

PROFESSIONAL ETHICS

OUR DUTIES TO THE COURTS

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Introduction

As has already been eloquently explained by Mrs Webster, clients of today are very aware of their rights. They are all too ready to complain and to find fault. It is very important that you do nothing which could give rise to a justifiable complaint and that you appreciate that there has to be an element of “defensive practice” because unfortunately in today’s competitive and consumer led society the lawyer must always protect his or her own position. This is true for our professional relationships with the courts as well as with clients, colleagues and the public at large.

The new Scottish Legal Services Ombudsman has, to date, supported self-regulation subject to the regulation of our Profession remaining efficient and effective. The Scottish Parliament gave a remit to a Justice Committee to look at the regulation of our Profession. Initially, it was a wide remit, but it has now been narrowed very much to how the Law Society deals with complaints against solicitors, and you will know from recent press headlines, particularly those in “The Herald”, that this is now a hot potato for the Profession. Ten discussion points have now been published and each and every solicitor has a responsibility to consider those discussion points and provide a view. There is talk of a single gateway for complaints, that gateway might be the Ombudsman’s Office, it may even be something independent from the Law Society. That authority would identify with the client the complaints and deal with the initial stages of correspondence and the investigation. The cost of all of this would likely be borne by the Profession.

At present we self regulate. We are part of a liberal Profession, we have the privilege of higher education and we also enjoy the privilege of self-regulation and that marks us out along with doctors, architects and chartered accountants. However, we have corresponding duties and in the Legal Profession, because we are the gatekeepers to the Courts, there are significant corresponding duties to the Profession's certain rights. The Scottish Consumer Council argues that there should be an independent body responsible for investigating complaints and regulating our Profession and as indicated the issue is very much on the agenda at present.

A lawyer is many things to many people. In Scotland he is advisor, agent, negotiator, legal draughtsman, advocate and often a form of social worker to his client. There is the wider role as being "the minder of justice". The lawyer is there to see fair play and to ensure human rights are defended. Ultimately though, the lawyer must serve the cause of justice, maintain the authority and dignity of the Courts be faithful to clients, be candid and courteous in his dealings with his fellow professionals and "be true to himself".

In other words the best form of Risk Management is that if a lawyer is not true to himself he might as well give up the practice of law and if his conscience tells him he might be doing something wrong then the lawyer should listen to his conscience.

I want now to deal with defending complaints.

1. Professional Misconduct

The current definition of professional misconduct as normally applied in Scotland, derives from the leading case of Sharp -v- the Law Society of Scotland (1984 SLT at 313):

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"There are certain standards of conduct to be expected of competent and reputable solicitors. Any departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.

Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered, and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made."

2. Unsatisfactory conduct

Unsatisfactory conduct is defined as:

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"conduct by a solicitor which does not amount to professional misconduct but which involves a failure to meet the standard of conduct observed by competent solicitors of good repute".

This definition has been evolved by the Law Society since November 2000, in place of the previously used “unprofessional conduct”. It has no formal statutory or court origin, but has been found useful in other jurisdictions for cases which fall short of the high standard necessary to meet the “Sharp” definition of professional misconduct, but where there is seen to be a significant failure to meet desired standards.

3. Contempt of Court

The test generally adopted is that in the unreported case of Kane -v- Carmichael, 20 January 1993, which is found in a commentary on the case of Caldwell -v- Normand, 1993 SCCR 624. The opinion of Lord Hardie in the case HMA -V- Graeme George Dickie 14th February 2002 confirms that:

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“an intention to challenge or affront the authority of the court or to defy its orders is a necessary prerequisite for a finding of contempt of court”.

It is clear that even gross recklessness can never amount to contempt of court. The test is whether there was a wilful challenge or a wilful failure in defiance of the authority of the court.

This raises interesting issues about the potential conflict between Bench and Bar as shown in a further decision made by Lord Hardie’s in HMA v Tarbett & Ors on 29th August 2003. In it, his Lordship made a finding of contempt of court against an advocate.

Donald Findlay QC, in defence of the advocate acknowledged at the outset the privileges associated with membership of the College of Justice as an advocate or a solicitor with extended rights of audience.

