, but had no choice. Mr and Mrs B could have been reimbursed by Mr Cowan for their attendance. These proceedings do not have the same aura of fear and formality of the Court of Session, where Mr Cowan had both Mr and Mrs B on the witness list and in personal attendance on several occasions. These proceedings have, in the main, been conducted in a dignified manner with all parties well accommodated for (in a five star hotel). The train through is relatively cheap, quick and regular. The Appellant and Mr and Mrs B still face each other in ongoing proceedings elsewhere, in particular an ongoing proof at Hamilton Sheriff Court.

In such circumstances, little or no prejudice would have been incurred to Mr and Mrs B. Support and test could have been given to Mr Cowan's version of events had he called Mr and Mrs B. Instead, he elected not to bring them. He must now face adverse inferences for that. Apart from an inference that Mr and Mrs B may not have supported the version Mr Cowan deponed to, an inference may also exist that they may have actually supported the Appellant's own account. We will never now know. In such circumstances it is totally unfair and unrealistic for Mr Cowan to expect this failure not to be taken into account and, following from that, to expect the Tribunal to accept his uncorroborated account in favour of a corroborated account. Had the Appellant failed to cite Ms. C, then there can be no doubt that this would have been used against him. The Appellant has little doubt that had he given an uncorroborated account, and Mr Cowan had his account corroborated by Mr and Mrs B, then Mr Cowan's account would have been preferred. It is also reminded that the Appellant stated in evidence, and put to Mr Cowan, that Mr and Mrs B now blame Mr Cowan's *animus* for the Appellant as having exacerbated matters and having frustrated any possibility for settlement. Despite such a serious accusation, Mr Cowan did not feel compelled to have Mr and Mrs B speak to the truth of that. This secondary failure to cite Mr and Mrs B in his favour further mitigates against Mr Cowan, and leads directly on to the next point.

In cross-examination by the Appellant, Mr Cowan deponed that he had no *animus* for the Appellant. This was simply not credible and serves to seriously undermine Mr Cowan's credibility and reliably. This is for the following reasons.

Both the Appellant and Ms. C spoke to Mr Cowan having tangible *animus* for the Appellant. Ms. C was very clear that Mr Cowan's relationship had not constituted a normal professional relationship without emotional involvement and animus towards an opponent. Rather, and capriciously, that he had tangible animus for the Appellant and that matters were personal. This position was actually inadvertently supported by Mr Dunlop himself. That is because he put to the Appellant that he had animus for Mr Cowan because Mr Cowan had objected to Mr A's offer of a Bar Traineeship to the Appellant. In posing such a question, Mr Dunlop overlooked the fact that he was implicitly attributing *animus* towards the Appellant from Mr Cowan. It will be appreciated that a person who personally objects to another's traineeship is not exactly going to like that person. It is entirely more likely and probable that a person why so objects does not like the person he objects to. An objector of another must possess adverse, subjective personal views in order to ground a basis for objection in the first place. Such circumstances of objection relate to the personal views of one as against the other. So, in highlighting these objections, Mr Dunlop himself introduced evidence that beared and supported the evidence of the Appellant and Ms. C regarding reciprocal *animus* (or at least dislike and issue) between both Mr Cowan and the Appellant.

Unlike the Appellant, Mr Cowan did not have the character and candour to admit this *animus* in evidence. In giving his calculated answers, he deponed that he had no *animus*. On the evidence heard, this answer was neither credible, truthful nor accurate. It thereby reflects very poorly on Mr Cowan's credibility and candour. Perhaps the most damming piece of evidence that illustrates this, actually stems from Mr Cowan's former clients, the said Mr and Mrs B. In cross-examination, the Appellant put to Mr Cowan that his former clients' new Solicitor, Mr E, had now approached the Appellant and his solicitors with global settlement proposals. During related discussions Mr E stated that Mr Cowan's personal *animus* of the Appellant had effectively stifled any earlier prospects for settlement discussions and had actually totally exacerbated matters. So, Mr and Mrs B now personally blame Mr Cowan's *animus* for that. The Appellant had earlier deponed to such a position in cross-examination by Mr Dunlop. Mr Cowan was not able to give any measure of convincing rebuttal or denial as to what Mr E is alleged to have said on behalf of Mr and Mrs B.

This failure is most profound. The Appellant could not possibly have imparted such comments to Mr E had they been false and untrue. It would only have taken a telephone call to Mr E to confirm the accuracy of such comments. Any reasonable solicitor, having received such allegations, would almost certainly have done so had they been incorrect and untrue. Had such comments not been true, then it is a near certainty that Mr E would have been brought here by Mr Cowan to refute them and to otherwise destroy the Appellant's credibility. The fact that no evidence has been led to refute the alleged comments of Mr E, justifies a very strong inference that they were in fact true. It is reiterated that had the comments not been true, they could have been refuted by Mr E with the plainest of ease (even by a lodged letter or affidavit). The fact that no attempt was made to do so, together with Mr Cowan's inability to convincingly rebuke the alleged comments of Mr E, is now fatal to Mr Cowan's evidence of having no *animus*.

Additionally, as earlier stated, in cross-examination the Appellant put to Mr Cowan that *Green's Weekly Digest* had little hesitation in removing the former judgement of Lord Macfadyen from their website on discovery of the reduction. The obvious point being that such a positive correcting act illustrated the quashing effect of the reduction and that the matter could not presently impugn the Appellant. In reply, Mr Cowan was not even prepared to concede that. Essentially, he started arguing the toss with the Appellant as to whether *Greens* had been correct to do so and basically that it did not really matter that they had done so.

Mr Cowan's inability to even concede the proper actions of *Greens*, and the implication their actions, flew in the face of his concurrent evidence of having no animus or personal interest in the Appellant. Mr Cowan admittedly obtained the judgement and thereafter founded upon it here. This was despite his admitted knowledge of the reduction, and an earlier threat of interdict. Such unreasonable behaviour is entirely consistent with someone taking a personal interest in another and is not consistent with his denials of lack of animus or personal interest in the Appellant. Again therefore, Mr Cowan's credibility is undermined.

Accordingly, Mr Cowan's evidence, under oath, of having no *animus* is demonstrably untruthful and incorrect. It was deliberately calculating and it is submitted that this lack of candour and character in maintaining an untruthful position effectively destroys Mr Cowan's whole credibility. His evidence to *animus* has been demonstrated as incorrect and utterly unreliable. This is from three different sources, not counting the inadvertent input of Mr Dunlop himself.

It is also pointed out that Mr Cowan gave a most curious answer to a leading, rhetorical question put to him by Mr Dunlop. Mr Dunlop enquired whether Mr Cowan would prefer a finding of UPC or a conviction for perjury before this Tribunal. The anticipated answer was of course the former. Any normal honest person would prefer a finding of UPC on a balance, as opposed to imprisonment and removal from The Solicitor's Roll for perjury beyond reasonable doubt.

In answer however, Mr Cowan did not automatically advance the former. He thought about it and suggested that both scenarios were equally unwelcome. This answer was most unconvincing. It illustrates that instead of simply advancing a natural answer, Mr Cowan was in fact giving staged and *"thought out"* answers, so as to limit any damage an answer may potentially give. That is not the hallmark of a good witness. It will be remembered that the Appellant put to Mr Cowan in cross-examination that he was thinking two moves ahead and effectively giving calculated answers. That is not the sign of a good, honest witness under oath.

The final and possibly most compelling attack on Mr Cowan's credibility may be demonstrated from his admitted conduct during the litigation at issue. This is for the following reasons:-

In cross-examination Mr Cowan admitted to the Appellant that by letter dated 11 January 2007 he had undertaken to appear for the Appellant in the Court of Session on 12 January 2007. This was with regards to his three ongoing motions all of which the Appellant had opposed. The letter (page 30 in the First Respondents' first inventory), was put to Mr Cowan and he admitted that by this undertaking he had undertook to represent the Appellant and to move the Court to continue consideration of the opposed motions until the next Court day, being Tuesday, 16 January 2007. In

his evidence Mr Cowan initially attempted to play with words with the Appellant and suggested that his letter of 11 January 2007 was not as much an undertaking as an agreement. However, he eventually departed from that and conceded it was indeed an undertaking.

Notwithstanding this undertaking, the Appellant was thereafter marked absent and the Court's interlocutor of 12 January specifically referred to the Appellant as having not appeared. The interlocutor was also put to Mr Cowan (page 31 on the First Respondents' first inventory). Mr Cowan suggested that both Lord Brailsford and his Clerk had been in error of the status of the Appellant's representation. Mr Cowan maintained that he did no wrong and had in fact duly informed the Court that he appeared for the Appellant, in addition to his own client, Mrs B. Despite being sure that he advised the Court of this, Mr Cowan wanted it to then be accepted that both the Clerk and the Lord Ordinary were in error. The letter from Simpson & Marwick to the Appellant dated 27 January 2009 was then put to Mr Cowan. (page 14 in the First Respondents' first inventory). This letter confirmed on page 15 that on 12 January 2007 Lord Brailsford had offered to grant Mr Cowan's motions in absence of the Appellant. Mr Cowan spoke to this letter and he confirmed that he had indeed received such an offer but he declined it. He stated that he had simply asked His Lordship to continue all three motions to 16 January 2007, as per his undertaking. Mr Cowan expressly recognised that there may have been confusion on the part of Lord Brailsford.

On the making of Lord Brailsford's offer however, it had to have been crystal clear to any Court of Session practitioner that the Court was not aware of the status of the Appellant's supposed representation by Mr Cowan. In offering to grant all three opposed motions in the Appellant's absence, the Court was proceeding on the basis that the Appellant was absent and, as such, was not offering any opposition. The normal term for this is that opposition is "not being insisted upon" (because of the lack of appearance, etc). The Court would not have been legally entitled to offer as it did had it been aware that the Appellant was represented by Mr Cowan and was thereby not absent, but actually represented before the Court. As such, opposition was being maintained and in no way could opposition be deemed as not insisted upon by virtue of non appearance, etc. Additionally, Rule of Court 20.1 is clear that where a

party does not appear at a calling of a cause (etc) then that party is deemed in default. As such, the Court is then (and only then) entitled to proceed in the absence of, and without reference to, that party. When that happens there can be severe ramifications, such as decree by default.

Clearly therefore, the Court was not proceeding on the basis that it should have been i.e. that the Appellant was represented, not absent, and was maintaining his opposition. Furthermore, the Court's misunderstanding had to have been joint and mutual as between both Lord Brailsford and his Clerk. That is because both the Clerk and Lord Brailsford had to share the same misunderstanding, since the Clerk could not have legally countenanced the offer to grant an opposed motion without any reference to the opposer. That is basic. Therefore, when Lord Brailsford offered in the way he did, the Clerk would have been dutybound to point out the incompetence and illegality of that had the Clerk known that the Appellant was not absent, but actually represented by Mr Cowan. The fact that the Clerk also wrote the interlocutor in the terms referred to, which was thereafter signed by Lord Brailsford, also illustrates that both the Clerk and Lord Brailsford shared the same view of the Appellant being absent and not represented. All this has to raise a serious question as to whether Mr Cowan honoured the undertaking and whether he *allowed* the Court to proceed in the erroneous way that it did.

Despite all this, Mr Cowan maintained in cross-examination that he acted properly. He maintained that he told the Court he represented the Appellant. This is of course not reflected in the Court's approach. Crucially however, the fact that Lord Brailsford made the offer to grant in the Appellant's absence had to have instilled in Mr Cowan very clear knowledge that the Court was erroneously proceeding on the basis the Appellant was not represented. As stated in the letter of 27 January 2009 supra, Mr Cowan expressly recognised that there may have been confusion on the part of Lord Brailsford. So, Mr Cowan knew or ought to have known of this confusion and candidly corrected it.

In further cross-examination however, Mr Cowan could give no explanation or satisfactory answer to any of this other than to simply maintain that he did no wrong. He could not explain why the Court proceeded on the basis the Appellant was not

represented if, as he maintained, he had made clear to the Court that he represented the Appellant.

Mr Cowan's whole explanation of the episode was tainted in incredulity. There can be no doubt that the Court could not have acted as it did had Mr Cowan made clear that he represented the Appellant or had at least corrected the Court's misunderstanding thus. The Tribunal is invited to take a view of Mr Cowan's explanation here in overall test of his credibility, reliability and honesty towards a superior Court.

Matters are no different even if a massive benefit of doubt is given and assumption made that all this was simply error and misunderstanding by the Court. That is hard to accept since, as stated, both the Clerk and Lord Brailsford would have had to have been in joint error and it would have been obvious to Mr Cowan that the Court's offer was being made to grant the motions on the basis the Appellant was absent and not represented. As stated, this could not have been lawful or competent, and the making of this offer must have alerted Mr Cowan to the fact that the Court was wrongfully proceeding on the basis that the Appellant was not represented. Mr Cowan clearly failed to correct that despite his admitted cognisance of the Court's possible confusion.

As stated however, for the time being the matter can be critically analysed even applying a generous assumption of error. Even proceeding on this basis, Mr Cowan's story falls down in respect of what happened at the next Hearing on 16 January 2007. Namely, that during this Hearing, where the Appellant was now represented by Ms. Ram, Lord Brailsford openly praised Mr Cowan's conduct during the earlier Hearing before him on the 12th. His Lordship stated that Mr Cowan had "very kindly" not taken his motions in the Appellant's earlier "absence" and had considerately asked that the motions be continued. The Appellant spoke to such comments *verbatim* in his evidence-in-chief. Ms C spoke to such praise both in her examination and cross-examination. Mr Cowan spoke to such praise in his cross-examination. It was therefore put beyond any doubt that the Court erroneously proceeded not only on the basis that the Appellant had been absent, but on the further basis that Mr Cowan had actually did the Appellant a favour by not earlier taking the motions because of that very absence. All this was quite wrong. It had to have been now crystal clear to Mr

Cowan on the 16th that the praise was unwarranted and wholly indicative of the Court having earlier proceeded in error and *still being* in that very error. Mr Cowan admitted to the Appellant in cross-examination that he had accepted such praise without any correction whatsoever. He effectively allowed the Court to dish out this praise in the knowledge that it was bestowed on an erroneous basis and that it was fundamentally obvious to him that the Court was in error. As stated, Mr Cowan felt no compulsion to correct this which reflects very poorly. The matter is not academic because on the 16th, shortly after receipt of such unwarranted praise, all three motions were granted and Mr Cowan then went on to seek and obtain the expenses of two of them against the Appellant. The award of such expenses was a discretionary act of Lord Brailsford, and on balance, the fact that His Lordship erroneously felt that Mr Cowan's earlier conduct justified praise, may well have had a favourable bearing on this discretion.

It is therefore with regards to the events on the 16th that Mr Cowan's credibility and candour before the Court collapses. By his own admission he was perfectly content to sit through all such praise and obvious confusion of the Court, without feeling any compulsion or duty whatsoever to correct it. Any ethical solicitor would have done so and clarified that in actual fact the Appellant had not been absent and was meant to have been represented by Mr Cowan and that Mr Cowan had not done any favour in any way. Mr Cowan could not give any explanation as to why he did not do this. In such circumstances the Tribunal is entitled to infer that he remained silent and accepted this praise deliberately and was content to allow the Court to proceed on the erroneous basis that it did. This silence is totally exacerbated by the seeking and obtaining of the award of expenses in the knowledge of the error of Lord Brailsford and that His Lordship would have erroneously had in mind that the Appellant had been earlier absent before the Court during Mr Cowan's "favour".

Therefore, when the incident on the 16th is aggregated back to what happened on the 12th, the silence and failure to correct on the 16th may serve to bolster any suggestion that Mr Cowan acted in the exact same way on the 12th i.e. by allowing the Court to proceed in error, in the knowledge of such error and without any correction. So, the incident on the 12th may not have been mere error after all. Rather, as later happened on the 16th, it was directly consequent to Mr Cowan having failed to correct an obviously misstated position, and his allowance of the Court to proceed on an

erroneous basis, of which had incorrectly put him in a good light to the prejudice of the Appellant. These acts border on being deceptive and dishonest before the Court, let alone uncandid. Neither the Appellant nor Ms. C were in Court on the 12th. They had trusted Mr Cowan to honour his undertaking. They therefore had no way of knowing on the 16th what had erroneously taken place on the 12th. They were therefore not in a position to make correction to Lord Brailsford either on the 12th or the 16th. It was only later on that events were to unfold themselves. The matter was then subsequently raised at the expenses Hearing before Temporary Judge Wise as a belated criticism of Mr Cowan. As such, the full duty to candidly correct any and all of this before Lord Brailsford at the time lay entirely with Mr Cowan and he failed miserably.

Mr Dunlop was at pains to object to all this on the basis of irrelevancy. Such an objection was arrogantly duplicitous given the extent of entirely irrelevant issues he had cross-examined the Appellant on. The objection was repelled. The matter not only went to credibility, but actually beared on Head of Complaint 1A relative to what had transpired at the Hearing on expenses before Temporary Judge Wise. That is because if Mr Cowan acted wrongfully before Lord Brailsford and Ms. C was founding upon that before Temporary Judge Wise in critical examination of Mr Cowan's conduct, then Mr Cowan had a clear motive to avoid all that by simply denying or refusing to recognise that there had been any undertaking in the first place. It is this very denial and lack of recognition which now forms the crux of Head of Complaint 1A.

Furthermore, the earlier actions before Lord Brailsford also have a bearing on the later actions now at issue before Temporary Judge Wise. By his own admission Mr Cowan sat silent and failed to correct an obviously misstated position and understanding by Lord Brailsford. Such conduct reflects very poorly on Mr Cowan. It was arguably deceptive and definitely lacking in candour. Mr Cowan's honesty and present credibility is therefore damaged by this conduct. The fact that he can behave in such a way on one occasion against the Appellant bears well on the probability that he could (and can) do so on another. The crux of Heads of Complaint 1A and 1B is that Mr Cowan gave wrong information to the Court and then sat silent without correction of his own misstated position. Such conduct is entirely consistent with the events before Lord Brailsford, of which Mr Cowan would have this Tribunal now accept he did no

wrong. So, the incident before Lord Brailsford does more than damage Mr Cowan's present credibility. In addition to reflecting very poorly on his honesty and candour before a Court, it actually bears on whether he acted in the way complained of under Head of Complaint IA and IB. A continuing thread of submitting incorrect information to the Court, without correction, now runs through both Heads of Complaint 1A and 1B which are interconnected and bolstered by the admitted events before Lord Brailsford.

The incident before Lord Brailsford is therefore of considerable moment and highly detrimental to Mr Cowan's case. As stated, it detracts severely on his trust, professional integrity and candour. It is therefore inappropriate for a person capable of such conduct to now expect his uncorroborated evidence to be preferred over the Appellant and Ms. C.

Accordingly, when all the foregoing points and criticisms are therefore aggregated, a picture emerges that Mr Cowan was not a reliable or truthful witness. His evidence was expressly contradicted by various other sources. He displayed gaps and inconsistency in his account of events. He has clearly prepared a *thought out* explanation which, when examined more closely, falls down or is at least severely undermined by inconsistency and vagueness. His account is tarnished with a general feeling of "something not right". His evidence did not have the *ring of truth*, not least because it was expressly contradicted by other witnesses and did not make very much sense. He omitted to call Mr and Mrs B as witnesses who could have supported him. He attempted to deflect attention away from the facts at issue by instructing his representative to turn these proceedings into a personal attack on the Appellant under a volume of total irrelevancy. He specifically lied about lack of *animus*. This was flatly contradicted not only by the direct evidence of the Appellant and Ms. C, but also from the unchallenged hearsay evidence of his two former clients Mr and Mrs B, and their new solicitor, Mr E.

