

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

FINDINGS

in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**GEORGE S ROSS, represented by Brodies LLP,
58 Morrison Street, Edinburgh**

Respondent

1. A Complaint dated 9 March 2023 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh (hereinafter referred to as "the Complainers") averring that George S Ross, represented by Brodies LLP, 58 Morrison Street, Edinburgh (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.
2. There was a Secondary Complainer, James McGrory, 35 Kilrymont Road, St Andrews.
3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.
4. In terms of its Rules, the Tribunal set the matter down for a virtual procedural hearing on 6 June 2023 and notice thereof was duly served on the Respondent.
5. At the virtual procedural hearing on 6 June 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by Niall McLean, Solicitor Advocate, instructed by James Jerman, Solicitor, Edinburgh. Both parties confirmed they were discussing a Joint Minute which would avoid the need for evidence to be

led. On Joint Motion the Tribunal continued the Complaint to a hearing to take place in person on a date to be afterwards fixed.

6. Subsequently, the Tribunal set a hearing for 22 August 2023 and notices thereof were duly served on both parties.
7. At the hearing on 22 August 2023, the Complainers were represented by their Fiscal, Gavin Whyte, Solicitor, Edinburgh. The Respondent was present and represented by Niall McLean, Solicitor Advocate, instructed by James Jerman, Solicitor, Edinburgh. Two Joint Minutes were lodged by the parties. The first, dated 8 August 2023, agreed facts in relation to the Complaint. The second, dated 18 August 2023, agreed two statements which were lodged on behalf of the Respondent and represented his evidence on the matter. In Answers lodged on behalf of the Respondent, he admitted three out of the four averred breaches of duty but denied that these breaches amounted to professional misconduct. No evidence required to be led. The Tribunal heard submissions from both parties.
8. Having given careful consideration to all of the information before it, the Tribunal found the following facts established:-
 - 8.1. The Respondent was admitted as a solicitor in Scotland on 11 October 1978. He was employed as a partner from 1 May 1998 to 31 October 2013 at Archibald Sharp. From 31 October 2013 to November 2016 the Respondent was employed as a Consultant at Archibald Sharp. Thereafter the Respondent elected not to renew his Practising Certificate and was employed as a legal executive at Archibald Sharp until 30 November 2022, when he retired.
 - 8.2. The Respondent was first instructed on behalf of the Secondary Complainer in around November 2008 when he was instructed in relation to the winding up of the estate of the Secondary Complainer's mother.
 - 8.3. The Secondary Complainer's mother's will was executed on 1 September 1999 (the Will). The Will named the Secondary Complainer as one of three executors of the estate alongside his brothers, Brother "X" and Charles McGrory.

- 8.4. Brother "X" acted as the principal point of contact and gave the Respondent and his firm instructions on behalf of all three executors in relation to the winding up of the estate of the Secondary Complainer's mother.
- 8.5. The executry concluded in March 2009 and the Secondary Complainer signed the asset valuation forms and financial statement.
- 8.6. The Respondent was contacted in January 2013 by the executors in relation to the proposed conveyance of 31 Tabard Road, Glasgow (the Property). The Property was held in trust by the executors having previously been owned by their mother.
- 8.7. The Respondent's file of papers from the original executry for which he received initial instructions in 2008 has been destroyed, except for certain key documents, due to passage of time. Accordingly the original letter of engagement is no longer available. The Respondent's normal practice would have been to send an updated letter of engagement on receipt of the further instruction in 2013. No such updated letter of engagement can be located in the Respondent's files in respect of any executor and it therefore appears that no letters of engagement have been prepared in this instance.
- 8.8. The Respondent was first contacted about the conveyance of the Property by Charles McGrory on 23 January 2013. Charles McGrory asked for the title deeds to the Property to be sent to Brother "X". The Respondent sent those documents by email to Brother "X" on 23 January 2013.
- 8.9. A letter from Lints Partnership solicitors (Lints), dated 23 January 2013, was received by the Respondent on or around 24 January 2013. Lints was representing Mr Stephen Day.
- 8.10. Lints' letter dated 23 January 2013 attached a draft disposition which recorded the consideration for the transaction as '*certain good and onerous causes*'.
- 8.11. Lints' letter, together with the draft disposition, was sent by the Respondent to Brother "X" and Charles McGrory by email on 24 January 2013.
- 8.12. Later on 24 January 2013, Lints emailed the Respondent with a revised draft disposition providing for the Property to be transferred to Assure Developments Ltd (Assure). Assure

was a limited company composed of two directors, including Mr Day, who was also the sole shareholder of Assure. No further information was provided as to the reasons for this change.