One of these privileges was described as:

“the mutual courtesy and respect between members and senators, attributable to the bond of mutual trust between them”.

Trust, he said, was at the heart of the relationship.

The Tarbett case was instrumental in highlighting the very real possibility of serious conflict between Bench and Bar and of course extending the scope for accusations of professional negligence. It also highlighted the fact that one of the most important reasons for contempt findings against solicitors and advocates is caused by their absence rather than by their presence.

Although Lord Hardie originally fixed a hearing to consider two possible counts of contempt of court – failure to appear and deliberately misleading the court about the latter – in the event he only made a contempt finding in relation to the latter, and the bulk of the Judgment relates to that and allied considerations:

“I ... agree that an advocate has an absolute duty of honesty and frankness in his dealings with the Bench. Such a duty extends to all members of the College of Justice in their dealings with the Court. Breach of that duty is, in my opinion, not only the most serious act, which a member of the College of Justice could commit but may also amount to contempt of court in certain circumstances.”

Whether or not one considers this the most serious act, we must accept that in this case it amounted to contempt of court. Indeed, prevarication or dishonesty on the part of a witness, never mind an officer of the court, is generally assumed to be a serious contempt, although direct dishonesty may more commonly be dealt with after the fact as perjury.

Thus, the submissions and Judgment in *Tarbett* focus on the advocate’s explanation for his absence, rather than on the absence itself.

The case does of course, also raise general points of political, as well as practical significance for the administration of justice.

HMA v Tarbett had been the subject of several adjournments. The advocate who was the subject of the contempt finding had, to external appearances, triple-booked himself to appear in this case, another High Court trial called *HMA v Casey* and a first diet in Edinburgh Sheriff Court. Even had the impugned advocate turned up punctually, the *Tarbett* trial could not have proceeded because counsel for the third accused had received

no papers from his instructing solicitors. Furthermore, even if he had received papers, he would not have been able to conduct the trial on behalf of the third accused, because he had previously been involved in the same case for the accused. Lord Hardie observed:

“It was clear that solicitors and counsel for the third accused simply expected the case to be adjourned, despite the history of adjournment.”

In Lord Hardie’s opinion the Tarbett Case disclosed a practice on the part of a minority of solicitors to fail to accord cases in the High Court of Justiciary the necessary priority of preparation to ensure that they may proceed to trial at the first opportunity. It also disclosed a practice by a minority of counsel and solicitors with extended rights of audience of obtaining adjournments on the basis that the individual appearing has had inadequate opportunity to prepare for trial. Thereafter, at the adjourned hearing a different counsel or solicitor appears and seeks an adjournment for the same reason. In his opinion:

“Such practices are undesirable and are contrary to the interests of justice. They result in unnecessary delays in the commencement of trials, with adverse consequences for the accused, particularly if he is in custody, as well as witnesses and prospective jurors.”

Lord Hardie’s comments about the consequences of deferring trial are hard to ignore. Aside from the inconvenience and waste of the time of all concerned, with a consequent

cost in public money and private economic inefficiency, there is the reduced value of certain types of evidence and, ultimately, the prolonged incarceration of presumptively innocent accused. Concretely, as Lord Hardie pointed out at the beginning of the Tarbett Judgment, the jury acquitted the fourth accused in the Tarbett case after he had spent almost eight months in custody awaiting trial.

However, for there to be a finding of contempt of court, there requires to be a contemnor. Leaving aside the dishonesty imputed to the advocate in the Tarbett case, would a similarly situated advocate or solicitor, who failed to appear in one court because she or he was due to appear in another, be guilty of contempt of court?

It is well-established that contempt is quasi-criminal in nature, with all that that implies in terms of gravity of consequence, the need for strict procedural justice and, normally, an element of *mens rea*. As to the last point, it is equally well-established that, before a finding of contempt can be made, there was the necessary intention by the contemnor to challenge or affront the authority of the court. This was the test applied by Lord Hardie to the “dishonesty” limb of the Tarbett case advocate’s contempt hearing. He also accepted, on the authority of *McMillan v Carmichael*, and following his own decision in *HMA v Dickie* that mere recklessness was not sufficient to constitute contempt.