In all such circumstances the Tribunal is invited to reject the contentious evidence of Mr Cowan as unreliable and tantamount to a staged story. In a contest of truth between Mr Cowan and the Appellant, the Tribunal is moved to consider why, if the

Appellant's evidence has been supported as much as it has, then he would get his account of the events before Lord Emslie so spectacularly wrong.

In the first place, the Appellant's account was corroborated by Ms C. So, if the Appellant was wrong under oath, then so was Ms. C. Why would this be so? Why would both persons get this recollection so wrong? Their account is totally different from that of Mr Cowan. So, it is not as if some excusable allowance can be made for everybody's recall slipping over the passage of time. Someone is either lying or is at least patently incorrect. Ms. C was adamant in her recall. She had nothing to gain and certainly did not lie. The suggestion was not even hinted at.

If the Appellant has already been demonstrably correct on a number of key matters, then why would he be *so* incorrect, along with Ms. C, regarding the events before Lord Emslie? The account of the Appellant and Ms. C had a *ring of truth* about it for numerous reasons. Mr Cowan admitted he told Lord Emslie that he wished to raise title to sue as an issue for expenses. His Lordship *of course* would have queried any lack of earlier title challenge, etc. Mr Cowan's clients were admittedly present when Mr Cowan so stated. Mr Cowan would not have wanted to look bad before them by any judicial criticism for not going to debate on a title challenge much earlier. It may be therefore that Mr Cowan had actually spoken before he realised what he was saying. Stating to Lord Emslie that he had only *recently* learned of lack of title (etc) provided an exculpatory answer in the heat of the moment. Crucially, such an answer is also entirely consistent with his earlier conduct of only amending and lodging title checks as late in the litigation as he did. Justifiable attacks have already been made on Mr Cowan's credibility and Court conduct supra. By his own admission he was capable on at least two occasions of not correcting a misstated or misunderstood position of Court. As critically stated above, the use of the judgement of Lord Macfadyen before this Tribunal, in the direct knowledge that it did not exist and had been quashed by reduction, was tantamount to deception. This conduct is actually broadly analogous to the conduct before all three Lords Ordinary as presently complained of. That is because the conduct before the three Lords Ordinary was concerned with incorrect information and a failure, at least by silence, to correct that. The present conduct anent the illicit use of the erstwhile judgement of Lord Macfadyen is much the same: Mr Cowan has sat back and allowed (and instructed)

his Counsel to attack the Appellant on said judgement in the direct knowledge it is a nullity.

In all the circumstances Mr Cowan has not been credible and has demonstrated a clear ability to allow a Court to proceed in error and on the basis of an incorrect position/understanding. On an issue of credibility and reliability the account of the Appellant and Ms. C should therefore be preferred. Matters are however not merely down to credibility and reliability, because all the foregoing indirect points are key and serve to bear on the probability of the conduct in question. So, in addition to credibility and reliability, there is indirect supportive evidence elsewhere against Mr Cowan.

Finally, it is also pointed out that the Appellant has reason to believe that both respondents will seek to undermine the evidence of Ms. C and fail to countenance what she deponed to. Amongst otter things, in cross-examination Mr Cowan thought that Ms. C had merely deponed to what she had been told by the Appellant. That is simply not true. Ms. C gave her own independent account of material events. She did so in clear and unequivocal terms.

Therefore, if there is any doubt as to what Ms. C deponed, then the Appellant will require extension of the shorthand notes. The Appellant noted some Tribunal Members not recording Ms. C's evidence. Given this, and the passage of time, the possibility has now been created for precise lack of recall and ambiguity. Given the importance of Ms. C's evidence to the Appellant, then that possibility cannot be tolerated. So, as stated, if either respondent is not prepared to concede the present factual narration of Ms. C's evidence, then the Appellant will have to insist on the notes being extended.

PART TWO: REMEDY

Section 42ZA10): The law according to Mr Dunlop

Mr Dunlop has submitted that what happened before The Society is a total irrelevance. As the Appellant understood him, he rationalised that by reference to the powers under Section 42ZA(10). This is in respect that the Tribunal can find the matter proven, and this therefore means the merits are entirely at issue for the Tribunal.

It is submitted that such an interpretation constitutes a misunderstanding of the Tribunal's present powers. It is incorrect because it means that a statutory right of appeal against a decision will not concern itself with what happened at that very decision in the first place. So, the present forum is simply a *de novo* platform for a complainer or respondent to get a second bite at the matter. If this were the case, then disgruntled complainers could routinely seek to bypass and ignore the whole of The Society's earlier disposal and effectively seek to argue the complaint *de novo* before the Tribunal, and without any reference to The Society. This cannot be what Parliament intended in enacting the present statutory right of appeal.

Moreover, if Mr Dunlop is correct that The Society's earlier actings were irrelevant then, by inference of that, a range of new matters and evidence not earlier before The Society in the decision-making process could then be introduced before this Tribunal. This would be totally unfair on The Society. This has to be a piece of nonsense and not what Parliament intended. When the statutory right of appeal was introduced it would never have been intended or envisaged as a complete replacement or alternative to The Society's exclusive first instance decision-making locus. No appellate Court ever is. There is no question that The Society does not have exclusive first instance jurisdiction to uphold complaints against Scottish Solicitors.

Mr Dunlop's interpretation of the statute effectively seeks to duplicate or replace The Society's exclusive locus of decision-making. It completely undermines The Society's exclusive jurisdiction to entertain complaints of this kind and effectively gives this Tribunal equal first instance jurisdiction in matters of fact. That is not the function of an Appellate Court. An Appellate Court exists at Appellate level and not as a first instance jurisdiction fact finder. It is emphasised that the normal function of an Appellate Court is to examine what took place in the first instance process and to rule

accordingly. Rarely, if at all, does an Appellate Court retry the matter *de novo* with a view to reaching its own determination and conclusion of the facts and merits at issue.

The approach of Mr Dunlop would also seek to negate any right of appeal against The Society on the basis of error of law or fact or of capricious or unlawful conduct. These are recognised grounds for Judicial Review. Prior to implementation of the present right the only way to challenge a decision was by way of Judicial Review, (usually along the foregoing grounds).

Judicial Review is not now competent however, because of the very introduction of the present right of appeal. So, a disgruntled complainer cannot now seek Judicial Review of a decision along the foregoing grounds because any such challenge would be deemed incompetent because of the existence of the present right of appeal (Rule of Court of Session 58.3.1). Notwithstanding this, Mr Dunlop wants to have everything which took place before The Society ignored, with the result that none of the above grounds matter. As a consequence, a disgruntled complainer is now actually worse off because of the introduction of the present appeal. That is because, on the one hand the right of Judicial Review on the foregoing grounds has been lost following the present right of appeal; and, on the other, anything that earlier happened, irrespective of how unlawful it may have been, is wholly irrelevant and not at issue here. This simply cannot be correct. In implementing the present right of appeal, the intention of Parliament was to afford a disgruntled complainer a corrective remedy and to aid facilitation of such remedy. It was never intended to make the obtaining of a corrective remedy more difficult for a disgruntled complainer.

The Tribunal may have implicitly accepted this in allowing the Appellant to proceed his evidence despite Mr Dunlop’s repeated, related objections. Mr Reid has not sought to countenance in any way Mr Dunlop's interpretation of Section 42ZA(10). Mr Dunlop’s interpretation places a far greater onus on an Appellant. It is an all or nothing approach with no in-between remedy to challenge and appeal on the basis of error or incompetence, etc. Mr Dunlop is attempting to set a very dangerous precedent totally at odds with Parliament's intention of use and application of the present procedure. The reason why he so strenuously attempts this may now be clear. On the evidence heard, the Appellant is well able to demonstrate a number of errors in the

decision at issue. In order to frustrate success of the appeal on this basis therefore, Mr Dunlop has attempted to simply by-pass The Society's decision-making process and effectively seeks to have a second bite at the apple. Moreover, it should be very clear that in doing so he had an agenda simply to attempt to vilify the Appellant so as to render the complaint without foundation. Such an approach was misguided and indeed quite cynical. It will be appreciated that the errors now identified, as appealed against, already exist. They exist irrespective of Mr Dunlop's view of the Appellant. They do not hinge on any credibility or reliability, etc. Such errors materially undermine the decision complained of irrespective of the various character demerits Mr Dunlop would attempt to attribute to the Appellant.

It should be additionally pointed out that the foregoing stance of Mr Dunlop has a substantial degree of mendacity about it. That is because at the earlier Procedural Hearing on 7 July 2011, and in later cross-examination to the Appellant, Mr Dunlop successively maintained that the complaint related to Professional Misconduct, and not UPC. He raised a preliminary challenge to this effect. He attempted to bolster this view by suggesting that the earlier complaints process and related correspondence had all been directed towards Misconduct and not UPC (this was not actually true). The stance adopted by Mr Dunlop however, sought to found upon and take account of the earlier decision-making process. He attempted this to his advantage. Wearing his other cap however, he *then* inconsistently claimed that what happened during the earlier decision-making process was entirely irrelevant since the Tribunal is now tasked with finding UPC.

Mr Dunlop cannot have it both ways. He cannot on the one hand found upon earlier references to Misconduct in support of his related stance and objection, and, on the other, inconsistently maintain that anything which had earlier taken place in the decision-making process is irrelevant. The fact that he is prepared to do so is erratic, inconsistent and indicative that he is confused over the application of the very point and embargo he seeks to invoke.

The Tribunal is therefore invited to reject the interpretation of Section 42ZA(10) as advanced by Mr Dunlop.

The Tribunal's powers in an appeal of this kind under Section 42ZA(10) are specified in Section 53ZB(2): Under Subsection 2(a) the Tribunal *"may quash the determination being appealed against and make a determination upholding the complaint"*.

It is important to emphasise the use of the word *"may"* in terms of making a determination to uphold. This is discretionary and not mandatory. It does not imply an imperative to make a finding for or against a complaint on the merits every time an appeal is brought. The imperative words of *"will, shall or must"* [make a determination] are not used or hinted at in any way. Such a mandatory, obligatory course puts far too great an onus on both an Appellant and the Tribunal. It effectively would mean that every appeal of this kind on any point of law or procedural error or unfairness, would be irrelevant and that the entire appeal procedure would simply be restricted to the Tribunal retrying the matter at large on its merits. As stated above, that is not the function of an Appellate Court and such an obligatory course greatly curtails the whole function and scope of the appeal process. Moreover, the mandatory expense consequently associated with all this is fierce. It would discourage many a disgruntled complainer and that is not what Parliament would have wished when implementing this appeal course for such disgruntled complainers. Indeed it is the exact opposite. As stated above, Mr Dunlop's interpretation cannot be countenanced on any sensible or fair or practical view.

It is submitted that Subsection 2(a) merely gives the Tribunal the power to uphold a complaint depending on the circumstances before it. Circumstances of appeal vary from case to case. There may be cases where the appropriate way to determine the matter is to look at it on its merits. There may however be other appeals, like the present, where challenge is made on the basis of earlier procedural errors and unfairness, with a view to getting the earlier determination quashed and no more. In no way however does this mean that every appeal of this nature has to be down to an expensive and unnecessary retrial at large and on the merits.

The Appellant submits that a far sensible interpretation of Subsection 2(a) is that it affords the Tribunal an *either or* scenario. In this, the Tribunal may quash a determination against a flawed complaint. In such a situation The Society would be

legally obliged to reconsider the matter if its determination was quashed. Alternatively, if the matter is quashed then the Tribunal should implicitly have the power to remit back. Subsection 2a is silent on this and that is unfortunate. Had it specially gave a power to remit back then its interpretation would be far easier. The fact of this omission however should in no way create a precedent lacking in common sense. A pragmatic view is to infer that logically the power to remit must inherently exist at least by implication. That is because if a power to quash a decision exists and the Law Society is the primary decision-maker, then this Tribunal, as its Appellate Court having quashed its decision, must logically have the power to then do something else.

Mr Dunlop's view that this *something else* is simply the making of a decision on the merits. As stated more than once however, this loses total sight of the fact that it turns every appeal of this kind into a cumbersome retrial with no scope for appeal on a point of law, etc.

It is submitted that a more common sense view of this must simply be an intended or implied power or duty simply to remit back to the Law Society in appropriate circumstances where the decision has been quashed. Such a view gives the Tribunal far greater width and scope in its duty and does not force the Tribunal to painstakingly and expensively retry every single complaint on its merits and factual issues.

Unsatisfactory Professional Conduct

On the first page of her Report (page 77 of the First Respondents' second inventory), the Complaints Investigator narrates the definition and test for Unsatisfactory Professional Conduct as follows:

"Unsatisfactory Professional Conduct

Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services.

Complaints of unsatisfactory professional conduct must be proved on a balance of probabilities. (This is a lesser test than beyond reasonable doubt). A fact will be established where it can be said that it is more likely than not that the incidents complained of happened. In a situation where the only available evidence is the opposing positions of the solicitor and complainer, there requires to be some additional independent evidence which weighs the balance in favour of the complainer in order for the allegation to be proved".

The facts presently at issue under both Heads of Complaint 1A and 1B clearly meet the foregoing criteria.

Both Heads of Complaint 1A and 1B are specifically concerned with giving wrong and misleading information to a Court and thereafter not correcting it or candidly acknowledging it as incorrect *even when* it was illustrated as demonstrably wrong. This was despite having had opportunity and indeed duty to do so. Mr Cowan's duty not only extended to the Court but also to Ms C as Mr Cowan's professional opponent.

Conduct of this nature meets the foregoing test. Such conduct was professionally discourteous and lacking in candour both to the Court and to Ms. C. Such conduct did not put Mr Cowan's behaviour, honesty and professional integrity beyond question. This conduct contravened Rules 7, 8 and 9 of the 2002 Code of Conduct for Scottish Solicitors and probably Rules 2, 7 and 8 of the 2002 Rules of Conduct for Solicitor Advocates.

For a test of UPC it does not matter whether Mr Cowan specifically lied or not. It is enough that the identified incorrect information was submitted. To prove Professional Misconduct one would probably have to prove specific deceit and intent so as to substantiate the mens rea for that. But in the foregoing test for UPC it is enough that such misleading submissions were made without correction. That satisfies the test for UPC since a competent and reputable solicitor would clearly not act in such a manner. Therefore, to prove UPC the Appellant does not need to prove that Mr Cowan specifically lied, as opposed to having given incorrect information, without correction. These are two different things.

In examination by the Appellant, Ms D conceded that the complaint was expressly and specifically concerned with giving wrong and misleading information to a Court. She conceded that the word "lying" was not used in the Issues of Complaint as agreed by the Appellant and SLCC. (For present reference purposes the Issues of Complaint as agreed with SLCC anent Heads IA and IB remain on the First Respondents' first inventory at pages 3 and 66 respectively). Ms. D was also prepared to accept from the Appellant that on no occasion during the complaint did he ever use the word "lying" to depict the conduct complained of. Consistently, Ms. D accepted that in her 22 July 2010 correspondence to Ms C, she herself had generally defined the complaint as one of misrepresenting matters in Court (page 72 on the First Respondents' second inventory). Consequently, Ms. D accepted that the entire complaint was concerned with the giving of incorrect information to a Court and that both she and the PCC had proceeded on the basis that the giving of incorrect information to a Court could constitute UPC. She accepted that giving wrong and misleading information to a Court can be done in a manner outwith lying i.e. by error or incompetence, etc.

She accepted that there were copious references to UPC throughout the report and the disposal of the Professional Conduct Committee. She accepted that from the copious references to UPC in her Report - including the two Heads presently appealed of - it would have been obvious that UPC was being considered as a live issue. She accepted that the PCC considered the complaint as one of Misconduct and Unsatisfactory Professional Conduct. Indeed, Mr Dunlop gave a concession to this effect during the Appellant's evidence-in-chief on 10 October 2011. In correspondence of 24 October 2011, Mr Reid also confirmed that in submissions he would be acceding this suggestion also.

In such circumstances, Ms, D clearly confirmed that The Law Society had viewed that the conduct complained of could have met the legal test for UPC. This clearly infers that had the facts been found as proven then the test would have been upheld.

Furthermore, if it was felt that Mr Cowan had lied to the Court, but that this could not be proven beyond reasonable doubt to reach Misconduct, then it could still constitute UPC if it could only be found on balance.

It was open to the PCC to find that, on balance, Mr Cowan probably did mislead the Court and this could be found to reach the standard for UPC, even although the higher test of beyond reasonable doubt for Misconduct had not been reached. In Scotland, findings are made daily in civil proceedings finding, on balance, criminal acts which would require to be proved beyond reasonable doubt in a criminal prosecution. So, UPC could have been found on balance relative to the matter at issue even if it requires being proven beyond reasonable doubt to meet a higher test for Misconduct.

Even if this is wrong, the fact remains that giving incorrect information to a Court, without correction, is unacceptable and of a standard not of a competent and reputable solicitor. It need not be given deceptively to meet the UPC test. The fact remains that giving incorrect information to a Court erroneously or incompetently, but without correction if there was a proper opportunity to do so, is unacceptable and of a standard not of a competent and reputable solicitor. So again therefore, this reaches the test for UPC. The point being that the matter is not Misconduct or nothing. Ms. D refuted any suggestion that the conduct complained of would only have been Misconduct or nothing. Such a view being entirely consistent with the approach of both herself and the PCC during the complaint.

In summation, it is very clear that throughout the complaint the First Respondents applied and tested the complaint and evidence for UPC. This clearly infers that the PCC viewed that the conduct complained of could have met the test for UPC if proved on balance. No mention is made anywhere that the conduct complained of could not meet this test if proved. On the contrary, why would all the copious references to UPC have been made in the Report and disposal if this had not been the case? Why would the First Respondents have directed themselves to apply the evidence towards UPC if that test was in no way relevant and not an option to them at all? Why would the First Respondents have advised the Appellant he had a right to bring this appeal in respect of their failure to find any UPC if UPC had not been at issue in the first place?

In essence, Ms D agreed that she had come across complaints where Misconduct was at issue, but on the exact same facts the conduct was found as UPC instead.

Circumstances routinely exist where a complaint, may not be proved beyond reasonable doubt on the evidence, but alternatively may be found on balance so as to be UPC. It is simply a weaker alternative scenario.

Additionally, Ms. D accepted that from the copious references to UPC in her Report - including the two Heads presently appealed of - it would have been obvious to Mr Cowan that UPC was being considered as a live issue. She accepted that Mr Cowan did not object in any way to the copious references to UPC throughout the Report. This was despite having been supplied with a copy of it by Ms. D prior to the decision by PCC. By such silence, Mr Cowan himself acquiesced that the conduct complained of could be characterised as UPC. By such silence and acquiescence he is now barred from retrospectively attempting to maintain that the conduct complained of could not be characterised as UPC.

Accordingly, the Second Respondents' Note of Arguments that Unsatisfactory Professional Conduct is not a present issue should now be formally dismissed.

Proof of issues

Head of Complaint 1A (Ground of Appeal 1a):

In the foregoing circumstances it has been established beyond any doubt that the First Respondents erred in terms of Head of Complaint IA. They so erred by finding that Mr Cowan stated to the Court that he *could not remember* any undertaking of 11 January 2007 when he had actually stated that there *could not have been* any such undertaking. This is a crucial distinction since the former merely imports forgetfulness and the latter is an active denial. This error is of particular moment because in evidence Mr Cowan admitted that the First Respondents made such a finding and that it was at odds with his own earlier account. This had admittedly been identical to that of the Appellant and Ms. C. Therefore, all three individuals had been square in their recall, but had been ignored in preference for a finding not supported by the weight of evidence!

By his own admission Mr Cowan gave such incorrect information to Temporary Judge Wise on 3 December 2007. Thereafter he admittedly failed to correct it or accede it as incorrect *even when* it was illustrated as demonstrably wrong. This was despite having had clear opportunity and indeed duty to do so. Mr Cowan's duty not only extended to the Court but also to Ms C as opposing Counsel and professional opponent.