- 8.13. On 25 January 2013, Charles McGrory emailed the Respondent with a copy of a document bearing to have transferred Brother "X"'s beneficial interest in the Property to him on 31 December 2008. That document was not witnessed or registered and had no legal effect on ownership of the Property, which remained held on trust by the three executors.
- 8.14. All three executors were required to sign the deed of disposition to transfer ownership of the Property.
- 8.15. The Respondent spoke to Brother "X" on 25 January 2013 and Brother "X" undertook to pass the principal copy of the disposition to the Secondary Complainer for execution.
- 8.16. On 30 January 2013, Charles McGrory attended the Respondent's office to discuss the transaction. The Respondent went through the terms of the disposition with him. Charles McGrory agreed he wished to sign the disposition. Charles McGrory also accepted that he would have no further interest in the Property thereafter. This attendance was recorded by the Respondent in a handwritten attendance note taken on the same day which stated: "Meeting with Charles McGrory, agreed to sign the disposition despite misgivings in earlier telephone calls in the last week. Charles McGrory had received assurances from his brother ["X"], that he would be paid equivalent of the value of his 1/3 share within the next few weeks."
- 8.17. Brother "X" returned the principal copy of the disposition to the Respondent under cover of letter dated 30 January 2013. This was received on 31 January 2013.
- 8.18. The disposition attached to Brother "X"'s letter dated 30 January 2013 stated, in capital letters, that the Property was to be disposed to Assure 'FOR CERTAIN GOOD AND ONEROUS CAUSES'. This disposition was executed by Brother "X" and the Secondary Complainer on 29 January 2013. Both signatures, including that of the Secondary Complainer, were in wet ink and had been witnessed by Angela Jean Huggan.

- 8.19. Charles McGrory executed the disposition at the Respondent's office on 31 January 2013. His signature was witnessed by the Respondent.
 - 8.20. The executed disposition was sent to Lints on 31 January 2013 to be held as undelivered.
 - 8.21. The transaction concluded on 7 February 2013 when Lints wrote to the Respondent, following a telephone conversation, confirming they were treating matters as settled and submitting the titles for registration.
 - 8.22. The Keeper of the Registers of Scotland accepted the disposition for registration. The date of registration was 8 February 2013.
 - 8.23. On 13 February 2013, the Respondent informed Brother "X" via email that the transaction had settled.
 - 8.24. The Respondent took instructions from Brother "X" throughout on the basis of the Respondent's understanding that Brother "X" was the executors' agreed point of contact. While the Respondent also engaged directly with and advised Charles McGrory on several occasions, at no time from the point of instruction to settlement did the Respondent interact directly with the Secondary Complainer.
 - 8.25. The Complainers contend that given the particulars of the transaction as well as the urgency required from his client, the Respondent should have raised this concern with all executors for whom he acted.
 - 8.26. After settlement, allegations of fraud in respect of the disposition were raised by the Secondary Complainer and Charles McGrory, related to the signature of the Secondary Complainer and a witness to the disposition.
 - 8.27. The Secondary Complainer submitted a complaint to the Scottish Legal Complaints Commission on 28 May 2018.
9. Having considered the foregoing information, the Tribunal found the Respondent guilty of professional misconduct in *cumulo* in respect that:

- (a) He failed to provide a letter of engagement to any of the executors in respect of their instruction to deal with the sale of the property in January 2013 (contrary to rule B4.2 of the 2011 Practice Rules);
 - (b) He failed to obtain proper instructions from the Secondary Complainer in respect of the transfer of title in relation to the property held under trust by the Secondary Complainer and other executors (contrary to rule B1.5.1 of the 2011 Practice Rules);
 - (c) He failed to act in the best interests of the Secondary Complainer in respect of the transfer of title in relation to the property held under trust by the Secondary Complainer and other executors (contrary to rule B1.4.1 of the 2011 Practice Rules); and
 - (d) He failed to communicate effectively with the Secondary Complainer in respect of the transfer of title in relation to the property held under trust by the Secondary Complainer and other executors (contrary to rule B1.9.1 of the 2011 Practice Rules).
10. Having heard further submissions in relation to sanction, publicity and expenses, the Tribunal pronounced an Interlocutor in the following terms:-