Muirhead v Douglas

There remain, however, sources of unease in the case law. One is a 1979 contempt finding which was upheld in the Supreme Court. In *Muirhead v Douglas*, a solicitor was fined £25 for arriving 25 minutes late. He had transacted business with clients who lived

close to his office shortly before he was due to be in court for a trial. He said that he had left instructions with the court officer to advise if the trial in front finished early. The court officer telephoned his receptionist, who did not realise the urgency of the matter. Lord Cameron took the view that an experienced sheriff court practitioner must:

“be held to be well aware that the prediction of the duration of summary criminal procedures is a hazardous matter [The] complainer deliberately chose to take a risk that he might for his own personal professional benefit bring about (as in fact he did) an avoidable and quite possibly serious delay in the due despatch of the court’s criminal business”.

This is worrying both because of the authority of Lord Cameron and because of the closeness of the facts to the sort of bets-hedging which clearly galls Lord Hardie and others. The former commented in this case, in the context of a refusal to lighten the penalty:

“The complainer’s conduct displayed a levity of regard for his professional duty ... and I am far from thinking that in the admitted circumstances the penalty imposed was harsh and oppressive.”

Muirhead is a questionable authority. It runs against the trend of the later cases dealing with lawyers who fail to appear in court and against Lord Hardie’s own assumption in Tarbett (albeit in a different context), and earlier in *HMA v Dickie*, that recklessness was

insufficient to establish contempt. Muirhead may also be challenged on the basis that the court appears to have been influenced by the publication contempt case of *Hall v Associated Newspapers* in that:

“Counsel was constrained to concede that there could be such a degree of carelessness or disregard of obligations leading to interference with or material disruption in the course of the administration of justice as to be equated with wilful or deliberate disobedience or interference.”

Publication contempt has traditionally been treated as, in effect, an offence of strict liability, a position formalised shortly after the Hall decision in the Contempt of Court Act 1981. It does not provide a ready comparator for the type of contempt alleged against solicitors and advocates in these cases.

Notwithstanding the social, economic, political and philosophical controversies surrounding the administration of Scottish justice, and the largely accusatory spotlight in which judges and lawyers mostly do their best, it is hardly surprising that relations between Bench and Bar occasionally fray. Obviously, too, it is in a relationship of trust that a perceived breach of it provokes the greatest storm. It is submitted, however, that the contempt jurisdiction, in its penal aspect, is there as a response to a deliberate undercutting of the efficacy of the court, and not as a guarantor of its seamless running.

Kyprianou v. Cyprus

Another interesting case surrounds the conviction of a Cypriot Advocate for contempt of court on February 14th 2001 at the Assize Court of Limassol. Mr Kyprianou had been conducting a cross-examination of a prosecution witness, a police constable, at a murder trial and following a question he had put to the witness he claims that the court interrupted him. He maintained that he felt sufficiently aggrieved to seek permission to withdraw from the case.

The Government on the other hand said that the court had only made a routine intervention with a simple and polite remark and that Mr Kyprianou had interrupted the court before it had been able to complete its remark. It contended that Mr Kyprianou had over-reacted by refusing to proceed with his cross-examination. It described the “unacceptable image” that Mr Kyprianou’s behaviour had created in the court-room and the “feeling of intimidation and terror” for the court members. The Government claimed that it had allowed breaks in the proceedings for Mr Kyprianou to apologise but when this was not forthcoming it ruled that he should be sentenced to five days imprisonment. The court asserted that unless this type of behaviour was prevented there would be serious implications for the authority and integrity of justice.

Mr Kyprianou duly served the five days but also filed an appeal to the Supreme Court. However, after two months the appeal was dismissed on the grounds of its members agreeing with the Assize Court that Mr Kyprianou had been responsible for the tense atmosphere and that his actions were unacceptable.