The First Respondents further erred with regards to the timescale of the making of the 11 January 2007 undertaking relative to the expenses Hearing of 3 December 2008. They clearly overlooked the fact that said letter had been lodged in the Court process on 4 April 2008. So, 4 April 2008, and not 11 January 2007, would have been, at the very least, the nearest date to 3 December 2008 in which Mr Cowan would have had cognisance and reminding of his 11 January 2007 undertaking. So, the First Respondents' finding that Mr Cowan's forgetfulness could be excused by the fact that his letter had been written almost 2 years before the expenses Hearing on 3 December 2008 was further demonstrably erroneous since it did not take the considerably later date of 4 April 2008 into account in any way. The First Respondents unfairly failed to take this into account and by this omission they proceeded on an unfair and erroneous understanding of the timescale. Put another way, they were unduly favourable to Mr Cowan in their interpretation of the timescale.

By such errors the First Respondents accordingly misapplied the true evidence and erred accordingly. They thereby misdirected themselves, and proceeded on an erroneous basis. The Appellant was thereby treated unfairly and denied a fair Hearing. The foregoing errors are fundamental and of sufficient weight to vitiate the entire decision under this Head.

As an aside it is also pointed out that in her Report to the Appellant Ms. D felt that all the foregoing conduct *"was not directly relevant to the matter at hand in December 2008"* (page 125 in the First Respondents' second inventory). In terms of the above circumstances, this was simply not the case. The breach of the undertaking had been critically founded upon as a basis for expenses. Mr Cowan's admitted denial and failure to recognise the undertaking in the first place went to the very crux of that matter. This was therefore an important live issue and not merely academic.

Therefore, by making such comments Ms. D failed to understand the import and relevancy of the foregoing events. She thereby misdirected herself and her erroneous view of all this was thereafter countenanced by the PCC.

Head of Complaint 1B (Ground of Appeal 1b):

In the foregoing circumstances it has also been established beyond any doubt that the First Respondents erred in terms of Head of Complaint IB. They so erred by finding that Ms. C did not provide corroboration to the Appellant's case. This was patently wrong both in law and in fact. The First Respondents accordingly misapplied the true evidence and erred accordingly. They thereby misdirected themselves, and proceeded on an erroneous basis.

By such error, the Appellant was consequently treated unfairly and denied a fair Hearing. The foregoing error is fundamental and of sufficient weight to vitiate the entire decision under Head 1B. Ordinarily, this error in itself should be enough to undermine the decision under Head 1B. Indeed, had this been a Judicial Review, the foregoing error would probably have been of sufficient weight to attain success on the basis of error and procedural unfairness. If such an error would probably satisfy a Judicial Review in the Court of Session, then, consistently, it would have to be of strong weight here.

Matters do not end there however, because on the evidence the Tribunal is entitled to find beyond reasonable doubt that Mr Cowan acted in the manner complained of under both Heads of Complaint 1A and IB. The evidence has already been referred to. There is a clear sufficiency to find beyond reasonable doubt, let alone on balance. As a matter of law therefore there is sufficient evidence to find the facts of Heads of Complaint 1A and 1B proven in their entirety.

Third Ground of Appeal:

The established case of *Barrs v British Wool Marketing Board* 1957 S.C. 72 is an established authority for the requirement of fair play in administrative or quasi

judicial bodies. Pages 82-84 are of moment. At page 84 the test is summoned up where the Lord President states: *"That is why the Courts have taken as the test for reducing the decisions of such bodies, not 'Has injustice been committed?' but 'Has fair play been exercised?'"*.

The requirement to apply elementary fairness is accordingly absolute and not an option of choice. A failure to do so may vitiate an entire decision-making process. From the evidence it has been clearly established that the First Respondents had no valid reason justifying their admitted failure to furnish the Appellant with a copy of the Note of Temporary Judge Wise. The Appellant was accordingly prejudiced. The errors and unfairness complained of under this Ground have been established in evidence, in particular, from Ms D herself. Neither respondent sought to contradict this or to lead any opposing evidence. The third Ground of Appeal has been clearly established. The error and unfairness therein narrated is of sufficient weight and moment to undermine the decision-making process relative to Head of Complaint 1A.

Fourth Ground of Appeal:

The foregoing identifiable errors have to be looked at in aggregation to the unchallenged evidence the Appellant gave relative to his fourth Ground of Appeal. The Appellant spoke to a capricious background of damages and litigation unfavourable to the respondents. This was not a one off but a necessary course he had to successively repeat over years. He subsequently alleged that he did not get a neutral or impartial hearing and that the background history plainly grounded the severe possibility for conscious or subconscious bias against him. This evidence has been earlier narrated as per the facts outlined in the fourth Ground of Appeal.

In terms of this background, the foregoing identifiable errors are exacerbated. The fact that the Second Respondents actually acted for the First Respondents in such litigation is of moment also. The background facts the Appellant spoke to anent the fourth Ground of Appeal went unchallenged. This Tribunal is therefore entitled to take this unchallenged background into account in its examination of the errors identified above. It would be wrong to disregard such a capricious background altogether. The

errors identified are quite blatant and unfair (especially the issue of Ms. C's corroboration and the Note). Given that all such errors favoured the very solicitors whom had acted for the First Respondents against the Appellant, the Tribunal is entitled to look deeper at such an incestuous position and ask whether the foregoing identifiable errors may have been more than mere error.

Remedy disposal

For the reasons earlier stated the Appellant would not wish to ask this Tribunal to act as a first instance fact finder. Rather than so finding therefore, the Appellant would suggest that the more appropriate disposal is for the decision simply to be quashed with or without a remit back to the First Respondents for re-consideration. If the Tribunal is not of a mind to do so and views that it must determine the complaint on its merits, then, in terms of the evidence before it, the Tribunal is moved to find the conduct complained of in Heads of Complaint 1A and 1B as proven and to make appropriate findings. In terms of the foregoing evidence, the Tribunal is thereafter moved to uphold Heads of Complaint 1A and 1B (Grounds of Appeal 1a and 1b), together with Ground of Appeal 2. Thereafter to quash the First Respondents' related disposal of 3 March 2011. The Tribunal is thereafter moved either to (i) recommend that the matter be reconsidered by the First Respondents, or alternatively (ii) to find the conduct complained of in Heads 1A and 1B as proven and to make appropriate sanction.

(Second Set of Submissions)
The Appellant would wish to make some further submissions in direct response to the submissions of Mr Reid which were received after the principal submissions had been completed. So, although the following submissions essentially seek to counter the submissions of Mr Reid, they are to be read in conjunction and aggregation with the Appellant's principal submissions.

1. The Appellant would wish to commence by pointing out that he and Mr Reid seem to be in agreement regarding the procedure adopted in this appeal.

On pages 31-34 of the principal submissions the Appellant narrates detailed reasons why appeals of this type should not take on the roll of a first instance fact finder, essentially retrying the matter de novo.

Mr Reid seems to advance this position himself on pages 11-12 of his submissions. Mr Reid confirms the Appellant's concerns that appeals of this type should not be dealt with by hearing evidence, since that effectively makes redundant the exclusive role of the Law Society. On any view, that cannot be what Parliament intended.

It is regrettable that only now, after 3 days of evidence, Mr Reid adopts such a positive stance. The exact background to the appeal is narrated on page 2 of the Appellant's principal submissions. As stated therein, the Appellant had originally intended to present his case simply by reference to lodged documentation. This would have avoided the need for witnesses. Mr Dunlop however positively objected to such a course and insisted on evidence right to the merits and facts at issue. He claimed that matters were at large and anything which earlier took place before The Law Society was irrelevant.

Mr Reid however had not objected to the Appellant's suggested course. He stated that he wanted to adopt a neutral position. Such a stance was unfortunate. Had Mr Reid actively supported the Appellant's contentions and advocated the stance he now makes anent appeals of this type not being dealt with in the manner of the present one, then 3 days of unnecessary evidence could have been avoided. This point will be expanded later.

Mr Reid however now makes an excellent point not expressly canvassed by the Appellant earlier. This being his page 4 comments that the Professional Conduct Committee did not have the benefit of seeing and hearing any witnesses. This Tribunal however did. So, this Tribunal has actually been put in a better first instance fact finding position than the actual statutory decision-maker. That is simply not appropriate. It is the first instance Court or decision-maker that is tasked with finding the facts and making a decision. The Law Society is bound by statute to do so and has exclusive jurisdiction. To therefore put the present appellate body in a better position

than the actual decision-maker is inappropriate. Matters should be the other way around, where the body of first instance has the benefit of any witnesses, with the appellate body simply reviewing how the first instance body conducted itself.

In such circumstances therefore, the point made by Mr Reid is sound and on all fours with the various analogous points the appellate also makes on pages 31-34 as referred to.

Accordingly, it is the Appellant's position that the procedure adopted in this appeal has not been appropriate. As stated, the Appellant only wished to lead evidence from documentation and without any necessity of calling witnesses. That was a matter for him in determining how best to discharge his present onus. Because of Mr Dunlop's objections and insistence on doing things his way, the Appellant was thereafter forced to conduct his appeal in a manner he had not intended, and in a highly expensive way now conceded by Mr Reid as inappropriate.

Mr Reid points out that if an Appellant wishes to lead evidence by witnesses then he can request that. But that is a matter for the Appellant and not the Second Respondents who have no appeal onus here. The Second Respondents effectively usurped any right of choice the Appellant may have had in how best to discharge his present onus. As stated, he was effectively forced by the Second Respondents to discharge his onus in a manner he had never intended. All this is very relevant for the question of expenses, and the question of the Second Respondent's true motives here. This point is expanded later.

2. On pages 1-4 Mr Reid attacks present competency. He submits that the matter was exclusively Misconduct and so the present appeal is incompetent anent UPC.

It is important to remember the origin of this entire line. Mr Reid made no mention of this line in Answer. He led no witnesses thus and did put to the Appellant that the complaint was one exclusively of Misconduct and not UPC. In particular, he did not cross-examine Ms D in any way, notwithstanding that Ms. D could have provided valuable input here. That was why the Appellant called her.

Moreover, the Appellant was of the view that this matter had been put to rest. That is because at the procedural hearing Mr Dunlop made a motion to have the appeal dismissed on the above basis. The motion was refused and the Appellant had understood from the Clerk that the appeal is proceeding as competent. The Appellant queried the matter last year and the Second Respondents eventually confirmed by letter dated 28 October 2011 that their preliminary note of argument to such effect is now redundant. This letter is attached in the interests of completeness.

By his present actings Mr Reid has effectively tailgated off the Second Respondents and has done so in an opportunist manner. It may be important to bear this in mind.

All this is mere background however. On pages 34-37 of his principal submissions the Appellant deals with the issue of UPC in enough detail to probably displace Mr Reid's present argument. In the interests of completeness however, the Appellant would expand upon that in direct response to Mr Reid's comments.

In the first place, Mr Reid has referred the Tribunal in detail to a number of documents, not in evidence. The Appellant has already objected to this to the Clerk and this objection remains maintained. Moreover, the background correspondence to the complaint is essentially irrelevant because the PCC was only tasked with addressing and directing itself to the narrated terms of the Heads of Complaint as agreed with the Appellant and SLCC. These terms have been narrated in the principal submissions. Therefore, what correspondence preceded all that is not relevant presently.

Even if it is relevant, the Appellant points out that in none of that correspondence did he state that Mr Cowan had lied to the Court. The Appellant simply maintained that false and misleading information had been given and that he wanted an investigation for Misconduct. In their deliberations the First Respondents opted not only to test Misconduct but to *also* [emphasis] test and treat the complaint as UPC on the exact same facts. Clearly, by the First Respondents' own actings, the complaint was never one exclusively of Misconduct (which would have rendered the present appeal incompetent). Mr Reid is acting duplicitously in actively suggesting this. That is disappointing. It was the First Respondents themselves who turned the complaint into

one of UPC. Neither the Appellant nor Mr Cowan objected to this course. Both are thereby legally deemed to have acquiesced it. Such acquiescence would have barred Mr Cowan from appealing on the basis that UPC should not have been at issue (had it been found).

Accordingly, the First Respondents themselves chose to test for UPC without objection. The fact that they did so created for the Appellant a reasonable and legitimate expectation that they would do so properly. The existence of such a reasonable and legitimate expectation *in itself* entitles the Appellant to proceed on the basis that UPC was at issue. In such circumstances it is misleading for Mr Reid to suggest that *only* Misconduct grounded the present complaint. Indeed, and as stated in the principal Note of Submissions, Ms D accepted that the PCC considered the complaint as one of Misconduct and Unsatisfactory Professional Conduct; Mr Dunlop gave a concession to this effect during the Appellant's evidence-in-chief on 10 October 2011, and in correspondence of 24 October 2011, Mr Reid also confirmed that in submissions he would be acceding this suggestion also. This letter is also attached in the interests of completeness.

Therefore if UPC was competently at issue and it was not considered correctly, as the Appellant now complains of, then the present appeal is perfectly competent. Like the Second Respondents, Mr Reid is effectively attempting to play with words. This is unsatisfactory and certainly disingenuous.

With reference to whether the conduct could have been UPC or not, the Appellant would again wish to expand upon his earlier submissions in response to Mr Reid. Pages 34-37 of the Appellant's principal submissions narrate in detail how the conduct complained of could be UPC. Aggregated to that should be the fact that as a Court Officer a solicitor implicitly warrants and insures to the Court the accuracy of what is being stated. That is a basic recognised duty. If it transpires that this duty was breached then the matter can be reprehensible. If the solicitor specifically lied then that can be Misconduct. But if the solicitor is found not to have specifically lied but nevertheless gave incorrect and misleading information, without any correction, then there can be no doubt that this is reprehensible also. Such a lesser wrongdoing satisfies the test for UPC. Such conduct is probably not Misconduct since the *actus*

reus for Misconduct (of deliberately lying) is not present. Not been Misconduct, it therefore has to be *something else*. It is very easily tested as being something else. This is for two reasons. The first reason is that such conduct certainly cannot be nothing. That would mean that solicitors could routinely submit wrong and misleading information without correction and be otherwise fireproof. Such a course would fly in the face of the warranty and various duties referred to above and in the principal submissions at page 35. The second reason is an extension of the first. The test for UPC is clear i.e. *"Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to professional misconduct and which does not comprise merely inadequate professional services"*

Therefore, if the nature of the conduct presently complained of did not reach UPC, then, inversely, it would be classed as okay and would then be *Conduct by a solicitor which <u>is</u> of the standard which could reasonably be expected of a competent and reputable solicitor.*

That would be a piece of nonsense where it would be okay for solicitors to routinely act in such a manner. As stated, that behaviour would fly in the face of all rules and duties in this area. Therefore, by an inverted use of the definition of UPC, it becomes clear that a solicitor cannot give incorrect and misleading information to a Court without falling foul of the test for UPC. This is what the PCC would have had in mind when they tested the matter for Misconduct *and* UPC.

It is reiterated that the exact same acts can have different consequences depending on the level of intent or *mens rea* established. The best example is a murder, where, on the exact same facts, a person can be guilty of murder or culpable homicide. The only distinction between the lesser evil is the degree of intent (or the lack of it) established. Similarly, delictual acts and wrongdoing can be done intentionally or negligently, with different legal consequences. The point being that the exact same set of facts can point to different legal conclusions and sanctions on the same matter. Clearly in such circumstances the wrongdoing is not only one thing or nothing. That would be nonsense. This is the exact view both respondents now suggest and it is simply wrong.

Mr Dunlop's earlier suggestion of a spade being a spade is inappropriate and has no relevance to the present issue.

In the present forum the Appellant does not offer to specifically prove that Mr Cowan specifically lied, but instead that his submissions had been merely incorrect and misleading without correction. For the above reasons the test for UPC is clearly met.

3. On pages 5-8 Mr Reid narrates in detail the reasoning and legal basis for a complainer not obtaining information in a third party complaint. Mr Reid emphasises the confidential nature, requiring the foregoing embargo.

With respect, Mr Reid has missed the point. The whole crux of the complaint regarding the Note of Temporary Judge Wise was that it was not a confidential document and wholly pertained to matters that took place in a public court. This document is not in point or relevant to the reasoning behind the foregoing rule. Mr Reid also omitted to mention that Ms D herself conceded that there was a degree of confusion and erratic conduct over this Note and that had matters been dealt with presently then in all likelihood the Note would have been forwarded. Ms. D herself has substantiated the Appellant's grievance in this respect. Mr Reid also submits that the Appellant could not have any conceivable grievance by not getting a copy of Ms. C's note. This again misses the point. Ms. C's Note is not at issue or a ground of present appeal. It was the Note of Temporary Judge Wise that forms the present grievance and not that of Ms. C. Mr Reid's related submissions in page 8 are therefore irrelevant.

4. On page 8 Mr Reid acknowledged that the Appellant has had a large degree of success in litigation. This was entirely consistent with the evidence and is totally at odds with the vexatious idiot Mr Dunlop so desperately attempted to portray.

5. On page 9 Mr Reid essentially attempts to suggest that a course of conduct cannot be found on the evidence here. This is a highly technical attack with an air of desperation about it. It constitutes a misrepresentation of the complaints. In order to convey this, it is appropriate to consider the background to the Heads of Complaint.

The terms of the issues of Head of Complaint 1A had been agreed by the Appellant and SLCC on 28 March 2008 and remitted to the First Respondents for consideration by letter from SLCC of 2 April 2009 (reference is made to the First Respondents' first inventory at pages 1-8). The terms of the issues of Head of Complaint 1B (and others) had been agreed by the Appellant and SLCC in January 2010 and accepted for consideration by letter from SLCC of 22 January 2010 (reference is made to the First Respondents' first inventory at page 66).

Quite clearly therefore, both Heads existed as competent separate complaints in their own right. They were accepted by SLCC nearly one year apart on their own individual merits and facts. One complaint was not therefore conditional on the other. The easiest way to illustrate this is by pointing out that Head 1B would have proceeded on its own, even if Head 1A had never been brought.

Mr Reid is correct to state that the Appellant, in correspondence, suggested that all Heads should be looked at cumulatively and in aggregation, so as to exacerbate or bolster each other as a continuing course. This was simply a practical suggestion made by the Appellant.

However, this suggestion in no way means that both Heads 1A and 1B were inextrinsically interlinked on their own merits and that the failure to prove one (or a course) would automatically negate proof of the other. That is what Mr Reid is now attempting to belatedly suggest and it is quite wrong. As stated, both complaints existed separately, were remitted from SLCC at different times, and were not conditional upon each other. Sufficient facts have now been proven to uphold the essential facts of both Heads in their own right. At the risk of repetition, sufficient evidence now exists for the narrated terms of both Heads to be completely (or at least essentially) upheld.

It is also pointed out that Mr Reid made no mention of this entire line in Answer or in evidence. He did not put this line to the Appellant and gave him no opportunity to refute it. He called no witnesses in support of this contention and did not seek to adduce in cross-examination of any witness, facts substantiating this contention. In

particular, he did not cross-examine Ms D in any way, notwithstanding that Ms. D could have provided valuable input to this entire line. This is an entirely new line of argument not referred to in evidence in any way. It is therefore disingenuous for Mr Reid to now attempt this.

6. It is of moment that on page 13 Mr Reid does not seek to actively suggest that Mr Cowan's credibility and reliability was good. Mr Reid uses guarded and coy language by simply suggesting that if Mr Cowan is found by the Tribunal to be credible and reliable then that would be favourable to him. That is a much different thing from actively suggesting that Mr Cowan was a truthful, credible and reliable witness. Perhaps Mr Reid also saw the various inconsistencies and criticisms of Mr Cowan's evidence, as founded upon by the Appellant.