Edinburgh, 22 August 2023. The Tribunal having considered the Complaint dated 9 March 2023 at the instance of the Council of the Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh against George S Ross, represented by Brodies LLP, 58 Morrison Street, Edinburgh; Find the Respondent guilty of professional misconduct *in cumulo* in respect of his breaches of Rules B4.2, B1.4.1, B1.5.1 and B1.9.1 of The Law Society of Scotland Practice Rules 2011; Censure the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that brother 'X' will continue to be so designed.

(signed)
Colin Bell
Chair

11. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 16 OCTOBER 2023.

IN THE NAME OF THE TRIBUNAL



Colin Bell
Chair

NOTE

At the Hearing on 22 August 2023, the Tribunal had before it the Complaint, Answers, two Joint Minutes and Productions for the Respondent, which included two statements for the Respondent. In the course of submissions, Mr McLean submitted a Bundle of Authorities for the Respondent. No evidence was led. The Tribunal heard submissions from both parties.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal in answer to a question from the Tribunal clarified that the Complaint proceeded on the basis of the Respondent acting for the brothers, including the Secondary Complainer, as executors and not individuals. He submitted that the only question for the members of the Tribunal was whether the conduct outlined within the agreed facts met the test for professional misconduct. He directed the Tribunal's attention to the averments of misconduct at paragraph 6.

The first averment of misconduct was in relation to a failure to send a letter of engagement. This letter of engagement was required in relation to the Respondent's instructions from the executors regarding the sale of the property in January 2013. In his Answers, the Respondent stated that this was an administrative error. In his statement produced to the Tribunal, the Respondent indicated that this had been overlooked. This was a clear admission of a breach of Rule B4.2.

The Fiscal submitted that the remaining three breaches of duty overlapped with each other and that it would be best for them to be dealt with together. These were that the Respondent, in respect of the transfer of title, failed to: obtain proper instructions from the Secondary Complainer; act in the best interests of the Secondary Complainer; and communicate effectively with the Secondary Complainer. He submitted that these were admitted by the Respondent under explanation in the Respondent's Answers and statement that the Respondent understood that the three brothers had agreed that brother "X" was to be his point of contact and that this transaction was a re-instruction following on from the executry where brother "X" had been his main point of contact in earlier steps in the course of dealing with the executry.

The Fiscal explained that it was agreed by the Respondent that he did not correspond with the Secondary Complainer at all in the course of this transaction, from the very outset of taking instructions up to the completed transfer. It was the Society's position that he should have. The Fiscal submitted that the Respondent required to provide relevant information to the Secondary Complainer prior to him signing the Disposition so that he could make an informed decision. This, he stated, was a breach of rule B1.9.1.

Whilst it is possible to take instructions from a majority of executors, he submitted that this is only where all executors are informed of the position and all are invited to take part. He stated that was not what happened in this case.

He submitted that this was not an orthodox conveyancing transaction and the Respondent should have made sure all three brothers understood the consequences. The Fiscal stated that it was not clear where any funds were coming from and at the very outset it was clear that a deed would be sent for registration which stated there was no consideration being paid.

He argued that to have no contact at all with the Secondary Complainer was not acting in his best interests.

The Fiscal drew the Tribunal's attention to the test for professional misconduct set out in the case of Sharp v Council of the Law Society of Scotland 1984 SC 129. He submitted that it was a matter for the Tribunal to determine whether the conjunctive test was met. He invited the Tribunal to hold that the four averments *in cumulo* amounted to professional misconduct. In answer to a question from the Tribunal, he moved to delete the word 'singly' from paragraph 6.1. The Fiscal further clarified that, where the transaction was referred to as a 'sale' in his averments or his submissions, he was using the term generically and he emphasised that this was not an orthodox transaction.

The Tribunal drew the Fiscal's attention to the Respondent's denial in his Answers of failing to act in the best interests of the Secondary Complainer. The Fiscal acknowledged that this was disputed but emphasised that it was the Law Society's position that the Respondent had failed to act in the best interests of the Secondary Complainer in his capacity as executor.