“It is our finding that Mr Kyprianou, by words and conduct, showed disrespect to the court and committed the offence of contempt.....and it was up to the Assize Court to deal with the contempt and to decide the means for the treatment and punishment of the person responsible for the contempt. No reason has been shown which justifies our intervention as regards the sentence imposed.”

In May 2001, this prompted the Lord Chief Justice to issue a Practice Note in which he stated:

- a) if an offence of contempt is admitted and the offender’s conduct was directed to the magistrates “it will not be appropriate for the same bench to deal with the matter”.
- b) In the case of a contested contempt, “the trial should take place at the earliest opportunity and should be before a bench of magistrates other than those justices before whom the alleged contempt took place. If a trial of the issue can take place on the very day of the alleged offence, such arrangements should be made taking into account the offender’s rights under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

Mr Kyprianou went on to claim that he had not been heard by an independent and impartial tribunal since the same court before which the alleged contempt had been committed had also found him guilty and had sentenced him.

After much legal debate Mr Kyprianou won his case. The Court ruled that there had been a breach of the principle of impartiality which was necessary to uphold public confidence in the justice system and that there had been a violation of Article 6 of the Convention. It was a landmark ruling and obviously one that was very important in the context of contempt of court.

4. Anderson Accountability

In the Anderson Appeal reported in 1996 SCCR at 131 the Court acknowledged the tension between the principles which give a wide discretion to Counsel (and that includes solicitor or solicitor-advocate) to conduct the defence as he or she thinks fit, and the duty of a Court of Criminal Appeal to correct a miscarriage of justice on the grounds that the accused did not have a fair trial.

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“Counsel's independence must be preserved if he is to fulfil his duty to the court and to act in the public interest upon his professional responsibility. Any erosion of this principle would be bound to lead to uncertainty, and with it to the risk of delay and confusion in the conduct of criminal trials, which rely to a substantial extent for their fairness and efficiency on the right of counsel to exercise their own judgement as to the way in which the defence is conducted.”

5. “Anderson Evolution”

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Recent evidence of “Anderson Evolution”

- **Hemphill v HMA 2001 S.C.C.R 361**

Failure to call rebuttal evidence which was later said to have been obtainable, to counter a crucial Crown inference against the accused. Appeal allowed.

- **Garrow v HMA 2000 S.C.C.R 772**

Failure to re-precognosce and call an available defence expert on an alternative explanation whereby a crucial inference against the accused was then left unchallenged.

- **Wright v HMA 2000 S.C.C.R 638**

Alibi defence presented on basis of erroneous date. Although the Crown seem to have initiated the error, and the court failed to correct it, the defence solicitor is alone in taking the blame.

- **Millar v Dickson plus other similar cases 2000 S.C.C.R 793**

Not taking the “Temp Sheriff” point, which had succeeded in the Starr and Chalmers cases, was not found to be a basis for an Anderson appeal.

Another landmark case in Anderson terms may be the recent decision AJE -v- HMA 2002 SCCR where the decision of an eminent Q.C., in an extremely serious case involving rape of two children, to adopt a “softly, softly approach and deal with the mother and children gently on a non-escalating basis” was the subject of serious criticism by the Appeal Court of the “minimalist” way the defence was conducted. The Appeal was allowed. The accused represented himself.

Anderson drew the distinction between a failure by an Advocate to present the defence that the accused instructed him to present and the making of a judgement by an Advocate as to the manner in which the defence should be presented in the course of the Trial. In the former case it can be said that the accused has been deprived of his right to a fair trial. In the latter case the accused is bound by the way in which his defence has been presented on his behalf. The Lord Justice Clerk felt that the distinction should not be

applied too rigidly and there could be circumstances in which the Court could hold that the conduct of the defence at the Trial was such as to deny the accused a fair trial.

A helpful view on how Anderson cases have “blossomed” can be found in Sir Gerald Gordon’s commentary on the Jeffrey case 2002 SCCR 837.

“The Defence case must not merely be presented, but be properly presented and also must be properly prepared”.

If an accused instructs the taking of a certain line, Counsel must obey or withdraw.