7. On page 13 Mr Reid also points out that Mr Cowan was subjected to a robust and vigorous cross-examination by the Appellant. This seems to be directed as a criticism. There can be no doubt that the Appellant's cross-examination was essentially relevant and fair. It was nowhere near as forceful, invasive or as irrelevant as his own cross-examination by Mr Dunlop. Unlike Mr Dunlop, the Appellant stuck to the matters at issue. It will be reminded that the Chairman kindly offered the Appellant a further opportunity to attack Mr Cowan on peripheral matters going entirely to credibility. The Appellant respectfully declined this offer explaining that he was happy to move on and to stick to the essential facts. This in itself should displace any myth that the Appellant's cross-examination was vexatious or hurtful or a matter he should now be criticised upon. It is also of some moment that Mr Reid does not seek to attack the cross-examination on the basis of irrelevancy or things like that.

8. On page 13 Mr Reid suggests that the Appellant's evidence should be rejected in its entirety. Mr Reid is simply not entitled to advance such a sweeping statement. There are two main reasons for this.

The first is that the Appellant's evidence has been favourably supported throughout these proceedings. This was by a number of different sources. This is founded upon in

detail in the principal submissions with reference to a generous number of specific examples. In particular, the Appellant's entire evidence of Head 1B was corroborated by Ms. C and that of 1A by Mr Cowan himself. Ms. D also supported crucial aspects of the Appellant's evidence also. As stated, all this is detailed in the principal submissions.

Therefore, if the evidence of the Appellant is to be rejected in its entirety, then the same has to apply to the evidence of the mentioned witnesses who supported the Appellant's evidence. This would make no sense because Mr Reid seems to support the evidence of all witnesses except the Appellant. Dismissal of the Appellant's entire evidence would seriously undermine and otherwise impugn the correlating evidence of the other witnesses which was entirely consistent with the Appellant's testimony. That is not a course advanced by Mr Reid, yet it is a corollary or direct innuendo of his suggested rejection of the Appellant's entire evidence. Clearly Mr Reid has simply made such a blunderbuss suggestion with no thought behind it. Mr Reid points out that the evidence of Mr Cowan and Ms. C has been consistent throughout. However, the appellant's evidence was consistent throughout. Mr Reid unfairly omits to mention that.

The second reason is that Mr Reid does not give sufficiently compelling reasons justifying such a draconian, remedial course. The Appellant's evidence was never demonstrated as been untruthful or incorrect. On the contrary, the exact opposite is clearly demonstrable from the evidence.

In specific rebuttal of Mr Reid's page 13 reasons for rejection of the Appellant's evidence, reference is made to the following:-

(i) Of course the Appellant has an agenda in this appeal. What party in any civil or criminal proceedings does not? The Appellant's present agenda is to seek to undermine The Law Society's decision-making process as having been incorrect. The Appellant has done so before. That is all that is presently sought. It is not as if the Appellant came to these proceedings to prove, by lying, that Mr Cowan acted in the

manner complained if. It was Mr Dunlop who, for the reasons already explained, forced proof of the merits on the Appellant. Accordingly, the fact that the Appellant has this admitted agenda in no way entitles the rejection of all (or any) of his evidence. It will also be appreciated that Mr Reid's claims of agenda are lacking in specification or detail of what this agenda actually is and how that undermines the Appellant. So, the Appellant is slightly curtailed in how to respond to this.

(ii) The Appellant gave unchallenged evidence of a capricious background of successful legal challenges and repeated litigation unfavourable to the respondents. This was not a one off but a necessary course the Appellant had to successively repeat over years. This was as a result of the First Respondents' repeated mishandling of his affairs, which incurred him severe prejudice and career damage. All this is in evidence. There was, and is, no duty on the Appellant to take all that with a smile on his face and without resentment. If the Appellant appeared belligerent (which is certainly not conceded) the foregoing mishandling and impropriety has to be fairly taken into account relative to the errors presently appealed against. The Appellant has clearly demonstrated fundamental, elementary errors in the decision now at issue. When such *elementary* errors are aggregated to the 15 year background, then any belligerence the Appellant may have inadvertently conveyed may be understandable, or at least mitigated.

(iii) The same point applies to Mr Reid's claims that the Appellant reacts badly to not getting his way. In terms of the history of systematic incompetence inflicted on the Appellant, there is no onus on him to take all that with a smile or without criticism. In any event, Mr Reid is not entitled, on the evidence, to impute such a sweeping character criticism on the Appellant. Even if it is accepted that he reacted badly to the First Respondents' decision-making process, such a reaction cannot be taken to denote a general character trait of the appellate. There was no further evidence to suggest such an inherent trait (even if it is factually true). It is simply making a leap too far on the evidence. The Appellant would like to suggest that he has afforded courtesy to the Tribunal during these proceedings. The Tribunal certainly did not give the Appellant everything his way. The prime example being the preference for Mr Dunlop's flawed approach supra to lead the issues on the merits. The Appellant however simply accepted all that and did not react to any of it in an untoward manner.

So, such evident conduct lets the Tribunal see for itself the Appellant's character, in refute of Mr Reid's unfounded claims.

(iv) Additionally, Mr Reid's claims on page 5 anent the Appellant's misplaced paranoia and analogous page 13 claims that his evidence "was littered with conspiracy theories", constitute such a misrepresentation of the evidence that the Appellant has had to deal with them by separate motions now before the Tribunal.

In general, it is also pointed out that Mr Reid never put to the Appellant that he was giving false or embellished evidence or that he was lying. Mr Reid called no witnesses to refute or contradict the Appellant's testimony. He did not seek to adduce in cross-examination of any witness, facts contradicting the Appellant's testimony. It is therefore entirely disingenuous for Mr Reid to now attempt to impugn the Appellant in the sweeping manner he does. He afforded the Appellant no opportunity to refute any of these allegations in the witness-box, and he did not seek to refute, by evidence, the Appellant's testimony in any way.

9. Innuendo: on page 8 Mr Reid makes a veiled attack on Ms. C stating that she and the Appellant *"have clearly been in communication with each other during this process"*. Mr Reid is not entitled to do this. He has no evidence of this. He is making a clear innuendo of some form of impropriety or collusion or lack of impartiality and objectivity. Such an allegation was not raised by him (or anybody) in any way. Despite that, he now makes such a latent, veiled attack in circumstances where no opportunity was *ever* given to refute it. That is because it had never been raised in the first place! Mr Reid is acting disingenuously and improperly. No doubt had he raised it with Ms. C he would have got an unwelcome response, because the hidden allegation implied into this innuendo is totally scurrilous. It was possibly with that possibility in mind that he did not raise it, but belatedly only does so now in circumstances where Ms. C cannot defend herself. This is actually quite characterless. The Appellant would invite the Tribunal to critically refute this innuendo by Mr Reid. If Mr Reid now wishes to attack Ms. C, notwithstanding that he had no cross-examination of her in any way, then the Appellant would want leave to recall her to speak to any attack Mr Reid is now presuming to create in his submissions.

10. Finally, Mr Reid has addressed the issue of expenses. The Appellant would now also wish to do so. The Appellant's position is that if the appeal is successful, then he should be awarded the expenses on the normal basis of success. If the Appellant has partial success then there should be an award of no expenses due to or by. If the Appellant is unsuccessful, then the matter is very different.

For the reasons already referred to, these proceedings were turned into an irrelevant trial of the Appellant with scrolls of irrelevant evidence heard and unnecessary time taken up. The Appellant could have completed his appeal within two hours of the first day had he been allowed to do so in the sensible and practical manner he had requested. That was simply by *ex parte* reference to the lodged productions in which he could have illustrated the exact same procedural errors it thereafter took 3 days of evidence to prove. The appeal could have easily been completed within the first day with both respondents having comfortable time to *ex parte* respond to the Appellant's references to the lodged productions. It is pointed out that even speaking to the productions under oath, with lots of time lost for Mr Dunlop's various unsuccessful objections, the Appellant had still completed his evidence by around 2.20 p.m. on the first day of evidence. Around an hour had also been lost on the morning in determining Mr Dunlop's insistence on hearing evidence.

So, the appeal could easily have been completed on the first day of evidence had the Appellant been allowed to conduct it in the manner he had intended. Because of Mr Dunlop's inappropriate insistence in retrying this matter de novo as a first instance fact finder, the above course was frustrated and various witnesses had to attend. The time and expense here has been lavishly multiplied by Mr Dunlop in pursuance of an agenda which must now be obvious. This being (i) a blatant attempt to divert attention from issues by creating a character trial of the Appellant and, (ii) creating an inappropriate first instance fact finding exercise in order to skip over and ignore the Law Society's procedural errors the Appellant has identified, and which were obvious from Mr Reid's lodged documentation. Mr Dunlop is responsible for all this. The inappropriate road this appeal has gone down has already been referred to above and in the principal submissions. It is of moment that Mr Reid seems to now agree. If unsuccessful therefore, the Appellant's liability should be restricted to the expenses of procedure up to the end of the first day of evidence and no more. All expense

thereafter should be awarded against the Second Respondents for the foregoing reasons. Furthermore, any expenses in favour of the Second Respondents should be restricted to the rate of a single solicitor and not a Senior Counsel. Mr Cowan has voluntarily elected to instruct a Senior Counsel (and agent) here. That was a matter entirely for him. There was no onus on him to do so. He could have been ably represented by a solicitor. So the Appellant should not have to be penalised by the added expenses of a Senior Counsel, simply because Mr Cowan elected to engage one.

In summation, Mr Reid is playing a very dangerous game. He has led no witnesses and did not seek to prove or create any position of his own in evidence (even by cross-examination only). He has opportunistically tailgated on the twisted idea of the Second Respondents that only Misconduct was the issue and, so, the present forum is not appropriate. He has attempted to create evidence in his submissions. Moreover, he has misrepresented the Appellant's evidence. He has made unfounded attacks on the Appellant directly, and indirectly on Ms. C by innuendo. This is despite having never raised such matters in evidence in any way.

The Appellant would accordingly invite the Tribunal to reject Mr Reid's submissions in their entirety. As representative of the governing body of Scottish Solicitors, Mr Reid is under a high duty to make proper concessions, where appropriate. It is now obvious to anyone who can read that the First Respondents fundamentally erred under both Heads IA and IB. This is for the reasons already specified in the principal note. It is also clear that the saga of the Note of Temporary Judge Wise was also flawed. Despite such lucid errors, Mr Reid is conceding nothing and is attempting to soldier on in the hope that, just maybe, the foregoing errors will not be spotted by the Tribunal. This is an uncandid, improper course of which the Appellant would invite the Tribunal to recognise as such.

(Third Set of Submissions)

The Appellant would wish to make some further submissions in direct response to the submissions of Mr Dunlop which were received after the principal submissions had been completed. So, although the following submissions essentially seek to counter

the submissions of Mr Dunlop, they are to be read in conjunction and aggregation with the Appellant's other submissions.

The Appellant would wish to commence by confirming that the vast majority of Mr Dunlop's points have already been dealt with in the other submissions. There are however some additional points which require express comment here. These mainly pertain to the content of evidence. The Appellant would therefore wish to deal with these points in the chronological order raised by Mr Dunlop, and by reference to Mr Dunlop's own numbering:-

Chapter 2: The nature of this appeal

2.2-2.8. In terms of complaints there is no question whatsoever of this Tribunal having a greater onus or role than The Society as statutory decision-maker regarding complaints. This is the practical effect of what Mr Dunlop is now advocating and it has already been implicitly refuted by Mr Reid. Mr Dunlop has inappropriately elevated this Tribunal over The Society at first instance and has put it in a better position than The Society at first instance. The point has already been extensively canvassed in the Appellant's other submissions. The matter is put in a nutshell by Mr Reid on page 11 of his own submissions where: *"The Society do not accept that as a matter of course each of the appeals of this type should be dealt with by the hearing of oral evidence. Such a course renders the process of investigation redundant and pointless. It is not what parliament intended"*. The foregoing proposition, made by the statutory decision-maker itself, renders this entire line of reasoning of Mr Dunlop erroneous and irrelevant.

Chapter 3: Assessment of evidence

3.4 to 3.6. The Appellant did indeed react indignantly to the question of how much litigation he had been involved in. That is because it was an entirely unfair question. The Appellant gave evidence that he had been involved in a massive property dispute over a large heritable estate and Executry. This had principally emanated from a forged will. Twenty years of legal proceedings had ensued. Numerous actions had taken place in which the Appellant had been involved as pursuer or defender (or

interested third party). Mr Dunlop has personal cognisance of this because he had earlier been instructed on behalf of the pursuer and his late Father. The most ludicrous of these litigations was an attempt to reduce a £300 Small Claims decree. The Second Respondents had acted against the Appellant in that action, and had represented the Appellant's uncle as a pursuer against the Appellant as a defender. The Second Respondents' present agent will remember that case very well, where, after 4 days of the Appellant in the witness-box in the Court of Session, the pursuer abandoned. The Appellant was assoilzied and the pursuer was left with a massive legal bill, courtesy of the Second Respondent's poor advice to attempt reduction of a £300 Small Claims decree.

In such circumstances for Mr Dunlop to therefore expect the Appellant to sporadically recall every action of those 20 years was entirely unfair, not to mention irrelevant. If Mr Dunlop wants a precise inventory of all such actions, with Court reference numbers and outcomes, then that can be arranged, albeit it will take considerable time and will not do his case any good whatsoever.

Additionally, as a matter of *ex parte* information, the Appellant's evidence that there were presently around 20 live litigations is now out of date. That is because in January 2012, a considerable number of litigations went favourably settled. The mentioned 20 year property dispute was concluded in favour of the Appellant and his sister. Details can be given if necessary, albeit these are entirely irrelevant and this is only mentioned in response to Mr Dunlop's related line.

Furthermore, there can be no doubt that Mr Dunlop sought to paint the Appellant as a stupid vexatious litigant. Mr Dunlop now seeks to depart from that, no doubt because the suggestion flies in the face of the evidence. Mr Dunlop now uses the more moderate term of merely being a recreational litigant. Mr Dunlop is not even entitled to do this. No evidence has been led thus. No evidence exists in any way thus. No averment was made in any Answer thus. These submissions are an attempt to create evidence in submissions.

There is a clear, latent innuendo of impropriety contained therein. To litigate recreationally would surely consider an abuse of process? So, even these more

moderate terms constitute a veiled attack on the Appellant. This is simply inappropriate, let alone unfounded. This whole line is easily defeated by one clear route. This being that irrespective of why the Appellant had to litigate, it has now been conceded by both respondents that the Appellant has had a large degree of success in litigation. This therefore means that litigations were well founded and necessary. That is the direct inference of success in litigation. This inference exists by the plainest of considerations and, reciprocally, it plainly displaces any suggestion of impropriety in the motive of the litigation. Such impropriety or ill motive is exactly what Mr Dunlop attempts to infer and it is defeated by the very successes of which Mr Dunlop has himself conceded.

In any event, the Appellant's legal business elsewhere is nothing to do with Mr Dunlop or this forum. The ongoing Mr and Mrs B actions remain sub judice and it is not appropriate to venture into these matters in any way. Mr Dunlop seems to want to place criticism to the Appellant for invoking legal remedies elsewhere. He is not entitled to do this. The Appellant is entitled to invoke legal remedies as a matter of law, should they be necessary. His record illustrates that they have been necessary. Nothing untoward can therefore be read into all this. Mr Dunlop has conceded that the Appellant is not vexatious and has had successes. In the absence of the Appellant's actions having been found as vexatious or improper, then no impropriety can be reflected against the Appellant, and this Tribunal is not entitled to do so. It is reminded that the Appellant's success was actually recognised by The Society. That is because, in consideration of the Appellant's various legal issues and results, The Society restricted his period of traineeship to only 18 months. This is a distinction not readily granted and only granted to a handful of applicants to date.

Mr Dunlop unduly flatters the Appellant when he states that he will turn to litigation at the drop of a hat. The Appellant's tenacity is not as good as that.

3.61. The Appellant had the candour to admit his dislike of Mr Cowan. This was not truthfully reciprocated.

3.62. The Appellant's evidence was not intemperate. His position was that he attempted to state a relevant case and reacted in a way commensurate with Mr

Dunlop's improper questioning. This has already been detailed in the principal note of submissions.

3.63. The letters to the Reporter were in strong, but not intemperate or aggressive terms The Reporter herself deponed thus in evidence and did not take issue. Mr Dunlop's remarks constitute a clear exaggeration of that matter.

3.64. Throughout pages 10-14 of the Appellant's principal note of submissions detailed submissions are made, with supportive authority, illustrating that Mr Cowan's sustained insistence in attempting to use the Lord Macfadyen matter against the Appellant is both inappropriate and unlawful. The Appellant's complete vindication (and success) in that matter has already been fully dealt with. As a matter of law this Tribunal is not entitled to take any cognisance of that matter, let alone to use it against the Appellant as a matter of entirely collateral relevance. Ordinarily, this should conclude this long extinguished issue. However, the Appellant is now compelled to *yet further* address this matter. This is now necessitated by the outrageous submissions made by Mr Dunlop in which he now suggests that the Appellant may have persuaded his mother not to oppose reduction. Mr Dunlop is simply not entitled to make these submissions or even moot the remotest of inferences or innuendo thus. No evidence whatsoever was led on this newly introduced suggestion. The Appellant was never given any opportunity to respond or refute this outrageous de novo imputation by Mr Dunlop. This suggestion clearly advances the contention that the Appellant may have persuaded his mother not to oppose reduction, with the latent innuendo therein of collusion, or at least a negation of the legal effect of the reduction of which the Appellant went vindicated upon. Mr Dunlop has inappropriately introduced this entire line in his submissions. He is not entitled to do so and once more a belated attempt is made to create evidence in submissions ex post facto enquiry. This is therefore entirely inappropriate, let alone irrelevant. The Appellant must ask that the Tribunal see this as such.

It is reiterated that the First Respondents themselves commissioned a part-time Sheriff to investigate the legal effect of the reduction. A conclusion was reached that the reduction was entirely proper. Furthermore, that <u>any</u> findings of Lord Macfadyen had to be treated as having never been made. The part time Sheriff stated inter alia: *"any*

findings in fact contained in the Opinion of Lord Macfadyen are reduced and in my view require to be regarded as though they had never been made". So, Mr Dunlop's further point that the reduction cannot mean that the issue of Lord Macfadyen cannot be looked at as having never occurred, is wrong. It is wrong both as a matter of law and as a matter of concluded enquiry by the First Respondents themselves. Such error comes from the very individual who had been paid and had taken an oath to act in the Appellant's best interests in the matter in the first place.

It is also pointed out that Mr Reid is again quiet on this point despite his client's earlier related stance and view. In the interests of absolute candour at this level Mr Reid should possibly be conceding this and refuting this attack on the Appellant.

Accordingly, Mr Cowan is actively failing to accept the Appellant's vindication because it suits him not to. In so doing he is acting without candour or respect and is deliberately attempting to embarrass, humiliate and hurt the Appellant on an entirely groundless and irrelevant basis. In so acting he is creating an inference of ill-will, ill-motive and malice. His obsessive-like attempt at use of this matter, despite it being annulled, renders into insignificance the fact that the judgement was of 1996 on facts from 1989. This timescale alone would surely have rendered the matter presently irrelevant – or is the Appellant to be crucified for the rest of his life on a matter of which he actually succeeded upon? This point is wholly in addition to all the foregoing points.

The fact that Mr Cowan is prepared to act before this Tribunal in this misleading way may surely bear on whether he acted in the misleading way complained of at issue in the first place?

3.7. There is no evidence to suggest that the complaint is borne from malice. This is a serious allegation and sweeping statement. It is not backed by the evidence which demonstrates the various merits of the Appellant's present grievance. It is reiterated that the Appellant only came to these proceedings to correct identified procedural and evidential errors by The Society. He had not intended to launch a character attack on Mr Cowan by evidence. He was however forced to turn this appeal into a trial of the issues on the insistence of Mr Dunlop.