SUBMISSIONS FOR THE RESPONDENT

Mr McLean lodged a bundle of authorities with the Tribunal.

He explained that the Respondent's position was set out in paragraph 6.1 of the Answers. This was a denial that the Respondent's conduct amounted to professional misconduct. Therein it is set out that the Respondent's behaviour did not, in the full circumstances of the matter, meet the serious and reprehensible part of the test for professional misconduct. His conduct did not involve any dishonesty and to the extent that the Secondary Complainer was the victim of a fraud then so was the Respondent. He submitted that the Respondent reasonably understood, on the basis of genuine documents, or at least

documents which appeared to be genuine, that the Secondary Complainer was content to allow brother "X" to continue as the point of contact for the executors and was content for title to the property to be transferred. Mr McLean emphasised that the Respondent had admitted throughout these proceedings that his conduct amounted to unsatisfactory professional conduct. He stated that the Respondent recognised the seriousness of the position and that this was a source of some regret given that it came at the end of a lengthy and unblemished career.

Mr McLean explained that his submissions would be in three parts, (1) the legal framework of unsatisfactory professional conduct and professional misconduct, (2) why the conduct in this case met the test for unsatisfactory professional conduct rather than professional misconduct and, if necessary, part (3) would be submissions in relation to sanction. The Chair indicated to Mr McLean that he should restrict his submissions to parts (1) and (2) at this stage as the Tribunal would adjourn to consider the issue of misconduct.

Mr McLean referred the Tribunal to Section 46(1) of the Legal Profession and Legal Aid (Scotland) Act 2007 which provides a statutory definition for unsatisfactory professional conduct. He then referred the Tribunal to paragraph 1.29 of *Law, Practice and Conduct for Solicitors, 2nd Edition (Paterson & Ritchie)* which gave some examples of instances held to amount to unprofessional or unsatisfactory conduct prior to the 2007 Act coming into force.

Mr McLean accepted that it was a matter for the Tribunal to assess the facts against the appropriate tests. He submitted that the test referred to by the Fiscal in Sharp is one well known to the Tribunal. He emphasised that the test was a high threshold. To meet that threshold a breach of the Rules requires to be "*serious and reprehensible*". He submitted that the Tribunal should also have regard to Lord Emslie's comments in that case when he refers to a breach of the rules and states "*Whether such a failure should be treated as professional misconduct must depend upon the gravity of the failure and a consideration of the whole circumstances in which the failure occurred including the part played by the individual solicitor in question.*" He submitted that the Tribunal requires to assess the conduct by looking at the whole circumstances of the case and the culpability of the solicitor himself.

Mr McLean referred the Tribunal to the case of Hood-v-The Council of the Law Society of Scotland 2017 SC386 where the court states "*Unsatisfactory professional conduct lies on a spectrum that runs from professional misconduct at the more serious end to inadequate professional services at the lesser end, and determining where the conduct complained lies on that spectrum is a question for evaluation by the relevant disciplinary tribunal, either the Council of the Respondents or the Scottish Solicitors*

Discipline Tribunal.” He invited the Tribunal to hold that the conduct here did not reach the serious and reprehensible end of the scale but rather amounted to unsatisfactory professional conduct.

In relation to the issue of the Respondent’s failure to issue a letter of engagement, Mr McLean referred the Tribunal to paragraph 27 of the Hood case where the court agreed that the single failure to issue a terms of business letter did not even amount to unsatisfactory professional conduct.

Moving on to the second part of his submissions, Mr McLean submitted that the gravity of the failure here was not of sufficient to meet the test for professional misconduct. Mr McLean directed the Tribunal to the terms of the Joint Minute. He stated that it was accepted that brother “X” had acted as the principal point of contact and gave the Respondent and his firm instructions on behalf of all three executors in relation to the winding up of the estate. The instructions of January 2013 were a re-instruction, not a first instruction. The Respondent, rightly or wrongly, understood the arrangement to continue in relation to the 2013 instructions. Evidence to support this was explained in the Joint Minute. Charles asked the Respondent to send the title deeds to brother “X” and the Respondent followed that instruction. The Respondent spoke to brother “X” on 25 January 2013 and brother “X” undertook to pass the principal copy of the disposition to the Secondary Complainer for execution. The disposition was returned to the Respondent signed by both brother “X” and the Secondary Complainer in wet ink and witnessed. The remaining brother executed the disposition in the Respondent’s office and his signature was witnessed by the Respondent himself.