Following upon Anderson there is a recent decision which you will find in the Scottish Law Gazette October 2002. Vol 70 No 5 Wright -v- Paton Farrell & Others and the opinion of T G Coutts, QC sitting as a Temporary Judge, 27th August 2002. Here it was recognised that Barristers and Advocates have traditionally enjoyed immunity from suit if claims of negligence are raised in relation to the conduct of cases. The famous case of Batchelor -v- Pattison & Mackersy (1876) 3R914 establishes that solicitors are officers of the court and owe the court various duties which can transcend duties owed to a client but generally when a counsel is employed the solicitor is bound to follow his instructions. In England the Rondel -v- Worley 1969 AC191 case established that solicitors “should not blindly follow counsel”.

This has implications for questions of negligence when they arise in the context of the conduct of hearings. In this case a client decided to sue his former solicitor in relation to his conduct of the trial claiming that his solicitor had been negligent. He advanced a human rights argument that he had been denied a fair trial because of negligence and claimed a miscarriage of justice had resulted. He did not aver that he would have been acquitted but for this negligence. Various breaches of service provided by his agent were cited, for example failure to precognose certain crown witnesses, failure to pin down precise dates and times of offences which were alleged to have taken place relevant to a plea of alibi.

The Temporary Judge's view was that Batchelor still applied. The Temporary Judge found that a solicitor did enjoy immunity. It was clear therefore that if someone is tried on a criminal charge and has been convicted there is no purpose for him to assert that his Counsel has been unskilful unless he can prove, or could prove, that he would have been acquitted had his Counsel conducted the case with due care and skill. He would have to prove that on balance of probability. This is an interesting case and worthwhile reading. The Temporary Judge's interpretation of immunity is in keeping with the traditional interpretation of the situation as far as Scottish Solicitors are concerned.

6. **Inadequate Professional Services**

Section 33 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides:

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“Where any person with an interest has made a complaint (a conduct complaint) to a professional organisation that a practitioner has:-

- (a) been guilty of professional misconduct, or*
- (b) provided inadequate professional services, the organisation shall investigate.....”*

Many problems arise from the definition of a person "having an interest". The Law Society, on the basis of a 1995 Counsel's Opinion, applies a wide, even generous, interpretation of these provisions, making it virtually impossible to knock out, or even to edit or sift, any complaint whatever its source or merit.

It is a mistake to attempt any exhaustive definition of an “interest” for the purposes of Section 33 of the Law Reform Act 1990.

One must distinguish between “the busybody” (who has no right to interfere in other people’s affairs) and the person affected by or having a reasonable concern with the matter to which the complaint relates, the latter being the person whose complaint has to be entertained.

One has to look at the underlying statute to see if it gives any clue as to the nature of the qualifying interest and, finally, the identity of the complainer need not be the sole consideration.

The Law Society has two objectives in terms of statute:-

- (a) the promotion of the solicitor’s profession in Scotland, and
- (b) the promotion of the interest of the public in relation to the profession.

The Law Society need not waste time on “the busybody” but it must take cognisance of information having a bearing on the achievement of these objectives and in particular protecting the interest of the public.

The definition of I.P.S. is found in s.65 (1) of the 1980 Act as amended:-

“Inadequate Professional Services” means “professional services which are in any respect not of the quality which could reasonably be expected of a competent solicitor....including reference to not providing professional services which such a solicitor ought to have provided”.

7. Legal Defence Union Experience - the risk areas for the busy Lawyer

DISCUSSION POINTS :-

*Slide 15***A. CRIMINAL**

1. The Statutory Factors
2. The Statement of Defence - how important is it?
3. The multiple pinks.
4. The Mandate problem - Mr McKinstry's Judicial Review.
5. Gifts and Goodies - humanity or misconduct? The Code of Conduct.
6. The Legal Aid Compliance Code under the 1997 Crime and Punishment Act.
7. Contempt of Court - recent cases.
8. The "Anderson" accountability.
9. S32 Legal Aid Act.