3.8. Mr Dunlop was afforded a much greater degree of latitude in his cross-examination than was reasonable or relevant. It turned on a mass of irrelevant issues, many of which he claimed merely went to credibility. Despite such width, he is only now able to cite three exaggerated examples of what he perceives to be unsatisfactory evidence. Even these examples turn on a misrepresentation of the evidence by Mr Dunlop. This is for the following reasons:-

3.81. The saga of the Appellant writing to neighbour witnesses has already been lucidly explained in evidence by the Appellant. This being that he had forgotten his neighbours were witnesses. The Appellant's evidence was that in his mind he was merely writing to his other 2 neighbours (of over 20 years' familiarity) expressing his concern that they were being dragged into the matter with Mr and Mrs B. If the daily noise was to continue then he would turn his property into a commercial business. This was a consideration at the time because the Appellant was on the point of being permanently driven from his home by the nuisance he sued for. The Closed Record of the action is in evidence already. It was averred that the Appellant was leaving his house every day to escape the nuisance sued for, etc. The Appellant gave evidence to this effect and that he had failed to realise the ramifications of his actions. These being that, as a matter of law, he was not merely writing to his neighbours, but in actual fact was writing to witnesses on an opponent's witness list already intimated to him. Temporary Judge Wise was to remark that this had been incorrect and unwise and Ms. C had little hesitation in conceding this on behalf of the Appellant. Indeed, had it been more severe then the Appellant could have exposed himself to a sanction from Temporary Judge Wise (or The Society). The fact that Her Ladyship or The Society did not do so infers that it was universally accepted that what had happened was mere stupidity or naiveté, as opposed to serious impropriety. The Appellant had no problem accepting this and learning from it. It was an obvious error. Furthermore, neither neighbour took exception and actually corresponded back to the Appellant in normal terms. The Appellant's naiveté can perhaps be reflected from the fact that it was *the Appellant himself* who drew Mr Cowan's attention to the 2 letters at issue i.e. the Appellant gave Mr Cowan copies of them in the first place with a covering letter! As an aside the letter at issue has not been lodged here, but Mr Dunlop is directly quoting from it. He is not entitled to do so.

Therefore the Appellant's evidence on this issue was not incorrect or false in the way Mr Dunlop suggests. His related attack constitutes an entire misconstrewal of the evidence. The Appellant's clear evidence being that he had written the 2 letters and had failed to realise the possible ramifications of his actions.

3.82. The Appellant did not falsely deny a Notice to Admit. This suggestion is as offensive as it is false. The Appellant was represented by Messrs. Brodies in the litigation. Messrs. Brodies were under a duty to ensure that the response to the Notice to Admit was not misleading. To therefore now accuse the Appellant of giving a misleading response constitutes an identical attack on Messrs. Brodies. This is a serious allegation and is only now belatedly made in submissions. It was not put to the Appellant in evidence and the Appellant thereby has been deprived of any opportunity to refute it or otherwise defend himself. Once again, this constitutes the creation of evidence in submissions and it is not appropriate.

The Notice to Admit was made very late in the action and about one month before its cessation in May 2008. The Appellant could have actually claimed to own the property at issue in the capacity as his late Father's Executor (such Executry having title to the property). Had the action proceeded, then the Appellant intended to amend the Instance to reflect that fact and to otherwise secure title to sue. This had been discussed at a Consultation with his solicitors and Counsel at the time. Since the action cessated very shortly afterwards however, there was no need to amend or address the issue any further. For this reason it was not appropriate to admit any lack of ownership or heritable proprietorial title to the property.

Moreover, no evidence whatsoever was led on this newly introduced suggestion. The Appellant was never given any opportunity to respond or refute this imputation by Mr Dunlop. This is a novel suggestion not in evidence and made in submissions ex post facto enquiry. Once again therefore, Mr Dunlop is not entitled to make these submissions or moot the remotest of inferences or innuendo thus.

3.83. Again this is a total irrelevance. In his evidence, the Appellant easily conceded that he had originally averred in litigation that he was a "Member" of The Society. The Appellant also deponed however that this had been brought to the attention of The Society by the Mr and Mrs B and the Appellant had clarified the matter. The Appellant had explained that he should have averred "Entrant" (being in possession of an Entrance Certificate) as opposed to "Member", obviously requiring a Practicing Certificate. The action had never proceeded and so the point was rendered academic. The Society not only accepted this without further ado, but also apologised to the Appellant for their actions in the first place and expressly confirmed that the issue was "closed". For the avoidance of doubt these letters are attached.

It is therefore of considerable moment that the foregoing three examples merely constitute Mr Dunlop's best attempt at credibility attack on the Appellant. Three examples out of the entire plethora of irrelevant questions and width of totally unrelated issues going back nearly 20 years, of which, in any event, are demonstrably misleading and unfairly critical of the Appellant. The Appellant has told the truth in these proceedings. He did not need to lie, even if he had been disposed to doing so. If he had been disposed to doing so, then his evidence could easily have been more exaggerated and embellished than what he has been accused of. Given the cumulative width and extent of both cross-examinations, it is likely that, had the Appellant been lying, then it would have been plainly recognised somewhere along the line.

It is also of moment that much of the foregoing attacks on the Appellant were actually issues for the Court or The Society. Both bodies had supervisory authority to deal with all such issues. They opted not do so. Had such bodies considered the foregoing issues to have been of moment, or worthy of sanction, then there is little doubt that sanction would have been taken in some way or another. Also, the neighbours did not object to the letters, but Mr Cowan does; ditto Ms D and ditto The Society re. the "Member" saga. It is of moment that all such relevant parties did not take any exception to their issues, but Mr Cowan now presumes to.

Moreover the sustained, attempted use of the 16 year old Lord MacFadyen matter speaks volumes. The impropriety of this has already been extensively detailed. Mr Cowan and only Mr Cowan is clinging onto that with the grip of a desperate man.

That matter did not stop his senior partner from offering the Appellant a Bar Traineeship directly under him.

The Tribunal is therefore moved to take note of the obsessive-like grip Mr Cowan has on all these unrelated issues of which (a) are entirely irrelevant presently and (b) are seemingly of no concern to anyone other than himself.

It may now be inferable why Mr Cowan insisted on proof of the merits by enquiry as much as he did. If the Tribunal is to accept that this insistence was made in order to canvass the foregoing irrelevant issues, as a vehicle to deflect attention from the relevant issues by the Appellant's vilification, then that may be a worthy point of comment.

5. Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1A

5.2. Mr Dunlop has made the same mistake as the Reporter in opining that Mr Cowan's admittedly incorrect denial of the undertaking could be explained by the timescale of the relevant Hearing, having been two years earlier. On page 19 of the principal submissions, the Appellant illustrates that such an analysis of timescale is flawed. That is because the letter of undertaking had been lodged in the process on 4 April 2008. So, 4 April 2008, and not the earlier Hearing date of 11 January 2007, would have been, at the very least, the nearest date to 3 December 2008 in which Mr Cowan would have had cognisance and reminding of his 11 January 2007 undertaking.

6. Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1B

6.5. Mr Dunlop's appraisal of the evidence of Ms. C constitutes a blatant misrepresentation of her evidence.

On page 31 of the principal note of submissions the Appellant pointed out that if there is any doubt as to what Ms. C deponed, then extension of the shorthand notes will be required. In the absence of the Tribunal now flatly rejecting Mr Dunlop's summary of Ms. C's evidence, the Appellant will now require to insist on extension, with a continued Hearing to facilitate further submissions thereby. The Tribunal should consider the following.

On pages 3-4 of the principal submissions the Appellant gave a detailed and accurate account of the evidence of Ms. C. This account narrates that he took her through all relevant matters, with Ms. C's supportive replies. The Appellant concludes this summary by pointing out that: *"For the avoidance of any doubt, the appellant concluded his examination of Ms. C by putting to her verbatim Head of Complaint 1B and asking if such events had transpired. Ms. C confirmed they had. This Head of Complaint has therefore been corroborated in its entirety and is therefore capable of being proved beyond reasonable doubt, let alone on a balance of probabilities"*.

For Mr Dunlop to now suggest that the evidence of Ms. C did not afford corroboration and (at 6.9) that the Appellant's account is only supported by himself constitutes a brazen misrepresentation of this evidence.

As Mr Dunlop observes, Ms. C did indeed depone that Mr Cowan submitted to Lord Emslie that he had only recently learned of no title to sue. But this was only one part of her evidence. The Appellant took Ms. C through everything and ended up with Ms. C confirming in the above manner and flatly rejecting Mr Dunlop's suggested version of events. The evidence of Ms. C corroborated Head IB in its entirety. For the reasons given on page 2 in the principal submissions, there is no need to look at Head IA.

Furthermore, Ms. C also deponed to her various e-mails earlier given to Ms D. Ms. D's erroneous use of these e-mails has been extensively canvassed on page 6 in the principal submissions. The present point however is that Ms. C deponed that in her e-mail of 31 January 2011 to Ms D she had expressly stated that Mr Cowan had falsely submitted to Lord Emslie that he had only recently learned that the Appellant did not own his house. Ms. C's e-mail had been in direct response to Ms. D's e-mail of same day in which she had specifically and unequivocally sought such clarification since

this was *the crux of the complaint*. The foregoing e-mails remain lodged in the First Respondents' second inventory at page 198. For ease of reference the e-mail was in the following terms:-

Q. Do you recall whether or not Mr Cowan said to Lord Emslie on 3 October 2008 that he had only "recently" learned that Mr Hardey did not own his own property? The allegation is specifically that Mr Cowan lied to the court.

Q. Do you agree with Mr Hardey that the submissions were not correct and were misleading?

A. On 3rd October 2008, Mr Cowan did advise the court that he had only recently learned that Mr Hardey did not own his property.

A. This was incorrect. Mr Cowan had been notified of the ownership in a previous minute of opposition sheet by Mr Hardey many months earlier.

Once again in order to put matters beyond any doubt, the Appellant asked Ms. C to confirm whether her e-mails constituted her present position Ms. C deponed affirmatively and without any ambiguity.

Mr Dunlop seems to have forgotten all this evidence. Ms. C has favorably supported the Appellant on at least two different occasions. His attempt to ignore all this is misleading and inappropriate. Given the fact that the shorthand notes have not been extended, together with the passage of time, Mr Dunlop owes this Tribunal the greatest candor. The foregoing acts fall far below that standard.

Mr Dunlop's account has also been demonstrated as incorrect by Mr Reid's own account. This is because on page 13 of his own submissions Mr Reid points out that Ms. C's evidence did not depart from what she electronically submitted during the complaint's process. Therefore, if Ms. C's evidence was consistent, then this consistency has to intrinsically reflect or recognise the foregoing e-mail which

corroborated Head 1B in its entirety. So, on Mr Reid's own appraisal of Ms. C's evidence, Mr Dunlop's narration can also be demonstrated as incorrect.

Mr Dunlop's summary of Ms. C's evidence is therefore erroneous, if not entirely misleading. No weight should therefore be attached to this account. To suggest that the Appellant's account is only supported by himself is incorrect. In actual fact it is Mr Cowan who is only supported by his own account.

If the Tribunal is prepared to indicate that, ignoring any question of credibility or reliability, Ms. C did afford prima facie corroboration, then extension of the notes will not be required. In the absence of this however, the Appellant will require extension and a continued Hearing.

6.8. The Appellant actually accedes Mr Dunlop's point that it would have been madness for Mr Cowan to have submitted before Lord Emslie in the manner complained of.

Likewise, it would have been madness for him to have denied before Temporary Judge Wise on 3 December 2008 his earlier undertaking, given that his letter of undertaking was actually lodged in process before her. Yet Mr Cowan admits that he did so without correction.

Likewise it would have been madness for him not to have clarified before Lord Brailsford on 12 and 16 January 2007 that he had undertaken to act for the Appellant and then go on to allow His Lordship to remain in error of that - the interlocutor would inevitably have brought this to light (as it did). The clear evidence however is that Mr Cowan did act in such manner.

On both these analogous occasions Mr Cowan acted in a way entirely commensurate with the conduct complained of before Lord Emslie. The point is reiterated that in not wanting to be embarrassed before his clients in open Court, Mr Cowan may have

actually spoken to Lord Emslie before he realised what he was saying. It happens. The Appellant has done so before, but correction is always a must.

In summation, Mr Dunlop has attempted to turn these proceedings into a character trial of the Appellant. It is submitted that his motive for doing so may now be very clear indeed. This being that the procedural errors the Appellant has now identified at first instance are now plainly (indeed admittedly) obvious and worthy of review by an appellate body. In order to get round this and to otherwise circumvent these appealable errors, Mr Dunlop has admittedly attempted to ignore and bypass all The Society's first instance proceedings in order to turn this appellate body into its own first instance fact finder. As already canvassed, the consequence of this approach is to ignore the privative statutory jurisdiction of the First Respondents. Needless to say, the First Respondents do not agree with that. Do not therefore be fooled by this attempt. The ramifications of countenancing Mr Dunlop's suggested approach and setting a precedent are extremely profound: this Tribunal will be permanently transformed from a review body under Section 42ZA into a Court of first instance and a usurper of The Society's statutory jurisdiction. From now on every appeal of this kind will simply retry a complaint de novo, from a better perspective than The Society, and in total circumvention of its authority. Such circumvention, together with the horrific time and expense of such an approach, in no way would have been intended by Parliament.

It is also of moment that, for reasons already identified, the respondents are at odds regarding the effect of the evidence of Ms. C. They are also at obvious odds regarding the remit of this Tribunal. They are also at odds regarding Head IA since Mr Cowan now admits that he did not submit in the manner found by PCC. They are also at odds regarding Head 1B since Mr Reid avers in his Answer 1b that the PCC specifically found that Mr Cowan did not use the word "recently" before Lord Emslie. Entirely inconsistently however, Mr Dunlop now suggests that he may have done, but in a different context from what both the Appellant and Ms. C deponed to.

Clearly therefore there is a good degree of essential divergence going on here between the respondents (both in fact and in law). This must serve to undermine both

respondents' respective positions. One would have thought that had the appeal been unfounded then there would have been a better degree of uniformity between both respondents.

Mr Hardey made additional oral submissions thanking the Tribunal for listening to him. He stated that if he came across as intemperate or improper this had not been his intention. He emphasised that he had told the truth and had only intended to come to the Appeal on a point of law. In respect of Head of Complaint 1B, the Law Society had misapplied the evidence and not realised that Ms C had corroborated Mr Hardey's evidence.

In connection with Head of Complaint 1A, the Law Society had misinterpreted what Mr Cowan had stated. Mr Hardey also indicated that it was unfair that he had not been provided with a copy of Judge Wise's Note.

Mr Hardey again submitted that it was not appropriate to have had evidence led in this case and that Mr Dunlop had an agenda to paint Mr Hardey as a stupid vexatious litigant.

Mr Hardey referred to his three sets of written submissions and invited the Tribunal to allow the Appeal on the basis of the evidence as heard. Mr Hardey explained that he did not come to the Tribunal to prove that Mr Cowan was guilty of unsatisfactory professional conduct but only to prove that there had been procedural errors made by the Law Society which he wanted the Tribunal to rectify.

Mr Hardey suggested that the evidence substantiated his three grounds of Appeal. In connection with Head of Complaint 1A, Mr Cowan admitted that what he had said was not what the Law Society Committee found he had said. In connection with Head of Complaint 1B, Ms D admitted that Ms C corroborated Mr Hardey and the Professional Conduct Committee had been incorrect in saying that this was not so.

In connection with Judge Wise's Note, there was no real reason why Mr Hardey could not have seen it and it was a procedural error not to give it to him.

Mr Hardey submitted that he has established each Head of his Appeal. He submitted that no one was sure what the Tribunal should do in this case but he asked the Tribunal to find that the errors in the Law Society Decision had been proven and to remit the matter to the Law Society to reconsider its Decision.

SUBMISSIONS BY MR REID ON BEHALF OF THE FIRST RESPONDENT
(Mr Reid's written submissions are incorporated below)

In presenting these submissions on behalf of the First Respondent, I seek to advance three propositions:-

Although the Appellant will not concede this, the true essence of the process he has instigated is an Appeal against the Determination of the Law Society not to find professional misconduct established against the solicitor, Allan Cowan. My invitation to the Tribunal is to recognise this is what this Appeal concerns in reality and to consider the Appeal to be incompetent, and not provided for by statute, and should be dismissed with an award of expenses in favour of the Law Society.

The Appeal is marked in terms of Section 42ZA(10) of the 1980 Act as amended by the 2007 Act. This allows a Complainer, a right of Appeal to the Discipline Tribunal against the Determination made by the Law Society. The Complainer is defined as the individual who made the complaint. In this case it is the Appellant. Section 42ZA(1) of the 1980 Act makes it clear that this appellate process can only deal with determinations relating to unsatisfactory professional conduct. There is no mention of professional misconduct. Such an Appeal against a refusal to find professional misconduct established is not available to the Appellant.

The factual circumstances which form the basis of the complaint, the written grounds of appeal advanced by the Appellant and the manner in which the Appellant has conducted the hearing make it clear that we are dealing with a set of circumstances which could only amount to professional misconduct and that the Appellant is very aware of this.

On behalf of the Law Society there is lodged two Inventories of Productions. These comprise the written documentation relevant to the complaint process. In particular it contains the considerable written representations advanced by the Appellant to the process. There is in effect two separate processes of complaint. The initial complaint is made. Subsequent complaints arise out of the same set of circumstances. They are aggregated and amalgamated at the request of the Appellant and thereafter processed to a determination.

Production 1 comprises the first complaint being intimated to the Law Society. It is a copy of the set of papers maintained by the SLCC. The 2007 Act now provides that the SLCC is a gateway in respect of complaints against the profession. The individual makes his complaint. Some form of investigation is carried out to establish if the boundaries of the complaint comply with the statutory criteria and if so, they are then passed to the Law Society to investigate.

The significance of this Production is that it reveals the considerable involvement of the Appellant in the process at the outset. The nature of the complaint advanced by the Appellant alleges behaviour on the part of Mr Cowan which can only be described as professional misconduct. He alleges deception and lying on the part of Mr Cowan. Indeed throughout his considerable written representations the Appellant uses constantly words such as deception, misconduct and professional misconduct. (Pages 6, 10, 19 and 29).

I stand to be corrected by the Appellant. I have lodged copies of all his representations. Nowhere in his considerable input does he use the word unsatisfactory professional conduct.

The Second Inventory comprises the commencement of the second complaint and thereafter the process involved in dealing with the amalgamated complaint. Once again it reveals considerable input by the Appellant. There are numerous pages of written representation, all of which are littered with reference to professional misconduct (Page 4, 7, 19 and 25).

Once again I stand to be corrected. In considering the documentation submitted by the Appellant at this stage, there is no mention of unsatisfactory professional conduct. Then consider the manner in which the Appellant conducted this Appeal. The written grounds of appeal themselves made reference to professional misconduct. Nowhere in the original documentation does the Appellant mention unsatisfactory professional conduct.

Then consider the manner in which he led evidence and examined witnesses. The questions put, the answers he sought to elicit and the labels he himself articulated to describe the behaviour of Mr Cowan.

You should not be fooled by the brief amendment at an earlier hearing or his submissions to you. This Appeal is about a failure on the part of the Law Society to find professional misconduct. This is what he seeks. Mr Hardey may suggest that the issue and proof of unsatisfactory professional conduct is something which has been raised by the Law Society and as such he is entitled to have their decision in that respect reviewed. Such a submission is disingenuous in the circumstances of this Appeal. The Law Society in considering a complaint require to assess the behaviour complained of and subsequently proved against the tests for professional misconduct and unsatisfactory professional conduct. These tests are articulated and brought to the attention of Mr Hardey in the documentation which he receives from the Society being the report, correspondence and decision of the PCC. The test in respect of unsatisfactory professional conduct makes it clear that this is conduct which "does not amount to professional misconduct". Mr Hardey was aware that the conduct he complained of and which he promoted was professional misconduct. The nature of the factual circumstances of the complaint are that it would never seriously be considered as anything other than professional misconduct.