Mr McLean explained that the Respondent accepted that at no point did he interact directly with the Secondary Complainer and this was a source of regret.

The Respondent accepted that no letter of engagement was sent to the executors in relation to the transfer of title. The Respondent explained that this was an isolated error. Mr McLean emphasised that it should be noted that it is not averred within the Complaint that a practitioner has to confirm in the letter of engagement who he is permitted to accept instructions from.

He emphasised that the Respondent had no reason to suspect that the signatures on the disposition were anything other than genuine. Mr McLean submitted that there was no requirement on the Respondent to check that the signatures were genuine. The Respondent was entitled to accept that in good faith.

Mr McLean referred the Tribunal to one of the statements lodged on behalf of the Respondent. Within that statement the Respondent fully accepted that his conduct amounted to unsatisfactory professional

conduct whilst explaining that this was an isolated failure on his account due to extremely unusual circumstances. Mr McLean stated that these unusual, in fact unique, circumstances were further amplified in paragraph 3.6 of that statement. This transaction was a re-instruction following on from the Respondent winding up the estate. The Respondent was reassured in his trust in brother "X" by the fact that the Secondary Complainer had signed the disposition, which the Respondent believed suggested that the Secondary Complainer was aware of the transaction. If the Secondary Complainer had been unaware of the transaction the Respondent would have expected the Secondary Complainer to contact him before signing the deed.

Mr McLean referred the Tribunal to paragraph 3.7 of the Respondent's statement where the Respondent stressed that he accepts that his conduct amounts to unsatisfactory professional conduct and that in hindsight he could see that certain aspects of the transaction were unusual and should have prompted him to make further enquiries before proceeding. Mr McLean submitted that this was to the Respondent's credit and demonstrated that he was being candid and demonstrating insight. He submitted that, to the extent that a fraud had taken place here, the Respondent was also a victim and the Tribunal should treat that as relevant to the question of culpability.

He invited the Tribunal to accept that there were far more features here that indicated that the conduct was within the middle of the spectrum and therefore amounted to unsatisfactory professional conduct than any pointing to professional misconduct.

In response to a question from the Tribunal, Mr McLean confirmed that a fee note was issued which was addressed to the executors and rendered to brother "X". That fee note was unpaid.

In response to a question from the Tribunal as to whether or not the circumstances here could be compared to a solicitor sending a document to an unrepresented third party without advising that third party to take independent legal advice, Mr McLean emphasised that this was not within the averments but conceded that there could be circumstances where a failure to communicate effectively with a client could amount to professional misconduct. He conceded that there were cases where such failures had been held to be professional misconduct but he sought to distinguish this particular case from them, emphasising that the issue of fraud was a key factor here. Mr McLean conceded that no advice was given by the Respondent to the Secondary Complainer.

The Tribunal drew Mr McLean's attention to averment 6.1 of the Respondent's Answers where it was said "*The Respondent reasonably understood, on the basis of genuine documents, or at least documents*

which appeared to be genuine, that the Secondary Complainer was content to allow brother X to continue as the point of contact.” The Tribunal asked which documents the Respondent said were the basis of that understanding and whether that understanding was reasonable. Mr McLean responded that the documents were the signed and witnessed deed together with the email from brother “X” returning the signed deed to the Respondent. He submitted that these taken together with all of the circumstances accepted in the Joint Minute were sufficient to raise a reasonable inference that brother “X” continued to act for all the executors. He submitted that this was a reasonable belief but accepted with the benefit of hindsight it was unsatisfactory.

Mr McLean confirmed that no missives were concluded. The Tribunal drew Mr McLean’s attention to paragraph 6.4 of the Answers where it was said that the Respondent believed that an agreement existed between the Secondary Complainer and brother “X”. Mr McLean was asked on what basis the Respondent held that belief. Mr McLean referred the Tribunal to a letter from the agents instructed by the “purchaser”. The Tribunal directed Mr McLean’s attention to that letter where the agent invited the Respondent to take instructions from the executors. Mr McLean submitted that the Respondent had taken instructions from brother “X”. He argued that the reasons for the family reaching their agreement was not a matter for the Respondent.