*Slide 16***B. THE GUARANTEE FUND ENQUIRY**

1. Accounts Rules - the usual offenders
 - (i) Designing cheques Rule 6(2)
 - (ii) Keeping a list of inter-client transfers Rule 8(3)(a)&(b)
 - (iii) Client identification - Money Laundering Rule 24
 - (iv) Taking the fee before raising the Fee Note - Rule 6(1)(d).
 - (v) The solvency of the firm – no longer private - Rule 8
2. Client identification - the husband and wife.
3. Client identification - the Company or Club.
4. Linked Conveyancing transactions.
5. The insolvency question – treatment of WIP and family loans
6. Sanctity of Deeds including Powers of Attorney

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1. The ambulance chaser - can we compete with Claims Direct Companies?
2. The Advocates' fees.
3. The Sheriff Officers' outlays.
4. The Expert's Report.
5. Promises to third parties.
6. Tell the client the truth on prospects, on progress and on costs.
7. Husband and wife - the joint sale operation and how to account.
8. Warranting your client.
9. The Power of Attorney for the elderly - new rules.
10. The Hospital Will.
11. Dodging those Residential Care costs - don't advise at all?
12. The defamation risks.

Arising from Section 32 of the Legal Aid (Scotland) Act 1986 where Legal Aid is available to a person in connection with any proceedings solicitors shall not take any payment in respect of any advice given or anything done in connection with such proceedings during any period when Legal Aid was so available except for such payment as may be made in accordance with the Act. Furthermore, the fixed payment scheme covered by Para. 47 of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 states “where the Board grants an application for change of solicitor under Regulation 17 (3) of the Criminal Legal Aid (Scotland) Regulations 1996 there should be paid to each of the solicitors who act for the assisted person in the relevant proceedings an equal part of the total amount payable in respect of those proceedings by virtue of Para. (1) above and for the purposes of calculating that total amount Para. (5) shall not apply.” Accordingly, solicitors must recognise that where they are registered as Criminal Legal Aid Practitioners with the Scottish Legal Aid Board they cannot breach Section 32. The terms of the fixed payment regime do not alter Section 32. Accordingly any payment received whether to meet exceptional outlays or to provide fees are specifically prohibited and will give rise to complaints and in certain cases there will be sufficient evidence to bring a prosecution of misconduct before the Scottish Solicitors’ Discipline Tribunal should the Law Society Council consider the matter sufficiently serious.

8. Complaint Handling and the Complaints Partner responsibility

Article 6(1) of the European Convention on Human Rights

Of course there is also concern about the influence of ECHR

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“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Reference should be made to the approach of the Judicial Committee of the Privy Council in the case *K -v- HMA* (Privy

Council 29th January 2002) and HMA -v- Watson & Burrows (Privy Council 29th January 2002).

The Crown appealed against two decisions of the High Court dismissing criminal proceedings on the basis that delays in the proceedings meant the Trials did not take place “within a reasonable time” in terms of Article 6 (1). In the case of Burrows and Watson two police officers were accused of committing perjury at a Trial in April 1998, the Sheriff having expressed an opinion to that effect in open Court. Their Trial would proceed in August 2000. In the case of K -v- HMA, K, born in December 1984, was cautioned and charged in October 1998 with rape, sodomy and other indecent practices committed over a period of Twenty months against three younger cousins. The Convention does not lay down precise time limits but looks to an objective common measure of protection; that the right to Trial within a reasonable time was a free standing one with the aim of protecting all parties against excessive procedural delays and that whilst prejudice to an accused was relevant to the question of reasonableness it was not necessary to show that he had suffered, or would suffer, any actual prejudice. Further the Convention was concerned not with departures from the ideal but with basic rights and freedoms and had regard also to public interest. A relatively high threshold had to be crossed before it could be said in any particular case that a period of delay was unreasonable and it was only when the period was one which on its face gave grounds for real concern that it was necessary to look into the detailed facts and circumstances and the onus passed to the State to explain and justify the lapse of time.

The European Court has identified three areas as calling for particular enquiry:-

- (a) the complexity of the case;
- (b) the conduct of the defendant; and
- (c) the manner in which the case had been dealt with by the authorities.

In the Appeals before the Privy Council the third factor was treated as the material one.