Parliament explicitly excluded the right of a complainer to appeal against such a finding. You as a Tribunal should not allow this to take place. My invitation to the Tribunal is to consider the Appeal as statutorily incompetent and to dismiss the Appeal and to find the Appellant liable in the expenses of the First Respondent.

The second proposition I seek to advance is that the process of investigation carried out by the Law Society was fair, transparent and impartial and that the Determination reached by them was one which was fair and reasonable on the evidence presented to them. Thereafter you should in terms of Section 53ZB(2)(c) confirm the Determination and award expenses in favour of the First Respondents.

At an earlier hearing the Tribunal determined the format in which this Appeal was to be conducted. You allowed for the oral evidence of witnesses and for them to be examined. Such a procedure is not within the ambit of the Law Society investigation when considering the complaint. I would invite the Tribunal when considering whether the Law Society acted fairly and reasonably in the manner in which they reached their determination to set aside the impressions gained by considering witnesses before you as this is a process distant from what the PCC had before them. They of course were not able to assess the credibility and reliability of witnesses, instead they had to rely upon the written submissions presented.

I have made reference to the Productions lodged on behalf of the First Respondents. They comprise copies of the relevant papers comprising the investigation. There is no suggestion that anything has been altered or excluded. The documentation which was considered relevant was copied to Mr Hardey for his reply and contribution. I would invite the Tribunal to consider that Mr Hardey was afforded every opportunity to contribute to the process by way of representation and that indeed he did. I would invite the Tribunal to consider that appropriate enquiry was made of third parties who were not directly involved in the matter. The information sought from these individuals was relevant and pertinent to the matter at hand. I would invite the Tribunal to consider the evidence given by Ms D as credible and reliable when she explained that if an issue had arisen which required further investigation then she would have carried out such investigation and that the same principal applied to the PCC when they considered the paperwork in reaching their final Determination.

The Appellant makes a suggestion of bias in the written Appeal and in his evidence. This appears to be based upon a suggestion that past history of litigation between the Appellant and the Law Society meant that he would be treated differently.

I would invite the Tribunal to consider there is no basis at all for this suggestion. No credible or reliable evidence has been presented to suggest or lend support to such a contention. The paranoia of the Appellant in this respect is misplaced and without foundation. I would remind the members of the Tribunal of the evidence of Ms D. She was the experienced Complaints Manager responsible for the process. She dealt with many complaints. She remarked in her evidence that she had never heard of John Hardey before being involved in this Appeal. This complaint was dealt with in an identical fashion to the many complaints which the Law Society require to deal with. It was in no way dealt with in a fashion different from the norm to accommodate the fact that it was at the instigation of Mr Hardey.

The Appellant also advanced criticism of the refined process employed by the Society when dealing with a third party complaint. In particular there was criticism of a failure on the part of the Society to allow Mr Hardey to consider the representations of third parties and to comment thereon.

I would invite the Tribunal to consider that such criticism is unjustified. The Law Society require to deal with many complaints. A structure has been devised which allows for appropriate investigation and considerable input by the parties involved. Such process has to be robust, credible and reliable, failing which, it defeats its purpose. The process has been designed to allow for a conclusion within a reasonable period of time, failing which, it would become never ending. It does no-one involved in the process any favours if the investigation is prolonged.

The complaints process organised by the Law Society was substantially overhauled following the enactment of the 2007 Act. A more complainer orientated environment was established. The Complainer was afforded the right of appeal. This allowance of third party complaints raised particular concerns which impacted upon the solicitor/client relationship, professional standards and most importantly the matter of confidentiality. Recognising these difficulties and in accordance with the thrust of Parliament, the Law Society devised a particular process which is followed when dealing with third party complaints.

This was intimated to the Appellant (Productions 39, 41 and 42). This was acknowledged by the Appellant in correspondence with the Society. The information provided to the Appellant makes it clear that correspondence and discussions between clients and solicitors are confidential and will not be disclosed. The process is therefore different and in my submission properly so. The Appellant acknowledges this. The Appellant is not a stranger to the complaint process.

The benefit of having such a process in place is that it ensures the complaint is able to reach a conclusion within a reasonable period which is of benefit to all involved. It respects client's confidentiality. It respects and assures witnesses that what information they provide will not be analysed or that they will find themselves dragged into prolix correspondence by parties who disagree with their recollections. As Mrs D mentioned in her evidence, if any issue arose of relevance in the third party correspondence then that matter could be continued for investigation.

I submit that this process is in keeping with the thrust and meaning of the legislation. It is designed to enhance the roll of the complainer but not make it a free for all. It does not depart from the primary purpose of the legislation being the regulation of the profession and the protection of the public in their dealings with the profession.

In terms of Section 6 of the 2007 legislation, the SLCC will determine whether the complaint meets the statutory boundaries. In terms of Section 42ZA(1), the Law Society must investigate. It is interesting to note that only the solicitor is given the opportunity to make representations.

Section 52 of the 2007 Act provides that the Society is barred from disclosing information which it receives in the course of considering a complaint or carrying out an investigation into such a complaint. The gravity of the Society breaching this statutory provision is advanced by the criminal penalty articulated in Sub-section 4 of this Section. In my submission, Parliament in enacting this Section recognises the importance of maintaining confidentiality regarding information received by the Society. The Society have established a complaint investigation process which is devised in accordance with the intention of Parliament and allows them to exercise

discretion in the manner in which they deal with contributions from third parties. Of course they do not ignore that the purpose of the investigation is to seek to establish the truth hence the reason why, as Mrs D indicated in her evidence, the option is always available after consideration of the information for further enquiry to be made. Therefore in the context of third party complaints and the particular circumstances of this Appeal, in my submission it was entirely appropriate that the information received by the Society from the two third parties was not disclosed to the Appellant.

Consider also the nature of the information. What is contentious? What contribution would the Appellant have made to the process if he had been provided with a copy? In my submission – nothing.

Temporary Judge Wise provides two reports concerning what occurred at a public hearing which Mr Hardey attended and upon which he has written at some length (Production 7, Page 52 and Production 23, page 79). In earlier written submissions, Mr Hardey complained that he was denied the opportunity to fully explore, analyse or comment upon the representations from third parties. This is the very situation which the Law Society seek to guard against. If there is no curtailment of the process, it would become never ending to the detriment of the individuals involved. The approach is not rigid. Mrs D confirmed that if an issue arose which she considered required clarification then she would have sought that clarification. The matter would not have gone unanswered.

The representations from the Advocate Miss C are representations from his Advocate (Production 9, Page 58, Production 30, Page 121, Production 35, Page 198). He was present at what she observed. They have clearly been in communication with each other during this process. Miss C in her reply answers specific questions which were put to her by the Law Society conducting their enquiries. Her initial replies appear to nCot be specific. Clarification is sought further from her. Her conclusions are addressed in the supplementary report prepared by Mrs D. What point would have been served if they had been copied to Mr Hardey other than for him to emphasise those aspects of the reply which he perceived to be supportive of his position. He was provided with the gist of their replies.

In conclusion I would invite the Tribunal to consider that the process devised was fair, transparent and impartial and that it allowed for clarification if necessary as remarked upon by Mrs D. I would invite the Tribunal to consider the criticism of the Appellant on this occasion as unfounded.

The Appellant may suggest that his Appeal is brought because the Society advised him. I consider such a suggestion to be naive. The Appellant is legally qualified. He is a serial litigator with many successes to his credit. He is not a stranger to litigation. He is not a stranger to the complaint process. The letter from the Law Society is Production 37 at page 201. The letter makes it clear that Mr Hardey has a right of appeal in terms of the legislation against the determination not to uphold the complaint of unsatisfactory professional conduct. There is no mention of professional misconduct. There is no invitation or encouragement that an appeal should be marked. It is a letter which merely draws to the attention of the complainer a statutory right to appeal. To suggest that he was acting in accordance with an instruction from the Society is nonsense. He is not being told to appeal. He made the decision as an experienced litigator to embark upon this process. The Appellant in his Appeal expressed his disappointment at the outcome. He is convinced the evidence points only one way, namely his way. He therefore seeks to criticise the decision by employing language suggesting conspiracy and bias. He lost. He did not get his way. He therefore marked this Appeal.

In my submission the decision of the Law Society was reasonable and was clearly a decision available to an adjudicator on the evidence before them. The decision of the PCC is dated 3rd March 2011. You will find it at Production 38, page 215 of the Second Inventory. I would invite you to consider the terms of the decision in detail.

You will note there were four solicitors and five non solicitor members. There was a greater number of lay members involved in the decision. This lends no weight to the conspiracy and bias fears of the Appellant.

Page 217 articulates that the PCC identified that the behaviour had to be considered in context and as a course of representation as demanded by the Appellant. This approach was at the instigation of the Appellant. His considerable written

representations are littered with his desire to have the complaints amalgamated and aggregated (Second Inventory, Pages 7, 10, 14, 19, 25, 50, 80, 131 and 143). Therefore the PCC can hardly be criticised for considering the behaviour as a whole rather than in isolation in keeping with what the Appellant wanted.

The factual circumstances which Mr Hardey asks you to consider are much diluted insofar as the circumstances he advanced at the outset of the complaint process. On the first day of this Appeal process, Mr Hardey indicated his intention to argue only limited grounds of appeal ignoring certain other grounds which he had presented in his written note of appeal, therefore far from a course of representation comprising a number of instances of alleged misconduct. What you have before you is at most two instances where the solicitor could be criticised. Mr Hardey in his written representation concedes himself that one or two incidents might be considered a mistake or put down to reasonable error on the part of the solicitor (Production 14, Pages 14 and 189). In considering the evidence presented to you, you may also wish to form a view that the circumstances are now so diluted that we are in the realms of mistake or reasonable error if you establish that the behaviour occurred.

Page 217 lists what paperwork was considered by the PCC. There is a report which you will have considered when listening to the evidence of Mrs D. There is also a letter from Mr Hardey and his enclosures. This is copied at Production 32, Page 133 and runs to some 56 pages of representation along with a draft Petition for Judicial Review. There is also his letter of 24th February 2011 at Production 36, Page 200. At page 218 the PCC once again acknowledge the request of the Appellant that matters be considered as a whole namely a course of conduct.

The PCC then address the individual heads of complaint. They consider the evidence available to them. Their rationale shows appropriate respect and consideration given to the representations they received in articulating their decision. They utilise the evidence from parties independent to the process being Temporary Judge Wise and the Advocate of the Appellant who do not support his version of events in respect of certain aspects. The PCC identify the complexity and confusion of the circumstances of the litigation, they identify the considerable number of court hearings which occur

in a fairly short period of time, they identify what is clearly a robust and vigorously contested litigation between the parties.

At page 220, the PCC consider issue 1B. The detail of issue 1B is set out at page 216. What should be considered by the Tribunal is that issue 1B comprises a number of component parts. There is reference to issues concerning title to sue, issues concerning whether Mr Hardey owned his house, issues in relation to the procedural history of action, issues relating to the pleadings and court procedure and issues in relation to whether the word "recently" had been used and the knowledge of Mr Cowan concerning a motion which had arisen a considerable period earlier in a complicated dispute.

The PCC in their decision articulate the rationale behind the conclusion which they have reached. They have had regard to the comments of the Advocate Miss C. They consider the complexity of the dispute. They consider the nature of the allegation and what is being sought by the Appellant namely a finding of professional misconduct. They consider the circumstances as presented to them against the evidential standard of professional misconduct which is that of beyond reasonable doubt. They identify that they are seeking exact corroboration. Such exact corroboration is not available to the component parts of the head of complaint. In the circumstances they conclude that they cannot make a finding. I would invite the Tribunal to consider also that they were being asked to make a finding within the context of a course of misrepresentation, at the instigation of the Appellant. That the evidence is simply not there to support the other heads of complaint presented by the Appellant therefore the course of misrepresentation evaporates. Is it therefore surprising that the PCC should reach the decision which they did in these circumstances.

In their role as adjudicator in respect of this complaint process, I would invite the Tribunal to consider that the PCC have behaved in a reasonable, transparent and fair fashion. That they have considered the representations advanced before them in an appropriate manner. That the decision which they have reached is justified within the context of the grounds of complaint. The PCC have identified the tests which they apply when considering whether the conduct amounts to misconduct or unsatisfactory professional conduct. They are satisfied on the basis of all that was before them that

what had been established fell far short of the appropriate test. In the circumstances I would invite you to consider that the approach adopted by the Tribunal in this respect was fair and reasonable and they should absolved from criticism.

My third proposition is that having heard the evidence of the various witnesses and having considered matters afresh from a different perspective than that enjoyed by the PCC, you should consider that there is no basis to the allegations made by Mr Hardey and that the Determination should be confirmed.

I once again emphasise in making this submission that the Society did not have the privilege of hearing and examining witnesses. The Society do not accept that as a matter of course each of the Appeals of this type should be dealt with by the hearing of oral evidence. Such a course renders the process of investigation redundant and pointless. It is not what Parliament intended.

In dealing with these Appeals the powers of the Tribunal are identified at Section 53ZB(2). Here there is no mention of holding an enquiry as the Tribunal is obliged to do in matters relating to professional misconduct. The procedure is provided for in terms of the Discipline Tribunal Rules. The process is governed by the 2008 Rules, in particular Part 3, Rules 20(2)(B). Rule 26(1) provides that where Answers are lodged and the Appeal has not been dismissed then a hearing will be fixed. Rule 29(1) allows the attendance of parties and for them to lead evidence. The discretion whether to lead evidence appears to lie with the parties rather than the Tribunal. My invitation to the Tribunal is to recognise that the hearing of evidence will not occur as a matter of course but rather they will require to be persuaded that it is necessary to achieve a proper and just outcome.

My submission is that the Society cannot be criticised if a decision is reached by the Tribunal having regard to the evidence which was led before them. The PCC did not hear oral evidence. The PCC did not examine witnesses. The PCC were not in a position to assess credibility and reliability of witnesses. The PCC did not observe witnesses being examined by hostile opponents. The PCC required to rely upon written representations and the contributions of relevant third parties thereafter applying the appropriate tests make a determination as to whether the conduct

complained of amounted to professional misconduct or unsatisfactory professional conduct.

As a review body you should consider the fairness of the procedure employed by the Society and whether the decision of the PCC was reasonable on the basis of the evidence submitted to them and was within the spectrum of decisions available to them as an adjudicator.

The first witness you considered was the Appellant himself. I would invite you to disregard the evidence of the Appellant. He presents as an individual with an agenda. His evidence was littered with conspiracy theories and unfounded allegations of bias. He presented as belligerent. His written representations are confrontational. He presents as an individual who reacts adversely to not getting his way.

Your heard evidence from the former Advocate, Miss C. She acted on behalf of the Appellant. Her evidence did not depart from that which she submitted electronically during the complaint process. She did expand upon what she had said in these communications, evidence which was not available to the PCC. She did confirm that this was a contested litigation where a variety of accusations were being made by each party against the other. Which allegations were of significance as an award of expenses in a Court of Session litigation was dependent upon the proof of these allegations.

I would invite you to find the evidence of Ms D as credible and reliable. She is a Complaints Manager of some experience. She deals with many complaints on an annual basis. She did not in any way deal with this complaint differently because of the Appellant's involvement. She did her job as best as she could. She made appropriate enquiries. She produced a report, made further enquiries and obtained representation from third parties to which she had regard in her supplementary report. She was not the decision maker. She carried out enquiries and made recommendations. The PCC are not bound nor influenced by her recommendations. Often they will depart from a Complaints Manager conclusions.

The final witness led was Mr Cowan. He did not need to give evidence. He could

have avoided what he had to endure. He was examined in a robust and vigorous fashion by the Appellant. His evidence remained consistent with that which he gave during the complaint process. If you find him to be credible and reliable then his version concludes that there is no justification to the heads of complaint advanced by the Appellant.

In conclusion I would invite the Tribunal to confirm the Determination in terms of Section 53ZB to refuse the Appeal and to order that expenses be paid by the Appellant.

Unless there is anything further with which I could assist the Tribunal in their deliberations, these are my submissions.

Mr Reid then orally submitted that the Law Society process in this case had been fair, transparent and impartial. Whilst the Tribunal had heard evidence, Mr Reid submitted that even if the Tribunal made a different finding based on the oral evidence they had heard, the Law Society could not be criticised because they had not heard evidence. Mr Reid asked the Tribunal to look at the process and the documents contained in the Productions and find that the Professional Conduct Committee's Decision was reasonable and fair based on the evidence before them. In connection with the Professional Conduct Committee not taking account of the evidence of Ms C, Mr Reid submitted that Ms D had email correspondence with Ms C and prepared a Supplementary Report which was before the Professional Conduct Committee. Mr Reid stated that it was accepted that the Professional Conduct Committee Decision did not reflect consideration of this issue but pointed out that there were other factors involved and that Mr Hardey had aggregated a number of Complaints and alleged a course of conduct and this had diluted matters and affected the approach taken by the Professional Conduct Committee.

In connection with the criticisms of the Law Society, Mr Reid stated that there were two tests. The first is to assess the credibility of the witnesses and then consider the Law Society process and whether it was fair and reasonable. In connection with Judge Wise's report, the Law Society had followed their third party procedure. There was

nothing sinister. If the issue had been raised, Ms D would have carried out a further enquiry.

Mr Reid referred to the language in the Grounds of Appeal, in the letters to the Law Society and on behalf of Mr Hardey and the variety of unfounded allegations made by him and the way in which Mr Hardey reacted in cross examination. Mr Reid clarified that there was no suggestion that Mr Hardey was vexatious or that there was any collusion between him and Ms C. Mr Reid invited the Tribunal to reject Mr Hardey's submissions and find that the Law Society's process had been sufficiently adaptable. Mr Reid asked the Tribunal to dismiss the Appeal.

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT

(Mr Dunlop's written submissions are incorporated below)

1. **Introduction**.

1.1. On behalf of the Second Respondent, the Tribunal is invited to refuse this appeal.

1.2. In the submissions which follow, five chapters are addressed:

1.2.1. The nature of the appeal.

1.2.2. An assessment of the evidence, in particular of Mr Hardey and the Second Respondent.

1.2.3. The test for unsatisfactory professional conduct.

1.2.4. Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1A.

1.2.5. Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1B.

2. The nature of this appeal.

2.1. It is often said that an appellate tribunal ought to pay particular deference to a decision at first instance made by a specialist tribunal (see, e.g. *McMahon v Council of the Law Society of Scotland* 2002 S.C. 475 at [16]). However, such a submission has less force where (a) the first instance decision maker has not seen and heard witnesses, while this Tribunal has; and (b) this Tribunal itself has the true specialist expertise, as was recognised in *McMahon*.

2.2. In such circumstances, the Second Respondent is content that the decision of the Professional Conduct Committee be treated as nothing more than an adminicle of evidence for consideration by the Tribunal, and that the correct approach would be for the Tribunal to consider the whole evidence and to arrive at their decision based on that evidence.

2.3. Mr Hardey has spent a great deal of time, in his grounds of appeal and in the course of these proceedings, in criticizing the approach of the Reporter and of the Professional Conduct Committee. However, as was remarked in the course of the hearing, such submissions are of minimal relevance. If the PCC was in error in its approach, that does not (of course) mean that Mr Cowan was guilty of the allegations complained of.