Mr McLean conceded that there had been no discussion between the Respondent and the Secondary Complainer and that the matters currently being raised by the Tribunal had caused the Respondent to reflect on the unusual elements of this transaction. The Respondent recognised that these issues ought to have caused him to ask more questions. This was a matter of regret for the Respondent.

In answer to a question from the Tribunal as to how the Respondent acted in the best interests of the Secondary Complainer, Mr McLean emphasised that the Respondent was instructed to act on behalf of executors in the transfer of property. The Respondent believed that he had instructions from all three executors, intimated to him by brother “X” and the Respondent carried out these instructions. The Respondent accepted that he did not communicate with the Secondary Complainer in order to ensure that the Secondary Complainer was in line with his fellow executors.

In response to the Respondent’s submissions, the Fiscal argued that it was difficult to see how the Respondent could be acting in the Secondary Complainer’s best interests without him obtaining any overt instructions. He emphasised that this was an unorthodox transaction and red flags should have been raised indicating that the Respondent required to contact the Secondary Complainer to confirm his instructions.

DECISION

The facts of this case were agreed by way of the Respondent's Answers and a Joint Minute of agreed facts. The Tribunal found these facts to be established and they are as noted above.

There were four averments of misconduct within the Complaint. The Respondent admitted breaching his duties in relation to three of these:-

- 1) that he failed to provide a letter of engagement to any of the executors in January 2013;
- 2) that he failed to obtain proper instructions from the Secondary Complainer in respect of the transfer of title; and
- 3) that he failed to communicate effectively with the Secondary Complainer in relation to the transfer of title.

He denied failing to act in the best interests of the Secondary Complainer and denied that his conduct amounted to professional misconduct.

The first issue for the Tribunal to determine was whether the facts supported the averment that the Respondent had failed to act in the best interests of the Secondary Complainer in respect of the transfer of title of the property held in trust by the three executors/trustees.

Fundamentally, it appeared to the Tribunal difficult to see how it could be argued that the Respondent had acted in the best interests of the Secondary Complainer if the Respondent made no attempt to contact him or to provide him with advice as to the consequences of his signing of the disposition. The Respondent's explanation appeared to be that the Secondary Complainer was acting in his capacity as one of three executors, the Respondent had the instructions of the majority of the executors and he was acting in the interests of the executry in ensuring that the instructions of the executry were put into effect. Whilst the Tribunal accepts that a solicitor may take instructions from a majority of executors, that is only where all of the executors are kept fully informed of matters and are given the opportunity to participate in the decision-making process. That did not happen here. The Respondent accepts that he should have made direct contact with the Secondary Complainer to confirm his willingness for instructions to be provided by brother "X" and that he should have provided advice to the Secondary Complainer. It is important to note that each executor/trustee is individually under a duty to act within the terms of the will/trust. The Tribunal accepts that there was no suggestion of any dishonesty on the part of the Respondent or any deliberate decision on his part to act contrary to the interests of the

Secondary Complainer. It is impossible to say whether or not the Secondary Complainer would have chosen not to sign the disposition if the Respondent had contacted him directly and had provided him with the appropriate advice. However, it was clear to the Tribunal that these were missed opportunities. The Tribunal concluded that factually, by not contacting the Secondary Complainer at all to ascertain his position, by not obtaining his proper instructions and by failing to communicate effectively with him in particular by failing to provide advice in relation to the consequences of his signing of this disposition, the Respondent failed to act in the best interests of the Secondary Complainer in respect of the transfer of title of the property held in trust by him and his two co-executors/trustees.

The next step for the Tribunal was to consider whether the four established breaches of duty amounted to professional misconduct or unsatisfactory professional conduct.

The test for professional misconduct is set out in Sharp v Council of the Law Society of Scotland 1984 SLT 313 where it is said:-

“There are certain standards of conduct to be expected of competent and reputable solicitors. A 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 to be made.”

Unsatisfactory professional conduct has a statutory definition provided in the Legal Profession and Legal Aid (Scotland) Act 2007, Section 46(1) where it is described as:-

“Professional conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor.”