In the Watson and Burrows case there was a delay of twenty months from January 1999 to August or September 2000, that is between the date of charge and the actual date of probable trial.

It was held that this was not a period which on its face caused real concern nor did European Case Law suggest that such a period violated Article 6. In particular given the nature of the case there was a particular need for careful and independent examination of the conduct of policemen in their own interest and the officers were in no special category which required priority and the delay was not such as to jeopardise the effectiveness and credibility of the Criminal Justice System.

However, in relation to K the reasonable time requirement had, when dealing with children, to be read in light of the UN Convention on the Rights of the Child and the Beijing Rules under both of which, criminal proceedings, if brought at all, had to be prosecuted with due expedition. The delay was particularly undesirable where children were concerned and the Twenty seven month period in K's case was one which on its face gave ground for real concern. The case had not been treated with the urgency which it had undoubtedly deserved and no satisfactory explanation had been given for the lapse of time. The considerations pointed towards discontinuance of the proceedings and that was the remedy given.

Regard should also be had to the Opinion of the Court delivered by the Lord President in the Petition of the Council of the Law Society of Scotland -v- Alastair David Armstrong Hall 11th June 2002. There it was common ground that for the purpose of Article 6.1, the proceedings before the Scottish Solicitors Discipline Tribunal were concerned with the determination of a solicitor's "civil rights and obligations" as opposed to the determination of the criminal charge against him. The powers conferred upon SSDT under Section 53 (2) of the 1980 Solicitors Act empower the Tribunal to impose a number of penalties. These plainly impinge on a solicitor's right to pursue his profession. However, the proceedings are not of a truly criminal nature. Therefore the Discipline Tribunal cannot rely on decisions relating to criminal proceedings so far as

delay is concerned. What is before the Tribunal where an issue of delay is concerned is the determination of a contestation in respect of civil rights and obligations. The starting point is the date when Council of the Law Society made the complaint to the Discipline Tribunal thereby putting an issue of dispute as to professional misconduct the result of which could affect a solicitor's civil right to practise as a solicitor.

Advice on good practice

Each of us knows that today's clients are very aware of their rights and in many cases, all too ready to complain and find fault. It is therefore vitally important that you do nothing which could give rise to a justifiable complaint and everything to ensure that you can adhere to the highest standards of professional conduct.

The main advice therefore is:

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- Know the law, have a partner responsible for monitoring all professional practice developments, bring them to the attention of staff, have source materials readily available for consultation.
- Assess risk element at start of transaction, its complexity, conflicts, knowledge of the firm on the topic and whether there is sufficient time to do the job properly.
- Supervise your staff and ensure they are well trained – note communications with the clients, follow-up files, record all phone calls and interviews and ensure that there is a foolproof filing system.

- Give a reasonable estimate of fees at the start of the transaction and ensure that the client knows exactly what you are prepared to do for them. I recommend writing a Letter of Engagement.
- Follow the Accounts Rules like a hawk and ensure that the relevant staff are fully conversant with the regulations (see appendix).
- Keep the client informed of all developments and explain the procedure by way of simple instructions and letters.

Third Parties

When it comes to instructions being received from a third party, do ensure that the client can provide you with written instructions that he/she wishes the third party to act. You must take care to ensure that the instructions received are actually what the client wants and in the case of Partnerships do ensure that you are clear about whether you are acting on behalf of individual partners or on behalf of them all. Never make assumptions however well you know your client or the third party.

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In the event of any mistake being made, be transparent and sort it out as quickly as possible. If necessary, especially if the situation involves a conflict of interest or a potential conflict of interest, direct the client elsewhere for independent advice.

Conclusion

Ladies and Gentlemen

I return to where I began, namely to reiterate just how important it is that we accept every opportunity to examine the code of conduct that governs the legal profession and ensure that we have done everything possible to cover our backs when it comes to the pursuit of the highest level of professional standards. Sadly, too much of our time is wasted defending solicitors who have, either through ignorance or negligence, not appreciated what has been required of them and in many cases been guilty of ignorance about appropriate court procedures. It is always good to take stock and I am very grateful to the Conference organisers for this opportunity today.