2.4. This appeal is brought under s.42ZA(10) of the Solicitors (Scotland) Act 1980. There is no power on the part of the Tribunal to remit the complaint back to the PCC for fresh determination. This can be seen from s.53ZB(2), which stipulates the powers available to a Tribunal in an appeal under s.42ZA(10) as follows:

2.4.1. "(2) On an appeal to the Tribunal under section 42ZA(10) the Tribunal—

(a) may quash the determination being appealed against **and** make a determination upholding the complaint;

(b) if it does so, may, where it considers that the complainer has been directly affected by the conduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as it may specify to the complainer for loss, inconvenience or distress resulting from the conduct;

(c) may confirm the determination." (emphasis added)

2.5. The statutory wording here plainly excludes a power to remit, and rather indicates that the Tribunal must itself arrive at a decision on the complaint in issue.

2.6. This can be seen both from the conjunctive "and" in s.53ZB(2)(a), and also from the content of s.53ZB(2)(b). The latter provision begins with the words "if it does so". This can only refer back to s.53ZB(2)(a). The power granted in s.53ZB(2)(b) to direct payment of compensation of up to £5,000 could not possibly be granted in the case of a remit. The statutory scheme envisages the Tribunal determining the complaint itself and, if it finds the complaint established, going on to consider exercising the power in s.53ZB(2)(b).

2.7. This point is further underlined by the fact that where the statutory scheme confers a power to remit, this is provided for expressly. This can be found in s.53ZA of the 1980 Act (where a Tribunal acquitting a solicitor of professional misconduct may remit a question of UPC to the PCC).

2.8. This makes perfect sense: the Tribunal is empowered to hear evidence, whereas the PCC can only take a view on the papers. It would make no sense at all for the Tribunal to hear witnesses and then, on the basis of the evidence heard, to remit back to a PCC which cannot hear those witnesses.

3. An assessment of the evidence, in particular of Mr Hardey and Mr Cowan.

3.1. It is appropriate to focus on the complaint made by Mr Hardey as defining the scope of the inquiry (*Law Society of Scotland v Scottish Legal Complaints Commission* 2011 S.C. 94, per Lord Reed at [45]-[46]).

3.2. Originally, there were of course seven complaints made by Mr Hardey. All were rejected by the Society. No appeal has been taken against the rejection of Complaints 2, 3, 4 and 5. In the course of these proceedings, Mr Hardey has abandoned his appeal against Complaint 6, leaving Complaints 1A and 1B.

3.3. In resolving the factual issues which arise here, it is submitted that a useful starting point is the nature of complaint. Mr Cowan was not Mr Hardey's solicitor, but rather his opponent's. No loss is said to have arisen as a result of the conduct complained of. Mr Hardey does not suggest that there has been any adverse effect from any of the 7 complaints which were made, 5 of which are now abandoned.

3.4. It is respectfully suggested that one has to query the motivation for advancing these complaints, in the absence of any material detriment, by way of a lengthy contested hearing before this Tribunal. It is suggested that the explanation for this is that Mr Hardey is a recreational litigant. It will be noted that the adjective adopted is "recreational" rather than "vexatious". At no time has Mr Hardey been accused of being a vexatious litigant, although he has repeatedly stressed that he is not such. It is not doubted that Mr Hardey has had various successes in litigation. But one cannot avoid astonishment at his response to questions regarding his involvement in litigation. At end of Day 1, he indicated that he had been involved in around 20 litigations. On resuming cross, he explained that he thought the question had been directed to live litigations. When asked about all such claims, he became indignant and queried whether the Second Respondent's counsel could remember how many claims he had been involved in. When pressed, he responded that he had been involved in "no more than one hundred" litigations.

3.5. It is suggested that Mr Hardey's evidence is demonstrative of someone who uses litigation as a weapon. In this regard, it is relevant to take account of letters sent by Mr Hardey to neighbours who had the temerity to appear on Mr and Mrs B' list of witnesses, threatening to turn his home into a pub with beer garden, or a DSS hostel, if he was unsuccessful in the claim against Mr and Mrs B; and of the fact that no less that six separate litigations have been commenced against Mr and Mrs B themselves. The evidence shows that Mr Hardey will resort to adversarial process at the drop of a hat. That does not mean, of course, that Mr Cowan is innocent of the charges against him. But it does provide the background to this complaint and may colour the view which the Tribunal takes of Mr Hardey and his evidence.

3.6. Also relevant in this regard are the following factors:

3.6.1. Mr Hardey plainly bears *animus* or ill-will towards Mr Cowan. He conceded as much, and that concession was vouchsafed by Ms C.

3.6.2. The general tenor of Mr Hardey's evidence was argumentative and intemperate.

3.6.3. Likewise, Mr Hardey's letters to the reporter are in extremely intemperate and aggressive terms. Mr Hardey does not like not getting his own way.

3.6.4. Mr Hardey sought to introduce collateral attacks on the Second Respondent. On Day 1, in response to questioning from Mr Reid, for the first time there was an assertion that Mr Cowan had feigned outrage when the suggestion was made that he had agreed to appear for both parties. When challenged, he suggested the Tribunal simply put a red line through that part of his evidence. This was a clear example of a collateral attack which was insupportable. Likewise, Mr Hardey advanced unsolicited criticism, again during Mr Reid's questioning, of Mr Cowan on the basis that Mr Cowan had planned, if the Mr and Mrs B litigation proceeded to proof, to put to Mr Hardey in cross-examination details of the case where he had failed before Lord MacFadyen. Mr Hardey introduced this in an attempt to mount a collateral attack on the Second Respondent. That attempt is relevant in assessing Mr Hardey's motives. Moreover, the attempted attack was groundless since there would have been nothing wrong in cross-examining Mr Hardey on the basis of Lord MacFadyen's decision, given that Mr Hardey accepts that after proof Lord MacFadyen found he had bullied his mother by force and fear into signing over certain heritable property. That Mr Hardey may have persuaded his mother not to resist a subsequent action of reduction does not mean that what happened before Lord MacFadyen did not in fact happen.

3.6.5. Mr Hardey himself puts as the context for this complaint an offer of a traineeship from Simpson & Marwick, which he feels was torpedoed by Mr Cowan. The basis for his *animus* is clear.

3.6.6. Mr Hardey accepts that he has threatened Simpson & Marwick, and Mr Cowan, with "years of legal ramifications".

3.6.7. It is also relevant to bear in mind the way in which these complaints were made. At Document 1 of the First Volume of the First Respondent's inventory, p.9, we see that the first complaint was made January 2009. By then, all of the matters which would subsequently be complained about had occurred. But at this stage, all that was complained about is the conduct which now gives rise to Complaint 1A. There was no complaint about anything else. We then see that by letter 23 September 2009 (Document 14, Volume 2, p.19) what is now Complaint 1B was raised. Again, at that time there was no mention of any other complaint. Then on 1 December 2009 (Document 14, Volume 2, p.7-9) – just before the 1 year time limit expired – Mr Hardey submitted a raft of further complaints about what had happened at the hearing on 3 December 2008. It is submitted that someone genuinely aggrieved would put all of his complaints in one letter. There is no legitimate reason for presenting them serially in this fashion

3.7. In the foregoing circumstances, the Tribunal is invited to accept that this complaint is borne of malice. Of course, that does not mean it is unfounded – but it should colour the view which the Tribunal takes of Mr Hardey and his evidence.

3.8. Likewise, it is suggested that the Tribunal should bear in mind other instances where Mr Hardey's evidence was unsatisfactory. By way of example:

3.8.1. When faced with the letter which he had written to the witnesses in the Mr and Mrs B litigation, he indicated that he had forgotten that they were witnesses when he was writing to them. That explanation was plainly false – Mr Hardey then had to concede that the letters opened with the

sentence "I am disappointed to note that your name appears on the witness list for Mrs B".

3.8.2. Mr Hardey admits that he averred he owned the property which was the subject of the Mr and Mrs B litigation, and that this was untrue. Faced with a notice to admit that he didn't own the property, he falsely maintained that he did.

3.8.3. Mr Hardey admits that in another litigation against Mr and Mrs B, he averred that he was a member of the Law Society of Scotland, when he plainly was not.

3.9. With all this in mind, it is submitted that Mr Hardey was an unsatisfactory evidence. The Tribunal is invited to reject his evidence save where supported by credible and reliable sources.

3.10. Mr Cowan, on the other hand, was entirely credible and reliable. The Tribunal is invited to consider the same question which was posed to him in evidence: which would pose greater risk to his career – the establishing as true of the two remaining complaints, or a finding that he perjured himself before this Tribunal? Mr Cowan gave his evidence in a clear and candid manner. He was plainly telling the truth.

4. **The test for unsatisfactory professional conduct.**

4.1. "Unsatisfactory professional conduct" ("UPC") means "professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor, but which does not amount to professional misconduct and which does not comprise merely inadequate professional services" (Solicitors (Scotland) Act 1980, s.65(1), applying s.46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007).

4.2. UPC thus means something which does not amount to professional misconduct, but which is more serious than inadequate professional services ("IPS"). IPS are "professional services which are in any respect not of the

quality which could reasonably be expected of a competent solicitor" (s.46(1) of the 2007 Act). The primary difference between the statutory definitions of UPC and IPS is the introduction of the word "reputable" with regard to the hypothetical comparator. Thus while IPS requires a comparison to be made with a "competent solicitor", UPC looks towards a "competent and reputable solicitor". It is thus submitted that UPC differs from IPS in connoting a more serious lapse which bears on the repute of the solicitor or the profession in general.

5. **Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1A?**

5.1. The first remaining Complaint, 1A, relates to what was said at a court hearing in December 2008, regarding a previous hearing which had taken place almost 2 years earlier, in January 2007. Mr Cowan accepts that his first reaction was that he couldn't have agreed to appear for both parties. He also accepts that that first reaction was wrong. But it is not unacceptable professional conduct merely to make a mistake. That is all this was. Mr Cowan's genuine reaction was that he did not think this was correct. He was mistaken in that reaction and has throughout accepted that he was mistaken.

5.2. This part of the complaint raises the dichotomy which was addressed earlier in these proceedings. Mr Cowan either remembered that he had agreed to appear for both parties, or he did not. If he had forgotten then, given that the hearing took place almost two years previously, what he said was a mere mistake. If he remembered then his false denial amounted to a lie. It would be difficult to argue that a lie was only unsatisfactory professional conduct, as opposed to professional misconduct. In any event, why would he lie? No live question turned on what had been said. The expenses of the hearings in January 2007 had been dealt with long before the hearing of 3 December 2008. The report from Temporary Judge Wise QC makes it clear that this was a point which she considered of no materiality. Once the error was pointed out, the Temporary Judge did not require an explanation from the Second

Respondent. If there was anything unsatisfactory in his conduct, it was for the judge to raise it and deal with it. She found it unnecessary to do so at the time. Moreover, even now the Temporary Judge voices no criticism of Mr Cowan in her report. It might be thought that if the Temporary Judge considered that there was anything disreputable in the conduct of the Second Respondent, she would have said so.

5.3. It is submitted that this shows that all that happened was a mistake, as happens on occasion to even the best prepared advocate. Mr Cowan accepts that, in an ideal world, he would not have made that mistake. However, UPC is not demonstrated by a mistake even if it were avoidable. Something disreputable, something worthy of condemnation, is required before a finding of UPC would be warranted. There is nothing of that nature here.

5.4. The charge of UPC is thus not made out.

6. **Whether Mr Hardey has made out his complaint of unsatisfactory professional conduct under Complaint 1B?**

6.1. There is here a dispute as to what was said to Lord Emslie.

6.2. Mr Hardey's allegation is as per his letter of 23 September 2009: Document 14 in the Second Volume of the First Respondent's productions, p.43. He claims that Mr Cowan attempted to explain the "reason a plea of title had never been taken". That simply cannot be correct. The Record, dated 1 May 2007 (contained in the Second Respondent's first inventory) clearly contains, at p.24, a plea of no title to sue.

6.3. Mr Hardey contends that this is not a true plea of "no title". But it plainly is. The plea may have been unsupported by averment, and thus vulnerable had its relevancy been debated, but that plea can only be read as a plea of "no title" – that is precisely what it says. Ms C accepts that Mr Cowan relied on this as a plea of "no title", and that is clear from Mr Cowan's manuscript notes referable to the earlier hearing before Lady Dorrian. Mr Hardey wanted

to argue that the question of title was raised too late, and Mr Cowan's answer was that it had been on record since 2007. That being so, he simply cannot have offered a reason why no such plea had been taken until recently, when his whole submission was that such a plea had been on Record since May 2007.

6.4. What actually happened was that Mr Cowan told Lord Emslie that it was only recently that the question of title could have been debated in light of recent amendment. The basis for the argument regarding title was the decision of the House of Lords in *Hunter v Canary Wharf* [1997] A.C. 655, which established that mere occupation does not give title to sue for nuisance. However, Mr Hardey designed himself as "proprietor and occupier". That was a wholly false designation, but while it remained on record it would require to be taken *pro veritate* and would thus preclude debate of the question of title. Shortly before the hearing before Lord Emslie, Mr Hardey amended to delete that false designation. As Mr Hardey accepted, it was only when that false designation was deleted that the point could have been debated.

6.5. Mr Hardey will doubtless say that he is supported by Ms C in what he alleges. But on close examination that is not correct. What Mr Hardey said is that Mr Cowan claimed it was only recently that he learned that Mr Hardey ***did not own his house***. What Ms C said is that Mr Cowan claimed it was only recently that he learned that Mr Hardey ***did not have title to sue***. She confirmed this in reply to the last question in cross examination.

6.6. This is important, for two reasons. Firstly, both Ms C and Mr Hardey were adamant that their version of events was correct. However, it is self-evident that they cannot both be right. Secondly, there is an important distinction between these two scenarios. It is difficult to see how one can reconcile what Mr Hardey claims was said with Mr Cowan's version of events. With regard to Ms C's evidence, however, such reconciliation is easier. One can readily understand Mr Cowan saying that it was only recently that the question of title could have been debated and Ms C taking from this that he had only recently learned about lack of title.

6.7. Here, again, we have the dichotomy in Mr Hardey's complaint. Mr Cowan accepts that he had known since 2006 that Mr Hardey did not own the property. Accordingly, if he said that he had only found that out recently, that would be a lie, and thus misconduct (and accordingly not UPC). But why would he lie, especially when it would so easily be exposed?

6.8. Indeed, this last point surely demonstrates that Mr Cowan cannot have said what either Ms C or Mr Hardey claim he said, for three reasons. Firstly, to assert that the point was only learned recently in a situation where a plea to title had been on record since May 2007 would have been so obviously and demonstrably false that it would have been madness to so assert. Secondly, this is all the more so given that there can be no question that Mr Cowan himself relied on the fact that said plea had been on Record since May 2007. It would make no sense to rely expressly on the fact that a plea which says in terms that Mr Hardey had no title to sue had been on Record for over 18 months while saying that a problem with title had only recently been discovered. Thirdly, there is no suggestion from either Ms C or Mr Hardey that Lord Emslie raised any query regarding what had been said. It is simply inconceivable that Mr Cowan could have made a factual assertion which was shown to be false by the very pleadings under discussion before Lord Emslie, and by Mr Cowan's own submissions, without Lord Emslie raising that point with him.

6.9. The only evidence supportive of Mr Hardey's version of events is his own. For the reasons already given, his evidence should not be accepted. Mr Cowan did not say that he had only recently discovered that Mr Hardey did not own his house. That would have been a lie, and it is quite clear than no lie was told.

7. **Conclusion.**

7.1. For the foregoing reasons, it is submitted that there is nothing in this complaint. Mr Hardey is pursuing it because of *animus* against Mr Cowan for his role in the Mr and Mrs B litigation and for opposing his traineeship. He is

making good his threat of "years of legal ramifications". The Tribunal is thus requested to reject both remaining aspects of this appeal.

Mr Dunlop then orally invited the Tribunal to refuse the Appeal and referred to his detailed written submissions. He indicated that he had additional comments to make. The parties were at odds with regard to the nature of the Appeal. Mr Dunlop submitted that it would ordinarily be for the party holding the decision below to be given deference but he could not say that in this case because the Law Society were not empowered to hear evidence and the Tribunal in this case had heard evidence. If the Tribunal were of the view that the Law Society had erred there would be no purpose served in sending it back to the Law Society. Mr Dunlop again referred to the terms of Section 53ZB(2) and pointed out that it was for the Tribunal to quash the Decision and make a Finding of unsatisfactory professional conduct or uphold the Law Society's Decision.

In respect of the assessment of evidence, Mr Dunlop stated that Mr Hardey's submissions were to the effect that no reliance could be placed on the letters written by to him to his neighbours but Mr Dunlop pointed out that Mr Hardey referred to these letters in evidence and it was accordingly quite in order for the Tribunal to take the letters into account.

In connection with the Notice to Admit, Mr Dunlop stated that the Tribunal would recall that this was put to Mr Hardey in cross examination. It borne manuscript, text and crosses and Mr Hardey accepted that there was a cross beside the Notice which meant that he denied paragraph 1 of the Notice. Mr Dunlop stated that Mr Hardey now blamed Brodies but this was not said in evidence. Mr Dunlop stated that he had a signed copy of the Notice to Admit.

Mr Dunlop referred to the piecemeal way in which the complaints had been made by Mr Hardey. He submitted that it was a strange way to bring complaints and this should colour the way the Tribunal viewed his evidence. Mr Dunlop submitted that Mr Cowan was a credible and reliable witness and asked why should Mr Cowan perjure himself just to avoid a finding of unsatisfactory professional conduct. Mr

Dunlop referred to the test of unsatisfactory professional conduct and reiterated the importance of distinguishing between unsatisfactory professional conduct and professional misconduct. Mr Dunlop referred to the Statutory definition of Inadequate Professional Service and contrasted this with the definition of unsatisfactory professional conduct which made reference to competent and reputable solicitors. Mr Dunlop submitted that this suggested a more serious lapse was required before the test of unsatisfactory professional conduct was met.

In respect of Head of Complaint 1A, Mr Cowan accepted that he had made an mistake with regard to what was said at the hearing in December 2008. Mr Dunlop however pointed out that this related to a hearing two years earlier. Mr Dunlop stated that no live issue turned upon what was said by Mr Cowan because the expenses of the January 2007 hearings had already been dealt with prior to the hearing in December 2008.

Judge Wise considered the point to be not material because she did not require an explanation from Mr Cowan. Mr Dunlop suggested that it was for the Judge to raise the issue if it was unsatisfactory but the Judge had not complained about this at the time or in her report to the Tribunal. Mr Dunlop submitted that it was for the Judge to supervise the conduct of those appearing before them.

In connection with Head of Complaint 1B, Mr Dunlop stated that he was accused of misrepresenting the evidence. He said it was for the Tribunal to arrive at its own view but pointed out that Mr Hardey accepted what Ms C had stated at the close of cross examination therefore how could this be claimed to be a misrepresentation?

Mr Dunlop stated that the original complaint was set out in document 14 in the Second Volume of the First Respondent's Inventory of Productions at page 43 and that was that Mr Cowan had attempted to explain to Lord Emslie the reason why a plea of no title to sue had ever been taken. This could not be correct because Mr Dunlop pointed out that the Record at page 24 makes reference to a plea of no title to sue and Mr Cowan relied on this as being a plea of no title to sue and he accordingly could not have offered a reason why no such plea had been taken when the plea had been on record since 2007.

Mr Cowan told Lord Emslie that it was only recently that the title could have been debated because Mr Hardey had designated himself as proprietor and owner and while that averment was in it was not possible to take the matter to debate. It was only shortly before the hearing before Lord Emslie that Mr Hardey amended his pleadings and took out the false designation and the matter could therefore be debated.

Mr Cowan was very clear that he had known since 2006 that Mr Hardey did not own his own house so he could not have said that he did not know this unless it was a lie.