Where the conduct lies on the scale is a question for evaluation by the Tribunal, having regard to the whole circumstances of the conduct and the degree of culpability which ought to be attached to the Respondent.

The Tribunal was invited by the Complainers to make a finding of professional misconduct *in cumulo*. The Tribunal recognised that the four breaches of duty were closely connected.

Whilst this transaction was referred to by the Respondent as a “re-instruction”, almost four years had passed between the winding up of the executry and the instructions in January 2013. This was an unusual transaction. On the face of the disposition, no price was being paid to the trust for the transfer of the property. No missives had been concluded. The “purchaser” was changed. The Respondent appeared to have been under some pressure to complete the transaction quickly. Whilst the Respondent had no contact at all with the Secondary Complainer, he appeared to have had a number of telephone conversations and at least one meeting with brother Charles, in the course of which Charles discussed “misgivings”. The letter from the transferee’s solicitors dated 23 January 2013, enclosing the draft disposition, invited the Respondent to “take instructions and confirm that the executors are happy to sign the disposition”. The Respondent emailed a copy of that letter and draft disposition to brother “X” and Charles, but not the Secondary Complainer. The Respondent’s submission, that the signing of the disposition by the Secondary Complainer provided support for the contention that the Secondary Complainer was content for the title to be transferred in this manner, appeared to the Tribunal to be a circular argument and to ignore the red flags raised in the course of this transaction.

The Respondent submitted that insofar as the Secondary Complainer had been a victim of fraud, then so was the Respondent, he having been misled by brother “X”. By not making any contact with the Secondary Complainer either to obtain proper instructions or to provide the necessary advice, the Respondent missed opportunities which may have prevented this.

In all of the circumstances, the Tribunal was satisfied that this conduct met the test for misconduct. The conduct fell below the standard to be expected of a competent and reputable solicitor to a degree that would be considered serious and reprehensible by a competent and reputable solicitor.

The Tribunal invited further submissions with regard to sanction, expenses and publicity.

SUBMISSIONS FOR THE COMPLAINER REGARDING SANCTION, PUBLICITY AND EXPENSES

The Fiscal made no submission in relation to sanction. He moved for expenses to be awarded to the Complainers.

With regard to publicity, he invited the Tribunal to continue to anonymise brother “X”, as he had been throughout proceedings.

SUBMISSIONS FOR THE RESPONDENT REGARDING SANCTION, PUBLICITY AND EXPENSES

Mr McLean referred to his earlier submissions as providing mitigation on behalf of the Respondent.

He emphasised the Respondent's early acceptance of unsatisfactory professional conduct. The Respondent had a 38-year long, successful legal career with no previous findings.

Mr McLean invited the Tribunal to accept that the Respondent had demonstrated insight into his conduct. He submitted that the Respondent had acted under a genuinely held belief and that he had expressed contrition. He confirmed that the Respondent retired in 2022 and had not undertaken any legal work since.

Mr McLean emphasised that there was no question of dishonesty or financial gain on the part of the Respondent. The Respondent had entered into a Joint Minute saving time and expense in the proceedings. He directed the Tribunal's attention to the case of The Council of the Law Society of Scotland v David Ewan McNeish, 26 April 2022.

Mr McLean indicated that the Respondent had no opposition to the motion for expenses and no submissions in relation to publicity.

DECISION WITH REGARD TO SANCTION, EXPENSES AND PUBLICITY

The Tribunal accepted that, whilst this was a course of conduct, it was over a short space of time and related to only one transaction. It noted that the Respondent had been in practice for 38 years without any previous findings. There was no suggestion of any dishonesty on the part of the Respondent or any personal gain. The Respondent had cooperated with the disciplinary process and expressed regret and demonstrated some insight into his conduct. Given the circumstances, the Tribunal considered that the appropriate disposal was that of a censure.

The Tribunal considered that the appropriate award in relation to expenses was one in the usual terms in favour of the Complainers.

Having regard to the principles of open justice balanced with the interests of the individuals concerned, the Tribunal ordered that the decision should be given publicity but that the brother currently designed as "X" should be continued to be so designed.

The Tribunal noted that the Fiscal had not had any recent contact with the Secondary Complainer. In the circumstances, the Tribunal allowed the Secondary Complainer 28 days from the intimation of these findings to lodge a claim for compensation, should he be so advised.



Colin Bell
Chair