Mr Dunlop then went on to refer to the criticisms levelled at him personally in the submissions by Mr Hardey. He indicated that he felt that he had to answer these because they were serious accusations made against him and Mr Hardey was using the attack on Mr Dunlop personally to try and apportion blame to Mr Cowan and this was inappropriate.

Mr Dunlop stated that he refuted that he had misled the Tribunal or failed to act with candour. He stated that he would have been much more indignant if the criticism had been from another member of the Bar but because it was Mr Hardey he just accepted it with weary resignation. Mr Dunlop referred to the Decision before Lord McFayden and pointed out that he had never personally acted for Mr Hardey but explained that he had been a trainee when Mr Hardey engaged Drummond Miller LLP in respect of the case which went before Lord McFayden. Mr Dunlop explained that when he was instructed in this case he took advice from the Dean of the Faculty in respect of whether there was any concern in him acting in this matter due to his past association with Mr Hardey through Drummond Miller. He was told there was no impediment to him acting and that he was duty bound to accept the instructions. Mr Dunlop also pointed out that Mr Hardey did not take any objection to this at the start. Mr Dunlop also pointed out that the McFayden case arose because Mr Hardey referred to it and stated that it was improper for Mr Cowan to have acted by threatening to raise the McFayden Decision in the case against Mr and Mrs B. Mr Dunlop explained that as the matter had been raised by Mr Hardey it required to be addressed. Mr Dunlop explained that he again took advice from the Dean who indicated that there was no problem in the matter being raised. Mr Dunlop pointed out that the Lord McFayden's

Decision was in the public domain and was available on the Bailli website and in Green's Weekly Digest. Mr Dunlop stated that if the Tribunal had thought that he was acting improperly the Tribunal would have stopped him. Mr Dunlop also asked that if the Tribunal did have any concerns with regard to this matter then no blame should be apportioned to Mr Cowan in respect of this.

In respect of Head of Complaint 1A, Mr Dunlop stated that what had happened was simple and excusable and had not resulted in any harm to Mr Hardey. In respect of Head of Complaint 1B, it factually could not have happened.

The Tribunal indicated that it would adjourn and consider its decision. The Tribunal would decide whether or not it was necessary to have the shorthand writer's notes extended in respect of Ms C's evidence. The Tribunal commenced its deliberations and decided that, in view of the fact that there was a dispute between the parties in respect of Ms C's evidence, and given that Ms C gave her evidence some considerable time ago, it would be useful to the Tribunal to have the shorthand writer's notes extended in respect of this evidence. The Tribunal adjourned the case to 17 July 2012 for further deliberations once the shorthand writer's notes were available.

Decision

The Tribunal reconvened on 17 July 2012 and 27 September 2012 and concluded its deliberations. The Tribunal noted that the Appellant had withdrawn his Appeal in respect of Head of Complaint 6 and the Tribunal was accordingly only dealing with Heads of Complaint 1A and 1B. The Tribunal has already ruled that in terms of Section 53ZB(2) of the Solicitors (Scotland) Act 1980, the Tribunal in dealing with an Appeal under Section 42ZA (10); may Quash the Determination being appealed against and make a Determination upholding the Complaint or may Confirm the Determination. The Tribunal accordingly considered that it was not open to the Tribunal to merely Quash the Law Society's Determination and remit the matter back to the Law Society. There is no statutory power to do this. This is why the Tribunal determined that it would require to hear evidence in this case, given the dispute about

the facts. This will however not necessarily be the case in all Section 42ZA Appeals. The Tribunal, as already ruled, also determined that because the Tribunal had to decide whether or not to quash the Law Society's determination, what happened during the Law Society's consideration of the case is relevant. The Tribunal accordingly allowed Mr Hardey to continue with Grounds of Appeal 2 and 3 and the Tribunal has considered whether or not the failure to provide Mr Hardey with a copy of Judge Wise's report in any way prejudiced him and also whether or not any bias by the Law Society against Mr Hardey affected the way that the Law Society dealt with the case.

Mr Dunlop's original note of argument for the Second Respondent to the effect that the Appeal was misconceived because the Appellant was claiming that Mr Cowan was guilty of professional misconduct rather than unsatisfactory professional conduct was not insisted upon by Mr Dunlop who conceded that all matters were live before the Tribunal. The Tribunal accordingly had allowed Mr Hardey's motion that the Respondents were personally barred from challenging the competency of the Appeal and the Tribunal take no issue with the competency of the Appeal.

The first thing the Tribunal had to do was to make its own Findings in Fact on the evidence heard. The Tribunal had before it when it reconvened on 17 July and 27 September 2012, the shorthand writer's notes in respect of Ms C's evidence. These were considered together with all the productions lodged and the Tribunal's own written notes with regard to all the evidence given in the case.

The Tribunal considered that the evidence of Ms C and Ms D was credible and reliable. The evidence of Mr Cowan and Mr Hardey was tarnished by the clear animosity between them. The Tribunal found a lot of the evidence which was given to be extraneous and irrelevant and not particularly helpful, especially that in connection with the history of the case involving Lord McFadyen. The Tribunal accordingly gave this evidence little or no weight.

Consideration in Respect of Head of Complaint 1A

Mr Hardey stated that he was not insisting on the second sentence of this Head of Complaint 1A which leaves Head of Complaint 1A as:-

"(1A) On 3 December 2008 at a hearing on expenses before Temporary Judge Wise, Mr Cowan incorrectly claimed to the Court that he had not undertaken to appear for Mr Hardy.

When Mr Cowan's letter of 11 January 2007 was then produced to the Court, he was completely contradicted by it and sat silent before Temporary Judge Wise."

The Determination of the Law Society in respect of Head of Complaint 1A was that Mr Cowan had stated that he did not recollect having given the undertaking. Mr Cowan, in his first response to the Law Society indicated that he had no clear recollection of how he introduced himself before Lord Brailsford but that he had no reason to believe that he said anything other than that he appeared for the Appellant and for himself. In Mr Cowan's Answers he states that his recollection was that there could not have been an agreement for him to appear for both parties on 12 January 2007 but that his recollection was erroneous. Mr Cowan also states in his Answers that he was confused as to the hearings on 10 and 12 January 2007. The Tribunal note that Ms D in her letter to Mr Hardey dated 12 January 2011 appears to accept that Mr Cowan stated in court that he had not undertaken to appear for Mr Hardey on 12 January 2007 but the Law Society's determination was to the effect that Mr Cowan had had a genuine lack of recollection. The Appellant's evidence in chief was to the effect that although Judge Wise's response suggests that her recollection is that Mr Cowan could not remember having given such an undertaking, this was not Mr Cowan's position and he was accepting that he was wrong when he said that there could not have been an undertaking to appear. Mr Cowan pointed out that there were three hearings within seven days in January 2007. An issue was raised by the Appellant in one of three hearings. Mr Cowan's position is that he got the hearings mixed up. He states in oral evidence that he did not recall and assumed that there had been no undertaking. Mr Cowan accepts that he remained silent before Judge Wise but points out that she did not ask him for an explanation. Mr Cowan in cross-examination stated that he did not accept that he breached the undertaking and indicated that the clerk and the judge got it wrong when they noted that he did not

appear also on behalf of the Appellant. Mr Cowan accepted that it was a serious matter to breach an undertaking. The Tribunal found Mr Cowan's evidence with regard to the undertaking somewhat confusing and inconsistent.

The Tribunal considered that due to the animosity between Mr Cowan and Mr Hardey the Tribunal did not believe that Mr Cowan would have forgotten when he appeared on 12 January 2007 that he had written a letter on 11 January 2007 undertaking to appear on behalf of Mr Hardey on 12 January 2007. The Tribunal further considered that it would be normal practice for one party to attend on behalf of another when there was an undisputed motion. Mr Cowan would have been reminded that he had given this agreement to appear on behalf of Mr Hardey by Mr Hardey's absence on 12 January. The Tribunal accordingly made a Finding in Fact that when Mr Cowan appeared in court on 12 January 2007 he would have been aware that he had given an undertaking to also appear on behalf of Mr Hardey. The Tribunal considered that given the history between Mr Hardey and Mr Cowan, Mr Cowan would have known how important it was to act carefully and would have been more likely to remember the circumstances relating to the case. The Tribunal also noted that Mr Cowan had given slightly different and confused versions in his submissions in connection with the undertaking as detailed above. The Tribunal did not accept Mr Cowan's evidence to the effect that the clerk and the Judge Lord Brailsford must both have made a mistake in connection with whether or not he did appear on behalf of the Appellant as well as himself. The court Interlocutor clearly shows that Mr Cowan did not appear for Mr Hardey on 12 January 2007.

Mr Cowan was also not able to adequately explain why, if his position was that Lord Brailsford was under a misapprehension about whether or not he had appeared for the Appellant on 12 January, Mr Cowan did not correct Lord Brailsford when the case called on 16 January. It was clear from the evidence that when the case called on 16 January Lord Brailsford was still under the impression that Mr Cowan had not appeared on behalf of Mr Hardey on 12 January and Mr Cowan does not appear to have done anything to correct him. It is also clear from the evidence that Lord Brailsford praised Mr Cowan's conduct during the earlier hearing on 12 January 2007 on the basis that Mr Cowan had "very kindly" not taken his motions in the Appellant's earlier "absence" and had considerately asked that the motions be continued.

Ms C's evidence was that Mr Cowan said in response to her submissions that no such undertaking had been given and the Tribunal found this as a fact. The Tribunal considered that if Mr Cowan had genuinely forgotten the undertaking, or genuinely got the dates mixed up, he would have reacted differently and immediately apologised. The Tribunal consider that reputation is extremely important for solicitors and failure to obtemper an undertaking would be an important matter.

The Tribunal was not able to make a Finding in Fact about whether or not Mr Cowan looked at the letter of 11 January 2007 when it was lodged as a production in the process on 4 April 2008. The Tribunal was not aware of how many productions there were in the case and could not know whether or when Mr Cowan would have looked at this particular letter.

Mr Cowan accepts that he gave incorrect information to temporary Judge Wise on 3 December 2008 and then even when the letter was produced, sat silently. The Tribunal found this as a fact. There is no evidence of him apologising or explaining the position.

In respect of the facts found the Tribunal considered that Mr Cowan should not have dealt with and responded to Mr Hardey in the way that he did. The Tribunal felt that he had let his animosity overflow into his professional life. His reaction to the situation was a human reaction but not a professional reaction. Mr Cowan did not accept in his oral evidence that there was any animosity between him and Mr Hardey. However it was clear from Ms C's evidence about the comments made between them at the court doors that there was indeed a great deal of animosity between Mr Hardey and Mr Cowan. The Tribunal found Ms C's evidence with regard to this to be the most credible and reliable as she would have no reason not to be completely truthful about this issue.

The Tribunal consider that if Mr Cowan's actions had been purely accidental he would have apologised. The Tribunal further consider that solicitors should act with integrity and that a competent and reputable solicitor would have so apologised. The Tribunal noted that Judge Wise, who was dealing with the matter, did not require an

explanation from Mr Cowan. However, from Judge Wise's note it would appear that the Judge was under the misapprehension that Mr Cowan had indicated that he could not remember giving the undertaking when the true position was, as accepted by Mr Cowan, that Mr Cowan had denied ever making the undertaking. The Tribunal do not accept, given the history between Mr Cowan and Mr Hardey that Mr Cowan would have forgotten that he had given the undertaking or that he would have not checked the matter prior to the hearing, especially as the letter of 11 January 2007 had been in the productions since April 2008. The Tribunal did not consider that Mr Cowan had adequately explained why he stated when he appeared in court in December 2008 that he had not given the undertaking. Mr Cowan's evidence was also inconsistent in this regard in that his evidence in his first response to the Complaint is that he had no recollection of how he introduced himself before Lord Brailsford and yet in cross-examination he appears to now be saying that he did honour the undertaking to appear for both parties and that it was the judge and the clerk in the case who got it wrong and misunderstood the situation. The Tribunal did not accept this. It is important for the reputation of the legal profession that solicitors honour undertakings given to each other. Failure to appear on behalf of a party is a discourtesy and could put the other party in default. In this case the Second Respondent did not honour the undertaking and also denied that he had given it. He accordingly gave the Court misleading information without correction. Given the length of time that passed between 12 January 2007 and the hearing on expenses in December 2008 the Tribunal cannot be satisfied on the balance of probabilities that Mr Cowan deliberately lied to the court but consider that the whole way in which he had dealt with the matter was not the way that a competent and reputable solicitor should have dealt with it and accordingly made a finding of unsatisfactory professional conduct. The Tribunal did not find his conduct sufficiently serious and reprehensible to amount to professional misconduct.

The result of Mr Cowan failing to appear on behalf of both parties was just to have the case continued which would have happened if he had appeared on behalf of both parties in any case. There was accordingly no harm caused to Mr Hardey. Although Mr Hardey was annoyed by this it was only a small aspect of the whole animosity between Mr Hardey and Mr Cowan. The Tribunal note that Mr Hardey saw the Interlocutor of 12 January 2007 in May 2007 but did not complain about it at this time. The Tribunal do not consider that there was any significant loss or

inconvenience or distress caused to Mr Hardey by this particular incident and therefore do not consider it appropriate to make any award of compensation.

Head of Complaint 1B

Head of Complaint 1B was:-

"(1B) Mr Cowan stated that there was an issue on Mr Hardey's title to sue because he (Mr Hardey) did not own his residence. Although Mr Cowan had never proceeded to procedure roll debate on that, he wished to raise it as part of Mr Hardey's overall conduct as Pursuer. When Lord Emslie questioned this omission, Mr Cowan then stated that the reason the plea of title to sue had never been taken, and the cause never taken to procedure roll was because the Defender had only "recently" learned that Mr Hardey did not own his residence and therefore had no reason to ever raise the matter earlier. This was wholly inaccurate and wrong. Mr Cowan and the Defender knew Mr Hardey did not own his house by virtue of an earlier Notice of Opposition to an earlier Motion dated 12 January 2007, in which Mr Hardey had made this fact clear."

The Tribunal considered that it was quite clear from the evidence that Mr Cowan had known since September 2006 that Mr Hardey did not own the property and there did not appear to be a dispute between the parties with regard to this. It appeared that Mr Hardey was the executor and occupier of the property. Ms C's evidence was that Mr Cowan stated that he had only recently learned that Mr Hardey did not own his own house. Ms C's evidence was also to the effect that Mr Cowan stated that he had only recently learned that Mr Hardey did not have title to sue. Ms C's position was that Mr Cowan should have taken the issue of title to sue properly in January 2007. Mr Cowan's position was that he could not do this until Mr Hardey amended his pleadings by deleting the averment that he was the owner. Mr Cowan's position also appeared to be that because Mr Hardey was the licensee he perhaps did have a title to sue but that Mr Cowan was investigating case law to the effect that this might not be the case. The Tribunal noted that Ms C's email specifically stated that Mr Cowan had indicated that it was only recently that he learned that Mr Hardey did not own his own property. Mr Cowan stated in his first response that he had no recollection of using

the word "recently" but later accepted that he had used the word recently but submitted that it was in a different context.

The Tribunal considered it significant that Ms C accepted that it was only when Mr Hardey took out the averment that he was the owner that the matter of title to sue could be taken to legal debate. The Tribunal also noted that Mr Cowan had been reasonably consistent with regard to his account of what had happened in his original submissions, his answers and his evidence. The Tribunal was satisfied on the balance of probabilities that the word "recently" was used by Mr Cowan in his submissions in connection with the issue of title to sue and made a finding in fact to this effect. The Tribunal however did not find the evidence conclusive as to the meaning of these words used. The Tribunal consider it inherently improbable that Mr Cowan would have said the words as stated by Mr Hardey and Ms C. Given the whole evidence, the Tribunal cannot think of any reason why Mr Cowan would have said that. This is especially the case given that there had been a general plea to title on record since May 2007 which was what Mr Cowan was relying on in order to make his more detailed plea of no title to sue 18 months later. The Tribunal noted that there were no supporting averments when the general plea to title was put on record in May 2007 but the Tribunal did not consider this to be particularly significant given that at this stage Mr Hardey still had an averment in that he was the owner of the property which was in fact untrue. It may be that Mr Cowan could have made a specific plea of title backed up by averments at an earlier stage but the Tribunal found his explanation that he was researching case law to be a reasonable one. The Tribunal also noted that Mr and Mrs B were present in court at the time when Mr Cowan is alleged to have stated this and they would have known that this was clearly not true.

Although the Tribunal accepted that Ms C's evidence corroborated what Mr Hardey had stated in connection with the words used by Mr Cowan, the Tribunal considered that the meaning could have been different and was open to interpretation. The Tribunal considered that Mr Cowan's interpretation of the words used made more sense, as per the evidence.

The Tribunal however do find that the Professional Conduct Committee erred when they stated that Ms C did not corroborate Mr Hardey in respect of the words used by

Mr Cowan. The Law Society may accordingly have misdirected itself in considering this matter. The Tribunal however has had the benefit of hearing evidence and submissions and has made its own Findings in Fact based on the evidence.

On the basis of the Findings in Fact made by the Tribunal, the Tribunal do not consider that Mr Cowan's conduct could amount to unsatisfactory professional conduct. The Tribunal have not accepted that Mr Cowan misled the court in connection with only recently finding out that Mr Hardey did not own his own property and accordingly there was nothing in his actings which would be contrary to what a competent and reputable solicitor would do.

The Tribunal considered Mr Hardey's submissions in connection with the Law Society acting manifestly unfairly in respect of the way that they dealt with his complaints due to bias against the Appellant. It was clear from the evidence that there is a long history between the Appellant and the Law Society. However the evidence from Ms D, who dealt with Mr Hardey's case, was that she had not heard of Mr Hardey prior to dealing with matters and the Tribunal had no reason to doubt this. It is unfortunate that there were errors made in the investigation and determination of Heads of Complaints 1A and 1B. The Tribunal however did not hear any evidence which would suggest that any errors made were as a result of any bias or conspiracy against Mr Hardey. The Tribunal did not consider that there was anything sinister in the way that the Law Society dealt with the case or anything that was particularly different from any other cases which have come before the Tribunal by way of Appeal. The Tribunal was not satisfied that there was any lack of fair play by the Law Society.

In connection with Mr Hardey's contention that his not having a copy of Judge Wise's report at the time of the Law Society's determination was prejudicial to him, the Tribunal can understand why the Law Society have to have procedures in place when dealing with third party complaints. In this case however, the Tribunal do not see what could have been in Judge Wise's report which would have raised confidentiality issues. Ms D accepted that this report would probably be given to Mr Hardey if they were dealing with the case now. The Tribunal accept that the Law Society, when dealing with Mr Hardey's case, was dealing with a new system of legislation and

would be learning as it went along. The Tribunal did not consider that the lack of Judge Wise's report would have been severely detrimental to Mr Hardey and in any event Mr Hardey had a copy of Judge Wise's report prior to the hearing before the Tribunal and accordingly any defects in the Law Society's decision in this regard have been remedied before the Tribunal, which has heard evidence, seen documentation and come to its own decisions in respect of both Heads of Complaint.

In this case the Tribunal received a lot of evidence and a lot of submissions in connection with matters which were extraneous to the specific complaints being considered by the Tribunal. The Tribunal was not satisfied that Mr Hardey's complaints were borne of malice but did note the piecemeal way in which the complaints were made and had concerns about Mr Hardey's use of the words "years of legal ramifications" in his correspondence with Mr Cowan. The Tribunal also considered it unfortunate that the Law Society had in the first instance not been prepared to allow Ms D to give evidence in the case. The Tribunal considered it unnecessary to deal with a number of issues raised in the extensive submissions lodged as it was not considered that these were particularly relevant to the main issues to be decided.

The Tribunal noted that Mr Hardey had levelled some personal criticisms against Mr Cowan's representative Mr Dunlop. The Tribunal had no concerns with regard to Mr Dunlop's actings in this case.

Vice Chairman